ITEM 6

TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code Sections 1720, 1720.2, 1720.3, 1726, 1727, 1733, 1735, 1741, 1742, 1742.1, 1743, 1750, 1770, 1771, 1771.5, 1771.6, 1771.7, 1772, 1773, 1773.1, 1773.2, 1773.3, 1773.5, 1773.6, 1775, 1776, 1777.1, 1777.5, 1777.6, 1777.7, 1812, 1813, 1861

Public Contract Code Section 22002

Statutes 2002, Chapter 868 (AB 1506); Statutes 2001, Chapter 938 (SB 975); Statutes 2001, Chapter 804 (SB 588); Statutes 2000, Chapter 954 (AB 1646); Statutes 2000, Chapter 920 (AB 1883); Statutes 2000, Chapter 881 (SB 1999); Statutes 2000, Chapter 875 (AB 2481); Statutes 2000, Chapter 135 (AB 2539); Statutes 1999, Chapter 903 (AB 921); Statutes 1999, Chapter 220 (AB 302); Statutes 1999, Chapter 83 (SB 966); Statutes 1999, Chapter 30 (SB 16); Statutes 1998, Chapter 485 (AB 2803); Statutes 1998, Chapter 443 (AB 1569); Statutes 1997, Chapter 757 (SB 1328); Statutes 1997, Chapter 17 (SB 947); Statutes 1993, Chapter 589 (AB 2211); Statutes 1992, Chapter 1342 (SB 222); Statutes 1992, Chapter 913 (AB 1077); Statutes 1989, Chapter 1224 (AB 114); Statutes 1989, Chapter 278 (AB 2483); Statutes 1988, Chapter 160 (SB 2637); Statutes 1983, Chapter 1054 (AB 1666); Statutes 1983, Chapter 681 (AB 2037); Statutes 1981, Chapter 449 (AB 1242); Statutes 1980, Chapter 992 (AB 3165); Statutes 1980, Chapter 962 (BA 2557); Statutes 1979, Chapter 373 (SB 925); Statutes 1978, Chapter 1249 (AB 3174); Statutes 1977, Chapter 423 (SB 406); Statutes 1976, Chapter 1179 (AB 3676); Statutes 1976, Chapter 1174 (AB 3365); Statutes 1976, Chapter 861 (SB 1953); Statutes 1976, Chapter 599 (AB 1125); Statutes 1976, Chapter 538 (AB 2466); Statutes 1976, Chapter 281 (AB 2363)

Title 8, California Code of Regulations Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802, 17201-17212, 17220-17229, 17230-17237, 17240-17253, 17260-17264
(Reg. 1956, No. 08; Reg. 1972, No. 13; Reg. 1972, No. 23; Reg. 1977, No.02; Reg. 1977, No. 49; Reg. 1978, No. 06; Reg. 1979, No. 19; Reg. 1980, No. 06; Reg. 1981, No. 09; Reg. 1982, No. 51; Reg. 1986, No. 07; Reg.1988, No. 35; Reg. 1990, No. 14; Reg. 1990, No. 42; Reg. 1991, No. 12; Reg. 1992, No. 13; Reg. 1996, No. 52; Reg. 1999, No. 08; Reg. 1999, No. 25; Reg. 1999, No. 41; Reg. 2000, No. 03; Reg. 2000, No. 18; and Reg. 2002, No. 03)

School Facility Program Substantial Progress and
Expenditure Audit Guide – May 2003
(Prepared by the Office of Public School Construction)

AB 1506 Labor Compliance Program Guidebook – February 2003
(Prepared by the Division of Labor Standards Enforcement)

Antioch Unified School District Labor Compliance Program
January 17, 2003

Prevailing Wage Rate

01-TC-28

Grossmont Union High School District, Claimant

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COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 2 (1/91)

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COMMISSION ON STATE MANDATES
10:20am

Exhibit A

TEST CLAIM FORM

Claim No. 01-TC-28

Local Agency or School District Submitting Claim

CLOVIS UNIFIED SCHOOL DISTRICT

Contact Person	Telephone Number
Keith B. Petersen, President SixTen and Associates 5252 Balboa Avenue, Suite 807 San Diego, California 92117	Voice: 858-514-8605 Fax: 858-514-8645

Claimant Address

William C. McGuire
Clovis Unified School District
1450 Herndon Avenue
Clovis, California 93612

Representative Organization to be Notified

Dr. Carol Berg, Consultant, Education Mandated Cost Network c/o School Services of California 1121 L Street, Suite 1060 Sacramento, CA 95814	Voice: 916-446-7517 Fax: 916-446-2011

This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable. **Prevailing Wage Rate**

See: Attached

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative	Telephone No.
William McGuire Associate Superintendent	Tel. (559) 327-9110 Fax. (559) 327-9129

Signature of Authorized Representative	Date
X	June 24, 2002

Attachment to CSM 2(2/91) Test Claim Form
Test Claim of Clovis Unified School District
Chapter 938, Statutes of 2001
Prevailing Wage Rate

Statutes	Labor Code	Title 8, California Code of Regulations
Chapter 938, Statutes of 2001	Section 1720	Section 16000
Chapter 804, Statutes of 2001	Section 1720.2	Sections 16001 through 16003
Chapter 954, Statutes of 2000	Sectionn 1720.3	Sections 16100 through 16102
Chapter 920, Statutes of 2000	Section 1726	Sections 16200 through 16206
Chapter 881, Statutes of 2000	Section 1727	Sections 16300 through 16304
Chapter 875, Statutes of 2000	Section 1733	Sections 16400 through 16403
Chapter 135, Statutes of 2000	Section 1735	Sections 16410 through 16414
Chapter 903, Statutes of 1999	Section 1741	Section 16425
Chapter 220, Statutes of 1999	Section 1742	Sections 16426 through 16428
Chapter 83, Statutes of 1999	Section 1742.1	Sections 16429 through 16432
Chapter 30, Statutes of 1999	Section 1743	Section 16433
Chapter 485, Statutes of 1998	Section 1750	Sections 16436 through 16439
Chapter 443, Statutes of 1998	Section 1770	Section 16500
Chapter 757, Statutes of 1997	Section 1771	Sections 16800 through 16802
Chapter 17, Statutes of 1997	Section 1771.5	Sections 17201 through 17212
Chapter 589, Statutes of 1993	Section 1771.6	Sections 17220 through 17229
Chapter 1342, Statutes of 1992	Section 1772	Sections 17230 through 17237
Chapter 913, Statutes of 1992	Section 1773	Sections 17240 through 17253
Chapter 1224, Statutes of 1989	Section 1773.1	Sections 17260 through 17264
Chapter 278, Statutes of 1989	Section 1773.2	
Chapter 160, Statutes of 1988	Section 1773.3	
Chapter 1054, Statutes of 1983	Section 1773.5	
Chapter 681, Statutes of 1983	Section 1773.6	
Chapter 449, Statutes of 1981	Section 1775	
Chapter 992, Statutes of 1980	Section 1776	
Chapter 962, Statutes of 1980	Section 1777.1	
Chapter 373, Statutes of 1979	Section 1777.5	
Chapter 1249, Statutes of 1978	Section 1777.6	
Chapter 423, Statutes of 1977	Section 1777.7	
Chapter 1179, Statutes of 1976	Section 1812	
Chapter 1174, Statutes of 1976	Section 1813	
Chapter 861, Statutes of 1976	Section 1861	
Chapter 599, Statutes of 1976		
Chapter 538, Statutes of 1976	**Public Contract Code**	
Chapter 281, Statutes of 1976	Section 22002	

PREVAILING WAGE RATES
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Claim Prepared By:
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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of:	)	No. CSM. _____
	)	
	)	Chapter 938, Statutes of 2001
Clovis Unified School District	)	Chapter 804, Statutes of 2001
	)	Chapter 954, Statutes of 2000
	)	Chapter 920, Statutes of 2000
	)	Chapter 881, Statutes of 2000
	)	Chapter 875, Statutes of 2000
	)	Chapter 135, Statutes of 2000
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	)	Chapter 17, Statutes of 1997
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Labor Code Sections 1720, 1720.2, 1720.3, 1726, 1727, 1733, 1735, 1741, 1742, 1742.1, 1743, 1750, 1770, 1771, 1771.5, 1771.6, 1772, 1773, 1773.1, 1773.2, 1773.3, 1773.5, 1773.6, 1775, 1776, 1777.1, 1777.5, 1777.6, 1777.7, 1812, 1813, 1861

Public Contract Code Section 22002

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)	Section 16500
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)	Sections 17230 through 17237
)	Sections 17240 through 17253
)	Sections 17260 through 17264
)	

PART I. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government Code Section 17551(a) to "..hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." Clovis Unified School District is a "school district" as defined in Government Code Section 17519.[1]

PART II. LEGISLATIVE HISTORY OF THE CLAIM

This test claim alleges mandated costs subject to reimbursement by the state for school districts, county offices of education, and community college districts to comply with laws pertaining to "public works".

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[1]Government Code Section 17519, as added by Chapter 1459, Statutes of 1984, Section 1:

> " 'School District' means any school district, community college district, or county superintendent of schools."

SECTION 1. LEGAL REQUIREMENTS PRIOR TO JANUARY 1, 1975

A. Definition of Public Works (Prior to 1975)

Labor Code Section 1720[2] subdivision (a) defined "public work" as "construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority" and other defined works. Subdivision (b) included work done for irrigation, utility, reclamation and improvement of districts. Subdivision (c) included certain street, sewer, and other improvement works. Subdivisions (d) and (e) included laying of carpet in a leased building and laying of carpet in public buildings.

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[2]Labor Code Section 1720, added by Chapter 90, Statutes of 1937, Section 1720, as amended by Chapter 77, Statutes of 1973, Section 19:

> "As used in this chapter 'public works' means:
> (a) Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.
> (b) Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type. 'Public work' shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.
> (c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether such political subdivision or district operates under a freeholder's charter or not.
> (d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.
> (e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds."

Labor Code Section 1720.2[3] added to the definition of "public works" any construction work done under private contract, when the parties to the contract are private, the property is privately owned, but more than half of the property will be leased to a state or political subdivision, when the lease agreement between the private person and state or political subdivision was entered into before the construction contract.

Labor Code Section 1721[4] defined "political subdivision" to include any county, city, district, township public housing authority, or public agency of the state.

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[3]Labor Code Section 1720.2, added by Chapter 1027, Statutes of 1974, Section 1:

"For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, 'public works' also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but, upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or political subdivision for its use.

(c) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be an appropriation made by this act because the duties, obligations, or responsibilities imposed on local government by this act are minor in nature and will not cause any financial burden on local government.

[4]Labor Code Section 1721, added by Chapter 90, Statutes of 1937, Section 1721, as amended by Chapter 1283, Statutes of 1953, Section 1:

> " 'Political subdivision' includes any county, city, district, township public housing authority, or public agency of the state, and assessment or improvement districts."

Labor Code Section 1722[5] defined "awarding body" to include department, board, authority, officer, or agent awarding the contract for public work.

B. Withholding Penalties and Forfeitures; Defending Litigation, Settlements (Prior to 1975)

Labor Code Section 1726[6] required the body awarding a contract for public work to take cognizance of violations by contractors when performing public works contracts.

Labor Code Section 1727[7] required the awarding body to withhold and retain amounts from payments due contractors for any amounts forfeited because of stipulations in the public works contract. Except for final payments, no amount could be

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[5]Labor Code Section 1722, as added by Chapter 90, Statutes of 1937, Section 1722:

" 'Awarding body' or 'body awarding the contract' means department, board authority, officer or agent awarding a contract for public work."

[6]Labor Code Section 1726, as added by Chapter 90, Statutes of 1937, Section 1726:

"The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract."

[7]Labor Code Section 1727, added by Chapter 90, Statutes of 1937, Section 1727, as amended by Chapter 1431, Statutes of 1945, Section 50:

"Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body."

withheld, retained, or forfeited without a full investigation by the Division of Labor Law Enforcement (later Division of Labor Standards Enforcement) or the awarding body.

Labor Code Section 1730[8] required awarding bodies which withheld any penalty or forfeiture to transfer those penalties and forfeitures to the State Treasurer after the expiration of 90 days after completion of the contract and formal acceptance of the job.

Labor Code Section 1731[9] required awarding bodies to continue to retain those penalties and forfeitures if suit is brought against the awarding body within the 90 day period, and shall be retained pending the outcome of the suit.

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[8]Labor Code Section 1730, as added by Chapter 90, Statutes of 1937, Section 1730:

"Every awarding body that withholds any penalty or forfeiture from any contract payment, for failure of a contractor or subcontractor to comply with any provision of this chapter or any of the labor laws on public works, or with any provision of a contract based on such labor laws, shall at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, transfer all penalties and forfeitures, whether withheld from a progress payment or final payment, to the State Treasurer to become part of the general fund."

[9]Labor Code Section 1731, as added by Chapter 90, Statutes of 1937, Section 1731:

"If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the penalties and forfeitures shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the State Treasurer only in the event of a final court judgment against the contractor or his assignee. Otherwise the penalties and forfeitures are subject to any final judgment which is obtained by the contractor or his assignee."

Labor Code Section 1732[10] limited the time for an action by a contractor to recover wages or penalties to the 90 day period after completion of the contract and formal acceptance of the job.

Labor Code Section 1733[11] allowed a contractor to bring suit against the awarding body to recover sums withheld without permission from the state, limited the scope of recovery, and allowed the awarding body to request assistance from the Division of Labor Law Enforcement (later Division of Labor Standards Enforcement) in the defense of such a suit.

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[10]Labor Code Section 1732, as added by Chapter 90, Statutes of 1937, Section 1732:

"The time for action by the contractor or his assignee for the recovery of penalties or forfeitures is limited to the 90-day period and such suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or his assignees with reference to such penalties or forfeitures."

[11]Labor Code Section 1733, added by Chapter 90, Statutes of 1937, Section 1733, as amended by Chapter 398, Statutes of 1957, Section 1:

"Suit may be brought by the contractor or his assignee without permission from the state or other authority and is limited to the recovery of the penalties or forfeitures without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the plaintiff to establish his right to the penalties or forfeitures withheld. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body.

The Division of Labor Law Enforcement may, upon written request of any awarding body, assist in the defense of the action."

Labor Code Section 1735[12] imposed penalties on a contractor for public works who discriminates on the basis of race, color, national origin, ancestry, or religion.

Labor Code Section 1740[13] allowed any state body receiving federal loans or grants to include in its call for bids that all bid specifications and contracts shall be subject to modification to comply with revisions in federal minimum wage schedules.

C. Wages - Prevailing Wage Rates (Prior to 1975)

Labor Code Section 1770[14] required awarding bodies authorizing public works

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[12]Labor Code Section 1735, as added by Chapter 643, Statutes of 1939, Section 1, and amended by Chapter 283, Statutes of 1965, Section 7:

"No discrimination shall be made in the employment of persons upon public works because of the race, color, national origin, ancestry, or religion of such persons, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter."

[13]Labor Code Section 1740, added by Chapter 1992, Statutes of 1957, Section 1:

"Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements."

[14]Labor Code Section 1770, added by Chapter 90, Statutes of 1937, Section 1770, as amended by Chapter 1706, Statutes of 1953, Section 2:

"The body awarding the contract or authorizing the public work shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and its determination in the matter shall be final except as provided in

contracts to determine the prevailing rate of per diem wages in accordance with Labor Code Section 1773 (infra), with exceptions provided in Labor Code Section 1773.4 and 1773.6 (infra). Nothing in the Act prohibited the payment of more than the general prevailing per diem wage rate. Overtime working violations of Article 3 were not permitted.

Labor Code Section 1771[15] required all workers employed on public works be paid not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holidays and overtime work. Public agencies were exempt from this requirement if work was not done under contract and with its own forces.

Section 1773.4 and 1773.6. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter."

[15]Labor Code Section 1771, added by Chapter 90, Statutes of 1937, Section 1771, as amended by Chapter 1202, Statutes of 1974, Section 1:

"Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work."

Labor Code Section 1772[16] declared that workers employed by contractors or subcontractors in the execution of any contract for public works are deemed to be employed on a public work.

Labor Code Section 1773[17] required awarding bodies to ascertain the general

[16]Labor Code Section 1772, as added by Chapter 90, Statutes of 1937, Section 1772:

"Workmen employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work."

[17]Labor Code Section 1773, added by Chapter 90, Statutes of 1937, Section 1773, as amended by Chapter 785, Statutes of 1971, Section 1:

"The body awarding any contract for public work, or otherwise undertaking any public work, shall ascertain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the awarding body shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the awarding body shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the awarding body determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the awarding body may adopt such rate by reference as provided for in such

prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality of the work done for the awarding body. The awarding body was not required to specify which holidays where to be recognized, but recognize holidays agreed upon in the collective bargaining agreement, if any. In determining the wage rates, the awarding body was required to ascertain and consider wage rates established by collective bargaining agreements and rates predetermined for federal public works. If such data was inaccurate, further data from labor organizations, employers, and associations was to be obtained. If the awarding body determined that the prevailing wage rate was the rate established by a collective bargaining agreement, the awarding body may adopt that rate by reference, until the awarding body determined that another rate should be adopted.

Labor Code Section 1773.1[18] included employer payments for health and welfare,

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agreement and such determination shall be effective for the life of such agreement or until the awarding body determines that another rate should be adopted."

[18]Labor Code Section 1773.1, added by Chapter 2173, Statutes of 1959, Section 1, as amended by Chapter 1502, Statutes of 1969, Section 1:

"Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workman needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed

pension, vacation, apprenticeship or other training programs within the definition of "per diem wages".

Labor Code Section 1773.2[19] required the awarding body to specify what the general per diem wage rate for each craft, classification, or worker was needed in the call for bids, the bid specifications, and in the contract itself. If the awarding body did not place the general wage rates in the call for bids, in the bid specifications and in the contract itself, the awarding body was required to keep a copy of the general prevailing wage rates at its principal office, as well as publish the prevailing wage rates at least one time in a newspaper of general circulation during each year, and cause a copy to be posted at each jobsite.

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within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids."

[19]Labor Code Section 1773.2, added by Chapter 785, Statutes of 1971, Section 2, as amended by Chapter 876, Statutes of 1974, Section 1:

"The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages for each craft, classification or type of workman needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy of the prevailing rate of per diem wages on file at its principal office, in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year, and in such event, the awarding body shall cause a copy thereof to be posted at each jobsite."

Labor Code Section 1773.3[20] required an awarding body whose public works contract fell within the jurisdiction of Labor Code Section 1777.5 (Employment of registered apprentices; wages; standards; number; apprenticeable craft or trade; exemptions; contributions) to send a copy of the award to the Division of Apprenticeship Standards. The awarding body was required to notify the Division of Apprenticeship Standards within five days of discovering any discrepancy regarding the ratio of required apprentices to journeymen.

Labor Code Section 1773.4[21] allowed any prospective bidder, any representative

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[20]Labor Code Section 1773.3, formerly Labor Code Section 3098, added by Chapter 1399, Statutes of 1972, Section 2, as amended by Chapter 1095, Statutes of 1974, Section 1:

"An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards."

[21]Labor Code Section 1773.4, added by Chapter 1706, Statutes of 1953, Section 4.5, as amended by Chapter 301, Statutes of 1969, Section 1:

"Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon

of any craft, or the awarding body, to file a petition with the Director of Industrial Relations alleging that prevailing rates have not been determined in accordance with the provisions of Section 1773, who would then conduct an investigation or hearing. Upon receipt of notice of the petition, the awarding body was then required to extend the closing date for the submission of bids or the starting of work until five days after the Director of Industrial Relations' final determination of general prevailing rates of per diem wages. Notice of the petition shall also be set forth in the next and all subsequent publications by the awarding party of the call for bids.

Labor Code Section 1773.5[22] allowed the Director of Industrial Relations to

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which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general prevailing rates of per diem wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract."

[22]Labor Code Section 1773.5, as added by Chapter 1706, Statutes of 1953, Section 5:

establish rules and regulations for the purpose of carrying out the prevailing wage provisions of the Labor Code.

Labor Code Section 1773.6[23] allowed the Director of Industrial Relations to notify the awarding body of certain state agencies any quarterly changes in the prevailing rate of per diem wages. The notification was not effective as to any contract for which the notice to bidders has been published.

Labor Code Section 1773.8[24] required the body awarding the contract to include in

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"The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out the prevailing wage provisions of this article."

[23]Labor Code Section 1773.6, added by Chapter 1706, Statutes of 1953, Section 6, as amended by Chapter 1786, Statutes of 1963, Section 68:

"Where the body awarding the contract or authorizing the public work is the State Department of Public Works, the Department of General Services, or the State Department of Water Resources or any division thereof, it shall file, quarterly, its determination of general prevailing rates of per diem wages for those localities in which public work is to be performed, in the office of the Director of Industrial Relations, commencing not later than January 10, 1954. Such determination shall be final except as hereinafter provided. If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall immediately notify the awarding body of such change and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published."

[24]Labor Code Section 1773.8, as added by Chapter 880, Statutes of 1968, Section 1:

"The body awarding any contract for public work shall include in the specifications for the contract a requirement requiring the payment of travel and subsistence payments to each workman needed to execute the work, as such travel and subsistence payments

the specifications for the contract a requirement to pay the travel and subsistence payments of workers needed to execute the work.

Labor Code Section 1774[25] required the contractor or subcontractor to pay not less than the specified prevailing rate of wages to the workers employed in the execution of the contract.

Labor Code Section 1775[26] required a contractor to pay a $25 per day penalty to

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are defined in the applicable collective bargaining agreements filed in accordance with this section.

To establish such travel and subsistence payments for contracts entered into with the state, each city, county and city and county, the representative of any craft, classification or type of workman needed to execute the contracts shall file with the Department of Industrial Relations fully executed copies of collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter shall establish such travel and subsistence payments whenever filed 30 days prior to the call for bids."

[25]Labor Code Section 1774, as added by Chapter 90, Statutes of 1937, Section 1774:

"The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract."

[26]Labor Code Section 1775, added Chapter 90, Statutes of 1937, Section 1775 as amended by Chapter 467, Statutes of 1963, Section 1:

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each workman paid less than the prevailing wage rates for such work or craft in which such workman is employed for any public work done under the contract by him or by any subcontractor under him. The difference between such prevailing wage rates stipulated and the amount paid to each workman

the state or political subdivision[27] which benefitted from the contract, for each worker paid less than the prevailing per diem rate by the contractor or any subcontractor. The body awarding the contract must insert in the contract a provision stating that Section 1775 will be complied with. To the extent there is insufficient money due to cover all penalties forfeited and amounts due, the awarding body was required to notify the violation to the Division of Labor Law Enforcement (later Division of Labor Standards Enforcement), and

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for each calendar day or portion thereof for which each workman was paid less than the prevailing wage rate stipulated shall be paid to each workman by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that the provisions of this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813 of this chapter, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify, provided that in the case of a workman claiming the difference between the prevailing wage rate and the amount paid him the awarding body has first been given the notice mentioned in Section 1190.1 of the Code of Civil Procedure, the Division of Labor Law Enforcement of such violation and the Division of Labor Law Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided for herein. Such action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of such public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in such action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in such action are not due.

Out of any money withheld or recovered or both there shall first be paid the amount due each workman and if insufficient funds are withheld or recovered or both to pay each workman in full the money shall be prorated among all such workmen."

[27]A "political subdivision" includes districts. Labor Code Section 1721
See: Footnote #4, supra.

out of any money withheld or recovered, or both, shall first pay the amount due each worker and, if insufficient funds were withheld to pay each worker in full, the money was to be prorated among all workers.

Former Labor Code Section 1776[28] allowed the contractor and subcontractor to keep accurate records showing the name, occupation, and actual per diem wages paid to each worker kept open for the inspection of the awarding body and the Division of Labor Law Enforcement.

Labor Code Section 1777[29] attached misdemeanor criminal liability to any officer, agent, or representative of the state or political subdivision, and a contractor, subcontractor, or their agent or representative, for neglecting to comply with the provisions of Labor Code Section 1776 when doing public work.

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[28]Labor Code Section 1776, added by Chapter 90, Statutes of 1937, Section 1776, as amended by Chapter 127, Statutes of 1949, Section 7:

"Every contractor and subcontractor shall keep an accurate record showing the name, occupation, and the actual per diem wages paid to each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the body awarding the contract and to the Division of Labor Law Enforcement."

[29]Labor Code Section 1777, added by Chapter 90, Statutes of 1937, Section 1777:

"Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of section 1776 is guilty of a misdemeanor."

Labor Code Section 1777.5[30] required the awarding body to insert in the

[30]Labor Code Section 1777.5, added by Chapter 872, Statutes of 1937, Page 2424, as amended by Chapter 965, Statutes of 1974, Section 1:

"Nothing in this chapter shall prevent the employment of properly indentured apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is indentured.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area of the site of the public work. Contractors or subcontractors shall be not required to submit individual application for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, shall, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall, employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each eight journeymen, the Division of Apprenticeship Standards shall grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to prime contracts involving less than thirty thousand dollars ($30,000) or 20

working days or to contracts of subcontractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

'Apprenticeable' craft or trade, as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with the rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such

contract stipulations to implement Labor Code Section 1777.5, which sets the ratio of apprentices to journeymen, and other apprentice matters.

Labor Code Section 1777.6[31] made it unlawful for an employer or a labor union to refuse to hire an apprentice on the basis of race, religion, national origin, ancestry, or age.

D. Working Hours and Overtime (Prior to 1975)

Labor Code Section 1810[32] set eight hours per day as the legal working day and

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contributions in computing his bid for the contract. The Division of Labor Law Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

In the event a contractor willfully fails to comply with this section, such contractor shall be denied the right to bid on a public works contract for a period of six months from the date the determination is made.

The interpretation and enforcement of this section shall be in accordance with the rules and procedures prescribed by the Apprenticeship Council.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081."

[31]Labor Code Section 1777.6, as added by Chapter 1192, Statutes of 1951, Section 1, and amended by Chapter 280, Statutes of 1971, Section 1:

"It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as indentured apprentices on any public works, on the ground of the race, religious creed, color, national origin, ancestry, or sex of such employee."

[32]Labor Code Section 1810, as added by Chapter 90, Statutes of 1937, Section 1810:

"Eight hours labor constitutes a legal day's work in all cases where the same is

requires an awarding body to include a stipulation to that effect in all public works contracts.

Labor Code Section 1811[33] limited and restricted to 8 hours during any one calendar day, and 40 hours during any one calendar week, as the legal time of service for work on a public works project.

Labor Code Section 1812[34] required the contractor and subcontractors to keep accurate daily and weekly records of hours worked by workers employed by them in connection with public works.

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performed under the authority of any law of this State, or under the direction, or control, or by the authority of any officer of this State acting in his official capacity, or under the direction, or control or by the authority of any municipal corporation, or of any officer thereof. A stipulation to that effect shall be made a part of all contracts to which the State or any municipal corporation therein is a party."

[33]Labor Code Section 1811, added by Chapter 90, Statutes of 1937, Section 1811, as amended by Chapter 964, Statutes of 1963, Section 1:

"The time of service of any workman employed upon public work is limited and restricted to 8 hours during any one calendar day, and 40 hours during any one calendar week, except as hereinafter provided for under Section 1815."

[34]Labor Code Section 1812 (Formerly 1814), added by Chapter 90, Statutes of 1937, Section 1814, as amended by Chapter 964, Statutes of 1963, Section 2:

"Every contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Law Enforcement."

Labor Code Section 1813[35] required a contractor to forfeit the sum of $25 for each worker required or permitted to work more than 8 hours in a day or 40 hours in a week. In awarding any contract for public work, the awarding body was required to insert a stipulation in the contract to this effect. The awarding body was required to take cognizance of all violations of this article and report such violations to the officer of the State or political subdivision authorized to pay the contractor money due under the contract.

Labor Code Section 1814[36] attached misdemeanor criminal liability to any officer,

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[35]Labor Code Section 1813 (Formerly 1815), added by Chapter 90, Statutes of 1937, Section 1815, as amended by Chapter 964, Statutes of 1963, Section 3:

"The contractor shall, as a penalty to the State or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the State or political subdivision who is authorized to pay the contractor money due him under the contract."

[36]Labor Code Section 1814 (Formerly 1816), added by Chapter 90, Statutes of 1937, Section 1816, as renumbered and amended by Chapter 238, Statutes of 1961, Section 6:

"Any officer, agent, or representative of the State or any political subdivision who violates any provision of this article and any contractor or subcontractor or agent or representative thereof doing public work who neglects to comply with any provision of Section 1812 is guilty of a misdemeanor."

agent, or representative of the state or political subdivision, and a contractor, subcontractor, or their agent or representative, for neglecting to comply with the provisions of Labor Code Section 1812 when doing public work.

Labor Code Section 1815[37] permitted overtime work on public work projects provided the worker was paid 1½ times his or her basic rate of pay.

E. Securing Worker's Compensation (Prior to 1975)

Labor Code Section 1860[38] required an awarding body to insert in every public works contract a clause providing that every contractor will be required to secure the payment of worker's compensation to employees, in accordance with Labor Code

[37]Labor Code Section 1815, added by Chapter 759, Statutes of 1941, Section 1, as amended by Chapter 964, Statutes of 1963, Section 4:

"Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1 ½ times the basic rate of pay."

[38]Labor Code Section 1860, as added by Chapter 1000, Statutes of 1965, Section 2:

"The awarding body shall cause to be inserted in every public works contract a clause providing that, in accordance with the provisions of Section 3700 of the Labor Code, every contractor will be required to secure the payment of compensation to his employees."

Section 3700[39].

Labor Code Section 1861[40] required a contractor to sign and file with the awarding body a statement saying "I am aware of the provisions of Section 3700 of the Labor Code

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[39]Labor Code Section 3700, added by Chapter 90, Statutes of 1937, Section 3700, as amended by Chapter 7, Statutes of 1946, Section 1:

"Every employer except the state and all political subdivisions or institutions thereof shall secure the payment of compensation in one or more of the following ways:
(a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this state.
(b) By securing from the Director of Industrial Relations a certificate of consent to self-insure, which may be given upon furnishing proof satisfactory to the Director of Industrial Relations of ability to self-insure and to pay any compensation that may become due to his employees.
(c) For all political subdivision of the state, including each member of a pooling arrangement under a joint exercise of powers agreement (but not the state itself), by securing from the Director of Industrial Relations a certificate of consent to self-insure against workers' compensation claims, which certificate may be given upon furnishing proof satisfactory to the director of ability to administer workers' compensation claims properly, and to pay workers' compensation claims that may become due to its employees. On or before March 31, 1979, a political subdivision of the state which, on December 31, 1978, was uninsured for its liability to pay compensation, shall file a properly completed and executed application for a certificate of consent to self-insure against workers' compensation claims. The certificate shall be issued and be subject to the provisions of Section 3702."

[40]Labor Code Section 1861, as added by Chapter 1000, Statutes of 1965, Section 2:

"Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: 'I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workmen's compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract'."

which require every employer to be insured against liability for workmen's compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract".

SECTION 2. LEGAL REQUIREMENTS AFTER DECEMBER 31, 1974

A. Definition of Public Works (After 1974)

Chapter 962, Statutes of 1980, Section 1, amended Labor Code Section 1720.2[41] to define "public works" to include, for the first time, construction work performed according to plans, specifications, or criteria furnished by the state or political subdivision,

[41]Labor Code Section 1720.2, added by Chapter 1027, Statutes of 1974, Section 1, as amended by Chapter 962, Statutes of 1980, Section 1:

"For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, 'public works' also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exist:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work."

and a lease agreement between the lessor and state or political subdivision is entered into during, or upon completion of the construction work. Therefore, for the first time, awarding parties must comply with laws pertaining to public works during construction work done according to plans, specifications, or criteria furnished by the state or political subdivision, where a lease of the property is entered into during, or upon completion of, the construction work between the lessor and the state or a political subdivision.

Chapter 278, Statutes of 1989, Section 1, amended Labor Code Section 1720[42] to include, for the first time, in the definition of "public works", public transportation

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[42]Labor Code Section 1720, added by Chapter 90, Statutes of 1937, Section 1720, as amended by Chapter 278, Statutes of 1989, Section 1:

"As used in this chapter 'public works' means:
(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.
(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. 'Public work' shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.
(c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.
(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.
(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.
(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code."

demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code. Therefore, for the first time, awarding bodies must comply with laws pertaining to public works when constructing transportation demonstration projects authorized by Section 143 of the Streets and Highways Code.

Chapter 220, Statutes of 1999, Section 1, amended Labor Code Section 1720.3[43] to define "public works" to now include "political subdivisions of the state" when hauling refuse from a public works site to an outside location[44]. Therefore, for the first time, political subdivisions must comply with laws pertaining to public works when contracts are let for hauling refuse. Prior to this time, the section only applied to the California State University and the University of California.

Chapter 881, Statutes of 2000, Section 1, amended Section 1720[45] subdivision (a)

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[43]Labor Code Section 1720.3, added by Chapter 1084, Statutes of 1976, Section 1, as amended by Chapter 220, Statutes of 1999, Section 1:

"For the limited purposes of Article 2 (commencing with Section 1770), 'public works' also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state."

[44]A "political subdivision" includes districts. Labor Code Section 1721
See: Footnote #4, supra.

[45]Labor Code Section 1720, added by Chapter 90, Statutes of 1937, Section 1720, as amended by Chapter 881, Statutes of 2000, Section 1:

"As used in this chapter 'public works' means:
(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public

to expand the definition of "public works" to include, for the first time, "work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work". Therefore, for the first time, awarding bodies must comply with laws pertaining to "public works" when contracting with third parties for the design and preconstruction phases of their respective public works.

Chapter 938, Statutes of 2001, Section 2, amended Labor Code Section 1720[46]

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utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this subdivision, 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. 'Public work' shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code."

[46]Labor Code Section 1720, added by Chapter 90, Statutes of 1937, Section 1720, as amended by Chapter 938, Statutes of 2001, Section 2:

"As used in this chapter, 'public works' means:

(a) (1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the

Public Utilities Commission or other public authority. For purposes of this ~~subdivision~~ paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(b) For purposes of this section, 'paid for in whole or in part out of public funds' means the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations.

(c) Notwithstanding subdivision (b):

(1) Private residential projects built on private property are not subject to the requirements of this chapter if the projects are not built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

(2) (a) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision

contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(b) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

(3) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code does not constitute a project that is paid for in whole or in part out of public funds.

(4) 'Paid for in whole or in part out of public funds' shall not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8369.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit

subdivision (a) to expand the definition of "public works" to include, for the first time, "installation" work done under a public works contract. Therefore, for the first time, awarding bodies must comply with laws pertaining to public works when contracting with third parties for installations of public works. Chapter 938, Statutes of 2001 also added subdivisions (b), (c), and (d) to define terms and establish exclusions.

B. Withholding Penalties and Forfeitures; Defending Litigation, Settlements (After 1974)

Chapter 1174, Statutes of 1976, Section 1, amended Labor Code Section 1735[47]

Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.
(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the Health and Safety Code, or Sections 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or an ordinance or regulation, other than an ordinance or regulation adopted pursuant to this section, applies this chapter to a project, the exclusions set forth in subdivision (d) shall not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code shall mean the Internal Revenue Code of 1986, as amended, and shall include the corresponding predecessor sections of the Internal Revenue Code of 1954, as amended."

[47] Labor Code Section 1735, added by Chapter 643, Statutes of 1939, Section1, as amended by Chapter 1174, Statutes of 1976, Section 1:

to expand the category of persons against whom discrimination was prohibited.

Chapter 992, Statutes of 1980, Section 10, amended Labor Code Section 1735 to substitute Section "12940" of the Government Code for Section "1420".

Chapter 160, Statutes of 1988, Section 122, amended Labor Code Section 1733[48] to change the reference to the Division of Labor Law Enforcement to the Division of Labor Standards Enforcement, and to remove gender references.

Chapter 913, Statutes of 1992, Section 36, amended Labor Code Section 1735[49]

"No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such persons, except as provided in Section 1420 of the Government Code, ~~or religion of such persons,~~ and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter."

[48]Labor Code Section 1733, added by Chapter 90, Statutes of 1937, Section 1733, as amended by Chapter 160, Statutes of 1988, Section 122:

"Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the penalties or forfeitures without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the plaintiff to establish his or her right to the penalties or forfeitures withheld. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body.

The Division of Labor ~~Law~~ Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action."

[49]Labor Code Section 1735, added by Chapter 643, Statutes of 1939, Section 1, as amended by Chapter 913, Statutes of 1992, Section 36:

"No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical ~~handicap~~

to substitute "disability" and "mental disability" for "handicap", in the list of traits not to be the subject of discrimination.

Chapter 1342, Statutes of 1992, Section 1, amended Labor Code Section 1727[50] to substitute the words "wages and penalties" for "amounts", and updating the name of the Division of Labor Law Enforcement to the Division of Labor Standards Enforcement.

Chapter 1342, Statutes of 1992, Section 6, amended Labor Code Section 1733[51]

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disability, mental disability, medical condition, marital status, or sex of such persons, except as provided in Section 1420 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter."

[50]Labor Code Section 1727, added by Chapter 90, Statutes of 1937, Section 1727, as amended by Chapter 1342, Statutes of 1992, Section 1:

"Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all ~~amounts~~ wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor ~~Law~~ Standards Enforcement or by the awarding body."

[51]Labor Code Section 1733, added by Chapter 90, Statutes of 1937, Section 1733, as amended by Chapter 1342, Statutes of 1992, Section 6:

"Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties ~~or forfeitures~~ without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee ~~plaintiff~~ to establish his or her right to the wages or penalties ~~or forfeitures~~ withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on

to substitute "wages or penalties" for "penalties or forfeitures", and to allow the Division of Labor Standards Enforcement to intervene in any court proceeding brought by any contractor against the awarding party for the recovery of wages or penalties withheld. The Division of Labor Standards, or the awarding body, could move to dismiss the action if the action was not commenced or notice was not received within the 90-day period.

Chapter 954, Statutes of 2000, Section 3, amended Labor Code Section 1726[52], as of July 1, 2001, to require an awarding body, for the first time, to report any suspected violations of this chapter to the Labor Commissioner. In addition, for the first time, if the awarding body, through its own investigation, determines that a violation has occurred, and withholds contract payments, the procedures of Section 1771.6 (Deposits of penalties or forfeitures withheld from contract payments) must be followed (infra).

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motion of the awarding body or the Division of Labor Standards Enforcement.
~~The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.~~

[52]Labor Code Section 1726, added by Chapter 90, Statutes of 1937, Section 1726, as amended by Chapter 954, Statutes of 2000, Section 3, operative July 1, 2001:

"The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.
If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed."

Chapter 954, Statutes of 2000, Section 4, amended Labor Code Section 1727[53], as of July 1, 2001, to delete the provision allowing an awarding body to withhold and retain wages and penalties forfeited by a contractor pursuant to stipulations, and, instead, required an awarding body to withhold amounts necessary to satisfy any Civil Wage and Penalty assessment issued by the Labor Commissioner and to hold such amounts until receipt of a final order that is no longer subject to judicial review. Subdivision (b), for the first time, requires the awarding body to receive money withheld by a contractor from a subcontractor. Therefore, for the first time, awarding bodies, before paying the contractor, are required to withhold, retain, and accept amounts required to satisfy civil wage and penalty assessments issued by the Labor

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[53]Labor Code Section 1727, added by Chapter 90, Statutes of 1937, Section 1727, as amended by Chapter 954, Statutes of 2000, Section 4, operative July 1, 2001:

"(a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all ~~wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.~~ amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review."

Commissioner and shall continue to retain such amounts until the awarding body receives a final order that is no longer subject to judicial review.

Chapter 954, Statutes of 2000, Sections 5, 6, 7, and 8, respectively, repealed Labor Code Sections 1730, 1731, 1732, and 1733, effective as of July 1, 2001.

Chapter 954, Statutes of 2000, Section 9, added Labor Code Section 1741[54], as of July 1, 2001, to require the Labor Commissioner to issue civil wage and penalty

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[54]Labor Code Section 1741, as added by Chapter 954, Statutes of 2000, section 9, effective July 1, 2001:

"If the Labor Commissioner or his or her designee determines after an investigation that there has been a violation of this chapter, the Labor Commissioner shall with reasonable promptness issue a civil wage and penalty assessment to the contractor or subcontractor or both. The assessment shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures due and shall include the basis for the assessment. The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment. The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body. However, no bonding company or surety shall be relieved of its responsibilities because it failed to receive notice from the Labor Commissioner."

assessments to the contractor or subcontractor upon a determination of a violation of this chapter after an investigation. A copy of the assessment shall be served upon the awarding body. As the holder of the funds withheld, the beneficiary of any surety bond, and as a party to the public works contract, the awarding body, for the first time, when required, must participate in this investigation and determination process.

Chapter 954, Statutes of 2000, Section 10, added Labor Code Section 1742[55],

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[55]Labor Code Section 1742, as added by Chapter 954, Statutes of 2000, Section 10, operative only until January 1, 2005:

" (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial hearing officer possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to

Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time. The director shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date."

operative only until January 1, 2005, to establish the due process procedure for a contractor and subcontractor to obtain a review of civil wage and penalty assessments. An affected contractor and subcontractor may obtain a review of a civil wage and penalty assessment by transmitting a written request to the office of the Labor Commissioner within 60 days after service of the assessment. Upon receipt of the request, a hearing shall be commenced within 90 days before the director who shall appoint an impartial hearing officer possessing the qualifications of an administrative law judge. As the holder of the funds withheld and as a party to the public works contract, an awarding body, for the first time, when required, must participate in this hearing procedure. Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. A copy of the decision shall be served upon the awarding body. An affected contractor and subcontractor may obtain a review of the decision of the director by filing a petition for a writ of mandate in the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the Director's decision. As a necessary party, the awarding body, would, for the first time, when served with process, be required to appear and defend petitions for writs of mandate filed by contractors or subcontractors seeking review of decisions of the Labor Commissioner. Upon receipt of a certified copy of a final order that is no longer

subject to judicial review, the awarding body is required to promptly remit the withheld funds, up to the amount of the certified order, to the Labor Commissioner. The awarding body shall distribute the balance of the funds to the contractor or as directed by the final order.

Chapter 954, Statutes of 2000, Section 11, adds a new Labor Code Section 1742[56], which will be operative on January 1, 2005, and is substantially similar to

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[56]Labor Code Section 1742, added by Chapter 954, Statutes of 2000, Section 11, as operative after January 1, 2005:

"(a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) (1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge appointed by the Director of Industrial Relations. The appointed hearing judge shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the

administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

Section 1742, operative until January 1, 2005, except that the Director of Industrial Relations will appoint an administrative law judge, rather than a hearing officer, for hearing procedures, and the appointed administrative law judge, rather than the Director of Industrial Relations, will affirm, modify, or dismiss an assessment after January 1, 2005. An awarding body will continue to perform the same duties as required currently in Section 1742.

Chapter 954, Statutes of 2000, Section 12, added Labor Code Section 1742.1[57],

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(h) This section shall become operative on January 1, 2005."

[57]Labor Code Section 1742.1, as added by Chapter 954, Statutes of 2000, Section 12, and operative only until January 1, 2005:

" (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the

operative until January 1, 2005. Subdivision (b), requires the awarding body, for the first time, upon receipt of a request from the affected contractor or subcontractor, within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, to afford the contractor or subcontractor the opportunity to meet with a designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment, also afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. Therefore, for the

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need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.
This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date."

first time, an awarding body is required to meet with contractors and/or subcontractors upon their request. As the holder of the funds withheld, as a party to the contract, and as the beneficiary of any surety bond, the awarding body, for the first time, will be required, when necessary, to participate in settlement meetings between contractors, subcontractors, and the Labor Commissioner.

Chapter 954, Statutes of 2000, Section 13, adds a new Labor Code Section 1742.1[58] which will be operative on January 1, 2005. New section 1742.1, operative on

[58]Labor Code Section 1742.1, as added by Chapter 954, Statutes of 2000, Section 13, and operative after January 1, 2005:

"(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the administrative law judge that he or she had substantial grounds for believing the assessment or notice to be in error, the administrative law judge shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request

January 1, 2005, is substantially similar to Section 1742.1 operative until January 1, 2005, except that the administrative law judge, rather than the Director of Industrial Relations, may waive payment of liquidated damages if the administrative law judge, rather than the Director of Industrial Relations, finds substantial grounds for believing the assessment or notice to be in error. An awarding body will continue to perform the same duties as required currently in Section 1742.1.

Chapter 954, Statutes of 2000, Section 14, added Labor Code Section 1743[59] to

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from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.
This section shall become operative on January 1, 2005."

[59]Labor Code Section 1743, added by Chapter 954, Statutes of 2000, Section 14:

" (a) The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon. The Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

attach joint and several liability to a contractor and subcontractor for all amounts due pursuant to a final order under this chapter. The amount collected will be first satisfy the wage claim, then penalties. Wages for workers who cannot be located are placed in the Industrial Relations trust fund pursuant to Labor Code Section 96.7. The final order is binding on a bonding company that secures the payment of wages and a surety on a bond.

C. Wages - Prevailing Wage Rates (After 1974)

Chapter 281, Statutes of 1976, Section 2, amended Labor Code Section 1770[60] to

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(b) From the amount collected, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(c) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(d) A final order under this chapter or a judgment thereon shall be binding, with respect to the amount found to be due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. The limitations period of any action on a payment bond shall be tolled pending a final order that is no longer subject to judicial review."

[60]Labor Code Section 1770, added by Chapter 90, Statutes of 1937, Section 1770, as amended by Chapter 281, Statutes of 1976, Section 2:

"The ~~body awarding the contract or authorizing the public work~~ Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4 ~~and 1773.6~~. Nothing in this article, however, shall prohibit the payment of more than the

require the Director of Industrial Relations, rather than the awarding body, to determine the general prevailing rate of per diem wages. The reference to the prevailing rate determination made by the Director of Industrial Relations as provided in Labor Code Section 1773.6 was deleted.

Chapter 281, Statutes of 1976, Section 3, amended Labor Code Section 1773[61] to

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general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter."

[61]Labor Code Section 1773, added by Chapter 90, Statutes of 1937, Section 1773, as amended by Chapter 281, Statutes of 1976, Section 3:

"The body awarding any contract for public work, or otherwise undertaking any public work, shall ~~ascertain~~ obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the ~~awarding body~~ Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the ~~awarding body~~ director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the ~~awarding body~~ director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the ~~awarding body~~ director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such

require the awarding body to obtain, rather than ascertain, the general prevailing rate of per diem wages of the public works contract. Now, for the first time, an awarding body, rather than ascertaining the wage rates, must obtain the prevailing wage rate from the Director of the Department of Industrial Relations.

Chapter 281, Statutes of 1976, Section 4, amended Labor Code Section 1773.1[62] to include travel time and subsistence pay in the definition of per diem wages.

Chapter 281, Statutes of 1976, Section 6, amended Labor Code Section 1773.6[63]

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agreement or until the ~~awarding body~~ director determines that another rate should be adopted.

[62]Labor Code Section 1773.1, added by Chapter 2173, Statutes of 1959, Section 1, as amended by Chapter 281, Statutes of 1976, Section 4:

"Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in Section 1773.8, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workman needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids."

[63]Labor Code Section 1773.6, added by Chapter 1706, Statutes of 1953, Section 6, as amended by Chapter 281, Statutes of 1976, Section 6:

~~"Where the body awarding the contract or authorizing the public work is the State Department of Public Works, the Department of General Services, or the State Department of Water Resources or any division thereof, it shall file, quarterly, its~~

to delete the requirement of the Director of Industrial Relations to immediately notify the awarding body of prevailing rates. Now, the Director must make such change available, with no reference to time.

Chapter 538, Statutes of 1976, Section 2, added Labor Code Section 1777.7[64] to require a contractor, who willfully fails to comply with Section 1777.5 of the Labor Code, be barred from bidding on public works contracts for one year, and the awarding body

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~~determination of general prevailing rates of per diem wages for those localities in which public work is to be performed, in the office of the Director of Industrial Relations, commencing not later than January 10, 1954. Such determination shall be final except as hereinafter provided.~~ If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall ~~immediately notify~~ make such change available to the awarding body ~~of such change~~ and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published."

[64]Labor Code Section 1777.7, as added by Chapter 538, Statutes of 1976, Section 2:

"In the event a licensed contractor willfully fails to comply with the provisions of Section 1777.5, such licensee shall be denied the right to bid on any public works contract for a period of one year from the date the determination of noncompliance is made by the Administrator of Apprenticeship and, notwithstanding the provisions of Section 1727, upon receipt of such a determination the awarding body shall withhold from contract progress payments then due or to become due the sum of five thousand dollars ($5,000). Any determination shall be issued after a full investigation, a fair and impartial hearing, and reasonable notice thereof in accordance with reasonable rules and procedures prescribed by the California Apprenticeship Council. Any funds withheld by the awarding body pursuant to this section shall be released to the contractor upon issuance of an order to that effect by the administrator, or upon completion of the contract.

The interpretation and enforcement of Section 1777.5 and 1777.7 shall be in accordance with the rules and procedures of the California Apprenticeship Council."

was required to withhold from contract progress payments the sum of five thousand dollars after determination by the Administrator of Apprenticeship that the contractor willfully failed to comply with Section 1777.5. The awarding body was required to withhold the sum until it received an order releasing it or until completion of the contract.

Chapter 599, Statutes of 1976, Section 1, amended Labor Code Section 1776[65] to require the awarding body to retain a copy of the payroll records of a worker supplied by a contractor and subcontractor for 90 days after completion of the contract. If a complaint regarding prevailing wage rates has been filed with the awarding body or the Division of Labor Standards Enforcement, then the contractor or subcontractor, upon

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[65]Labor Code Section 1776, added by Chapter 90, Statutes of 1937, Section 1776, as amended by Chapter 599, Statutes of 1976, Section 1:

"~~Every~~ Each contractor and subcontractor shall keep an accurate payroll record showing the name, ~~occupation,~~ address, social security number, work classification, straight time and overtime hours worked each day and week, and the per diem wages paid to each ~~workman~~ journeyman, apprentice or worker employed by him in connection with the public work. ~~The record shall be kept open at all reasonable hours to the inspection of the body awarding the contract and to the Division of Labor Law Enforcement.~~ The contractor's and subcontractor's payroll records shall be available for inspection at all reasonable hours, and a copy shall be made available to the employees or his authorized representative, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards. The body awarding the contract may charge a reasonable fee for copying such records. The body awarding the contract shall be required to retain the records filed pursuant to this section of 90 days after completion of the contract. After a complaint has been filed with the awarding body or the Division of Labor Standards Enforcement alleging that a contractor or subcontractor has paid less than the prevailing wage on a public works project, the contractor or subcontractor shall upon written notice from either the awarding body or the Division of Labor Standards Enforcement within 10 days file with the body awarding the contract a certified copy of the payroll records."

written notice from either the awarding body or the Division of Labor Standards Enforcement, shall file with the awarding body a certified copy of the payroll records.

Chapter 861, Statutes of 1976, Section 2, amended Labor Code Section 1771[66] to exempt public works projects of five hundred dollars or less from the general prevailing wage rate law.

Chapter 1179, Statutes of 1976, Section 2, amended Labor Code Section 1777.5[67]

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[66]Labor Code Section 1771, added by Chapter 90, Statutes of 1937, Section 1771, as amended by Chapter 861, Statutes of 1976, Section 2:

"Except for public works projects of five hundred dollars ($500) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work."

[67]Labor Code Section 1777.5, added by Chapter 872, Statutes of 1937, page 2424, as amended by Chapter 1179, Statutes of 1976, Section 2:

"Nothing in this chapter shall prevent the employment of properly ~~indentured~~ registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is ~~indentured~~ registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political

subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area ~~of the site of the public work.~~ or industry affected: provided, however, that the approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each ~~eight~~ five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to ~~prime~~ contracts of general contractors involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts of ~~subcontractors~~ specialty contractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the

Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor ~~Law~~ Standards Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

~~In the event a contractor willfully fails to comply with this section, such contractor~~

to make technical changes and to delete the provision that denied a contractor who willfully failed to comply with this section from bidding on a public works contract for six months.

Chapter 1179, Statutes of 1976, Section 3, amended Labor Code Section 1777.6[68] to make technical changes.

Chapter 423, Statutes of 1977, Section 1, amended Labor Code Section 1773.2[69]

~~shall be denied the right to bid on a public works contract for a period of six months from the date the determination is made.~~

~~The interpretation and enforcement of this section shall be in accordance with the rules and procedures prescribed by the Apprenticeship Council.~~

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081."

[68]Labor Code Section 1777.6, added by Chapter 1192, Statutes of 1951, Section 1, as amended by Chapter 1179, Statutes of 1976, Section 3:

"It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as ~~indentured~~ registered apprentices on any public works, on the ground of the race, religious creed, color, national origin, ancestry, ~~or~~ sex, ~~or age, except as provided in Section 3077,~~ of such employee."

[69]Labor Code Section 1773.2, added by Chapter 785, Statutes of 1971, Section 2, as amended by Chapter 423, Statutes of 1977, Section 1:

"The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may ~~refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy~~ , in such call for

to require the awarding body to include a statement in any call for bids that copies of the prevailing rate of per diem wages are on file at its principal office and are available to any interested party upon request, and that a copy be posted on the jobsite. Now, for the first time, an awarding body is required to add a statement in the call for bids, bid specification, and in the contract itself, a statement that copies of the prevailing wage rate are available at its principal office and to post a copy at the jobsite. The awarding body is no longer required to post notices of the prevailing wage rate in newspapers.

Chapter 1249, Statutes of 1978, Section 2, amended Labor Code Section 1775[70] to

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bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, ~~in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year,~~ which shall be made available to any interested party on request. ~~and in such event, the~~ The awarding body shall also cause a copy ~~thereof~~ of the determination of the director of the prevailing rate of per diem wages to be posted at each jobsite."

[70]Labor Code Section 1775, added by Chapter 90, Statutes of 1937, Section 1775, as amended by Chapter 1249, Statutes of 1978, Section 2:

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each workman paid less than the prevailing ~~wage~~ rates ~~stipulated~~ as determined by the director for such work or craft in which such workman is employed for any public work done under the contract by him or by any subcontractor under him. The difference between such prevailing wage rates ~~stipulated~~ and the amount paid to each workman for each calendar day or portion thereof for which each workman was paid less than the prevailing wage rate ~~stipulated~~ shall be paid to each workman by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that the provisions of this section will be complied with.

change "prevailing wage rates" to "prevailing rates", to delete references to stipulated wage rates and to refer, instead, to prevailing rates as determined by the director, changed "Division of Labor Law Enforcement" to "Division of Labor Standards Enforcement", and made other technical changes.

Chapter 1249, Statutes of 1978, Section 3 repealed Former Labor Code Section 1776 and Section 4 added new Labor Code Section 1776[71] which was similar

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To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813 of this chapter, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify, provided that in the case of a workman claiming the difference between the prevailing wage rate and the amount paid him the awarding body has first been given the notice mentioned in Section 1190.1 of the Code of Civil Procedure, the Division of Labor ~~Law~~ Standards Enforcement of such violation and the Division of Labor ~~Law~~ Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided for herein. Such action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of such public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in such action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in such action are not due.

Out of any money withheld or recovered or both there shall first be paid the amount due each workman and if insufficient funds are withheld or recovered or both to pay each workman in full the money shall be prorated among all such workmen."

[71]Labor Code Section 1776, as added by Chapter 1249, Statutes of 1978, Section 4:

" (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification,

straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to such employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request to the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. The public shall not be given access to such records at the principal office of the contractor.

(c) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested such records within 10 days after receipt of a written request.

(d) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(e) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(f) In the event of noncompliance with the requirements of this section, the contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects such contractor must comply with this

to the repealed section except the new section expanded the requirements of contractors to keep accurate payroll records and allows awarding bodies to inspect the records, and made technical changes. When providing copies of payroll records to the public, subdivision (d) requires the marking or obliteration of an individual's name, address, and social security number. Subdivision (f) requires the contractor within a 10 day period to comply with the section. If not compliant, the contractor shall forfeit $25 per day to the awarding body. Subdivision (g) requires the awarding body to insert stipulations in the contract to effectuate this section. Therefore, for the first time, an awarding body, when necessary, may obtain and inspect a contractor's or subcontractor's payroll records and provide certified copies thereof to the public marked or obliterated in such a manner as to prevent disclosure of an individual's name, address, and social security number.

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section. Should noncompliance still be evident after such 10-day period, the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, such penalties shall be withheld from progress payments then due.

(g) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility or compliance with this section on the prime contractor.

(h) The director shall adopt rules consistent with the California Public Records Act, (Ch. 3.5 (commencing with Sec. 6250), of Div. 7, Title 1, Gov. C.) and the Information Practices Act of 1977, (Title 1.8 (commencing with Sec. 1798 (Pt. 4, Div. 3, Civ. C.) governing the release of such records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

Chapter 1249, Statutes of 1978, Section 5, amended Labor Code Section 1777.7[72] to require an awarding body to withhold amounts determined by the Administrator of Apprenticeship rather than five thousand dollars and daily penalties.

Chapter 1249, Statutes of 1978, Section 6, renumbered Labor Code Section 3098 as 1773.3, and did not change any duties of an awarding body.

Chapter 449, Statutes of 1981, Section 1, amended Labor Code Section 1771[73] to

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[72] Labor Code Section 1777.7, added by Chapter 538, Statutes of 1976, Section 2, as amended by Chapter 1249, Statutes of 1978, Section 5:

"(a) In the event a ~~licensed~~ contractor willfully fails to comply with the provisions of Section 1777.5, such ~~licensee~~ contractor shall:

(1) Be denied the right to bid on any public works contract for a period of one year from the date the determination of noncompliance is made by the Administrator of Apprenticeship; and.

~~(2) Forfeit as a civil penalty in the sum of fifty dollars ($50) for each calendar day of noncompliance.~~ Notwithstanding the provisions of Section 1727, upon receipt of such a determination the awarding body shall withhold from contract progress payments then due or to become due ~~the~~ such sum ~~of five thousand dollars ($5,000)~~.

(b) Any such determination shall be issued after a full investigation, a fair and impartial hearing, and reasonable notice thereof in accordance with reasonable rules and procedure prescribed by the California Apprenticeship Council.

(c) Any funds withheld by the awarding body pursuant to this section shall be ~~released to the contractor upon issuance of an order to that effect by the administrator, or upon completion of the contract~~ deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if such awarding body is an entity other than the state.

The interpretation and enforcement of Section 1777.5 and 1777.7 shall be in accordance with the rules and procedures of the California Apprenticeship Council."

[73] Labor Code Section 1771, added by Chapter 90, Statutes of 1937, Section 1771, as amended by Chapter 449, Statutes of 1981, Section 1:

change the amount of a contract that is exempt from general prevailing wage rate laws from $500 to $1,000, or less.

Chapter 681, Statutes of 1983, Section 1, amended Labor Code Section 1776[74]

"Except for public works projects of ~~five hundred dollars ($500)~~ one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work."

[74]Labor Code Section 1776, added by Chapter 1249, Statutes of 1978, Section 4, as amended by Chapter 681, Statutes of 1983, Section 1:

"(a) Each contract and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to such employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request to the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor

Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor,subcontractors, and the entity through which the request was made. The public shall not be given access to such records at the principal office of the contractor.

(c) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested such records within 10 days after receipt of a written request.

(d) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(e) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(f) In the event of noncompliance with the requirements of this section, the contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects such contractor must comply with this section. Should noncompliance still be evident after ~~such~~ the 10-day period, the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, such penalties shall be withheld from progress payments then due.

(g) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. ~~Such~~ These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(h) The director shall adopt rules consistent with the California Public Records Act, (Ch. 3.5 (commencing with Sec. 6250), of Div. 7, Title 1, Gov. C.) And the Information Practices Act of 1977, (Title 1.8 (commencing with Sec. 1798 (Pt. 4, Div. 3, Civ. C.) governing the release of ~~such~~ these records, including the establishment of reasonable fees to be charged for reproducing

to allow reimbursement by the public to the providing party of the cost of obtaining and preparing copies of the payroll records requested.

Chapter 1224, Statutes of 1989, Section 2, added Labor Code Section 1771.5[75] to

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copies of records required by this section."

[75]Labor Code Section 1771.5, as added by Chapter 1224, Statutes of 1989, Section 2:

" (a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractor shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred."

provide that the awarding party is not required to pay the general prevailing rate of per diem wages and per diem holiday and overtime wages for construction work projects of $25,000 or less, or for public works projects for alteration, demolition, repair, or maintenance projects of $15,000 or less, if the awarding body elects to initiate and enforce a labor compliance program as defined in subdivision (b). Therefore, for the first time, for public work construction projects of $25,000, or less, and for alteration, demolition, repair or maintenance work projects of $15,000, or less, awarding parties must either comply with prevailing wage rate laws or the requirements of a defined labor compliance program.

Chapter 1224, Statutes of 1989, Section 3, added Labor Code Section 1771.6[76] to require a political subdivision to deposit penalties or forfeitures withheld from any contract payments in its General Fund at the expiration of 90 days after the completion of the contract and the formal acceptance of the job. Any fines or penalties collected by a court

[76]Labor Code Section 1771.6, as added by Chapter 1224, Statutes of 1989, Section 3:

"Notwithstanding Sections 1730, 1731, and 1734, any political subdivision which enforces this chapter in accordance with Section 1771.5 shall, at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, deposit all penalties or forfeitures withheld from any contract payment in the general fund of the political subdivision. Any court collecting any fines or penalties under the criminal provisions of this chapter, or any of the labor laws pertaining to public works, when the fines and penalties resulted from enforcement actions by a political subdivision pursuant to Section 1771.5, shall deposit the fines or penalties in the general fund of the political subdivision."

resulting from enforcement actions by a political subdivision shall also be deposited in its general fund.

Chapter 1224, Statutes of 1989, Section 5, amended Labor Code Section 1773.5[77] to allow the Director of Industrial Relations to establish rules and regulations for the purpose of carrying out the chapter including, but not limited to, the responsibilities and duties of awarding bodies.

Chapter 1224, Statutes of 1989, Section 6, amended Labor Code Section 1775[78]

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[77]Labor Code Section 1773.5, added by Chapter 1706, Statutes of 1953, Section 5, as amended by Chapter 1224, Statutes of 1989, Section 5:

"The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out ~~the prevailing wage provisions of this article~~ this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

[78]Labor Code Section 1775, added by Chapter 90, Statutes of 1937, Section 1775, as amended by Chapter 1224, Statutes of 1989, Section 6:

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) ~~twenty-five dollars ($25)~~ for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for work or craft in which such worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between ~~such~~ the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the

to change maximum forfeitures from $25 to $50 per day as determined in the discretion of the Labor Commissioner after consideration of listed factors.

Chapter 1224, Statutes of 1989, Section 10, added Labor Code Section 1777.1[79] to

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prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that the provisions of this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813 ~~of this chapter~~, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify~~, provided that in the case of a workman claiming the difference between the prevailing wage rate and the amount paid him the awarding body has first been given the notice mentioned in Section 1190.1 of the Code of Civil Procedure,~~ the Division of Labor Standards Enforcement of ~~such~~ the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided ~~for herein~~ in this section. ~~Such~~ This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of ~~such~~ the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in ~~such~~ the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in ~~such~~ the action are not due.

Out of any money withheld, ~~or~~ recovered, or both there shall first be paid the amount due each worker and if insufficient funds are withheld, ~~or~~ recovered, or both to pay each worker in full, the money shall be prorated among all ~~such~~ workers."

[79]Labor Code Section 1777.1 as added by Chapter 1224, Statutes of 1989, Section 10:

> " (a) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible

set periods of debarment for contractors and subcontractors who fraudulently or repeatedly violate the provisions of the general prevailing wage law. Therefore, for the first time, awarding bodies must maintain records of disbarred contractors and subcontractors to prevent them from bidding on public works projects and are required, when requested, to participate in determinations of the Labor Commissioner.

Chapter 1224, Statutes of 1989, Section 12, repealed Labor Code Section 1777.7 and Section 13 added a new Labor Code Section 1777.7[80], which is similar to the

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to bid on or to receive any public works contract for a period of not less than one year or more than three years. The period of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(b) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter. These periods of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(c) Any determination by the Labor Commissioner shall be made after a full investigation by the Labor Commissioner and a fair and impartial hearing and reasonable notice.

(d) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(e) The Labor Commissioner shall promulgate rules and regulation for the administration and enforcement of this section, the definition of terms, and appropriate penalties."

[80]Labor Code Section 1777.7 as added by Chapter 1224, Statutes of 1989, Section 13:

repealed section, except that the new section expanded the penalties in the event a contractor willfully fails to comply with Section 1777.5. Subdivision (a) expands the period of disbarment to three years for a second and subsequent violations. Subdivision (c) allows a contractor, in lieu of monetary penalty, to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the

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" (a) In the event a contractor or subcontractor willfully fails to comply with Section 1777.5, the Director of Industrial Relations shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on, or to receive, any public works contract for a period of up to one year for the first violation and for a period of up to three years for the second and subsequent violations. Each period of debarment shall run from the date of the determination of noncompliance by the Administrator of Apprenticeship becomes an order of the California Apprenticeship Council.

(b) A contractor or subcontractor who violates Section 1777.5 shall forfeit as a civil penalty the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(c) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first time violation and with the concurrence of the joint apprenticeship committee, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(e) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council."

period of noncompliance.

Chapter 1342, Statutes of 1992, Section 7 and 8, amended Labor Code Sections 1772[81] and 1773.2[82], to make technical changes by removing gender references.

Chapter 1342, Statutes of 1992, Section 9, amended Labor Code Section 1775 to make technical changes.

Chapter 1342, Statutes of 1992, Section 10, amended Labor Code Section 1776[83]

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[81]Labor Code Section 1772, added by Chapter 90, Statutes of 1937, Section 1772, as amended by Chapter 1342, Statutes of 1992, Section 7:

"Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work."

[82]Labor Code Section 1773.2, added by Chapter 785, Statutes of 1971, Section 2, as amended by Chapter 1342, Statutes of 1992, Section 8:

"The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each jobsite."

[83]Labor Code Section 1776, added by Statutes of 1978, Chapter 1249, Section 4, as amended by Chapter 1342, Statutes of 1992, Section 10:

" (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification,

and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to such employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request to the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to such records at the principal office of the contractor. <u>The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.</u>

<u>(d)</u> Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested such records within 10 days after receipt of a written request.

<u>(e)</u> Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

<u>(f)</u> The contractor shall inform the body awarding the contract of the

to require contractors and subcontractors to keep accurate payroll records on forms provided by the Division of Labor Standards Enforcement or on forms containing the same information, and other technical changes.

Chapter 589, Statutes of 1993, Section 107, amended Labor Code Section 1776, to make technical changes.

Chapter 17, Statutes of 1997, Section 91, amended Labor Code Section 1777.5 to make technical changes.

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location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) ~~In the event of noncompliance with the requirements of this section,~~ The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects such contractor must comply with this section. ~~Should noncompliance still be evident after the 10-day period,~~ In the event that the contractor fails to comply within the 10-day period, the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, such penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Ch. 3.5 (commencing with Sec. 6250), of Div. 7, Title 1, Gov. C.) And the Information Practices Act of 1977, (Title 1.8 (commencing with Sec.1798 (Pt. 4, Div. 3, Civ. C.) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section."

Chapter 757, Statutes of 1997, Section 1, amended Former Labor Code Section 1775 to make technical changes and add a sunrise date of January 1, 2003.

Chapter 757, Statutes of 1997, Section 2, added a new Labor Code Section 1775[84],

[84]Labor Code Section 1775, added by Chapter 757, Statutes of 1997, Section 2:

" (a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or the willful failure by the contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor or subcontractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5,

1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. If the Division of Labor Standards Enforcement determines that employees of a subcontractor were not paid the general prevailing rate of per diem wages and if the body awarding the contract under which the employees performed work did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the contractor shall withhold an amount of moneys due the subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by the Division of Labor Standards Enforcement. The contractor shall pay any money retained from and owed to a subcontractor upon receipt of notification by the Division of Labor Standards Enforcement that the wage complaint has been resolved. If notice of the resolution of the wage complaint has not been received by the contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, whichever occurs later, the contractor shall pay all moneys retained from the subcontractor to the awarding body. The moneys shall be retained by the awarding body pending the final decision of an enforcement action, and be forwarded to the Labor Commissioner for disbursement pursuant to subdivision (d) if the subcontractor does not prevail in the action. Wages for workers who cannot be

effective only until January 1, 2003, to require an awarding body to insert in each public works contracts a stipulation that the contractor will comply with the penalties and damages provisions of the section. If notice of a resolution of a wage complaint against a

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located after a diligent search by the Labor Commissioner shall be deposited in the Industrial Relations Unpaid Wage Fund pursuant to subdivision (c) of Section 96.7. Penalties shall be paid into the General Fund.

If the subcontractor prevails in the enforcement action, the awarding body shall release any funds retained pursuant to this subdivision to the contractor within 10 working days from the date of the final decision of the court.

(d) To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section or Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the division, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor and subcontractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor and subcontractor to establish that the penalties and amounts demanded in the action are not due. The contractor and subcontractor shall be jointly and severally liable in an enforcement action for any wages due. Following entry of a judgement for joint and several liability, the division shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim for wages against the contractor. From the amount collected from the subcontractor, the wage claim shall be satisfied prior to the amount being applied to penalties.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

(e) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date."

subcontractor has not been received by the contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, the contractor shall pay all monies retained from the subcontractor to the awarding body pending final decision of the enforcement action. In the event the subcontractor does not prevail in the action, all monies withheld shall be forwarded to the Labor Commissioner. In the event the subcontractor prevails, the awarding body shall release the funds to the contractor. In cases where insufficient funds are withheld, the awarding party shall notify the Division of Labor Standards Enforcement who may, if necessary with the assistance of the awarding body, maintain an action to recover penalties and amounts due. Therefore, for the first time, awarding bodies are required to insert required stipulations in public works contracts, to receive from contractors funds withheld from subcontractors, to retain those funds pending a final decision of an enforcement action, and to assist, when required, in actions brought by the Division of Labor Standards Enforcement to recover penalties and amounts due.

Chapter 757, Statutes of 1997, Section 3, amended Labor Code Section 1776 to make technical changes and add a sunrise date of January 1, 2003. Section 4, added a new Labor Code Section 1776[85]

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[85]Labor Code Section 1776, added by Chapter 757, Statutes of 1997, Section 4:

" (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to

each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated ~~in a manner so as~~ to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded

operative only until January 1, 2003. Subdivision (b)(2), allows awarding parties, upon request, to be furnished with and allowed to inspect the contractor or subcontractor's payroll records. Subdivision (b)(3) allows the public to view such records, but the request must be made through the awarding party and other designated entities. Subdivision (h) requires the awarding body to insert a stipulation in the contract to implement the section by requiring contractors and subcontractors to keep and make available accurate records

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the contract or the subcontractor performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date."

regarding payroll and employee hours.

Chapter 443, Statutes of 1998, Section 1, amended Labor Code Section 1777.1[86]

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[86]Labor Code Section 1777.1, added by Chapter 1224, Statutes of 1989, Section 10, as amended by Chapter 443, Statutes of 1998, Section 1:

" (a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or ~~any~~ a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible for a period of not less than one year or more than three years. ~~The period of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.~~ to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or ~~any~~ a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter. ~~These periods of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.~~ to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

~~(c) Any determination by the Labor Commissioner shall be made after a full investigation by the Labor Commissioner and a fair and impartial hearing and reasonable notice.~~

~~(d)~~ (c) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

Not less than semiannually, the Labor Commissioner shall publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project pursuant to this chapter. The list shall contain the name of the contractor, the Contractor's State License Board license number of the

to clarify that disbarred contractors and subcontractors shall not bid or perform work as a subcontractor and, for the first time, required the Labor Commissioner to publish and distribute, not less than semiannually, a list of contractors who are ineligible to bid on work on public works projects. Therefore, for the first time, awarding parties are required to receive and retain lists of ineligible contractors and subcontractors published and distributed by the Labor Commissioner and to exclude those contractors and subcontractors from bidding or working on their public works projects.

Chapter 485, Statutes of 1998, Section 121, amended Labor Code Section 1776 to make technical changes.

Chapter 30, Statutes of 1999, Section 1, amended Labor Code Section 1773[87] to

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contractor, and the effective period of debarment of the contractor.

~~(c)~~ (d) The Labor Commissioner shall ~~promulgate~~ adopt rules and regulations for the administration and enforcement of this section, the definition of terms, and appropriate penalties."

[87]Labor Code Section 1773, added by Chapter 90, Statutes of 1937, Section 1773, as amended by Chapter 30, Statutes of 1999, Section 1:

"The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director ~~of the Department~~ of Industrial Relations. The holidays upon which those rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the applicable collective bargaining agreement ~~applicable to the particular craft, classification or type of workman employed on the project.~~ If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code.

require that, absent collectively bargained holidays, the holidays upon which the prevailing rate shall be paid shall be those provided in Section 6700[88] of the Government Code.

In determining the rates, the Director ~~of the Department~~ of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and the rates that may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved. The rate fixed for each craft, classification, or type of work shall be not less than the prevailing rate paid in the craft, classification, or type of work.

If the director determines that the rate of prevailing wage for any craft, classification, or type of worker is the rate established by a collective bargaining agreement, the director may adopt that rate by reference as provided for in ~~such~~ the collective bargaining agreement and that determination shall be effective for the life of the agreement or until the director determines that another rate should be adopted."

[88]Government Code Section 6700, added by Chapter 655, Statutes of 1951, Section 24, as amended by Chapter 1011, Statutes of 1994, Section 8:

"Government Code Section 6700 as added by Chapter 655, Statutes of 1951, Section 24, and amended by Chapter 1011, Statutes of 1994, Section 8:

"The holidays in this state are:
(a) Every Sunday.
(b) January 1st.
(c) The third Monday in January, known as 'Dr. Martin Luther King, Jr. Day.'
(d) February 12th, known as 'Lincoln Day.'
(e) The third Monday in February.
(f) March 31st known as 'Cesar Chavez Day.'
(g) The last Monday in May.
(h) July 4th.
(i) The first Monday in September.
(j) September 9th, known as 'Admission Day.'
(k) The second Monday in October, known as 'Columbus Day.'
(l) November 11th, known as 'Veterans Day.'

Chapter 30, Statutes of 1999, Section 2, amended Labor Code Section 1773.1[89] to limit apprentice training costs to amounts reasonably related to the amount of the

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(m) December 25th.
(n) Good Friday from 12 noon until 3 p.m.
(o) Every day appointed by the President or Governor for a public fast, thanksgiving, or holiday.
Except for the Thursday in November appointed as Thanksgiving Day, this subdivision and subdivisions (c) and (f) shall not apply to a city, county, or district unless made applicable by charter, or by ordinance or resolution of the governing body thereof.
If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if those provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act."

[89]Labor Code Section 1773.1, added by Chapter 2173, Statutes of 1959, Section 1, as amended by Chapter 30, Statutes of 1999, Section 2:

"Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel ~~time, and,~~ subsistence ~~pay as provided for in Section 1773.8,~~ and apprenticeship or other training programs authorized by Section 3093 so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term 'per diem wages' is used in this chapter or in any other statute applicable to public works.

For the purpose of determining ~~such~~ per diem wages for contracts entered into with the state, the representative of any craft, classification or type of worker needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations an executed statement of the ~~collective bargaining agreements~~ collectively bargained wage rates for the particular craft, classification, or type of work involved. ~~Such agreements~~ The statement of rates shall be filed within 10 days after ~~their execution~~ the rates have been negotiated and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids."

contributions by the employer.

Chapter 30, Statutes of 1999, Section 3, repealed Labor Code Section 1773.8 relating to travel and subsistence pay.

Chapter 83, Statutes of 1999, Section 132, amended Labor Code Section 1771.5 to make technical changes.

Chapter 903, Statutes of 1999, Section 2, amended Labor Code Sections 1777.5 and 1777.7 to make technical changes.

Chapter 135, Statutes of 2000, Section 124, amended Labor Code Section 1777.5[90] to make technical changes regardin the use of apprentices.

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[90]Labor Code Section 1777.5, added by Chapter 872, Statutes of 1937, page 2424, as amended by Chapter 135, Statutes of 2000, Section 124:

" (a) Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

(b) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either (1) the apprenticeship standards and apprentice agreements under which he or she is training or (2) the rules and regulations of the California Apprenticeship Council.

(d) When the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this section and may apply to any

apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, ~~approval or denial~~ the decision of the apprenticeship program to approve or deny a certificate shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that program. "Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, "contractor" includes any subcontractor under a contractor who performs any public works not excluded by subdivision (o).

(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any

day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Chief of the Division of Apprenticeship Standards, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this section that has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1-to-5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio, as set forth in this section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(1) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(2) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(3) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(4) Assignment of an apprentice to any work performed under a

public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

(i) When an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m)(1) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract. At the end of each fiscal year the California Apprenticeship Council shall make grants to each apprenticeship program in proportion to the number of hours of ~~training provided by the program for which the program did not receive contributions, weighted by the regular rate of contribution for the program. These grants shall be made from funds collected by the California Apprenticeship Council during the fiscal year pursuant to this subdivision from contractors that employed registered apprentices but did not contribute to an approved apprenticeship program. All these funds received during the fiscal year shall be distributed as grants.~~

(2) At the conclusion of each fiscal year, the California Apprenticeship Council shall distribute training contributions received by the council under this subdivision, less the expenses of the Division of Apprenticeship Standards for administering this subdivision, by making grants to approved apprenticeship program for the purpose of training apprentices. The funds shall be distributed as follows:

(A) If there is an approved multiemployer apprenticeship program serving the same craft or trade and geographic area for which the training contributions were made to the council, a grant to that program shall be made.

(B) If there are two or more approved multiemployer apprenticeship programs serving the same craft or trade and

1 Chapter 875, Statutes of 2000, Section 2, amended Labor Code Section 1777.7[91]

geographic area for which the training contributions were made to the council, the grant shall be divided among those programs based on the number of apprentices registered in each program.

(C) All training contributions not distributed under subparagraphs (A) and (B) shall be used to defray the future expenses of administering this subdivision.

(3) All training contributions received pursuant to this subdivision shall be deposited in the Apprenticeship Training Contribution Fund, which fund is hereby created in the State Treasury. Notwithstanding Section 13340 of the Government Code, all money in the Apprenticeship Training Contribution Fund is hereby continuously appropriated for the purpose of carrying out this subdivision and to pay the expenses of the division in administering this subdivision.

(n) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

(o) This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) ~~or 20 working days~~.

(p) All decisions of an apprenticeship program under this section are subject to Section 3081."

[91]Labor Code Section 1777.7, added by Chapter 1224, Statutes of 1989, Section 13, as amended by Chapter 875, Statutes of 2000, Section 2:

" (a)(1) A contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty ~~shall be based on consideration whether the violation was a good faith mistake due to inadvertence~~ may be reduced by the Chief if the amount of the penalty would be disproportionate to the severity of the violation. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in

apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed by the Chief, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(2) In lieu of the penalty provided for in this subdivision ~~(a) or (b)~~, the Chief may, for a first-time violation and with the concurrence of an apprenticeship program described in subdivision (d), order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(b)~~(1)~~ In the event a contractor or subcontractor is determined by the ~~Administrator of Apprenticeship~~ Chief to have knowingly ~~violated~~ committed a serious violation of any provision of Section 1777.5, the ~~Administrator~~ Chief may also deny to the contractor or subcontractor, ~~both individually and in the name of the business entity under which the contractor or subcontractor is doing business~~, and to its responsible officers, the right to bid on or ~~receive~~ be awarded or perform work as a subcontractor on any public works contract for a period of up to one year for the first violation and for a period of up to three years for a second or subsequent violation. Each period of debarment shall run from the date the determination of noncompliance by the Chief becomes a final order of the Administrator of Apprenticeship.

~~(2)~~(c)(1) An affected contractor, subcontractor, or responsible officer may obtain a review of the determination of the Chief imposing the debarment or civil penalty by transmitting a written request to the office of the Administrator within 30 days after service of the determination of debarment or civil penalty. A copy of this report shall also be served on the Chief. If the Administrator ~~receives no~~ does not receive a timely request for review of the determination of debarment or civil penalty made by the Chief, the order shall become the final ~~for the period authorized~~ order of the Administrator.

(2) Within 20 days of the timely receipt of a request for review, the

Chief shall provide the contractor, subcontractor, or responsible officer the opportunity to review any evidence the Chief may offer at the hearing. The Chief shall also promptly disclose to the ~~contractor or subcontractor~~ any nonprivileged documents obtained after the 20-day time limit at a time set forth for exchange of evidence by the Administrator.

(3) Within 90 days of the timely receipt of ~~the~~ a request for review, a hearing shall be commenced before the Administrator or an impartial hearing officer designated by the Administrator and possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The affected contractor, subcontractor, or responsible officer shall have the burden of ~~showing~~ providing evidence of compliance with Section 1777.5. ~~The decision to debar shall be reviewed by a hearing officer or court only for abuse of discretion.~~

(4) Within 45 days of the conclusion of the hearing, the ~~hearing officer~~ Administrator shall issue a written decision affirming, modifying, or dismissing the determination of debarment or civil penalty. The decision shall contain a ~~notice of findings, findings,~~ statement of the factual and legal basis for the decision and an order. This decision shall be ~~deemed the final decision of the Administrator and shall be~~ served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party ~~on file~~ that the party has filed with the Administrator. Within 15 days of issuance of the decision, the ~~hearing officer~~ Administrator may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(5) An affected contractor, subcontractor, or responsible officer who has timely requested review and obtained a decision under paragraph (4) may obtain review of the ~~final~~ decision of the Administrator by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the final decision ~~to debar or to assess a civil penalty~~. If no timely petition for a writ of mandate is filed ~~within 45 days after service of~~, the ~~final~~ decision ~~the order~~ shall become the final order of the Administrator. The decision of the Administrator shall be affirmed unless the petitioner shows that the Administrator abused his or her discretion. If the petitioner claims that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the entire record.

(6) The ~~Administrator~~ Chief may certify a copy of the final order of the Administrator and file it with the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order. A judgment entered

pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and be given the same preference allowed by the law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section. An awarding body that has withheld funds in response to a determination by the Chief imposing a penalty under this section shall, upon receipt of a certified copy of a final order of the Administrator, promptly transmit the withheld funds, up to the amount of the certified order, to the Administrator.

(d) If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

(1) The contract executed between the contractor and the subcontractor or the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.

(3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

(4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain ~~an affidavit~~ a declaration signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

(e) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(f) The Chief shall consider, in setting the amount of a monetary penalty, in determining whether a violation is serious, and in determining whether and for how long a party should be debarred for violating this section, all of the following circumstances:

(1) Whether the violation was intentional.

(2) Whether the party has committed other violations of Section 1777.5.

(3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.

(4) Whether, and to what extent, the violation resulted in lost training

to require, for the first time, an awarding body that withheld funds in response to a determination by the Chief of the Division of Apprenticeship Standards imposing a penalty, upon receipt of a copy of a final order of the Administrator of Apprenticeship, certified by a clerk of the court, to promptly transmit the withheld funds, up to the amount of the certified order, to the Administrator.

Chapter 954, Statutes of 2000, Section 15, repealed Former Labor Code Section 1771.6 and Section 16 added new Labor Code Section 1771.6[92]. The new section

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opportunities for apprentices.

(5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

If a party seeks review of a decision by the Chief to impose a monetary penalty or period of debarment, the Administrator shall decide de novo the appropriate penalty, by considering the same factors set forth above.

(g) The interpretation ~~and enforcement~~ of Section 1777.5 and this section shall be in accordance with the ~~rules and procedures~~ regulations of the California Apprenticeship Council. The Administrator may adopt regulations to establish guidelines for the imposition of monetary penalties and periods of debarment and may designate precedential decisions under Section 11425.60 of the Government Code."

[92]Labor Code Section 1771.6, added by Chapter 954, Statutes of 2000, Section 16:

" (a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments.

The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the

requires an awarding body to provide written notice of the withholding of contract payments to a contractor and subcontractor which describes the nature of the violation and the amount of wages, penalties, and forfeitures withheld. The notice must also be served on any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on the bond. Subdivision (c) prohibits the awarding body from disbursing payment on the contract before a final order, or the expiration of the time for review of the notice. The notice of withholding of contract payments is reviewable under Labor Code Section 1742 in the same manner as if the notice was for a civil wage and penalty assessment. Therefore, for the first time, awarding bodies are required to provide notice of withholding contract payments to contractors and subcontractors which describes the nature of the violation, the amount of

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notice and to any surety on a bond, if their identities are known to the awarding body.

(b) The withholding of contract payments in accordance with Section 1726 or 1771.5 shall be reviewable under Section 1742 in the same manner as if the notice of the withholding was a civil penalty order of the Labor Commissioner under this chapter. If review is requested, the Labor Commissioner may intervene to represent the awarding body.

(c) Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the awarding body shall not disburse any contract payments withheld.

(d) From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(e) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the awarding body that has enforced this chapter pursuant to Section 1771.5."

wages, penalties and forfeitures withheld, and to continue to withhold those funds until receipt of a final order. Therefore, also for the first time, awarding bodies are required to appear and defend petitions for writ of mandate filed by contractors and subcontractors from whom they have withheld contract payments and served notices of withholding contract payments.

Chapter 954, Statutes of 2000, Section 18, amended Labor Code Section 1773.1[93]

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[93]Labor Code Section 1773.1, added by Chapter 2173, Statutes of 1959, Section 1, as amended by Chapter 954, Statutes of 2000, Section 18:

" (a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

(d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

to further define "employer payments".

Chapter 954, Statutes of 2000, Section 19, repealed Former Labor Code Section 1775 before it became operative and Section 20 amended Labor Code Section 1775[94]

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(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required by a project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(e) For the purpose of determining those per diem wages for contracts, ~~entered into with the state,~~ the representative of any craft, classification, or type of worker needed to execute contracts ~~entered into with the state~~ shall file with the Department of Industrial Relations fully executed copies of the ~~collectively bargained wage rates~~ collective bargaining agreements for the particular craft, classification, or type of work involved. ~~The statement of rates shall be filed within 10 days after the rates have been negotiated and thereafter may be~~ The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date. Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct."

[94] Labor Code Section 1775, added by Chapter 757, Statutes of 1997, Section 2, as amended by Chapter 954, Statutes of 2000, Section 20:

" (a) The contractor and any subcontractor under him or her shall, as a

penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner ~~and shall be~~ based on consideration of ~~the mistake, inadvertence, or neglect of the contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or the willful failure by the contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor or subcontractor had knowledge of his or her obligations under this part~~ both of the following:

(1) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor.

(2) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776,

1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. ~~If the Division of Labor Standards Enforcement determines that employees of a subcontractor were not paid the general prevailing rate of per diem wages and if the body awarding the contract under which the employees performed work did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the contract shall withhold an amount of moneys due the subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by the Division of Labor Standards Enforcement. The contractor shall pay any money retained from and owed to a subcontractor upon receipt of notification by the Division of Labor Standards Enforcement that the wage complaint has been resolved. If notice of the resolution of the wage complaint has not been received by the contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, whichever occurs later, the contractor shall pay all moneys retained from the subcontractor to the awarding body. The moneys shall be retained by the awarding body pending the final decision of an enforcement action, and be forwarded to the Labor Commissioner for disbursement pursuant to subdivision (d) if the subcontractor does not prevail in the action. Wages for workers who cannot be~~

to delete the requirement of the awarding body to receive and retain moneys from the contractor, to notify the Division of Labor Standards of violations or to assist, if necessary, in litigation to recover the penalties and amounts due.

~~located after a diligent search by the Labor Commissioner shall be deposited in the Industrial Relations Unpaid Wage Fund pursuant to subdivision (c) of Section 96.7. Penalties shall be paid into the General Fund. If the subcontractor prevails in the enforcement action, the awarding body shall release any funds retained pursuant to this subdivision to the contractor within 10 working days from the date of the final decision of the court.~~

~~(d) To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section or Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the division, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor and subcontractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor and subcontractor to establish that the penalties and amounts demanded in the action are not due. The contractor and subcontractor shall be jointly and severally liable in an enforcement action for any wages due. Following entry of a judgement for joint and several liability, the division shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim for wages against the contractor. From the amount collected from the subcontractor, the wage claim shall be satisfied prior to the amount being applied to penalties.~~
~~Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.~~

~~(e) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.~~",

1 Chapter 970, Statutes of 2000, Section 1, amended Labor Code Section 1777.1[95]

[95]Labor Code Section 1777.1, added by Chapter 1224, Statutes of 1989, Section 10, as amended by Chapter 970, Statutes of 2000, Section 1:

" (a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has ~~a substantial~~ any interest ~~shall be~~ is ineligible for a period of not less than one year or more than three years to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has ~~a substantial~~ any interest ~~shall be~~ is ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(c) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(d) Not less than semiannually, the Labor Commissioner shall publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project pursuant to this chapter. The list shall contain the name of the contractor, the Contractor's State License Board license number of the contractor, and the effective period of debarment of the contractor. The commissioner shall also place advertisements in construction industry publications targeted to the contractors and subcontractors, chosen by the commissioner, that state the effective period of the debarment and the reason for debarment. The advertisements shall appear one time for each debarment of a contractor in each publication chosen by the commissioner. The debarred contractor or subcontractor shall be liable to the commissioner for the reasonable

to require the Labor Commissioner, in addition to publishing and distributing a list of ineligible contractors, to place advertisements in construction industry publications that state the effective period of a contractor's debarment and reason for debarment.

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cost of the advertisements, not to exceed five thousand dollars ($5,000). The amount paid to the commissioner for the advertisements shall be credited against the contractor's or subcontractor's obligation to pay civil fines or penalties for the same willful violation of this chapter.

(e) For purposes of this section, "contractor or subcontractor" means a firm, corporation, partnership, or association and its responsible managing officer, as well as any supervisors, managers, and officers found by the Labor Commissioner to be personally and substantially responsible for the willful violation of this chapter.

(f) For the purposes of this section, the term 'any interest' means an interest in the entity bidding or performing work on the public works project, whether as an owner, partner, officer, manager, employee, agent, consultant, or representative. 'Any interest' includes, but is not limited to, all instances where the debarred contractor or subcontractor receives payments, whether cash or any other form of compensation, from any entity bidding or performing work on the public works project, or enters into any contracts or agreements with the entity bidding or performing work on the public works project for services performed or to be performed for contracts that have been or will be assigned or sublet, or for vehicles, tools, equipment, or supplies that have been or will be sold, rented, or leased during the period from the initiation of the debarment proceedings until the end of the term of the debarment period. "Any interest" does not include shares held in a publicly traded corporation if the shares were not received as compensation after the initiation of debarment from an entity bidding or performing work on a public works project.

(g) For the purposes of this section, the term "entity" is defined as a company, limited liability company, association, partnership, sole proprietorship, limited liability partnership, corporation, business trust, or organization.

(h) The Labor Commissioner shall adopt rules and regulations for the administration and enforcement of this section, ~~the definition of terms, and appropriate penalties.~~"

1 Chapter 804, Statutes of 2001, Section 2, amended Labor Code Section 1776[96]

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[96]Labor Code Section 1776, added by Chapter 757, Statutes of 1997, Section 4, as amended by Chapter 804, Statutes of 2001, Section 2 and operative until January 1, 2003:

"(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days

after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated ~~in a manner so~~ as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's name and social security number. A joint labor management committee may maintain an action in a court of competent jurisdiction against an employer who fails to comply with Section 1774. The court may award restitution to an employee for unpaid wages and may award the joint labor management committee reasonable attorney's fee and costs incurred in maintaining the action. An action under this subdivision may not be based on the employer's misclassification of the craft of a worker on its certified payroll records. Nothing in this subdivision limits any other available remedies for a violation of this chapter.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798),

operative until January 1, 2003, to allow a joint labor management committee to maintain an action in a court against an employer who fails to comply with Section 1774, and may order restitution by an employer who does not keep accurate payroll records. Also, any copies of records made available by, or furnished to, a joint labor-management committee shall be marked or obliterated only to prevent disclosure of an individual's name and social security number.

Chapter 804, Statutes of 2001, Section 3, amended Labor Code Section 1776[97],

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Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date."

[97]Labor Code Section 1776, added by Chapter 1249, Statutes of 1978, Section 4, as amended by Chapter 804, Statutes of 2001, Section 3:

" (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a

representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's social security number.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of

operative on January 1, 2003, to require the marking or obliteration of only social security numbers from any copy of payroll records furnished to a joint labor-management committee.

D. Working Hours and Overtime (After 1974)

Chapter 160, Statutes of 1988, Section 123, amended Labor Code Section 1812[98] by removing gender references and making other technical changes.

Chapter 757, Statutes of 1997, Section 5, amended Labor Code Section 1813 to be operative on January 1, 2003, by making technical changes. Section 6, added a new

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Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall become operative January 1, 2003."

[98]Labor Code Section 1812 (Formerly 1814), added by Chapter 90, Statutes of 1937, Section 1814, as amended by Chapter 160, Statutes of 1988, Section 123:

"Every contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each ~~workman~~ worker employed by him or her in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor ~~Law~~ Standards Enforcement."

Labor Code Section 1813[99] operative only until January 1, 2003, to require the contractor to forfeit the sum of $25 for any worker permitted to work more than 8 hours in a day or 40 hours in a week. New Labor Code Section 1813 requires an awarding body to cause to be inserted in the contract a stipulation regarding the penalties, to take cognizance of all violations, and to report them to the Division of Labor Standards Enforcement. Therefore, for the first time, awarding bodies are required to place penalty stipulations in their contract regarding maximum working hours, to take cognizance of all violations and to report those violations to the Division of Labor Standards Enforcement.

Chapter 485, Statutes of 1998, Section 122, amended Labor Code Section 1813[100],

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[99]Labor Code Section 1813, as added by Chapter 757, Statutes of 1997, Section 6, operative until January 1, 2003:

"The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date."

[100]Labor Code Section 1813 (Formerly 1815), added by Chapter 90, Statutes of 1937, Section 1815, as amended by Chapter 485, Statutes of 1998, Section 122, operative on January 1, 2003:

to be operative on January 1, 2003, by removing gender references and making other technical changes.

E. Securing Worker's Compensation (After 1974)

Chapter 373, Statutes of 1979, Section 232, amended Labor Code Section 1861, by removing gender references.

SECTION 3. DEPARTMENT OF INDUSTRIAL RELATIONS REGULATIONS

Regulations restating code requirements, expanding duties and creating new duties are found in Title 8, California Code of Regulations. Copies of those regulations are found in Exhibit 4 which is attached hereto and incorporated herein by reference.

A. Definition of Public Works

Subchapter 3, "Payment of Prevailing Wages upon Public Works", is set forth in four articles. The first two articles pertain to the definition of Public Works.

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which the workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him or her under the contract.

This section shall become operative January 1, 2003."

Article 1 (Section 16000) contains definitions. Section 16000 defines words and phrases used in Public Works law, including the term "Awarding Body" to mean any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract or purchase order for public works. "Maintenance work" is defined to include (1) routine, recurring, and usual work for preservation, protection, and keeping of any publicly owned or publicly operated facility in a safe and continually usable condition, (2) carpentry, electrical, plumbing, glazing, and other craft works designed to preserve a facility in a safe, efficient, continuously usable condition[101], and (3) landscape maintenance. "Landscape maintenance work" includes works as defined in Public Contract Code 22002[102], subdivision (d)(4), which is defined as mowing,

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[101] "Maintenance work" does not include janitorial or custodial services or protection by guards, watchmen, or other security services.

[102] Public Contract Code Section 22002, former Section 21002, added by Chapter 1054, Statutes of 1983, Section 1, as amended by Chapter 733, Statutes of 1989, Section 1:

> " (a) "Public agency," for purposes of this chapter, means a city, county, city and county, including chartered cities and chartered counties, any special district, and any other agency of the state for the local performance of governmental or proprietary functions within limited boundaries. "Public agency" also includes a nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.
>
> (b) "Representatives of the construction industry" for purposes of this chapter, means a general contractor, subcontractor, or labor representative with experience in the field of public works construction.
>
> (c) "Public project" means any of the following:

watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

Article 2 (Sections 16001 through 16003) pertains to what work is subject to prevailing wages.

Section 16001 allows the awarding body, and other interested parties, to request from the Director of Industrial Relations a "coverage determination" regarding a specific

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(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

(2) Painting or repainting of any publicly owned, leased, or operated facility.

(3) In the case of a publicly owned utility system, "public project" shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(d) "Public project" does not include maintenance work. For purposes of this section, "maintenance work" includes all of the following:

(1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.

(2) Minor repainting.

(3) Resurfacing of streets and highways at less than one inch.

(4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

(5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(e) For purposes of this chapter, "facility" means any plant, building, structure, ground facility, utility system, subject to the limitation found in paragraph (3) of subdivision (c), real property, streets and highways, or other public work improvement."

project or type of work to be performed. Upon receipt of a copy of a request by an interested party, the awarding body must then forward to the Director, within 15 days, any documents, arguments, or authorities it wishes to have considered in the coverage determination process. Section 16001, subdivision (c) extends state prevailing wage law to field surveying work traditionally covered by collective bargaining agreements, when the work is integral to the specific public works project in the design, preconstruction, or construction phases. Subdivision (d) also applies prevailing wage law to residential projects consisting of single family homes and apartments up to and including four stories, which can include school dormitories. Subdivision (e) applies prevailing wage laws to commercial projects, including residential projects over four stories (which can also include school dormitories), and subdivision (f) applies prevailing laws to maintenance work.

Section 16002.5 allows an interested party, including awarding bodies, to appeal a coverage determination decision by the Director of Industrial Relations. The party appealing the determination, if other than an awarding body, must, in writing, notify the awarding body and other identifiable parties.

Section 16003 requires an awarding body wishing to use volunteer labor on what would otherwise be a public works project to serve a written request for approval on the Director which shall fully set forth its grounds for belief that the requirements of Labor Code Section 1720.4(a),(b), and (c) are satisfied and shall list all the crafts and

classifications of workers that typically perform the types of work needed for the project. The request shall also identify the unions which represent workers in the crafts or classifications listed within the locality in which the public work is performed.

B. Withholding Penalties and Forfeitures; Defending Litigation, Settlements

Article 7 (Sections 16410 through 16414) pertains to the withholding of funds from a contractor and due process hearing procedures.

Section 16410 defines "awarding body" to mean the same as in Part 7 of Division 2 of the Labor Code - "Public Works and Public Agencies".

Section 16411 requires the Division of Labor Standards Enforcement to give written notice to the awarding body of any decision to withhold, retain, or forfeit any sum due to a contractor or subcontractor. The notice shall contain the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code section 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which, a hearing must be requested.

Section 16412 requires the awarding body to withhold, retain, or forfeit amounts from a contractor or subcontractor when notice has been received from the Division of Labor Standards Enforcement, subject to the right of a contractor or subcontractor to

request a hearing, and further subject to the right of a contractor or contractor's assignee to bring suit against the awarding body.

Section 16413 allows a contractor or subcontractor to request a hearing before the Department of Industrial Relations regarding the withholding, retaining, or forfeiture of any amount and sets forth the required contents of such a request.

Section 16414 requires the Labor Commissioner to provide a hearing within 30 days of a timely request and to issue a decision within 15 days after the conclusion of the hearing. The decision shall consist of a notice of findings, findings and an order which shall be served on the awarding body. The awarding body is required to promptly abide by the decision and order.

Article 6 (Sections 16400 through 16403) pertains to certified payroll records, requests for copies, contents and costs.

Section 16400, subdivision (a)(1), allows any person to request from an awarding body certified copies of payroll records. If a request is made, the awarding body is required to acknowledge the receipt of the request, and indicate the cost of providing the payroll records based upon an estimate provided by the contractor or subcontractor.

Section 16401 requires the awarding body to supply a report of payroll records on forms provided by the Department of Labor Standards Enforcement which shall be certified under penalty of perjury.

Section 16402 establishes the maximum costs for providing copies of payroll

records and requires the awarding body to obtain payment from the requesting party prior to the release of the documents. To the extent that copy cost revenues are received, those amounts would be accounted for as a reduction in the mandated costs incurred by the awarding body for receiving and processing those requests and the costs charged by the contractor for producing those records.

Section 16403 subdivision (a), requires the awarding body to keep records received from a contractor on file for at least six months following completion and acceptance of the project. Thereafter, the records may be destroyed unless administrative, judicial, or other pending litigation, including arbitration, mediation, or other methods of dispute resolution are in process. Subdivision (b) requires that copies provided to the public shall be marked or obliterated in such a manner that the name, address and social security number and other private information pertaining to each employee cannot be identified.

Subchapter 6 pertains to hearings to review Assessments and Notices of Withholding of Contract Payments. Article 1 (sections 17201 through 17212) sets forth the general requirements for those hearings.

Section 17201 defines the scope of proceedings for review of civil wage and penalty assessments ("Assessments") and Notices of Withholding of Contract Payments under Article 1 and 2 of Division 2, Part 7, Chapter 1, of the Labor Code, and limits its applicability to assessments and notices served on a contractor or subcontractor on or

after July 1, 2001.

Section 17202 defines terms relevant to those hearings. Subdivision (c) defines "awarding body" to include an awarding body or body awarding a contract, (as defined in Labor Code Section 1722) and that exercises enforcement authority under Labor Code Section 1726 or 1771.5. Subdivision (f) defines "Enforcing Agency" to include the entity which has issued an Assessment or a Notice of Withholding of Contract Payments and with which a request for review has been filed. Subdivision (j) defines "Party" to include the enforcing agency that issued the Assessment or the Notice of Withholding of Contract Payments from which review is sought.

Sections 17203 through 17212 define hearing procedures and rules relevant to those hearings.

Article 2 (Sections 17220 through 17229) pertains to Penalty and Wage Assessments and Notices of Withholding of Contract Payments, and requests for review.

Section 17220, subdivision (a), requires the enforcing agency to serve an Assessment or a Notice of Withholding of Contract Payments on the contractor and/or subcontractor, with a copy being served on any bonding company issuing a bond that secures the payment of wages and to any Surety on the bond. Subdivision (b) requires that the Assessment or Notice of Withholding of Contract Payments be in writing and shall include the following information:

1. A description of the nature of the violation and basis for the notice.

2. The amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1.

3. The name and address of the office to whom a Request for Review may be sent.

4. Information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments.

5. Notice of Opportunity to request a settlement meeting under Section 17221.

6. A statement appearing in bold or another type of face, that makes it stand out from other text, to the effect that failure to submit a timely request for review will result in a final order binding on the contractor and subcontractor, and on the bonding company.

Section 17221 allows the affected contractor or subcontractor to request a meeting with the awarding body or Labor Commissioner within 30 days following service of an Assessment of penalties or Notice of Withholding of Contract Payments for the purposes of attempting to settling the dispute regarding the Assessment or Notice of Withholding of Contract Payments.

Section 17222 sets forth the procedures for requesting a review of an Assessment or Notice of Withholding of Contract Payments.

Section 17223 requires the awarding body or Labor Commissioner to transmit to

the Office of the Director the request for review, along with copies of the Assessment or Notice of Withholding of Contract Payments, any audit summary that accompanied the Assessment or Notice of Withholding of Contract Payments, and a copy of the proof of service showing the name and address of any bonding company or surety.

Section 17224 requires the awarding body or Labor Commissioner to notify the affected contractor and subcontractor, within 10 days following its receipt of a request for review, of its opportunity and procedures for reviewing evidence to be utilized by the enforcing agency at the hearing. Subdivision (d) requires the awarding body or Labor Commissioner to make evidence available for review as specified within 20 days of its receipt of the request for review.

Section 17225, subdivision (a), allows an affected contractor and subcontractor to withdraw a request for review. Subdivision (b) allows a dismissed request for review to be reinstated for good cause.

Section 17226 allows an awarding body or Labor Commissioner to dismiss or amend an Assessment or Notice of Withholding of Contract Payments.

Section 17227, subdivision (a), allows a hearing officer to issue an Order to Show Cause why an Assessment, Notice of Withholding of Contract Payments, or request for review should not be dismissed as untimely under the relevant statutes. Subdivision (b) allows any party at least 10 days to respond in writing to the Order to Show Cause and an additional 5 days, following the service of a response, to reply to the response of any

other party.

Section 17228, subdivision (a), provides that an Assessment or Notice of Withholding of Contract Payments shall become a final order upon the failure of an affected contractor or subcontractor to file an timely request for review. Subdivision (b) provides that, when an Assessment or Notice of Withholding of Contract Payments has become final as to at least one, but not as to every affected contractor or subcontractor, the awarding body shall continue to withhold and retain the amounts required to satisfy any wages and penalties at stake in a review proceeding until there is a final order as to all that is no longer subject to judicial review.

Section 17229 provides that where a Notice of Withholding of Contract Payments seeks to recover wages, penalties or damages in excess of the amounts withheld from available contract payments, the awarding body may recover any excess amounts that become or remain due when the Notice of Withholding of Contract Payments has become final. To recover the excess amounts, the awarding body shall transmit to the Labor Commissioner the Notice together with any decision of the Director or court that has become final. The Labor Commissioner shall, in turn, certify and file the final order with the superior court in accordance with Labor Code section 1742(d). Once filed, the awarding body would be required to pursue judgment debtor collection proceedings as any other judgment creditor.

Article 3 (Sections 17230 through 17237) pertains to prehearing procedures,

including the scheduling of hearings (Section 17230), prehearing conferences (Section 17231), consolidations and severances (Section 17232), prehearing motions (Section 17233), the proffer of evidence by affidavit or declaration (Section 17234), authority and use of subpoenas and subpoenas duces tecum (Section 17235), written notice to parties in lieu of subpoena (Section 17236) and depositions and other discovery procedures (Section 17237).

Sections 17240 through 17253 sets forth the required hearing procedures, such as notice of appointment of hearing officers, including the filing of motions, affidavits and declarations objecting to the appointment of a particular hearing officer (Section 17240), the time and place of hearings which could be outside of the county of the awarding body (Section 17241), open hearings and the right of a party to move to exclude witnesses (Section 17242), the conduct of the hearing, including a party's right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses, the right to impeach any witness and to rebut any opposing evidence (Section 17243), rules of evidence (Section 17244), official notice and the opportunity to show why and to the extent to which official notice should or not be taken (Section 17245), the filing of motions supported by affidavits or declarations requesting relief from default upon a showing of good cause (Section 17246), the request for and opposition to contempt and monetary sanctions (Section 17247), the request for, use and cost of interpreters (Section 17248), the hearing record, including the right to use a certified court reporter, videotape or other appropriate means

to record and preserve testimony and the cost thereof (Section 17249), burdens of proof (Section 17250), the placing on the awarding body the burden of coming forward with evidence relative to liquidated damages (Section 17251), the submission of prehearing briefs, presenting closing oral argument, written post-hearing briefs and the preparation of findings (Section 17252), and the conclusion and time for decision (Section 17253).

Article 6 (Sections 17260 through 17264) pertain to the decision of the Director.

Section 17260 requires the hearing officer to prepare a recommended decision for the Director of Industrial Relations' review and approval.

Section 17261 allows any party to apply for reconsideration or modification of a decision. Section 17262 provides for the final decision and time in which to seek review. Section 17263 requires the Department, upon request, to prepare a hearing record consisting of all exhibits, other papers and a transcript of all testimony. The moving party who requested the record shall bear the cost of its preparation. Section 17264 allows any party to a judicial review of the decision to request the Director to file a written response.

Article 8 of Subchapter 4 (Sections 16800 through 16802) pertains to Debarment of contractors and subcontractors.

Section 16800 defines terms relevant to debarment proceedings. "Person" is defined to include awarding bodies.

Section 16801 allows the Division of Labor Standards Enforcement to investigate any alleged violations of relevant labor laws and to conduct hearings to determine facts.

When requested or required, an awarding body shall assist and cooperate with the investigation. Subdivision (b) requires an awarding body to inform contractors of the requirements of Labor Code Section 1776, and any other requirements imposed by law, in order to assist the Department of Labor Standards Enforcement with an investigation pursuant to Labor Code Section 1777.1.

C. Wages - Prevailing Wage Rates

Article 4 of Subchapter 3 (Sections 16200 through 16206) pertains to Prevailing Wage Determinations.

Section 16202, subdivision (a), requires the awarding body to request from the Director of Industrial Relations a determination of prevailing wage rates for a particular craft, classification or type of worker not covered by a general determination at least 45 days prior to the bid advertisement date.

Section 16204, subdivision (a)(5), requires the awarding body to ensure that the correct determination of prevailing wage rates is used by the Director of Industrial Relations.

Section 16205 allows an awarding body to request to be put on a mailing list for all area wage determinations for a specific county or counties, or request that a special or general prevailing wage determination be furnished when needed. The request must be confirmed in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of

workers needed to make a determination.

Article 5 (Sections 16300 through 16304) pertains to petitions to review prevailing wage determinations.

Section 16302, subdivisions (a) and (c)(5), allows an interested party, including an awarding body, to file a petition to review a determination of any rate or rates, and specifies the required procedures for filing such a petition; and would require an awarding body to file a petition if the Director of Industrial Relations uses an incorrect determination of prevailing wages.

Section 16303, subdivision (a), declares that the authority of the Director of Industrial Relations to establish the prevailing wage rate for any craft, classification, or type of worker to be quasi-legislative and, therefore, subject to review pursuant to Code of Civil Procedure Section 1085.

Section 16304 specifies the procedures for prevailing wage law determination hearings, including petitions for review. Subdivision (a)(4) grants interested parties the opportunity to present evidence and oral or written arguments in support of their positions and, with the consent of the hearing officer, to cross-examine witnesses.

Subchapter 4 pertains to Labor Compliance Programs of an awarding body. Article 1 (Section 16425) pertains to the applicable dates for enforcement of a labor compliance program. ("LCP") Subdivisions (a) and (e), allows an awarding body to voluntarily terminate a LCP providing the awarding body notifies the Director of its intention and

effective date of termination, notifies the contractor and the Department of Labor Standards Enforcement of the identity of the agent who will carry out the compliance obligations, and specify the general fund into which penalties or forfeitures withheld from any contract payment shall be deposited.

Article 2 (Sections 16426 through 16428) pertains to the approval and revocation of approval of a labor compliance program ("LCP") by the Director.

Section 16426, requires the awarding body seeking approval of a Labor Compliance Program to submit evidence of its ability to operate a LCP, which includes information relating to the following factors:

(1) The experience and training of the awarding body's personnel on public works labor compliance issues.

(2) The average number of public works contracts the awarding body annually administers.

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved.

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years.

(5) The availability of legal support for the LCP.

(6) The availability and quality of a manual outlining the responsibilities and

procedures of the LCP and the awarding body.

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code section 1777.1(d).

Section 16427 allows an awarding body which has operated a Labor Compliance Program for eleven continuous months to apply to the Director of Industrial Relations for final approval. The awarding body bears the burden of producing evidence that it has demonstrated ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

Section 16428 allows the Director of Industrial Relations to revoke a final approval of a Labor Compliance Program only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation. Cause for revocation may include the failure of awarding body to monitor compliance with the Labor Code, its failure to take enforcement actions, or its failure to file timely, complete, and accurate reports to the Director.

Article 3 (Sections 16429 through 16432) pertains to notice and components of an LCP.

Section 16429, requires an awarding body to give notice of the initial or final approval of its Labor Compliance Program in the call for bids, in the contract or purchase order, and the notice shall also be posted at the jobsite.

Section 16430, requires a Labor Compliance Program to include, but not be limited to, the following requirements:

(1) The call of bids and the contract or purchase order shall contain appropriate language concerning the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code.

(2) A prejob conference shall be conducted before commencement of the work with the contractors and subcontractors listed in the bid, at which time federal and state labor law requirements applicable to the contract shall be discussed, and copies of suggested reporting forms furnished. A checklist, showing which federal and state labor law requirements were discussed shall be kept for each conference. An appendix "A" follows which presumptively meets these requirements.

(3) A requirement that certified payroll records be kept by the contractor in accordance with Labor Code Section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body. The awarding body may create a form meeting the minimum requirements of a "Certified Weekly Payroll." Use of the current version of DIRECTOR OF INDUSTRIAL RELATIONS's "Public Works Payroll Reporting Form" (A-1-131) (New 2-80) constitutes full compliance with this requirement by the awarding body. A copy of the suggested form follows Section 16500.

(4) A program for orderly review of payroll records and, if necessary, for audits to

verify compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code.

(5) A prescribed routine for withholding penalties, forfeitures and underpayment of wages for violations of the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code.

(6) All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

Section 16431 requires an awarding body to submit to the Director of Industrial Relations an annual report on the operation of its Labor Compliance Program within 60 days after the close of the fiscal year.

Section 16432 permits the awarding body to conduct an audit when it deems necessary, and requires an audit when requested by the Labor Commissioner. Any such audit consists of a comparison of payroll records to the best available information as to the actual hours worked and classifications of workers employed on the contract; and is sufficiently detailed when it enables the LCP and the Labor Commissioner to draw reasonable conclusions as to compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code, and when it enables accurate computation of underpayments of wages to workers and of applicable penalties and forfeitures. An audit form is attached as Appendix "B" to the section, which presumptively demonstrates

sufficiency.

Section 16433 permits an awarding body having a Labor Compliance Program approved by the Director of Industrial Relations, in accordance with Labor Code Section 1771.5, to not require payments of general prevailing wage rates when construction is for $25,000, or less, or $15,000, or less, when the work is for alteration, demolition, repair, or maintenance work.

Article 5 (Sections 16434 through 16439) pertains to enforcement of public wage laws where there is a LCP.

Section 16434 requires an awarding body approved for a Labor Compliance Program to enforce the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code.

Section 16435 defines terms relating to withholding contract payments when payroll records are delinquent or inadequate.

Section 16435.5 sets forth requirements on how to calculate "underpayments". Section 16436 defines "forfeitures" and "failing to pay the correct rate of prevailing wages". The latter must be approved by the Labor Commissioner before they are recoverable by a LCP.

Section 16437 requires the LCP of the awarding body to file a request with the Labor Commissioner for the determination of the amount of a forfeiture. The request shall include a file or a report which contains at least the following information:

1. The deadline by which contract acceptance or filing a notice of completion, under Labor Code Section 1775, plus 90 days, will occur.

2. Any other deadline which, if missed, would impede collection.

3. Evidence of violation in narrative form.

4. Evidence that an "audit" or "investigation," as defined in Section 16432 of these regulations, occurred.

5. Evidence that the contractor was given the opportunity to explain why there was no violation, or that any violation was caused by mistake, inadvertence, or neglect, before the forfeiture was sent to the Labor Commissioner; and the contractor either did not attempt, or failed to, convince the awarding body of its position.

6. Where the LCP of the awarding body seeks not only amounts of wages but also a penalty as part of the forfeiture, and the contractor has unsuccessfully contended that the cause of the violation was mistake, inadvertence, or neglect, a short statement should accompany the proposal for a forfeiture, with a recommended penalty amount pursuant to Labor Code Section 1775.

7. Where the LCP of the awarding body seeks only wages or a penalty less than $50 per day as part of the forfeiture, and the contractor has successfully contended that the cause of the violation was mistake, inadvertence, or neglect, then the file should include evidence as to the contractor's knowledge of his or her obligation, including the program's communication to the contractor of the obligation in the bid invitations, at the

prejob conference agenda and records, and any other notice given as part of the contracting process. With the file should be a statement, similar to that prescribed in paragraph 6 above, and recommended penalty amounts, pursuant to Labor Code Section 1775.

8. The previous record of the contractor in meeting his or her prevailing wage obligations.

9. Whether the LCP has been granted initial, extended initial or final approval.

Section 16438, subdivision (a) , provides that where the involvement of the Labor Commissioner has been limited to a determination of the actual amount of the penalty, forfeiture or underpayment of wages, and the matter has been resolved without litigation by or against the Labor Commissioner, an awarding body having a LCP shall deposit penalties and forfeitures in its general fund. Subdivision (b) provides that where collection of fines, penalties or forfeitures results from court action to which the Labor Commissioner and awarding body are both parties, the fines, penalties or forfeitures shall be divided between the general fund of the state and the awarding body, as the court may determine. Subdivision (c) provides that all amounts recovered by the Labor Commissioner and to which the awarding body is not a party, shall be deposited in the general fund of the state. To the extent that fines, penalties or forfeitures are deposited into the general fund of the awarding body, those amounts would be accounted for as a reduction in the mandated costs incurred by the awarding body in implementing its LCP.

Section 16439, subdivision (a), allows a contractor to appeal the result of a LCP enforcement action by serving a notice of appeal on the Director of Industrial Relations, with copies being served on the awarding body and the LCP. Subdivision (c) requires the awarding body, within 30 days, to forward to the Director a full copy of the record of the enforcement proceedings and any further documents, arguments, or authorities it wishes to have considered in the appeal process, along with a declaration of service on the contractor. Subdivision (d) requires the awarding body to supply the Director with a supplemental report on the activities of the LCP, when requested.

PART III. STATEMENT OF THE CLAIM

SECTION 1. COSTS MANDATED BY THE STATE

The Statutes, Labor and Public Contract Code Sections, and California Code of Regulations referenced in this test claim result in school districts incurring costs mandated by the state, as defined in Government Code Section 17514[103], by creating new state-mandated duties related to the uniquely governmental function of providing for public works.

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[103]Government Code Section 17514, added by Chapter 1459, Statutes of 1984, Section 1:

> " 'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

The new duties mandated by the state upon school districts, county offices of education and community college districts require state reimbursement of the direct and indirect costs of labor, materials and supplies, data processing services and software, contracted services and consultants, equipment and capital assets, staff and student training and travel to implement the following activities:

When contracting with third parties for "public works" as an awarding body for projects pursuant to Labor Code sections 1720, 1720.2 and 1720.3 and Title 8, California Code of Regulations Sections 16000 and 16001,school districts, county offices of education and community colleges are required to:

1) To obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for public works, pursuant to Labor Code Section 1773 and Title 8, California Code of Regulations, Section 16202.

2) To ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations, pursuant to Title 8, California Code of Regulations, Section 16204.

3) To request from the Director of Industrial Relations a coverage determination regarding a specific project or type of work to be performed, pursuant to Title 8, California Code of Regulations, Section 16001.

4) To file a petition for review of a determination of the Director of Industrial

Relations of any rate or rates, pursuant to Title 8, California Code of Regulations, Section 16302.

5) To appeal an incorrect determination made by the Director of Industrial Relations, pursuant to Labor Code Section 1773.4 and Title 8, California Code of Regulations, Section 16002.5.

6) To include a statement of prevailing rates of per diem wages in all calls and advertisements for bids, in the public works contract itself, and to post the statement at all job sites. In lieu of those requirements, the district may include a statement in the call for bids and contract a statement to the effect that copies of the prevailing rate of wages are on file in its principal office, pursuant to Labor Code Section 1773.2.

7) To maintain records of ineligible contractors and subcontractors and to refuse to grant them public works projects of the district, pursuant to Labor Code Section 1777.1 and Title 8, California Code of Regulations, Section 16800 through 16802.

8) To send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies, pursuant to Labor Code Section 1777.3

9) To inspect and audit payroll records of contractors and subcontractors working on district public works projects, when necessary or requested by

the Director of Industrial Relations, pursuant to Labor Code Section 1776.

10) To obtain and provide copies of the payroll records of the contractors and subcontractors working on district public works projects, when requested by appropriate parties. The records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number, pursuant to Labor Code Section 1776 and Title 8, California Code of Regulations, Section 16402.

11) To comply with all of the requirements of a Labor Compliance Program, when initiated and enforced by the district, pursuant to Labor Code Section 1771.5 and Title 8, California Code of Regulations, Section 16425 through 16439. These requirements include:

1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of the prevailing wage laws;

2) A prejob conference shall be conducted with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract;

3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury;

4) The district shall review, and, if appropriate, audit payroll records to

verify compliance with prevailing wage laws;

5) The district shall withhold contract payments when payroll records are delinquent or inadequate; and

6) The district shall withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred.

12) To provide contractors and subcontractors, bonding companies and sureties with Notice of Withholding of Contract Payments when minimum wage law violations are discovered by the district, pursuant to Labor Code Section 1771.6 and Title 8, California Code of Regulations, Section 17220. The notice shall be in writing and include the following information:

1) A description of the nature of the violation and basis for the notice.

2) The amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code Section 1742.1

3) The name and address of the office to whom a Request for Review may be sent.

4) Information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments.

5) Notice of Opportunity to request a settlement meeting under Section 17221.

6) A statement appearing in bold or another type of face, that makes it stand out from other text, to the effect that failure to submit a timely request for review will result in a final order binding on the contractor and subcontractor, and on the bonding company.

13) Report any suspected violations of the prevailing wage laws to the Labor Commissioner, pursuant to Labor Code Section 1726.

14) Withhold contract payments for underpaid wages and for penalties when, through the district's own investigation, the district determines a violation of prevailing wages has occurred, pursuant to Labor Code Section 1726.

15) Withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner, pursuant to Labor Code Section 1727.

16) Retain amounts withheld to satisfy a Civil Wage and Penalty Assessment until receiving a final order no longer subject to judicial review, pursuant to Labor Code Section 1727.

17) After July 1, 2001, comply with all due process requirements for the benefit

of contractors and subcontractors when amounts are withheld pursuant to a Civil Wage and Penalty Assessment or a Notice of Withholding of Contract Payments, including the providing of proper and timely notices, allowing review of evidence relied upon, appearance and participation at hearings and the appeals therefrom, pursuant to Labor Code Section 1742[104] and Title 8, California Code of Regulations, Section 17220.

18) After July 1, 2001, to respond to petitions for writs of mandates filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including the retention of counsel to file timely responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment, pursuant to Labor Code Section 1742.

19) To grant and to participate in settlement meetings requested by contractors or subcontractors in an attempt to settle any disputed issue before formal hearing procedures, pursuant to Labor Code Section 1742.1 and Title 8, California Code of Regulations, Section 16413.

20) A joint labor-management committee may bring an action against an employer who fails to pay prevailing wages, pursuant to Labor Code Section

[104] Prior to July 1, 2001, different procedures and legal remedies were available to contractors and subcontractors. See: former Labor Code Section 1730, 1731, 1732 and 1733.

1771.2. As a necessary party, the school district would be required to appear and participate in these legal proceedings.

21) To furnish copies of payroll records of a contractor or subcontractor to a joint labor management committee, when requested, obliterated only to prevent disclosure of social security numbers, pursuant to Labor Code Section 1776.

SECTION 2. EXCEPTIONS TO MANDATE REIMBURSEMENT

None of the Government Code Section 17556[105] statutory exceptions to a finding of

[105]Government Code Section 17556, added by Chapter 1459, Statutes of 1984, Section 1, as amended by Chapter 589, Statutes of 1989, Section 1:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts.

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

costs mandated by the state apply to this test claim. Note, that to the extent school districts may have previously performed functions similar to those mandated by the referenced code sections, such efforts did not establish a preexisting duty that would relieve the state of its constitutional requirement to later reimburse school districts when these activities became mandated.[106]

SECTION 3. FUNDING PROVIDED FOR THE MANDATED PROGRAM

No funds are appropriated by the state for reimbursement of these costs mandated by the state and there is no other provision of law for recovery of costs from any other source.

PART IV. ADDITIONAL CLAIM REQUIREMENTS

The following elements of this claim are provided pursuant to Section 1183, Title 2, California Code of Regulations:

Exhibit 1: The Declaration of Bill McGuire, Associate Superintendent, Business

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(f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

[106]Government Code Section 17565, added by Chapter 879, Statutes of 1986, Section 10:

"If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

Services, Clovis Unified School District

Exhibit 2: The Declaration of Thomas J. Donner, Executive Vice President, Business and Administration, Santa Monica Community College District

Exhibit 3: Copies of Code Sections Cited

- Labor Code Section 1720
- Labor Code Section 1720.2
- Labor Code Section 1720.3
- Labor Code Section 1726
- Labor Code Section 1727
- Labor Code Section 1733
- Labor Code Section 1735
- Labor Code Section 1741
- Labor Code Section 1742
- Labor Code Section 1742.1
- Labor Code Section 1743
- Labor Code Section 1750
- Labor Code Section 1770
- Labor Code Section 1771
- Labor Code Section 1771.5
- Labor Code Section 1771.6

Labor Code Section 1772

Labor Code Section 1773

Labor Code Section 1773.1

Labor Code Section 1773.2

Labor Code Section 1773.3

Labor Code Section 1773.5

Labor Code Section 1773.6

Labor Code Section 1775

Labor Code Section 1776

Labor Code Section 1777.1

Labor Code Section 1777.5

Labor Code Section 1777.6

Labor Code Section 1777.7

Labor Code Section 1812

Labor Code Section 1813

Labor Code Section 1861

Public Contract Code Section 22002

Exhibit 4: Copies of Statutes Cited

Chapter 938, Statutes of 2001

Chapter 804, Statutes of 2001

Chapter 954, Statutes of 2000

Chapter 920, Statutes of 2000

Chapter 881, Statutes of 2000

Chapter 875, Statutes of 2000

Chapter 135, Statutes of 2000

Chapter 903, Statutes of 1999

Chapter 220, Statutes of 1999

Chapter 83, Statutes of 1999

Chapter 30, Statutes of 1999

Chapter 485, Statutes of 1998

Chapter 443, Statutes of 1998

Chapter 757, Statutes of 1997

Chapter 17, Statutes of 1997

Chapter 589, Statutes of 1993

Chapter 1342, Statutes of 1992

Chapter 913, Statutes of 1992

Chapter 1224, Statutes of 1989

Chapter 278, Statutes of 1989

Chapter 160, Statutes of 1988

Chapter 1054, Statutes of 1983

Chapter 681, Statutes of 1983

Chapter 449, Statutes of 1981

Chapter 992, Statutes of 1980

Chapter 962, Statutes of 1980

Chapter 373, Statutes of 1979

Chapter 1249, Statutes of 1978

Chapter 423, Statutes of 1977

Chapter 1179, Statutes of 1976

Chapter 1174, Statutes of 1976

Chapter 861, Statutes of 1976

Chapter 599, Statutes of 1976

Chapter 538, Statutes of 1976

Chapter 281, Statutes of 1976

Exhibit 5: Copies of Regulations Cited

Title 8, California Code of Regulations Section 16000

Sections 16001 through 16003

Sections 16100 through 16102

Sections 16200 through 16206

Sections 16300 through 16304

Sections 16400 through 16403

Sections 16410 through 16414

Section 16425 through 16433

Sections 16436 through 16439

Section 16500

Sections 16800 through 16802

Sections 17201 through 17212

Sections 17220 through 17229

Sections 17230 through 17237

Sections 17240 through 17253

Sections 17260 through 17264

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PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on June 24, 2002 at Clovis, California, by:

William McGuire
Clovis Unified School District

Voice (559) 327-9110
Fax: (559) 327-9129
/
/

PART VI. APPOINTMENT OF REPRESENTATIVE

Clovis Unified School District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.

William McGuire, Associate Superintendent
Clovis Unified School District

6/24/2002
Date

/
/
/

Exhibit 1
Declaration of Bill McGuire

DECLARATION OF BILL McGUIRE

Clovis Unified School District

Test Claim of Clovis Unified School Disrict
Chapter 938, Statutes of 2001

COSM No. _____

Labor Code Section 1720
Labor Code Section 1720.2
Labor Code Section 1720.3
Labor Code Section 1726
Labor Code Section 1727
Labor Code Section 1733
Labor Code Section 1735
Labor Code Section 1741
Labor Code Section 1742
Labor Code Section 1742.1
Labor Code Section 1743
Labor Code Section 1750
Labor Code Section 1770
Labor Code Section 1771
Labor Code Section 1771.5
Labor Code Section 1771.6
Labor Code Section 1772
Labor Code Section 1773
Labor Code Section 1773.1
Labor Code Section 1773.2
Labor Code Section 1773.3
Labor Code Section 1773.5
Labor Code Section 1773.6
Labor Code Section 1775
Labor Code Section 1776
Labor Code Section 1777.1
Labor Code Section 1777.5
Labor Code Section 1777.6
Labor Code Section 1777.7
Labor Code Section 1812
Labor Code Section 1813
Labor Code Section 1861
Public Contract Code Section 22002

Title 8, California Code of Regulations
Section 16000
Sections 16001 through 16003
Sections 16100 through 16102
Sections 16200 through 16206
Sections 16300 through 16304
Sections 16400 through 16403
Sections 16410 through 16414
Section 16425
Sections 16426 through 16428
Sections 16429 through 16432
Sections 16433
Sections 16434 through 16439
Section 16500
Sections 16800 through 16802
Sections 17201 through 17212
Sections 17220 through 17229
Sections 17230 through 17237
Sections 17240 through 17253
Sections 17260 through 17264

Prevailing Wage Rates

I, Bill McGuire, Associate Superintendent, Business Services, Clovis Unified

School District, make the following declaration and statement.

In my capacity as Associate Superintendent Business Services, I am responsible for the award and implementation of public works contracts. I am familiar with the provisions and requirements of the Labor and Public Contract Code Sections and the Title 8 California Code of Regulations enumerated above.

These code sections and regulations require the Clovis Unified School District to:

1) Pursuant to Labor Code Section 1773 and Title 8, California Code of Regulations, Section 16202, to obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for public works.

2) Pursuant to Title 8, California Code of Regulations, Section 16204, to ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations.

3) Pursuant to Title 8, California Code of Regulations Section 16001, to request from the Director of Industrial Relations a coverage determination regarding a specific project or type of work to be performed.

4) Pursuant to Title 8, California Code of Regulations, Section 16302, to file a petition for review of a determination of the Director of Industrial Relations of any rate or rates.

5) Pursuant to Labor Code Section 1773.4 and Title 8, California Code of Regulations Section 16002.5, to appeal an incorrect determination made by the

Director of Industrial Relations.

6) Pursuant to Labor Code Section 1773.2, to include a statement of prevailing rate of per diem wages in all calls and advertisements for bids, in the public works contract itself, and to post the statement at all job sites. In lieu of those requirements, the district may include a statement in the call for bids and contract a statement to the effect that copies of the prevailing rate of wages are on file in its principal office.

7) Pursuant to Labor Code Section 1777.1 and Title 8, California Code of Regulations, Section 16800 through 16802, to maintain records of ineligible contractors and subcontractors and to refuse to grant them public works projects of the district.

8) Pursuant to Labor Code Section 1777.3, to send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies.

9) Pursuant to Labor Code Section 1776, when necessary or requested by the Director of Industrial Relations, to inspect and audit payroll records of contractors and subcontractors working on district public works projects.

10) Pursuant to Labor Code Section 1776 and Title 8, California Code of Regulations, Section 16402, when requested by appropriate parties, to obtain and provide copies of the payroll records of the contractors and subcontractors working on district public works projects. The records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social

security number.

11) Pursuant to Labor Code Section 1771.5 and Title 8, California Code of Regulations, Sections 16425 through 16439, to comply with all of the requirements of a Labor Compliance Program, when initiated and enforced by the district. These requirements include:

(a) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of the prevailing wage laws;

(b) A prejob conference shall be conducted with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract;

(c) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury

(d) The district shall review, and, if appropriate, audit payroll records to verify compliance with prevailing wage laws;

(e) The district shall withhold contract payments when payroll records are delinquent or inadequate; and

(f) The district shall withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred.

12) Pursuant to Labor Code Section 1771.6 and Title 8, California Code of

Regulations, Section 17220, to provide contractors and subcontractors, and bonding companies and sureties with Notices of Withholding of Contract Payments when minimum wage law violations are discovered by the district. The notice shall be in writing and include the following information:

(a) A description of the nature of the violation and basis for the notice.

(b) The amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1.

(c) The name and address of the office to whom a Request for Review may be sent.

(d) Information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments.

(e) Notice of Opportunity to request a settlement meeting under Section 17221.

(f) A statement appearing in bold or another type of face, that makes it stand out from other text, to the effect that failure to submit a timely request for review will result in a final order binding on the contractor and subcontractor, and on the bonding company.

13) Pursuant to Labor Code Section 1726, to report any suspected violations of the prevailing wage laws to the Labor Commissioner.

14) Pursuant to Labor Code Section 1726, to withhold contract payments for underpaid wages and for penalties when, through the district's own investigation, the district determines a violation of prevailing wages has occurred.

15) Pursuant to Labor Code Section 1727, to withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner.

16) Pursuant to Labor Code Section 1727, to retain amounts withheld to satisfy a Civil Wage and Penalty Assessment until receiving a final order no longer subject to judicial review.

17) Pursuant to Labor Code Section 1742, after July 1, 2001[1], and Title 8, California Code of Regulations, Section 17220, to comply with all due process requirements for the benefit of contractors and subcontractors when amounts are withheld pursuant to a Civil Wage and Penalty Assessment or a Notice of Withholding of Contract Payments, including the providing of proper and timely notices, allowing them to review evidence relied upon, appearance and participation at hearings and the appeals therefrom.

18) Pursuant to Labor Code Section 1742, after July 1, 2001, to respond to petitions for writs of mandates filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including the retention of counsel to file timely

[1] Prior to July 1, 2001, different procedures and legal remedies were available to contractors and subcontractors. See: former Labor Code Sections 1730, 1731, 1732 and 1733

responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment.

19) Pursuant to Labor Code Section 1742.1 and Title 8, California Code of Regulations, Section 16413, to grant and to participate in settlement meetings requested by contractors or subcontractor in an attempt to settle any disputed issue before formal hearing procedures.

20) Pursuant to Labor Code Section 1771.2, a joint labor-management committee may bring an action against an employer who fails to pay prevailing wages. As a necessary party, the school district would be required to appear and participate in these legal proceedings.

21) Pursuant to Labor Code Section 1776, to furnish copies of payroll records of a contractor or subcontractor to a joint labor management committee obliterated only to prevent disclosure of social security numbers.

Clovis Unified School District is required to comply with these laws relating to prevailing wage rate laws in all public works projects, as defined when:

(a) Pursuant to Labor Code Section 1720.2, the construction work is performed according to plans, specifications or criteria furnished by the district and where the district enters into a lease, as lessee, of the completed project during or upon completion of the construction;

(b) Pursuant to Labor Code Section 1720.3, hauling refuse from a public works site to an outside location;

(c) Pursuant to Labor Code Section 1720, the work performed during the design

and preconstruction phases of construction including, but not limited to, inspection and land surveying work;

(d) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for maintenance, including landscape maintenance;

(e) Pursuant to Labor Code Section 1720, the work is for installation works;

(f) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for field surveying work traditionally covered by collective bargaining agreements when the work is integral to the specific public works project; and

(g) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for residential and commercial projects when the public work is for student or faculty housing.

It is estimated that Clovis Unified School District has incurred, or will incur, in excess of $200 in staffing and other costs in excess of revenues annually, for the period from July 1, 2000 through June, 2002, to implement these new duties mandated by the state for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and, where so stated, I declare that I believe them to be true.

EXECUTED this 24 day of June, 2002, at Clovis, California.

Bill McGuire
Associate Superintendent, Business Services
Clovis Unified School District

Exhibit 3
Copies of Code Sections Cited

§ 1720. Public works; use of public funds

(a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(b) For purposes of this section, "paid for in whole or in part out of public funds" means the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations.

(c) Notwithstanding subdivision (b):

(1) Private residential projects built on private property are not subject to the requirements of this chapter if the projects are not built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

(2)(A) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(B) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

(3) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code does not constitute a project that is paid for in whole or in part out of public funds.

(4) "Paid for in whole or in part out of public funds" shall not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8369.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the Health and Safety Code; or Sections 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or an ordinance or regulation, other than an ordinance or regulation adopted pursuant to this section, applies this chapter to a project, the exclusions set forth in subdivision (d) shall not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code shall mean the Internal Revenue Code of 1986, as amended, and shall include the corresponding predecessor sections of the Internal Revenue Code of 1954, as amended.

(Amended by Stats.1989, c. 278, § 1, eff. Aug. 7, 1989; Stats.2000, c. 881 (S.B.1999), § 1; Stats.2001, c. 938 (S.B.975), § 2.)

§ 1720.2. Public works; private contracts; conditions

For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exist:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

(Added by Stats.1974, c. 1027, p. 2228, § 1. Amended by Stats.1980, c. 962, p. 3054, § 1.)

§ 1720.3. Public works; hauling refuse from public works site

For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state.

(Amended by Stats.1999, c. 220 (A.B.302), § 1.)

§ 1726. Cognizance of violations in execution of contracts; reports; withholding procedures

The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed.

(Amended by Stats.2000, c. 954 (A.B.1646), § 3, operative July 1, 2001.)

§ 1727. Withholding to satisfy wage and penalty assessments

(a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all * * * amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(Amended by Stats.1992, c. 1342 (S.B.222), § 1; Stats.2000, c. 954 (A.B.1646), § 4, operative July 1, 2001.)

§ 1733. Suit to recover penalties and forfeitures

Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the penalties or forfeitures without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the plaintiff to establish his or her right to the penalties or forfeitures withheld. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

(Stats.1937, c. 90, p. 242, § 1733. Amended by Stats.1957, c. 398, p. 1241, § 1; Stats.1988, c. 160, § 122.)

§ 1735. Discrimination in employment because of race, color, etc.

No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

(Amended by Stats.1992, c. 913 (A.B.1077), § 36.)

§ 1741. Determination of violations; civil wage and penalty assessments; service

Text of section operative July 1, 2001

If the Labor Commissioner or his or her designee determines after an investigation that there has been a violation of this chapter, the Labor Commissioner shall with reasonable promptness issue a civil wage and penalty assessment to the contractor or subcontractor or both. The assessment shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures due and shall include the basis for the assessment. The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment. The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body. However, no bonding company or surety shall be relieved of its responsibilities because it failed to receive notice from the Labor Commissioner.

(Added by Stats.2000, c. 954 (A.B.1646), § 9, operative, July 1, 2001.)

1742. Review of wage and penalty assessments; hearing procedure

Text of section operative until January 1, 2005.

(a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment ıder this chapter by transmitting a written request to the office of the Labor Commissioner that)pears on the assessment within 60 days after service of the assessment. If no hearing is requested ithin 60 days after service of the assessment, the assessment shall become final.

(b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, ho shall appoint an impartial hearing officer possessing the qualifications of an administrative law judge ursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall e an employee of the department, but shall not be an employee of the Division of Labor Standards nforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be tilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be romptly disclosed to the contractor or subcontractor.

The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and enalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the ontractor or subcontractor of the issues at the hearing.

Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, nodifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, indings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on ile with the Labor Commissioner. Within 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

The director shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

(Added by Stats.2000, c. 954 (A.B.1646), § 10, operative July 1, 2001.)

Repeal

This section is repealed by its own terms on January 1, 2005.

1742.1. Liability of contractor, subcontractor, or surety; settlements

Text of section operative until January 1, 2005.

(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a otice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and urety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice ıall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still ımain unpaid. If the assessment or notice subsequently is overturned or modified after administrative judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If ıe contractor or subcontractor demonstrates to the satisfaction of the director that he or she had ibstantial grounds for believing the assessment or notice to be in error, the director shall waive payment the liquidated damages. Any liquidated damages collected shall be distributed to the employee along ith the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or ıbcontractor within 30 days following the service of a civil wage and penalty assessment under Section 741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his her designee to attempt to settle a dispute regarding the assessment without the need for formal oceedings. The awarding body shall, upon receipt of a request from the affected contractor or ıbcontractor within 30 days following the service of a notice of withholding under subdivision (a) of ection 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the varding body to attempt to settle a dispute regarding the notice without the need for formal oceedings. The settlement meeting may be held in person or by telephone and shall take place before e expiration of the 60-day period for seeking administrative review. No evidence of anything said or ıy admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is lmissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the ırpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement greement, is admissible or subject to discovery in any administrative or civil proceeding. The ıssessment or notice shall advise the contractor or subcontractor of the opportunity to request a ttlement meeting.

This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a ter enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

ıdded by Stats.2000, c. 954 (A.B.1646), § 12, operative July 1, 2001.)

Repeal

This section is repealed by its own terms on January 1, 2005.

For text of section operative January 1, 2005, see Labor Code § 1742.1, post.

1742.1. Liability of contractor, subcontractor, or surety; settlements

Text of section operative January 1, 2005.

(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a ıtice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and rety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice all be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still main unpaid. If the assessment or notice subsequently is overturned or modified after administrative judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If e contractor or subcontractor demonstrates to the satisfaction of the administrative law judge that he she had substantial grounds for believing the assessment or notice to be in error, the administrative w judge shall waive payment of the liquidated damages. Any liquidated damages collected shall be stributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for evailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or bcontractor within 30 days following the service of a civil wage and penalty assessment under Section 41, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his her designee to attempt to settle a dispute regarding the assessment without the need for formal oceedings. The awarding body shall, upon receipt of a request from the affected contractor or bcontractor within 30 days following the service of a notice of withholding under subdivision (a) of ıction 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the varding body to attempt to settle a dispute regarding the notice without the need for formal oceedings. The settlement meeting may be held in person or by telephone and shall take place before e expiration of the 60-day period for seeking administrative review. No evidence of anything said or ıy admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is lmissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the ırpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement greement, is admissible or subject to discovery in any administrative or civil proceeding. The ıssessment or notice shall advise the contractor or subcontractor of the opportunity to request a ttlement meeting.

This section shall become operative on January 1, 2005.

§ 1743. Joint and several liability; order of collection; application of amounts collected; payment of workers; bonding company liability

(a) The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon. The Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

(b) From the amount collected, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(c) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(d) A final order under this chapter or a judgment thereon shall be binding, with respect to the amount found to be due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. The limitations period of any action on a payment bond shall be tolled pending a final order that is no longer subject to judicial review.

(Added by Stats.2000, c. 954 (A.B.1646), § 14, operative July 1, 2001.)

§ 1750. **Second lowest bidder or legal entity with contract with second lowest bidder; damage due to acceptance of successful bidder who violated provisions of workers' compensation or Unemployment Insurance Code; rebuttable presumption; costs and fees**

(a)(1) The second lowest bidder, and any person, firm, association, trust, partnership, labor organization, corporation, or other legal entity which has, prior to the letting of the bids on the public works project in question, entered into a contract with the second lowest bidder, that suffers damage as a proximate result of a competitive bid for a public works project, as defined in subdivision (b), not being accepted due to the successful bidder's violation, as evidenced by the conviction of the successful bidder therefor, of any provision of Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code, may bring an action for damages in the appropriate state court against the violating person or legal entity.

(2) There shall be a rebuttable presumption that a successful bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of this code or of the Unemployment Insurance Code, or of both, was awarded the bid because that successful bidder was able to lower the bid due to this violation or these violations occurring on the contract for public work awarded by the public agency.

(b) For purposes of this article:

(1) "Public works project" means the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement, or renovation of a public building or structure.

(2) "Second lowest bidder" means the second lowest qualified bidder deemed responsive by the public agency awarding the contract for public work.

(3) The "second lowest bidder" and the "successful bidder" may include any person, firm, association, corporation, or other legal entity.

(c) In an action brought pursuant to this section, the court may award costs and reasonable attorney's fees, in an amount to be determined in the court's discretion, to the prevailing party.

(d) For purposes of an action brought pursuant to this section, employee status shall be determined pursuant to Division 4 (commencing with Section 3200) with respect to alleged violations of that division, pursuant to the Unemployment Insurance Code with respect to alleged violations of that code, and pursuant to Section 2750.5 with respect to alleged violations of either Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code.

(e) The right of action established pursuant to this article shall not be construed to diminish rights of action established pursuant to Section 19102 of, and Article 1.8 (commencing with Section 20104.70) of Chapter 1 of Part 3 of Division 2 of, the Public Contract Code.

(f) A second lowest bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of the Labor Code or of the Unemployment Insurance Code, or both, within one year prior to filing the bid for public work, and who has failed to take affirmative steps to correct that violation or those violations, is prohibited from taking any action authorized by this section.

(Added by Stats.1991, c. 906 (A.B.1754), § 1.)

§ 1770. Determination of general prevailing rate

The Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.

(Stats.1937, c. 90, p. 243, § 1770. Amended by Stats.1953, c. 1706, p. 3455, § 2; Stats.1976, c. 281, p. 587, § 2.)

§ 1771. Payment of general prevailing rate

Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

(Stats.1937, c. 90, p. 243, § 1771. Amended by Stats.1953, c. 1706, p. 3455, § 3; Stats.1974, c. 1202, p. 2593, § 1; Stats.1976, c. 861, p. 1969, § 2; Stats.1981, c. 449, p. 1697, § 1.)

§ 1771.5. Exemptions from general prevailing rate; labor compliance program; withholding contract payments for failure to comply

(a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

(Added by Stats.1989, c. 1224, § 2. Amended by Stats.1999, c. 83 (S.B.966), § 132.)

Historical and Statutory Notes

1999 Legislation

Subordination of legislation by Stats.1999, c. 83 (S.B. 966), to other 1999 legislation, see Historical and Statutory Notes under Business and Professions Code § 2530.2.

Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

§ 1771.6. Deposits of penalties or forfeitures withheld from contract payment

(a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments.

The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on a bond, if their identities are known to the awarding body.

(b) The withholding of contract payments in accordance with Section 1726 or 1771.5 shall be reviewable under Section 1742 in the same manner as if the notice of the withholding was a civil penalty order of the Labor Commissioner under this chapter. If review is requested, the Labor Commissioner may intervene to represent the awarding body.

(c) Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the awarding body shall not disburse any contract payments withheld.

(d) From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(e) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the awarding body that has enforced this chapter pursuant to Section 1771.5.

(Added by Stats.2000, c. 954 (A.B.1646), § 16, operative July 1, 2001.)

§ 1772. Employees of contractors and subcontractors

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

(Amended by Stats.1992, c. 1342 (S.B.222), § 7).

§ 1773. Method of determining general prevailing rates; holidays; adoption of rates established by collective bargaining

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director * * * of Industrial Relations. The holidays upon which those rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the applicable collective bargaining agreement * * *. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code.

In determining the rates, the Director * * * of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and the rates that may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved. The rate fixed for each craft, classification, or type of work shall be not less than the prevailing rate paid in the craft, classification, or type of work.

If the director determines that the rate of prevailing wage for any craft, classification, or type of worker is the rate established by a collective bargaining agreement, the director may adopt that rate by reference as provided for in * * * the collective bargaining agreement and that determination shall be effective for the life of the agreement or until the director determines that another rate should be adopted.

(Amended by Stats.1999, c. 30 (S.B.16), § 1.)

§ 1773.1. Per diem wages; scope; determination

(a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

(d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required by a project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(e) For the purpose of determining those per diem wages for contracts, * * * the representative of any craft, classification, or type of worker needed to execute contracts * * * shall file with the Department of Industrial Relations fully executed copies of the * * * collective bargaining agreements for the particular craft, classification, or type of work involved. * * * The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date.

Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct.

(Amended by Stats.1999, c. 80 (S.B.16), § 2; Stats.2000, c. 954 (A.B.1646), § 18, operative July 1, 2001.)

§ 1773.2. Specification of general wage rate in call for bids, in bid specifications and in contract; posting at job site

The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

(Amended by Stats.1992, c. 1342 (S.B.222), § 8.)

§ 1773.3. Contract awards; copy to division; notice to local committee; discrepancy in ratio

An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

(Formerly § 3098, added by Stats.1972, c. 1399, p. 2922, § 2. Amended by Stats.1974, c. 1095, p. 2322, § 1. Renumbered § 1773.3 and amended by Stats.1978, c. 1249, p. 4063, § 6.)

§ 1773.5. Rules and regulations

The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out * * * this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

(Amended by Stats.1989, c. 1224, § 5.)

§ 1773.6. Determination of change in prevailing wages during quarter; availability to awarding body

If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

(Added by Stats.1953, c. 1706, p. 3456, § 6. Amended by Stats.1957, c. 1932, p. 3446, § 486; Stats.1963, c. 1786, p. 3592, § 68, operative Oct. 1, 1963; Stats.1976, c. 281, p. 588, § 6.)

§ 1775. Penalties for violations

(a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner * * * based on consideration of * * * both of the following:

(1) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor.

(2) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. * * *

* * *

(Added by Stats.1997, c. 757 (S.B.1328), § 2. Amended by Stats.2000, c. 954 (A.B.1646), § 20, operative July 1, 2001.)

§ 1776. Payroll records; retention; inspection; noncompliance penalties; rules and regulations

Text of section operative until Jan. 1, 2003.

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated * * * to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor- management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's name and social security number. A joint labor management committee may maintain an action in a court of competent jurisdiction against an employer who fails to comply with Section 1774. The court may award restitution to an employee for unpaid wages and may award the joint labor management committee reasonable attorney's fee and costs incurred in maintaining the action. An action under this subdivision may not be based on the employer's misclassification of the craft of a worker on its certified payroll records. Nothing in this subdivision limits any other available remedies for a violation of this chapter.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

(Added by Stats.1997, c. 757 (S.B.1328), § 4. Amended by Stats.2001, c. 804 (S.B.588), § 2.)

Repeal

This section is repealed by its own terms on Jan. 1, 2003.

For text of section operative Jan.1, 2003, see Labor Code § 1776, post.

§ 1776. Payroll records; retention; inspection; noncompliance penalties; rules and regulations

Text of section operative Jan. 1, 2003.

(a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement * * * shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's social security number.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall become operative January 1, 2003.

(Amended by Stats.1992, c. 1342 (S.B.222), § 10; Stats.1993, c. 589 (A.B.2211), § 107; Stats.1997, c. 757 (S.B.1328), § 3, operative Jan. 1, 2003; Stats.1998, c. 485 (A.B.2803), § 121, operative Jan. 1, 2003; Stats.2001, c. 804 (S.B.588), § 3, operative Jan. 1, 2003.)

~~*For text of section operative until Jan. 1, 2003, see Labor Code § 1776, ante.*~~

§ 1777.1. Violations with intent to defraud; willful violations

(a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has * * * any interest * * * is ineligible for a period of not less than one year or more than three years to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has * * * any interest * * * is ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(c) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(d) Not less than semiannually, the Labor Commissioner shall publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project pursuant to this chapter. The list shall contain the name of the contractor, the Contractor's State License Board license number of the contractor, and the effective period of debarment of the contractor. The commissioner shall also place advertisements in construction industry publications targeted to the contractors and subcontractors, chosen by the commissioner, that state the effective period of the debarment and the reason for debarment. The advertisements shall appear one time for each debarment of a contractor in each publication chosen by the commissioner. The debarred contractor or subcontractor shall be liable to the commissioner for the reasonable cost of the advertisements, not to exceed five thousand dollars ($5,000). The amount paid to the commissioner for the advertisements shall be credited against the contractor's or subcontractor's obligation to pay civil fines or penalties for the same willful violation of this chapter.

(e) For purposes of this section, "contractor or subcontractor" means a firm, corporation, partnership, or association and its responsible managing officer, as well as any supervisors, managers, and officers found by the Labor Commissioner to be personally and substantially responsible for the willful violation of this chapter.

(f) For the purposes of this section, the term "any interest" means an interest in the entity bidding or performing work on the public works project, whether as an owner, partner, officer, manager, employee, agent, consultant, or representative. "Any interest" includes, but is not limited to, all instances where the debarred contractor or subcontractor receives payments, whether cash or any other form of compensation, from any entity bidding or performing work on the public works project, or enters into any contracts or agreements with the entity bidding or performing work on the public works project for services performed or to be performed for contracts that have been or will be assigned or sublet, or for vehicles, tools, equipment, or supplies that have been or will be sold, rented, or leased during the period from the initiation of the debarment proceedings until the end of the term of the debarment period. "Any interest" does not include shares held in a publicly traded corporation if the shares were not received as compensation after the initiation of debarment from an entity bidding or performing work on a public works project.

(g) For the purposes of this section, the term "entity" is defined as a company, limited liability company, association, partnership, sole proprietorship, limited liability partnership, corporation, business trust, or organization.

(h) The Labor Commissioner shall adopt rules and regulations for the administration and enforcement of this section * * *.

(Added by Stats.1989, c. 1224, § 10. Amended by Stats.1998, c. 443 (A.B.1569), § 1; Stats.2000, c. 970 (A.B.2513), § 1.)

Code of Regulations References

Debarment, see 8 Cal. Code of Regs. § 16800 et seq.

§ 1777.5. Employment of registered apprentices; wages; standards; number; apprenticeable craft or trade; exemptions; contributions

(a) Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

(b) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either (1) the apprenticeship standards and apprentice agreements under which he or she is training or (2) the rules and regulations of the California Apprenticeship Council.

(d) When the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this section and may apply to any

apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, * * * the decision of the apprenticeship program to approve or deny a certificate shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that program. "Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, "contractor" includes any subcontractor under a contractor who performs any public works not excluded by subdivision (*o*).

(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Chief of the Division of Apprenticeship Standards, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this section that has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1-to-5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Chief of the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio, as set forth in this section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(1) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(2) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(3) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(4) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the

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public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

(*l*) When an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1–to–5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m)(1) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract. * * *

(2) At the conclusion of each fiscal year, the California Apprenticeship Council shall distribute training contributions received by the council under this subdivision, less the expenses of the Division of Apprenticeship Standards for administering this subdivision, by making grants to approved apprenticeship programs for the purpose of training apprentices. The funds shall be distributed as follows:

(A) If there is an approved multiemployer apprenticeship program serving the same craft or trade and geographic area for which the training contributions were made to the council, a grant to that program shall be made.

(B) If there are two or more approved multiemployer apprenticeship programs serving the same craft or trade and geographic area for which the training contributions were made to the council, the grant shall be divided among those programs based on the number of apprentices registered in each program.

(C) All training contributions not distributed under subparagraphs (A) and (B) shall be used to defray the future expenses of administering this subdivision.

(3) All training contributions received pursuant to this subdivision shall be deposited in the Apprenticeship Training Contribution Fund, which fund is hereby created in the State Treasury. Notwithstanding Section 13340 of the Government Code, all money in the Apprenticeship Training Contribution Fund is hereby continuously appropriated for the purpose of carrying out this subdivision and to pay the expenses of the division in administering this subdivision.

(n) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

(*o*) This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) * * *.

(p) All decisions of an apprenticeship program under this section are subject to Section 3081.

(Amended by Stats.1989, c. 1224, § 11; Stats.1997, c. 17 (S.B.947), § 91; Stats.1999, c. 903 (A.B.921), § 2; Stats.2000, c. 135 (A.B.2539), § 124; Stats.2000, c. 875 (A.B.2481), § 1.)

§ 1777.6. Discrimination against apprentices because of race, religious creed, etc.

It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as registered apprentices on any public works, on the ground of the race, religious creed, color, national origin, ancestry, sex, or age, except as provided in Section 3077, of such employee.

(Added by Stats.1951, c. 1192, p. 3005, § 1; Amended by Stats.1965, c. 283, p. 1284, § 8; Stats.1971, c. 280, p. 586, § 1; Stats.1976, c. 1179, p. 5279, § 3, eff. Sept. 22, 1976.)

§ 1777.7. Violations of § 1777.5; civil penalty; denial of right to bid on contracts; procedure; violations by subcontractors

(a)(1) A contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty * * * may be reduced by the Chief if the amount of the penalty would be disproportionate to the severity of the violation. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed by the Chief, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(2) In lieu of the penalty provided for in this subdivision * * *, the Chief may, for a first-time violation and with the concurrence of an apprenticeship program described in subdivision (d), order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(b) * * * In the event a contractor or subcontractor is determined by the * * * Chief to have knowingly * * * committed a serious violation of any provision of Section 1777.5, the * * * Chief may also deny to the contractor or subcontractor, * * * and to its responsible officers, the right to bid on or * * * be awarded or perform work as a subcontractor on any public works contract for a period of up to one year for the first violation and for a period of up to three years for a second or subsequent violation.

Each period of debarment shall run from the date the determination of noncompliance by the Chief becomes a final order of the Administrator of Apprenticeship.

* * * (c)(1) An affected contractor, subcontractor, or responsible officer may obtain a review of the determination of the Chief imposing the debarment or civil penalty by transmitting a written request to the office of the Administrator within 30 days after service of the determination of debarment or civil penalty. A copy of this report shall also be served on the Chief. If the Administrator * * * does not receive a timely request for review * * * of the determination of debarment or civil penalty made by the Chief, the order shall become the final * * * order of the Administrator.

(2) Within 20 days of the timely receipt of a request for review, the Chief shall provide the contractor, subcontractor, or responsible officer the opportunity to review any evidence the Chief may offer at the hearing. The Chief shall also promptly disclose * * * any nonprivileged documents obtained after the 20-day time limit at a time set forth for exchange of evidence by the Administrator.

(3) Within 90 days of the timely receipt of * * * a request for review, a hearing shall be commenced before the Administrator or an impartial hearing officer designated by the Administrator and possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The affected contractor, subcontractor, or responsible officer shall have the burden of *. * * providing evidence of compliance with Section 1777.5.* *. * .

(4) Within 45 days of the conclusion of the hearing, the * * * Administrator shall issue a written decision affirming, modifying, or dismissing the determination of debarment or civil penalty. The decision shall contain a * * * statement of the factual and legal basis for the decision and an order. This decision shall be * * * served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party * * * that the party has filed with the Administrator. Within 15 days of issuance of the decision, the * * * Administrator may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(5) An affected contractor, subcontractor, or responsible officer who has timely requested review and obtained a decision under paragraph (4) may obtain review of the * * * decision of the Administrator by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the final decision* * * . If no timely petition for a writ of mandate is filed* * * , the * * * decision * * * shall become the final order of the Administrator. The decision of the Administrator shall be affirmed unless the petitioner shows that the Administrator abused his or her discretion. If the petitioner claims that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the entire record.

(6) The * * * Chief may certify a copy of the final order of the Administrator and file it with the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order. A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and be given the same preference allowed by the law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section. An awarding body that has withheld funds in response to a determination by the Chief imposing a penalty under this section shall, upon receipt of a certified copy of a final order of the Administrator, promptly transmit the withheld funds, up to the amount of the certified order, to the Administrator.

(d) If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

(1) The contract executed between the contractor and the subcontractor or the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.

(3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

(4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain * * * a declaration signed under penalty of perjury from the

subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

(e) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(f) The Chief shall consider, in setting the amount of a monetary penalty, in determining whether a violation is serious, and in determining whether and for how long a party should be debarred for violating this section, all of the following circumstances:

(1) Whether the violation was intentional.

(2) Whether the party has committed other violations of Section 1777.5.

(3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.

(4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.

(5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

If a party seeks review of a decision by the Chief to impose a monetary penalty or period of debarment, the Administrator shall decide de novo the appropriate penalty, by considering the same factors set forth above.

(g) The interpretation * * * of Section 1777.5 and this section shall be in accordance with the * * * regulations of the California Apprenticeship Council. The Administrator may adopt regulations to establish guidelines for the imposition of monetary penalties and periods of debarment and may designate precedential decisions under Section 11425.60 of the Government Code.

(Added by Stats.1989, c. 1224, § 13. Amended by Stats.1999, c. 903 (A.B.921), § 3; Stats.2000, c. 135 (A.B.2539), § 125; Stats.2000, c. 875 (A.B.2481), § 2.)

§ 1812. Record of hours of employment; inspection

Every contractor and subcontractor shall keep an accurate record showing he name of and actual hours worked each calendar day and each calendar veek by each worker employed by him or her in connection with the public vork. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Standards Enforcement.

Formerly § 1814, Stats.1937, c. 90, p. 245, § 1814. Amended by Stats.1945, c. 1431, p. 2692, § 51. Renumbered § 1812 and amended by Stats.1961, c. 238, p. 1256, § 4; Stats.1963, c. 964, p. 2222, § 2; Stats.1988, c. 160, § 123.)

§ 1813. Forfeiture for violation; contract stipulation; report of violations

Text of section operative until Jan. 1, 2003.

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

(Added by Stats.1997, c. 757 (S.B.1328), § 6.)

Repeal

This section is repealed by its own terms on Jan. 1, 2003.

For text of section operative Jan. 1, 2003, see Labor Code § 1813, post.

§ 1813. Forfeiture for violation; contract stipulation; report of violations

Text of section operative Jan. 1, 2003

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which the workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him or her under the contract.

This section shall become operative January 1, 2003.

(Amended by Stats.1997, c. 757 (S.B.1328), § 5, operative Jan. 1, 2003; Stats.1998, c. 485 (A.B.2803), § 122, operative Jan. 1, 2003.)

For text of section operative until Jan. 1, 2003, see Labor Code § 1813, ante.

§ 1861. Certification by contractor

Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: "I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

(Added by Stats.1965, c. 1000, p. 2630, § 2. Amended by Stats.1979, c. 373, p. 1343, § 232.)

§ 22002. Definitions

(a) "Public agency," for purposes of this chapter, means a city, county, city and county, including chartered cities and chartered counties, any special district, and any other agency of the state for the local performance of governmental or proprietary functions within limited boundaries. "Public agency" also includes a nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.

(b) "Representatives of the construction industry" for purposes of this chapter, means a general contractor, subcontractor, or labor representative with experience in the field of public works construction.

(c) "Public project" means any of the following:

(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

(2) Painting or repainting of any publicly owned, leased, or operated facility.

(3) In the case of a publicly owned utility system, "public project" shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(d) "Public project" does not include maintenance work. For purposes of this section, "maintenance work" includes all of the following:

(1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.

(2) Minor repainting.

(3) Resurfacing of streets and highways at less than one inch.

(4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

(5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(e) For purposes of this chapter, "facility" means any plant, building, structure, ground facility, utility system, subject to the limitation found in paragraph (3) of subdivision (c), real property, streets and highways, or other public work improvement.

(Formerly § 21002, added by Stats.1983, c. 1054, § 1. Renumbered § 22002 and amended by Stats.1986, c. 1019, § 89; Stats.1989, c. 733, § 1.)

Exhibit 4
Copies of Statutes Cited

Senate Bill No. 975

CHAPTER 938

An act to amend Section 63036 of the Government Code, and to amend Section 1720 of the Labor Code, relating to the California infrastructure and economic development bank.

[Approved by Governor October 14, 2001. Filed with Secretary of State October 14, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

SB 975, Alarcon. California Infrastructure and Economic Development Bank.

Existing law, the Bergeson-Peace Infrastructure and Economic Development Bank Act, establishes the California Infrastructure and Economic Development Bank in the Trade and Commerce Agency. The act requires public works financed by the bank to comply with certain laws applicable to payment of prevailing wages on public works.

This bill would require any of those public works financed through the use of industrial development bonds under the California Industrial Development Financing Act to comply with those laws relating to payment of prevailing wages.

Existing law generally defines "public works" to include construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds.

This bill would redefine "public works" to include installation and provide that "paid for in whole or in part with public funds" means certain payments, transfers, credits, reductions, waivers, and performances of work, but does not include the construction or rehabilitation of affordable housing units for low- or moderate-income persons, as specified.

This bill would provide that certain private residential housing projects and development projects built on private property are not subject to the prevailing wage, hour, and discrimination laws that govern employment on public works projects.

This bill would also make technical, nonsubstantive changes.

The people of the State of California do enact as follows:

SECTION 1. Section 63036 of the Government Code is amended to read:

63036. It is the intent of the Legislature that the activities of the bank be fully coordinated with any future legislative plan involving growth management strategies designed to protect California's land resource, and ensure its preservation and use it in ways which are economically and socially desirable. Further, all public works financed pursuant to this division, including those projects financed through the use of industrial development bonds under Title 10 (commencing with Section 91500), shall comply with Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

SEC. 2. Section 1720 of the Labor Code is amended to read:

1720. (a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(b) For purposes of this section, "paid for in whole or in part out of public funds" means the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value,

waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations.

(c) Notwithstanding subdivision (b):

(1) Private residential projects built on private property are not subject to the requirements of this chapter if the projects are not built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

(2) (A) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(B) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

(3) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code does not constitute a project that is paid for in whole or in part out of public funds.

(4) "Paid for in whole or in part out of public funds" shall not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8369.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the Health and Safety Code, or Sections 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or an ordinance or regulation, other than an ordinance or regulation adopted pursuant to this section, applies this chapter to a project, the exclusions set forth in subdivision (d) shall not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code shall mean the Internal Revenue Code of 1986, as amended, and shall include the corresponding predecessor sections of the Internal Revenue Code of 1954, as amended.

Senate Bill No. 588

CHAPTER 804

An act to amend Section 1776 of, and to add Section 1771.2 to, the Labor Code, relating to public works.

[Approved by Governor October 12, 2001. Filed with Secretary of State October 13, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

SB 588, Burton. Prevailing wages: payroll records.

Existing law generally requires contractors engaged in public works to pay employees the prevailing wage, as determined by the Director of Industrial Relations, and to comply with requirements relating to recordkeeping and employee work schedules.

This bill would authorize a joint labor-management committee established pursuant to a specified provision of federal law to bring an action against any employer who fails to pay prevailing wages as required by state law.

Existing law requires each contractor and subcontractor on a public works project to keep accurate payroll records containing information about employees, including name, address, social security number, and work history. Existing law requires, if these records are provided to the public or any public agency, that the names, addresses, and social security numbers of the employees be obliterated.

This bill would prohibit the obliteration of any information on employee payroll records except the employee's name and social security number, for any records supplied to a joint labor-management committee established pursuant to federal law.

The people of the State of California do enact as follows:

SECTION 1. Section 1771.2 is added to the Labor Code, to read:

1771.2. A joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) may bring an action in any court of competent jurisdiction against an employer that fails to pay the prevailing wage to its employees, as required by this article. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs.

SEC. 2. Section 1776 of the Labor Code, as added by Section 4 of Chapter 757 of the Statutes of 1997, is amended to read:

1776. (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's name and social security number. A joint labor management committee may maintain an action in a court of competent jurisdiction against an employer who fails to comply with Section 1774. The court may award restitution to an employee for unpaid wages and may award the joint labor management committee reasonable attorney's fee and costs incurred in maintaining the action. An action under this subdivision may not be based on the employer's misclassification of the craft of a worker on its certified payroll records. Nothing in this subdivision limits any other available remedies for a violation of this chapter.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil

Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

SEC. 3. Section 1776 of the Labor Code, as amended by Section 3 of Chapter 757 of the Statutes of 1997, is amended to read:

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's social security number.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall become operative January 1, 2003.

O

Assembly Bill No. 1646

CHAPTER 954

An act to amend Sections 1723, 1726, 1727, and 1773.1 of, to add Sections 1741 and 1743 to, to add and repeal Sections 1742 and 1742.1 of, to repeal Sections 1730, 1731, 1732, 1733, and 1771.7 of, to repeal and amend Section 1775 of, and to repeal and add Section 1771.6 of, the Labor Code, relating to public works.

[Approved by Governor September 29, 2000. Filed with Secretary of State September 30, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1646, Steinberg. Public works: payments.

(1) Existing law regulating public works contracts requires the awarding body of a public works contract to withhold and retain from payments to the contractor all wages and penalties that have been forfeited pursuant to the contract or existing law. The awarding body is required to transfer all wages and penalties retained, to the Labor Commissioner for disbursement pursuant to specified provisions whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties withheld within 90 days after the completion of the contract and formal acceptance of the job.

This bill would require the awarding body to report promptly any suspected violations of the laws regulating public works contracts to the Labor Commission and to retain all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner.

(2) Existing law authorizes the contractor to bring suit for the limited purpose of recovery of the penalties or forfeitures withheld. Existing law permits the Division of Labor Standards Enforcement to intervene in a contractor's suit for recovery of amounts withheld, provides for the deposit of wages for workers who cannot be located into the Industrial Relations Unpaid Wages Fund, and provides for the deposit of penalties into the General Fund. Existing law, until January 1, 2003, requires a contractor to withhold moneys due a subcontractor in an amount sufficient to pay the wages that are the subject of a claim filed with the Division of Labor Standards Enforcement, as directed by the division, if the body awarding the public works contract has not withheld sufficient moneys to pay the wage claims. Existing law requires the contractor to pay those moneys to the subcontractor after receipt of notification that the claim has been resolved, or to pay those moneys to the awarding body, under specified circumstances.

This bill would repeal these provisions and instead would require the Labor Commissioner to issue a civil wage and penalty assessment to the contractor or subcontractor or both if the Labor Commissioner determines after investigation that there has been a violation of the laws regulating public works contracts. The bill would permit an affected contractor or subcontractor to obtain review of a civil wage and penalty assessment by transmitting a written request for a hearing to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment and would require an impartial hearing officer, until January 1, 2005, and then an administrative law judge appointed by the Director of Industrial Relations to commence a hearing within 90 days of receipt of the request. The bill would permit an affected contractor or subcontractor to obtain review of the decision of the director, until January 1, 2005, and then an administrative law judge by filing a petition for a writ of mandate to the superior court within 45 days after service of the decision. The bill would provide for liquidated damages in an amount equal to the amount of unpaid wages, as specified. The bill would also authorize informal settlement meetings.

The bill would provide that the contractor and subcontractor are jointly and severally liable for all amounts due pursuant to a final order or a judgment on that final order, but would require the Labor Commissioner to collect amounts due from the subcontractor before pursuing the claim against the contractor. The bill would require that the wage claim be satisfied from the amounts collected prior to those amounts being applied to penalties and that the money be prorated among all workers if an insufficient amount is recovered to pay each worker in full. The bill would require wages for workers who cannot be located to be placed in the Industrial Relations Unpaid Wage Fund, a continuously appropriated fund, and penalties to be paid into the General Fund.

(3) Existing law requires any political subdivision that enforces the laws regulating public works contracts and any court collecting fines or penalties that result from enforcement actions by political subdivisions to deposit penalties or forfeitures withheld from any contract payment in the General Fund of the political subdivision. Existing law authorizes a contractor to appeal an enforcement action by a political subdivision to the Director of Industrial Relations.

The bill would repeal and recast this provision to apply to any awarding body that enforces the laws regulating public works contracts in accordance with specified provisions of existing law. The bill would require such an awarding body to provide written notice of the withholding of contract payments to the contractor and subcontractor, as specified. The withholding of contract payments would be reviewable in the same manner as a civil penalty order of the Labor Commissioner.

(4) Existing law provides that per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, and subsistence pay, apprenticeship or other training programs, and similar purposes. Existing law requires the representative of any craft, classification, or type of worker needed to execute a public works contract entered into with the state to file with the Department of Industrial Relations, fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved for the purposes of determining the per diem wages.

This bill would specify the employer contributions, costs, and payments that employer payments may include and would provide that employer payments not required to be provided by state or federal law are a credit against the obligation to pay the general prevailing rate of wages. However, credits for employer payments would not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing. This bill would expand the requirement that copies of collective bargaining agreements be filed with the Department of Industrial Relations to apply to representatives of any craft, classification, or type of worker needed to execute a public works contract entered into with a public entity other than the state. The bill would revise the filing requirements to permit, if the collective bargaining agreement has not been formalized, the temporary filing of a typescript of the final draft accompanied by a statement under penalty of perjury as to its effective date. Because this bill would impose additional duties on local agency employers, expand the scope of the existing crime of perjury, and provide that a violation of these provisions is a misdemeanor, this bill would impose a state-mandated local program.

(5) This bill provides that it would become operative on July 1, 2001.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 2. Section 1723 of the Labor Code is amended to read:

1723. "Worker" includes laborer, worker, or mechanic.

SEC. 3. Section 1726 of the Labor Code is amended to read:

1726. The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed.

SEC. 4. Section 1727 of the Labor Code is amended to read:

1727. (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

SEC. 5. Section 1730 of the Labor Code is repealed.

SEC. 6. Section 1731 of the Labor Code is repealed.

SEC. 7. Section 1732 of the Labor Code is repealed.

SEC. 8. Section 1733 of the Labor Code is repealed.

SEC. 9. Section 1741 is added to the Labor Code, to read:

1741. If the Labor Commissioner or his or her designee determines after an investigation that there has been a violation of this chapter, the Labor Commissioner shall with reasonable

promptness issue a civil wage and penalty assessment to the contractor or subcontractor or both. The assessment shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures due and shall include the basis for the assessment. The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment. The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body. However, no bonding company or surety shall be relieved of its responsibilities because it failed to receive notice from the Labor Commissioner.

SEC. 10. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial hearing officer possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.

The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

The director shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 11. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) (1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge appointed by the Director of Industrial Relations. The appointed hearing judge shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the

court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall become operative on January 1, 2005.

SEC. 12. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal

proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 13. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the administrative law judge that he or she had substantial grounds for believing the assessment or notice to be in error, the administrative law judge shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section

1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall become operative on January 1, 2005.

SEC. 14. Section 1743 is added to the Labor Code, to read:

1743. (a) The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon. The Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

(b) From the amount collected, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(c) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(d) A final order under this chapter or a judgment thereon shall be binding, with respect to the amount found to be due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. The limitations period of any action on a payment bond shall be tolled pending a final order that is no longer subject to judicial review.

SEC. 15. Section 1771.6 of the Labor Code is repealed.

SEC. 16. Section 1771.6 is added to the Labor Code, to read:

1771.6. (a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and

subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments.

The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on a bond, if their identities are known to the awarding body.

(b) The withholding of contract payments in accordance with Section 1726 or 1771.5 shall be reviewable under Section 1742 in the same manner as if the notice of the withholding was a civil penalty order of the Labor Commissioner under this chapter. If review is requested, the Labor Commissioner may intervene to represent the awarding body.

(c) Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the awarding body shall not disburse any contract payments withheld.

(d) From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(e) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the awarding body that has enforced this chapter pursuant to Section 1771.5.

SEC. 17. Section 1771.7 of the Labor Code is repealed.

SEC. 18. Section 1773.1 of the Labor Code is amended to read:

1773.1. (a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce

the obligation to pay the hourly straight time or overtime wages found to be prevailing.

(d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required by a project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(e) For the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved. The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date.

Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct.

SEC. 19. Section 1775 of the Labor Code, as amended by Section 1 of Chapter 757 of the Statutes of 1997, is repealed.

SEC. 20. Section 1775 of the Labor Code, as added by Section 2 of Chapter 757 of the Statutes of 1997, is amended to read:

1775. (a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her.

The amount of this penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(1) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor.

(2) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages.

SEC. 21. This act shall become operative on July 1, 2001.

SEC. 22. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

O

Assembly Bill No. 1883

CHAPTER 920

An act to amend Sections 4850 and 4850.3 of the Labor Code, relating to workers' compensation.

[Approved by Governor September 29, 2000. Filed with Secretary of State September 29, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1883, Lowenthal. Workers' compensation: disability benefits for airport law enforcement officers and harbor and port police.

Existing workers' compensation law provides that certain peace officers, firefighters, and other specified state and local public employees are entitled to a leave of absence without loss of salary while disabled by injury or illness arising out of and in the course of employment. This leave of absence is in lieu of temporary disability payments or maintenance allowance payments otherwise payable.

This bill would extend this provision to specified airport law enforcement officers, harbor and port police officers, wardens, and special officers.

This bill would incorporate additional changes in Section 4850 of the Labor Code proposed by AB 1124 and SB 2081, to become operative only if those bills are enacted, as specified, and become operative on or before January 1, 2001, and this bill is enacted last.

The people of the State of California do enact as follows:

SECTION 1. Section 4850 of the Labor Code is amended to read:

4850. (a) Whenever any person listed in subdivision (b) who is a member of the Public Employees' Retirement System or the Los Angeles City Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code), is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments under Section 139.5, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3.

(b) The persons eligible under subdivision (a) include all of the following:

(1) City police officers.

(2) City, county, or district firefighters.

(3) Sheriffs.

(4) Officers or employees of any sheriff's offices.

(5) Inspectors, investigators, detectives, or personnel with comparable titles in any district attorney's office.

(6) County probation officers, group counselors, or juvenile services officers.

(7) Officers or employees of a probation office.

(8) Peace officers under Section 830.31 of the Penal Code employed on a regular, full-time basis by a county of the first class.

(9) Lifeguards employed year round on a regular, full-time basis by a county of the first class.

(10) Airport law enforcement officers under subdivision (d) of Section 830.33 of the Penal Code.

(11) Harbor or port police officers, wardens, or special officers of a harbor or port district or city or county harbor department under subdivision (a) of Section 830.1 or subdivision (b) of Section 830.33 of the Penal Code.

(c) This section shall apply only to persons listed in subdivision (b) who meet the requirements of subdivision (a) and does not include any of the following:

(1) Employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service.

(2) Employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(3) Employees of a county probation office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(4) Employees of a city fire department, county fire department, or fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service.

(d) If the employer is insured, the payments which, except for this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

(e) No leave of absence taken pursuant to this section by a peace officer, as defined by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, shall be deemed to constitute

family care and medical leave, as defined in Section 12945.2 of the Government Code, or to reduce the time authorized for family care and medical leave by Section 12945.2 of the Government Code.

SEC. 1.3. Section 4850 of the Labor Code is amended to read:

4850. (a) Whenever any person listed in subdivision (b) who is a member of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code), is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments under Section 139.5, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3.

(b) The persons eligible under subdivision (a) include all of the following:

(1) City police officers.

(2) City, county, or district firefighters.

(3) Sheriffs.

(4) Officers or employees of any sheriff's offices.

(5) Inspectors, investigators, detectives, or personnel with comparable titles in any district attorney's office.

(6) County probation officers, group counselors, or juvenile services officers.

(7) Officers or employees of a probation office.

(8) Peace officers under Section 830.31 of the Penal Code employed on a regular, full-time basis by a county of the first class.

(9) Lifeguards employed year round on a regular, full-time basis by a county of the first class.

(10) Custody assistants employed on a regular, full-time basis by a county of the first class.

(11) Airport law enforcement officers under subdivision (d) of Section 830.33 of the Penal Code.

(12) Harbor or port police officers, wardens, or special officers of a harbor or port district or city or county harbor department under subdivision (a) of Section 830.1 or subdivision (b) of Section 830.33 of the Penal Code.

(c) This section shall apply only to persons listed in subdivision (b) who meet the requirements of subdivision (a) and does not include any of the following:

(1) Employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist,

mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service.

(2) Employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(3) Employees of a county probation office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(4) Employees of a city fire department, county fire department, or fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service.

(d) If the employer is insured, the payments which, except for this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

(e) No leave of absence taken pursuant to this section by a peace officer, as defined by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, shall be deemed to constitute family care and medical leave, as defined in Section 12945.2 of the Government Code, or to reduce the time authorized for family care and medical leave by Section 12945.2 of the Government Code.

SEC. 1.5. Section 4850 of the Labor Code is amended to read:

4850. (a) Whenever any person listed in subdivision (b) who is a member of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code), is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments under Section 139.5, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3.

(b) The persons eligible under subdivision (a) include all of the following:

(1) City police officers.

(2) City, county, or district firefighters.

(3) Sheriffs.

(4) Officers or employees of any sheriff's offices.

(5) Inspectors, investigators, detectives, or personnel with comparable titles in any district attorney's office.

(6) County probation officers, group counselors, or juvenile services officers.

(7) Officers or employees of a probation office.

(8) Peace officers under Section 830.31 of the Penal Code employed on a regular, full-time basis by a county of the first class.

(9) Lifeguards employed year round on a regular, full-time basis by a county of the first class.

(10) Airport law enforcement officers under subdivision (d) of Section 830.33 of the Penal Code.

(11) Harbor or port police officers, wardens, or special officers of a harbor or port district or city or county harbor department under subdivision (a) of Section 830.1 or subdivision (b) of Section 830.33 of the Penal Code.

(12) Police officers of the Los Angeles Unified School District.

(c) This section shall apply only to persons listed in subdivision (b) who meet the requirements of subdivision (a) and does not include any of the following:

(1) Employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service.

(2) Employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(3) Employees of a county probation office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(4) Employees of a city fire department, county fire department, or fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service.

(d) If the employer is insured, the payments which, except for this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

(e) No leave of absence taken pursuant to this section by a peace officer, as defined by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, shall be deemed to constitute family care and medical leave, as defined in Section 12945.2 of the Government Code, or to reduce the time authorized for family care and medical leave by Section 12945.2 of the Government Code.

SEC. 1.7. Section 4850 of the Labor Code is amended to read:

4850. (a) Whenever any person listed in subdivision (b) who is a member of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code), is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments under Section 139.5, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3.

(b) The persons eligible under subdivision (a) include all of the following:

(1) City police officers.

(2) City, county, or district firefighters.

(3) Sheriffs.

(4) Officers or employees of any sheriff's offices.

(5) Inspectors, investigators, detectives, or personnel with comparable titles in any district attorney's office.

(6) County probation officers, group counselors, or juvenile services officers.

(7) Officers or employees of a probation office.

(8) Peace officers under Section 830.31 of the Penal Code employed on a regular, full-time basis by a county of the first class.

(9) Lifeguards employed year round on a regular, full-time basis by a county of the first class.

(10) Custody assistants employed on a regular, full-time basis by a county of the first class.

(11) Airport law enforcement officers under subdivision (d) of Section 830.33 of the Penal Code.

(12) Harbor or port police officers, wardens, or special officers of a harbor or port district or city or county harbor department under subdivision (a) of Section 830.1 or subdivision (b) of Section 830.33 of the Penal Code.

(13) Police officers of the Los Angeles Unified School District.

(c) This section shall apply only to persons listed in subdivision (b) who meet the requirements of subdivision (a) and does not include any of the following:

(1) Employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service.

(2) Employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(3) Employees of a county probation office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(4) Employees of a city fire department. county fire department, or fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service.

(d) If the employer is insured, the payments which, except for this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

(e) No leave of absence taken pursuant to this section by a peace officer, as defined by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, shall be deemed to constitute family care and medical leave, as defined in Section 12945.2 of the Government Code, or to reduce the time authorized for family care and medical leave by Section 12945.2 of the Government Code.

SEC. 2. Section 4850.3 of the Labor Code is amended to read:

4850.3. A city, county, special district, or harbor district that is a member of the Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees' Retirement System, may make advanced disability pension payments to any local safety officer who has qualified for benefits under Section 4850 and is approved for a disability allowance. The payments shall be no less than 50 percent of the estimated highest average annual compensation earnable by the local safety officer during the three consecutive years of employment immediately preceding the effective date of his or her disability retirement, unless the local safety officer chooses an optional settlement in the permanent disability retirement application process which would reduce the pension allowance below 50 percent. In the case where the local safety officer's choice lowers the disability pension allowance below 50 percent of average annual compensation as calculated, the advanced pension payments shall be set at an amount equal to the disability pension allowance. If a local agency has an adopted policy of paying for any accumulated sick leave after the safety officer is eligible for a disability allowance, the advanced disability pension payments under this section may only be made when the local safety officer has exhausted all sick leave payments. Advanced disability pension payments shall not be considered a salary under this or any other provision of law. All advanced disability pension payments made by a local agency with

membership in the Public Employees' Retirement System shall be reimbursed by the Public Employees' Retirement System pursuant to Section 21293.1 of the Government Code.

SEC. 3. Section 1.3 of this bill incorporates amendments to Section 4850 of the Labor Code proposed by both this bill and AB 1124. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2001, (2) SB 2081 does not amend Section 4850 of the Labor Code, (3) each bill amends Section 4850 of the Labor Code, and (4) this bill is enacted after AB 1124, in which case Sections 1, 1.5, and 1.7 of this bill shall not become operative.

SEC. 4. Section 1.5 of this bill incorporates amendments to Section 4850 of the Labor Code proposed by this bill and SB 2081. It shall become operative if (1) both bills are enacted and become effective on or before January 1, 2001, (2) AB 1124 does not amend Section 4850 of the Labor Code, (3) each bill amends Section 4850 of the Labor Code, and (4) this bill is enacted after SB 2081, in which case Sections 1, 1.3, and 1.7 of this bill shall not become operative.

SEC. 5. Section 1.7 of this bill incorporates amendments to Section 4850 of the Labor Code proposed by this bill, AB 1124, and SB 2081. It shall only become operative if (1) all three bills are enacted and become effective on or before January 1, 2001, (2) each bill amends Section 4850 of the Labor Code, and (3) this bill is enacted after AB 1124 and SB 2081, in which case Sections 1, 1.3, and 1.5 of this bill shall not become operative.

O

Senate Bill No. 1999

CHAPTER 881

An act to amend Section 1720 of the Labor Code, relating to public contracts.

[Approved by Governor September 28, 2000. Filed with Secretary of State September 29, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1999, Burton. Public work.

Existing law defines public works and establishes certain requirements that must be met by persons who enter into contracts for public works. Those requirements include provisions generally known as the prevailing wage laws. The prevailing wage laws require that all workers employed on public works be paid the general prevailing rate of per diem wages, as determined by the Director of Industrial Relations.

This bill would revise the definition of public works by providing that "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work. By requiring local government entities to comply with the provisions affecting public works, including the prevailing wage laws, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 1720 of the Labor Code is amended to read:

1720. As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

For purposes of this subdivision, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

O

Assembly Bill No. 2481

CHAPTER 875

An act to amend Sections 1777.5, 1777.7, and 3099 of the Labor Code, relating to employment, and making an appropriation therefor.

[Approved by Governor September 28, 2000. Filed with Secretary of State September 29, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2481, Romero. Apprentice employment: apprenticeship standards.

(1) Existing law requires contractors on public works who employ journeymen or apprentices to contribute to a fund to administer certain apprenticeship programs, as specified. Existing law also requires the California Apprenticeship Council to make prescribed grants to apprenticeship programs at the end of each fiscal year.

This bill would revise and recast the provisions prescribing grants to apprenticeship programs. The bill would also provide that contributions be deposited into the Apprenticeship Training Contribution Fund, a continuously appropriated fund, which the bill would create. By providing for the deposit of moneys into a continuously appropriated fund, the bill would make an appropriation.

(2) Under existing law, a contractor or subcontractor that employs apprentices on a public work in a contract for 50 or more working days, must comply with various conditions relating to that employment, including payment of the prevailing wage and employing apprentices only in the craft or trade for which they are registered. Existing law provides penalties for knowing violations of these provisions. If the Administrator of Apprenticeship determines that there has been a knowing violation, the administrator is required to deny the violator the right to bid on any public works contract for specified periods of time.

This bill would delete the reference to days thereby making those provisions applicable regardless of the length of the contract.

This bill would instead impose the above penalties on a contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards to have knowingly committed a serious violation of the provisions governing employment of apprentices on public works. These penalties may be reduced if the chief determines that they would be disproportionate to the severity of the violation. The bill would also provide that the chief has discretion as to whether to suspend a violator's right to bid on or be awarded or perform work

as a subcontractor on any public works contracts. The bill would also make related, technical, and clarifying changes.

(3) Existing law provides for apprenticeship programs within the Division of Apprenticeship Standards in the Department of Industrial Relations. Existing law also requires the division, on or before January 1, 2001, to establish and validate minimum standards for the competency and training of electricians, as defined, through a system of testing and certification; establish fees necessary to implement those requirements; and establish and adopt regulations for enforcement.

This bill instead would require those standards, fees, and regulations to be established on or before July 1, 2001. The bill would also make a clarifying change.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 1777.5 of the Labor Code is amended to read:

1777.5. (a) Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

(b) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either (1) the apprenticeship standards and apprentice agreements under which he or she is training or (2) the rules and regulations of the California Apprenticeship Council.

(d) When the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this section and may apply to any apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, the decision of the apprenticeship program to approve or deny a certificate shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the

contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that program. "Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, "contractor" includes any subcontractor under a contractor who performs any public works not excluded by subdivision (o).

(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed

at the jobsite. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Chief of the Division of Apprenticeship Standards, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this section that has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1-to-5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Chief of the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio, as set forth in this section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(1) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(2) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(3) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(4) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

(*l*) When an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m) (1) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute

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to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

(2) At the conclusion of each fiscal year, the California Apprenticeship Council shall distribute training contributions received by the council under this subdivision, less the expenses of the Division of Apprenticeship Standards for administering this subdivision, by making grants to approved apprenticeship programs for the purpose of training apprentices. The funds shall be distributed as follows:

(A) If there is an approved multiemployer apprenticeship program serving the same craft or trade and geographic area for which the training contributions were made to the council, a grant to that program shall be made.

(B) If there are two or more approved multiemployer apprenticeship programs serving the same craft or trade and geographic area for which the training contributions were made to the council, the grant shall be divided among those programs based on the number of apprentices registered in each program.

(C) All training contributions not distributed under subparagraphs (A) and (B) shall be used to defray the future expenses of administering this subdivision.

(3) All training contributions received pursuant to this subdivision shall be deposited in the Apprenticeship Training Contribution Fund, which fund is hereby created in the State Treasury. Notwithstanding Section 13340 of the Government Code, all money in the Apprenticeship Training Contribution Fund is hereby continuously appropriated for the purpose of carrying out this subdivision and to pay the expenses of the division in administering this subdivision.

(n) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

(o) This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000).

(p) All decisions of an apprenticeship program under this section are subject to Section 3081.

SEC. 2. Section 1777.7 of the Labor Code is amended to read:

1777.7. (a) (1) A contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Chief if the amount of the penalty would be disproportionate to the severity of the violation. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed by the Chief, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(2) In lieu of the penalty provided for in this subdivision, the Chief may, for a first-time violation and with the concurrence of an apprenticeship program described in subdivision (d), order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(b) In the event a contractor or subcontractor is determined by the Chief to have knowingly committed a serious violation of any provision of Section 1777.5, the Chief may also deny to the contractor or subcontractor, and to its responsible officers, the right to bid on or be awarded or perform work as a subcontractor on any public works contract for a period of up to one year for the first violation and for a period of up to three years for a second or subsequent violation. Each period of debarment shall run from the date the determination of noncompliance by the Chief becomes a final order of the Administrator of Apprenticeship.

(c) (1) An affected contractor, subcontractor, or responsible officer may obtain a review of the determination of the Chief imposing the debarment or civil penalty by transmitting a written request to the office of the Administrator within 30 days after service of the determination of debarment or civil penalty. A copy of this report shall also be served on the Chief. If the Administrator does not receive a timely request for review of the determination of debarment or civil penalty made by the Chief, the order shall become the final order of the Administrator.

(2) Within 20 days of the timely receipt of a request for review, the Chief shall provide the contractor, subcontractor, or responsible officer the opportunity to review any evidence the Chief may offer at the hearing. The Chief shall also promptly disclose any nonprivileged documents obtained after the 20-day time limit at a time set forth for exchange of evidence by the Administrator.

(3) Within 90 days of the timely receipt of a request for review, a hearing shall be commenced before the Administrator or an impartial hearing officer designated by the Administrator and possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5.

(4) Within 45 days of the conclusion of the hearing, the Administrator shall issue a written decision affirming, modifying, or dismissing the determination of debarment or civil penalty. The decision shall contain a statement of the factual and legal basis for the decision and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party that the party has filed with the Administrator. Within 15 days of issuance of the decision, the Administrator may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(5) An affected contractor, subcontractor, or responsible officer who has timely requested review and obtained a decision under paragraph (4) may obtain review of the decision of the Administrator by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the final decision. If no timely petition for a writ of mandate is filed, the decision shall become the final order of the Administrator. The decision of the Administrator shall be affirmed unless the petitioner shows that the Administrator abused his or her discretion. If the petitioner claims that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the entire record.

(6) The Chief may certify a copy of the final order of the Administrator and file it with the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order. A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and be given the same preference allowed by the law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section. An awarding body that has withheld funds in response to a determination by the Chief imposing a penalty under this section shall, upon receipt of a certified copy of a final order of the Administrator, promptly transmit the withheld funds, up to the amount of the certified order, to the Administrator.

(d) If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

(1) The contract executed between the contractor and the subcontractor or the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.

(3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

(4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain a declaration signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

(e) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(f) The Chief shall consider, in setting the amount of a monetary penalty, in determining whether a violation is serious, and in determining whether and for how long a party should be debarred for violating this section, all of the following circumstances:

(1) Whether the violation was intentional.

(2) Whether the party has committed other violations of Section 1777.5.

(3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.

(4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.

(5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

If a party seeks review of a decision by the Chief to impose a monetary penalty or period of debarment, the Administrator shall decide de novo the appropriate penalty, by considering the same factors set forth above.

(g) The interpretation of Section 1777.5 and this section shall be in accordance with the regulations of the California Apprenticeship Council. The Administrator may adopt regulations to establish guidelines for the imposition of monetary penalties and periods of debarment and may designate precedential decisions under Section 11425.60 of the Government Code.

SEC. 3. Section 3099 of the Labor Code is amended to read:

3099. The Division of Apprenticeship Standards shall do all of the following:

(a) On or before July 1, 2001, establish and validate minimum standards for the competency and training of electricians through a system of testing and certification.

(b) On or before March 1, 2000, establish an advisory committee and panels as necessary to carry out the functions under this section. There shall be contractor representation from both joint apprenticeship programs and unilateral nonunion programs in the electrical contracting industry.

(c) On or before July 1, 2001, establish fees necessary to implement this section.

(d) On or before July 1, 2001, establish and adopt regulations to enforce this section.

(e) There shall be no discrimination for or against any person based on membership or nonmembership in a union.

As used in this section, "electricians" include all employees who engage in the connection of electrical devices for electrical contractors licensed pursuant to Section 7058 of the Business and Professions Code, specifically, contractors classified as electrical contractors in the Contractors' State License Board Rules and Regulations. This section does not apply to electrical connections under 100 volt-amperes. This section does not apply to persons performing work to which Section 7042.1 of the Business and Professions Code is applicable, or to electrical work ordinarily and customarily performed by stationary engineers.

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Assembly Bill No. 2539

CHAPTER 135

An act to amend Sections 651, 680, 4112, 4982, 4998, 4998.2, 4998.5, 4998.6, 6086.65, and 17537.11 of the Business and Professions Code, to amend Sections 1102.2, 1103, and 2924c of the Civil Code, to amend Sections 131.4, 703.140, and 704.115 of the Code of Civil Procedure, amend Sections 1201, 2210, 2502, 9528, and 9706 of the Commercial Code, to amend Sections 5222, 7236, 14000, 14030, 14030.1, 14035, 14036, and 25207 of the Corporations Code, to amend Sections 1209, 17210, 17284.5, 17620, 23812, 24255, 35012, 35160.5, 37252, 44225.6, 44227, 44259, 44275.3, 44424, 47611.5, 47612.5, 51871.5, 54685.2, 54685.3, 60200.2, 60855, 66293, and 81149 of, to amend and renumber Section 39006 of, and to amend and renumber the heading of Chapter 8 (commencing with Section 60850) of Part 33 of Division 4 of Title 2 of, the Education Code, to amend Section 8040 of the Elections Code, to amend Sections 243, 2040, 3021, 4065, and 5002 of the Family Code, to amend Section 18210 of the Financial Code, to amend Section 55702 of the Food and Agricultural Code, to amend Sections 3540.1, 7222, 15346.9, 18935, 19827.3, 20395, 20397, 20677, 21070.5, 21071, 21073.7, 21370, 21572, 22825.01, 22875, 31469.5, 51298, 53601, 53635, 54985, 69915, 72114.2, and 91007 of the Government Code, to amend Sections 1357.50, 1368, 1368.04, 1370.4, 1374.32, 1386, 1507.3, 1596.7927, 25390.4, 32121.7, 33333.6, 33334.17, 44287, 51451, 104550, 104556, 104557, 112040, 115813, and 128375 of, and to amend and renumber Section 13933 of, the Health and Safety Code, to amend Sections 384, 791.02, 1035, 1765.1, 1874.81, 10123.68, 10145.3, 10169, 10169.2, 10176.61, 11629.92, and 12967 of, and to amend and renumber Sections 1785.89, 10140, 10141, and 12698 of, the Insurance Code, to amend Sections 1174.5, 1777.5, 1777.7, 3762, 6394.5, 6429, 6434, and 6650 of the Labor Code, to amend Sections 273.84, 296.1, 487c, 666, 830.32, 1463, 2962, 6129, 11166.3, 11170.6, 12000, and 13510 of the Penal Code, to amend Section 2357 of the Probate Code, to amend Section 12102 of the Public Contract Code, to amend Sections 2715.5, 31164, and 42923 of the Public Resources Code, to amend Sections 237, 2512, 2613, 6471, and 6472 of the Revenue and Taxation Code, to amend Sections 426, 1666, 5204, 9980, 12808, 12815, 13377, 16020.1, 21051, 22511.56, 34505.9, and 35790.1 of the Vehicle Code, to amend Sections 361.5, 727.3, 727.31, 827, 1788, 1789.5, 9564, 14105.26, and 25002 of the Welfare and Institutions Code, and to amend Section 1 of Chapter 868 of the Statutes of 1998, and Section 7 of Chapter 84 of the Statutes of 1999, relating to maintenance of the codes.

[Approved by Governor July 19, 2000. Filed with Secretary of State July 19, 2000.]

(4) The oversight committee shall be composed of qualified individuals with experience in Holocaust claims cases, similar investigations, archival research, and international law. The oversight committee shall also include Holocaust survivors. No member of the oversight committee shall have a potential or actual conflict of interest, or shall be employed by a person who has a potential or actual conflict of interest.

(5) The appointments shall be expedited because of the urgency due to survivors' needs.

(6) The oversight committee shall have the following authority and shall do all of the following:

(A) Review and make recommendations concerning any insurance settlement negotiation or offer relating to a Holocaust era insurance claim in which the department is involved.

(B) Review and make recommendations to the commissioner on the priorities for expenditure of funds and use of resources by the department for Holocaust era insurance claims related activities.

(C) Recommend whether a proposed settlement of a Holocaust era insurance claim submitted to the committee pursuant to paragraph (7) is equitable before the department finalizes the settlement agreement.

(7) The commissioner, in the event of a proposed settlement of any policy or group of policies relating to Holocaust era insurance claims, shall confer with the committee prior to the department finalizing the settlement agreement. The department may not finalize a proposed settlement of a Holocaust era insurance claim unless the committee, pursuant to subparagraph (C) of paragraph (6), recommends that the proposed settlement is equitable.

(e) The department shall report its progress in implementing this section and its participation in the identification and resolution of insurance claims of Holocaust survivors and their beneficiaries and heirs. The report shall also include an overview of current and anticipated expenditures in implementing this section. The department shall make this report biannually to the insurance and budget committees of the Legislature.

SEC. 123. Section 1174.5 of the Labor Code is amended to read:

1174.5. Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars ($500).

SEC. 124. Section 1777.5 of the Labor Code is amended to read:

1777.5. (a) Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

(b) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to

which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either (1) the apprenticeship standards and apprentice agreements under which he or she is training or (2) the rules and regulations of the California Apprenticeship Council.

(d) When the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this section and may apply to any apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval or denial of the apprenticeship program shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that program. "Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, "contractor" includes any subcontractor under a contractor who performs any public works not excluded by subdivision (o).

(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision

shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this section that has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1-to-5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio, as set forth in this section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1-to-5 ratio set

forth in this section when it finds that any one of the following conditions is met:

(1) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(2) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(3) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(4) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

(*l*) When an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract. At the end of each fiscal year the California Apprenticeship Council shall make grants to each apprenticeship program in proportion to the number of hours of training provided by the program for which the program did not receive contributions, weighted by the regular rate of contribution for the program. These grants shall be made from funds collected by the California Apprenticeship Council during the fiscal year pursuant to this subdivision from contractors that employed registered apprentices but did not contribute to an approved apprenticeship program. All these funds received during the fiscal year shall be distributed as grants.

(n) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

(o) This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days.

(p) All decisions of an apprenticeship program under this section are subject to Section 3081.

SEC. 125. Section 1777.7 of the Labor Code is amended to read:

1777.7. (a) A contractor or subcontractor that knowingly violates Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty shall be based on consideration whether the violation was a good faith mistake due to inadvertence. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(b) (1) In the event a contractor or subcontractor is determined by the Administrator of Apprenticeship to have knowingly violated any provision of Section 1777.5, the Administrator shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on or receive any public works contract for a period of up to one year for the first violation and for a period of up to three years for a second or subsequent violation. Each period of debarment shall run from the date the determination of noncompliance by the Administrator of Apprenticeship.

(2) An affected contractor or subcontractor may obtain a review of the debarment or civil penalty by transmitting a written request to the office of the Administrator within 30 days after service of the order of debarment or civil penalty. If the Administrator receives no request for review within 30 days after service, the order of debarment or civil penalty shall become final for the period authorized.

(3) Within 20 days of the timely receipt of a request for hearing, the Administrator shall provide the contractor or subcontractor the opportunity to review any evidence the Administrator may offer at the hearing. The Administrator shall also promptly disclose to the contractor or subcontractor any nonprivileged documents obtained after the 20-day time limit.

(4) Within 90 days of the timely receipt of the request for hearing, a hearing shall be commenced before an impartial hearing officer

designated by the Administrator and possessing the qualifications of an administrative law judge pursuant to Section 11502 of the Government Code. The contractor or subcontractor shall have the burden of showing compliance with Section 1777.5. The decision to debar shall be reviewed by a hearing officer or court only for abuse of discretion.

(5) Within 45 days of the conclusion of the hearing, the hearing officer shall issue a written decision affirming, modifying, or dismissing the debarment or civil penalty. The decision shall contain a notice of findings, findings, and an order. This decision shall be deemed the final decision of the Administrator and shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Administrator. Within 15 days of issuance of the decision, the hearing officer may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(6) An affected contractor or subcontractor may obtain review of the final decision of the Administrator by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the final decision to debar or to assess a civil penalty. If no petition for a writ of mandate is filed within 45 days after service of the final decision, the order shall become final. If the petitioner claims that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the entire record.

(7) The Administrator may file a certified copy of a final order with the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business.

(c) If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

(1) The contract executed between the contractor and the subcontractor or the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.

(3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

(4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

(d) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first-time violation and with the concurrence of the apprenticeship program, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(e) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(f) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

SEC. 126. Section 3762 of the Labor Code is amended to read:

3762. (a) Except as provided in subdivisions (b) and (c), the insurer shall discuss all elements of the claim file that affect the employer's premium with the employer, and shall supply copies of the documents that affect the premium at the employer's expense during reasonable business hours.

(b) The right provided by this section shall not extend to any document that the insurer is prohibited from disclosing to the employer under the attorney-client privilege, any other applicable privilege, or statutory prohibition upon disclosure, or under Section 1877.4 of the Insurance Code.

(c) An insurer, third-party administrator retained by a self-insured employer pursuant to Section 3702.1 to administer the employer's workers' compensation claims, and those employees and agents specified by a self-insured employer to administer the employer's workers' compensation claims, are prohibited from disclosing or causing to be disclosed to an employer, any medical information, as defined in Section 56.05 of the Civil Code, about an employee who has filed a workers' compensation claim, except as follows:

(1) If the diagnosis of the injury for which workers' compensation is claimed would affect the employer's premium, then an insurer may disclose that diagnosis pursuant to subdivision (a).

in the county, that contributed a positive amount to the county's Educational Revenue Augmentation Fund for the 1998–99 fiscal year. The allocation share for each recipient local agency shall be determined pursuant to the following calculations:

(1) Divide the amount of revenue shifted for the 1998–99 fiscal year from the local agency to the county's Educational Revenue Augmentation Fund by the total amount of revenue shifted for the 1998–99 fiscal year to the county's Educational Revenue Augmentation Fund by all local agencies in the county contributing a positive amount to that fund.

(2) Multiply the ratio determined pursuant to paragraph (1) by the amount of revenues allocated to the county pursuant to paragraph (2) of subdivision (b).

SEC. 176. Any section of any act enacted by the Legislature during the 2000 calendar year that takes effect on or before January 1, 2001, and that amends, amends and renumbers, adds, repeals and adds, or repeals a section that is amended, amended and renumbered, added, repealed and added, or repealed by this act, shall prevail over this act, whether that act is enacted prior to, or subsequent to, the enactment of this act. The repeal, or repeal and addition, of any article, chapter, part, title, or division of any code by this act shall not become operative if any section of any other act that is enacted by the Legislature during the 2000 calendar year and takes effect on or before January 1, 2001, amends, amends and renumbers, adds, repeals and adds, or repeals any section contained in that article, chapter, part, title, or division.

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Assembly Bill No. 921

CHAPTER 903

An act to amend Sections 1777.5, 1777.7, 3070, 3075, and 3080 of, to add Sections 3073.1 and 3098 to, and to add and repeal Section 3073.2 of, the Labor Code, relating to apprenticeship programs.

[Approved by Governor October 9, 1999. Filed with Secretary of State October 10, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 921, Keeley. Apprenticeship programs.

Existing law establishes the California Apprenticeship Council to issue rules and regulations that establish apprenticeship standards, among other things. The council is composed of 14 members appointed by the Governor plus the Director of Industrial Relations or his or her designee, the Superintendent of Public Instruction or his or her designee, and the Chancellor of the California Community Colleges or his or her designee. The Governor's appointees include 6 representatives each from employer and employee organizations, geographically selected, and 2 representatives of the general public. This provision also provides that each member of the council shall receive $50 for each day of actual attendance at council or committee meetings together with actual and necessary traveling expenses.

This bill would provide that the Governor's appointees shall be 6 representatives each from employer organizations that sponsor apprenticeship programs and employee organizations that sponsor apprenticeship programs, geographically selected, and 2 representatives of the general public. This bill would also increase the council members' per diem to $100 for each day of actual attendance at council or committee meetings together with actual and necessary traveling expenses.

Existing law requires the Chief of the Division of Apprenticeship Standards or his or her representative, among other things, to foster, promote, and develop the welfare of the apprentice and industry, improve the working conditions of apprentices, and advance their opportunities for profitable employment.

This bill would additionally require the division to randomly audit all apprenticeship programs during each 5-year period commencing January 1, 2000, to ensure compliance with specified requirements, including industry-specific training criteria that the bill would authorize the division to adopt, as specified. The authorization to adopt these criteria shall be repealed on January 1, 2003, unless a later enacted provision deletes or extends that date. The bill would require every apprenticeship program sponsor to cooperate with the division

in conducting the audit. The audit reports would be presented to the California Apprenticeship Council and made public, except as specified. The chief would recommend remedial action to correct deficiencies and failure to correct them within a reasonable time would be grounds for withdrawing state approval of a program.

Existing law requires contractors on public works who employ journeymen or apprentices to contribute to a fund to administer certain apprenticeship programs, as specified.

This bill would revise those contribution requirements and would provide that, at the end of each fiscal year, the California Apprenticeship Council shall make prescribed grants to apprenticeship programs.

Existing law requires that the ratio of apprentice work to journeyman work performed on public works be not less than one hour of apprentice's work for every 5 hours by a journeyman, except as specified in the case of the land surveyor classification. A violation of this provision is punishable by a civil penalty of $50 per day of noncompliance. In the event of willful noncompliance of this provision, the Director of Industrial Relations would be required to debar the contractor, as specified.

This bill would eliminate the land surveyor exception and increase the civil penalty to $100 for each day of noncompliance. This bill would also impose a civil penalty of $300 for each day of noncompliance in the event of a subsequent violation of this provision within a 3-year period. The bill would provide that where a subcontractor is found to have violated these provisions, the prime contractor shall not be liable, unless the prime contractor had knowledge of the subcontractor's failure to comply or the prime contractor failed to comply with specified requirements with regard to the subcontract. The bill would also revise the procedure for debarment under these provisions.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that apprenticeship programs are a vital part of the educational system in California. It is the purpose and goal of this legislation to strengthen the regulation of apprenticeship programs in California, to ensure that all apprenticeship programs approved under Chapter 4 (commencing with Section 3070) of Division 3 of the Labor Code meet the high standards necessary to prepare apprentices for the workplaces of the future and to prevent the exploitation of apprentices by employers or apprenticeship programs. It is further the intent of the Legislature that apprenticeship programs should make active efforts to recruit qualified men, women, and minorities and train them in the skills needed for the workplace.

SEC. 2. Section 1777.5 of the Labor Code is amended to read:

1777.5. (a) Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

(b) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either (1) the apprenticeship standards and apprentice agreements under which he or she is training or (2) the rules and regulations of the California Apprenticeship Council.

(d) When the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this section and may apply to any apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval or denial of the apprenticeship program shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that the program. "Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, "contractor" includes any subcontractor under a contractor who performs any public works not excluded by subdivision (o).

(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the

awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this section that has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1-to-5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio, as set forth in this section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(1) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(2) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(3) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(4) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

(*l*) When an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract. At the end of each fiscal year the California Apprenticeship Council shall make grants to each apprenticeship program in proportion to the number of hours of training provided by the program for which the program did not receive contributions, weighted by the regular rate of contribution for the program. These grants shall be made from funds collected by the California Apprenticeship Council during the fiscal year pursuant to this subdivision from contractors that employed registered apprentices but did not contribute to an approved apprenticeship program. All these funds received during the fiscal year shall be distributed as grants.

(n) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

(o) This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days.

(p) All decisions of an apprenticeship program under this section are subject to Section 3081.

SEC. 3. Section 1777.7 of the Labor Code is amended to read:

1777.7. (a) A contractor or subcontractor that knowingly violates Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty shall be based on consideration whether the violation was a good faith mistake due to inadvertence. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(b) (1) In the event a contractor or subcontractor is determined by the Administrator of Apprenticeship to have knowingly violated any provision of Section 1777.5, the Administrator shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on or receive any public works contract for a period of up to one year for the first violation and for a period of up to three years for a second or subsequent violation. Each period of debarment shall run from the date the determination of noncompliance by the Administrator of Apprenticeship.

(2) An affected contractor or subcontractor may obtain a review of the debarment or civil penalty by transmitting a written request to the office of the Administrator within 30 days after service of the order of debarment or civil penalty. If the Administrator receives no request for review within 30 days after service, the order of debarment or civil penalty shall become final for the period authorized.

(3) Within 20 days of the timely receipt of a request for hearing, the Administrator shall provide the contractor or subcontractor the opportunity to review any evidence the Administrator may offer at the hearing. The Administrator shall also promptly disclose to the

contractor or subcontractor any nonprivileged documents obtained after the 20-day time limit.

(4) Within 90 days of the timely receipt of the a request for hearing, a hearing shall be commenced before an impartial hearing officer designated by the Administrator and possessing the qualifications of an administrative law judge pursuant to Section 11502 of the Government Code. The contractor or subcontractor shall have the burden of showing compliance with Section 1777.5. The decision to debar shall be reviewed by a hearing officer or court only for abuse of discretion.

(5) Within 45 days of the conclusion of the hearing, the hearing officer shall issue a written decision affirming, modifying, or dismissing the debarment or civil penalty. The decision shall contain a notice of findings, findings, and an order. This decision shall be deemed the final decision of the Administrator and shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Administrator. Within 15 days of issuance of the decision, the hearing officer may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(6) An affected contractor or subcontractor may obtain review of the final decision of the Administrator by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the final decision to debar or to assess a civil penalty. If no petition for a writ of mandate is filed within 45 days after service of the final decision, the order shall become final. If the petitioner claims that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the entire record.

(7) The Administrator may file a certified copy of a final order with the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business.

(c) If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

(1) The contract executed between the contractor and the subcontractor or the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project

pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.

(3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

(4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

(d) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first-time violation and with the concurrence of the apprenticeship program, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(e) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(f) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

SEC. 4. Section 3070 of the Labor Code is amended to read:

3070. There is in the Division of Apprenticeship Standards the California Apprenticeship Council, which shall be appointed by the Governor, composed of six representatives each from employers or employer organizations and employee organizations, that sponsor apprenticeship programs under this chapter, respectively, geographically selected, and of two representatives of the general public. The Director of Industrial Relations, or his or her permanent and best qualified designee, and the Superintendent of Public Instruction, or his or her permanent and best qualified designee, and the Chancellor of the California Community Colleges, or his or her permanent and best qualified designee, shall also be members of the California Apprenticeship Council. The chairperson shall be elected by vote of the California Apprenticeship Council. Beginning with appointments in 1985, three representatives each of employers and employees, and one public representative shall serve until January 15, 1989. In 1987, three representatives each of the employers and employees, and one public representative shall serve until January 15, 1991. Any member whose term expires on January 15, 1986, shall continue to serve until January 15, 1987. Thereafter each member shall serve for a term of four years. Any member appointed to fill a

vacancy occurring prior to the expiration of the term of his or her predecessor shall be appointed for the remainder of that term. Each member of the council shall receive the sum of one hundred dollars ($100) for each day of actual attendance at meetings of the council, for each day of actual attendance at hearings by the council or a committee thereof pursuant to Section 3082, and for each day of actual attendance at meetings of other committees established by the council and approved by the Director of Industrial Relations, together with his or her actual and necessary traveling expenses incurred in connection therewith.

SEC. 5. Section 3073.1 is added to the Labor Code, to read:

3073.1. (a) The division shall randomly audit apprenticeship programs approved under this chapter during each five-year period commencing January 1, 2000, to ensure that the program is complying with its standards, that all on-the-job training is performed by journeymen, that all related and supplemental instruction required by the apprenticeship standards is being provided, that all work processes in the apprenticeship standards are being covered, and that graduates have completed the apprenticeship program's requirements. The division shall examine each apprenticeship program to determine whether apprentices are graduating from the program on schedule or dropping out and to determine whether graduates of the program have obtained employment as journeymen. Every apprenticeship program sponsor shall have a duty to cooperate with the division in conducting an audit.

(b) Audit reports shall be presented to the California Apprenticeship Council and shall be made public, except that the division shall not make public information which would infringe on the privacy of individual apprentices. The division shall recommend remedial action to correct deficiencies recognized in the audit report, and the failure to correct deficiencies within a reasonable period of time shall be grounds for withdrawing state approval of a program. Nothing shall prevent the division from conducting more frequent audits of apprenticeship programs where deficiencies have been identified.

(c) The division shall give priority in conducting audits to programs that have been identified as having deficiencies. The division may conduct simplified audits for programs with fewer than five registered apprentices.

SEC. 6. Section 3073.2 is added to the Labor Code, to read:

3073.2. (a) The California Apprenticeship Council may adopt industry-specific training criteria for use by apprenticeship programs subject to the requirements of this chapter. The adoption of these criteria, as established following notice and workshop, under Section 212.01 of Title 8 of the California Code of Regulations shall not be subject to Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code.

(b) The audits conducted by the division pursuant to Section 3073.1 shall ensure that any applicable training criteria are followed.

(c) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

SEC. 7. Section 3075 of the Labor Code is amended to read:

3075. (a) An apprenticeship program may be administered by a joint apprenticeship committee, unilateral management or labor apprenticeship committee, or an individual employer. Programs may be approved by the chief in any trade in the state or in a city or trade area, whenever the apprentice training needs justify the establishment. Where a collective bargaining agreement exists, a program shall be jointly sponsored unless either party to the agreement waives its right to representation in writing. Joint apprenticeship committees shall be composed of an equal number of employer and employee representatives.

(b) For purposes of this section, the apprentice training needs in the building and construction trades shall be deemed to justify the approval of a new apprenticeship program only if any of the following conditions are met:

(1) There is no existing apprenticeship program approved under this chapter serving the same craft or trade and geographic area.

(2) Existing apprenticeship programs approved under this chapter that serve the same craft or trade and geographic area do not have the capacity, or neglect or refuse, to dispatch sufficient apprentices to qualified employers at a public works site who are willing to abide by the applicable apprenticeship standards.

(3) Existing apprenticeship programs approved under this chapter that serve the same trade and geographic area have been identified by the California Apprenticeship Council as deficient in meeting their obligations under this chapter.

(c) Notwithstanding subdivision (b), the California Apprenticeship Council may approve a new apprenticeship program if special circumstances, as established by regulation, justify the establishment of the program.

SEC. 8. Section 3080 of the Labor Code is amended to read:

3080. (a) For the purpose of providing greater diversity of training or continuity of employment, any apprentice agreement made under this chapter may in the discretion of the California Apprenticeship Council be signed by an association of employers or an organization of employees instead of by an individual employer. In that case, the apprentice agreement shall expressly provide that the association of employers or organization of employees does not assume the obligation of an employer but agrees to use its best endeavors to procure employment and training for an apprentice with one or more employers who will accept full responsibility, as herein provided, for all the terms and conditions of employment and

training set forth in the agreement between the apprentice and employer association or employee organization during the period of the apprentice's employment. The apprentice agreement shall also expressly provide for the transfer of the apprentice, subject to the approval of the California Apprenticeship Council, to an employer or employers who shall sign a written agreement with the apprentice, and if the apprentice is a minor, with the apprentice's parent or guardian, as specified in Section 3079, contracting to employ the apprentice for the whole or a definite part of the total period of apprenticeship under the terms and conditions of employment and training set forth in the apprentice agreement.

(b) All apprenticeship programs with more than one employer or an association of employers shall include provisions sufficient to ensure meaningful representation of the interests of apprentices in the management of the program.

SEC. 9. Section 3098 is added to the Labor Code, to read:

3098. An apprentice registered in an approved apprenticeship program in any of the building and construction trades shall be employed only as an apprentice when performing any construction work for an employer that is a party, individually or through an employer association, to any apprenticeship agreement or standards covering that individual.

O

Assembly Bill No. 302

CHAPTER 220

An act to amend Section 1720.3 of the Labor Code, relating to public works.

[Approved by Governor July 28, 1999. Filed with Secretary of State July 28, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 302, Floyd. Public works: prevailing wages.

(1) Existing law defines the term "public works" for purposes of requirements regarding the payment of prevailing wages, the regulation of working hours, and the securing of workers' compensation for public works projects. Existing law further requires that, except as specified, not less than the general prevailing rate of per diem wages be paid to workers employed on public works and imposes misdemeanor penalties for a violation of this requirement.

Existing law provides that for the purposes of provisions of law relating to the payment of prevailing wages, "public works" means, among other things, the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any state agency, including the California State University and the University of California.

This bill would revise the definition of "public works" for these purposes to include the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any political subdivision of the state, thereby requiring the payment of prevailing wages in connection with all such contracts involving any local public entity.

Because the violation of prevailing wage requirements by local public entities when engaged in these public works projects would result in the imposition of misdemeanor penalties, this bill would impose a state-mandated local program.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 1720.3 of the Labor Code is amended to read:

1720.3. For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

Senate Bill No. 966

CHAPTER 83

An act to amend Sections 2530.2, 2725.1, 4052, 4827, 10145, 10177, 10229, 10232, 11018.12, 17539.15, 17550.14, 17550.16, 17550.23, 17550.41, 19950.2, 21701.1, and 23104.2 of, and to amend and renumber Section 730 of, the Business and Professions Code, to amend Sections 1102.6c, 1739.7, 1793.22, 1815, and 3269 of the Civil Code, to amend Sections 631 and 1167.3 of the Code of Civil Procedure, to amend Sections 25102 and 28956 of the Corporations Code, to amend Sections 8927, 42238.95, 44259.3, 44403, 44579.4, 44731, 51201.5, 51554, 51555, 51871, 52122, 54745, 54748, 54761.3, 60603, 60640, 69621, and 89010 of the Education Code, to amend Sections 10262, 15112, and 15151 of the Elections Code, to amend Sections 4252, 4351, 4901, 6380, 7572, and 7575 of the Family Code, to amend Sections 6420 and 7151 of the Fish and Game Code, to amend Sections 221, 5852, 14651, 20797, and 31753 of the Food and Agricultural Code, to amend Sections 3517.65, 4560, 6253, 6505.5, 7073, 7260, 7262.5, 9359.01, 12652, 13965.2, 14838.5, 18523.3, 19141.3, 19175.6, 19576.5, 19582.3, 20068.2, 20677, 21028, 22200, 22209, 22754.5, and 54975 of, to amend the heading of Article 5 (commencing with Section 63043) of Chapter 2 of Division 1 of Title 6.7 of, to amend and renumber Sections 66400, 66401, 66402, and 66403 of, and to amend and renumber the heading of Chapter 6 (commencing with Section 66400) of Division 1 of Title 7 of, and to repeal Section 54953 of, the Government Code, to amend Sections 1206, 1261.5, 1261.6, 1300, 1351.2, 1357.09, 1357.50, 1357.51, 1367.24, 1442.5, 1502.6, 1522, 1746, 1771.9, 1797.191, 18020, 18025.5, 25989.1, 33392, 33492.22, 44015, 111940, 120440, 124980, and 129820 of, to amend and renumber Section 50518 of, and to repeal Section 33298 of, the Health and Safety Code, to amend Sections 1063.6, 1765.1, 10095, 10116.5, 10194.8, 10232.8, 10273.4, 10700, and 10841 of, and to amend and renumber Sections 12963.96 and 12963.97 of, the Insurance Code, to amend Sections 138.4, 201.5, 1771.5, 3716.2, 4707, and 5433 of the Labor Code, to amend Sections 136.2, 148.10, 290, 298, 299, 299.6, 350, 550, 594, 626.9, 653m, 790, 831.5, 1203.097, 1269b, 1347, 3003, 4536.5, 5066, 6051, 6065, 6126, 12071, 12085, 12086, 12370, 13515.55, and 13602 of the Penal Code, to amend Section 10218, 14575, and 33001 of the Public Resources Code, to amend Sections 64, 401.15, 995.2, 3772.5, 17275.6, 19057, 19141.6, 19271, 23038.5, 23610.5, 23701t, 23704, 24416.2, 41136, and 65004 of the Revenue and Taxation Code, to amend Section 1095 of the Unemployment Insurance Code, to amend Sections 2478, 2810, 4466, 11614, and 40000.15 of the Vehicle Code, to amend Section 1062 of the Water Code, to amend Sections 319, 366.26, 781, 1801, 5768.5, 6609.1, 10980, 11369, 11401, 12302.3, 16118, and 16501.1 of, to amend and renumber Sections 1790, 1791, 1792, 1793,

being provided, the termination of benefits, and an accounting of the benefits paid, with copies to the administrative director.

(c) Prescribe reasonable rules and regulations for serving on the employee notice of rejection of any liability for compensation and the remedies available to the employee, and the employee's right to seek information and advice from an information and assistance officer or an attorney.

SEC. 131. Section 201.5 of the Labor Code is amended to read:

201.5. An employer who lays off an employee engaged in the production of motion pictures, whose unusual or uncertain terms of employment require special computation in order to ascertain the amount due, shall be deemed to have made immediate payment of wages within the meaning of Section 201 if the wages of the employee are paid by the next regular payday, as prescribed by Section 204, following the layoff. For purposes of this section, "layoff" means the termination of employment of an employee where the employee retains eligibility for reemployment with the employer. For purposes of this section, "discharge" means the unconditional termination of employment of an employee. However, if an employee is discharged, payment of wages shall be made within 24 hours after discharge, excluding Saturdays, Sundays, and holidays. For purposes of this section, a payment required by this section may be mailed and the date of mailing is the date of payment.

The Legislature finds and determines that special provision must be made for the payment of wages on layoff and discharge of persons engaged in the production of motion pictures because their employment at various locations is often far removed from the employer's principal administrative offices and the unusual hours of their employment in this industry is often geared to the completion of a portion of a picture, which time of completion may have no relation to normal working hours.

SEC. 132. Section 1771.5 of the Labor Code is amended to read:

1771.5. (a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

SEC. 133. Section 3716.2 of the Labor Code is amended to read:

3716.2. Notwithstanding the precise elements of an award of compensation benefits, and notwithstanding the claim and demand for payment being made therefor to the director, the director, as administrator of the Uninsured Employers Fund, shall pay the claimant only such benefits allowed, recognizing proper liens thereon, that would have accrued against an employer properly insured for workers' compensation liability. The Uninsured Employers Fund shall not be liable for any penalties or for the payment of interest on any awards. However, in civil suits by the director to enforce payment of an award, including procedures pursuant to Section 3717, the total amount of the award, including interest, other penalties, and attorney's fees granted by the award, shall be sought. Recovery by the director, in a civil suit or by other means, of awarded benefits in excess of amounts paid to the claimant by the Uninsured Employers Fund shall be paid over to the injured employee or his representative, as the case may be.

SEC. 134. Section 4707 of the Labor Code is amended to read:

4707. (a) Except as provided in subdivision (b), no benefits, except reasonable expenses of burial not exceeding one thousand dollars ($1,000), shall be awarded under this division on account of the death of an employee who is an active member of the Public Employees' Retirement System unless it is determined that a special death benefit, as defined in the Public Employees' Retirement Law, or the benefit provided in lieu of the special death benefit in Sections 21547 and 21548 of the Government Code, will not be paid by the Public Employees' Retirement System to the surviving spouse or children under 18 years of age, of the deceased, on account of the death, but if the total death allowance paid to the surviving spouse and children is less than the benefit otherwise payable under this division the surviving spouse and children are entitled, under this division, to the difference.

(c) It is the intent of the Legislature that any research activities undertaken by the State Department of Education pursuant to this section be funded by any federal funds appropriated to the State Department of Education for child care capacity-building efforts pursuant to Item 6110-196-0001 of the Budget Act of 1998.

SEC. 216. Section 11 of Chapter 760 of the Statutes of 1998 is amended to read:

Sec. 11. (a) Section 5 of this act shall become operative only if Section 190 of the Penal Code, as amended by Section 1 of Chapter 413 of the Statutes of 1997, is rejected by the voters at the statewide election held on June 2, 1998, in which case Section 6 of this act shall not become operative and shall not be submitted to the voters.

(b) Section 6 of this act shall become operative if Section 190 of the Penal Code, as amended by Section 1 of Chapter 413 of the Statutes of 1997, is approved by the voters at the statewide election held on June 2, 1998, in which case Section 5 of this act shall not become operative and shall not be submitted to the voters.

SEC. 217. Section 12 of Chapter 760 of the Statutes of 1998 is amended to read:

Sec. 12. Sections 5 and 6 of this act affect an initiative statute and shall become effective only when submitted to, and approved by, the voters pursuant to subdivision (c) of Section 10 of Article II of the California Constitution and in accordance with the provisions of Section 11 of this act.

SEC. 218. Section 10 of Chapter 969 of the Statutes of 1998 is amended to read:

Sec. 10. All funds appropriated and positions created for support of the office of the Inspector General in Item 0550-001-0001 of the Budget Act of 1998 shall be transferred upon approval of the Department of Finance to the office of the Inspector General as established pursuant to Section 2 of this act.

SEC. 219. Any section of any act enacted by the Legislature during the 1999 calendar year that takes effect on or before January 1, 2000, and that amends, amends and renumbers, adds, repeals and adds, or repeals a section that is amended, amended and renumbered, repealed and added, or repealed by this act, shall prevail over this act, whether that act is enacted prior to, or subsequent to, the enactment of this act. The repeal, or repeal and addition, of any article, chapter, part, title, or division of any code by this act shall not become operative if any section of any other act that is enacted by the Legislature during the 1999 calendar year and takes effect on or before January 1, 2000, amends, amends and renumbers, adds, repeals and adds, or repeals any section contained in that article, chapter, part, title, or division.

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Senate Bill No. 16

CHAPTER 30

An act to amend Sections 1773 and 1773.1 of, to add Section 1773.9 to, and to repeal Section 1773.8 of, the Labor Code, relating to public works.

[Approved by Governor June 1, 1999. Filed with Secretary of State June 1, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

SB 16, Burton. Public works: prevailing wages.

(1) Existing law requires the body awarding any contract for public work to include in the contract specifications a requirement requiring the payment of travel and subsistence payments to each workman needed to execute the work, as those payments are defined in the applicable collective bargaining agreements.

This bill would repeal this provision.

(2) Existing law requires, except for public works projects of $1,000 or less, that workers employed on public works be paid not less than the general prevailing rate of per diem wages for work of a similar character in the locality that the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed, as provided in specified provisions. Existing law requires the body awarding a contract for public work to obtain from the Director of Industrial Relations the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed. Existing law specifies that the holidays upon which the prevailing rate of per diem wages shall be paid need not be specified by the awarding body but shall be all holidays recognized in the collective bargaining agreement.

This bill would provide that the holidays upon which the prevailing rate of per diem wages shall be paid shall be all holidays recognized by the applicable collective bargaining agreement and that if the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided by a specified provision of existing law.

This bill would specify the methodology that the Director of Industrial Relations is to use to determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed, including the rate for holiday and overtime work.

(3) Existing law requires that the representative of any craft, classification, or type of worker needed to execute a public works contract entered into with the state to file with the Department of Industrial Relations fully executed copies of collective bargaining

agreements for the particular craft, classification, or type of work involved for the purposes of determining the per diem wages.

This bill would require the representative to file with the department an executed statement of the collectively bargained wage rates for the particular craft, classification, or type of work involved. The bill would provide that employer payments for per diem wages are deemed to include apprenticeship or other training programs authorized by an existing provision of law so long as the cost of training is reasonably related to the amount of the contributions.

The people of the State of California do enact as follows:

SECTION 1. Section 1773 of the Labor Code is amended to read:

1773. The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director of Industrial Relations. The holidays upon which those rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the applicable collective bargaining agreement. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code.

In determining the rates, the Director of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and the rates that may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved. The rate fixed for each craft, classification, or type of work shall be not less than the prevailing rate paid in the craft, classification, or type of work.

If the director determines that the rate of prevailing wage for any craft, classification, or type of worker is the rate established by a collective bargaining agreement, the director may adopt that rate by reference as provided for in the collective bargaining agreement and that determination shall be effective for the life of the agreement or until the director determines that another rate should be adopted.

SEC. 2. Section 1773.1 of the Labor Code is amended to read:

1773.1. Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs

authorized by Section 3093 so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining per diem wages for contracts entered into with the state, the representative of any craft, classification, or type of worker needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations an executed statement of the collectively bargained wage rates for the particular craft, classification, or type of work involved. The statement of rates shall be filed within 10 days after the rates have been negotiated and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids.

SEC. 3. Section 1773.8 of the Labor Code is repealed.

SEC. 4. Section 1773.9 is added to the Labor Code, to read:

1773.9. (a) The Director of Industrial Relations shall use the methodology set forth in subdivision (b) to determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed.

(b) The general prevailing rate of per diem wages includes all of the following:

(1) The basic hourly wage rate being paid to a majority of workers engaged in the particular craft, classification, or type of work within the locality and in the nearest labor market area, if a majority of the workers is paid at a single rate. If no single rate is being paid to a majority of the workers, then the single rate being paid to the greatest number of workers, or modal rate, is prevailing. If a modal rate cannot be determined, then the director shall establish an alternative rate, consistent with the methodology for determining the modal rate, by considering the appropriate collective bargaining agreements, federal rates, rates in the nearest labor market area, or other data such as wage survey data.

(2) Other employer payments included in per diem wages pursuant to Section 1773.1 and as included as part of the total hourly wage rate from which the basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, the director shall establish a prevailing employer payment rate by the same procedure set forth in paragraph (1).

(3) The rate for holiday and overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, the rate for holidays and overtime work, if any, included with the prevailing basic hourly rate of pay shall be prevailing.

(c) If the director determines that the general prevailing rate of per diem wages is the rate established by a collective bargaining

agreement, and that the collective bargaining agreement contains definite and predetermined changes during its term that will affect the rate adopted, the director shall incorporate those changes into the determination. Predetermined changes that are rescinded prior to their effective date shall not be enforced.

SEC. 5. The Legislature declares that the intent of Section 1773.9 of the Labor Code, as added by Section 4 of this act, is to give effect to Assembly Concurrent Resolution No. 17 of the 1997–98 Regular Session of the Legislature (Res. Ch. 34, Stats. 1997) by codifying the methodology for calculating the general prevailing rate of per diem wages. In Assembly Concurrent Resolution No. 17, the Legislature declared that it "has relied on the long-established definitions of general prevailing rate of per diem wages in amending and extending the prevailing wage law contained in the California Labor Code on numerous occasions, and that it would be contrary to the intent of the Legislature for those definitions to be changed by administrative action, because the definitions have become incorporated by implication into these statutory provision."

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Assembly Bill No. 2803

CHAPTER 485

An act to amend Sections 4840, 5040, 5051, 5681, 6009.3, 7507.10, 10085.5, 10133.1, 10133.15, 10133.5, 10145, 10165, 10231, 10231.2, 10232, 10232.1, 10232.4, 10236, 10236.2, 11000.1, 11010.2, 11010.4, 11018.3, 11018.12, 17505.2, 17538, 17762, 19556, 19846A, 19847A, 19942, 22252.5, 23817.5, 24045.14, 24045.15, and 25503.30 of, and to repeal Section 10223 of, the Business and Professions Code, to amend Sections 1714.45 and 2924c of, and to amend and renumber Section 3333.4 of, the Civil Code, to amend Sections 14312, 15052, and 16956 of the Corporations Code, to amend Sections 11301, 17016, 17203.5, 17591, 19116, 27405, 44279.7, 44306, 44308, 44759.4, 52122, 52122.1, 52124, 52181, 52183, 60640, 69621, 69629, and 89010 of, and to amend and renumber Section 17883 of, the Education Code, to amend Sections 3030, 4901, 7552, 7571, 7572, and 7575 of the Family Code, to amend Sections 1505, 13081, and 22050 of the Financial Code, to amend Sections 1348.2, 2052.1, 4600, and 7151 of, and to repeal Section 4606 of, the Fish and Game Code, to amend Section 12803 of, to repeal the heading of Article 2 (commencing with Section 11241) of Chapter 2 of Part 4 of Division 5 of, to repeal the headings of Chapter 4 (commencing with Section 16701) and Chapter 5 (commencing with Section 16801) of Part 1 of Division 9 of, and to repeal the heading of Article 5 (commencing with Section 39461) of Chapter 8 of Part 3 of Division 15 of, the Food and Agricultural Code, to amend Sections 6254, 12940, 15814.26, 15814.27, 21290, 22825.5, 51017.1, 53125, 54902.5, 73759, 75050, and 95022 of, to amend and renumber the heading of Chapter 2.1 (commencing with Section 68650) of Title 8 of, to amend and renumber Sections 68650, 68651, 68652, 68653, 68654, 68655, and 68656 of, to repeal Section 29550.2 of, and to repeal Chapter 12.8 (commencing with Section 7070) of Division 7 of Title 1 of, the Government Code, to repeal Section 651 of the Harbors and Navigation Code, to amend Sections 1206, 1357.52, 1746, 44056, 44401, 102425, and 111940 of, to amend and renumber Sections 40928 and 40929 of, and to amend and renumber the heading of Article 1.5 (commencing with Section 42320) of Chapter 4 of Part 4 of, the Health and Safety Code, to amend Sections 1760.5, 10273.4, 10700, 10841, and 14029 of the Insurance Code, to amend Sections 1295.5, 1776, 1813, 3710.3, 4064, 4600.3, and 5433 of the Labor Code, to amend Section 1011 of the Military and Veterans Code, to amend Sections 290, 290.4, 629.82, 830.3, 1054.2, 1203.1d, 11167.5, and 13764 of the Penal Code, to amend Section 22050 of the Public Contract Code, to amend Sections 6353 and 130051.18 of the Public Utilities Code, to amend Sections 69.5, 95.31, 97.3, 619, 3772.5, 7273, 7284.6, 7284.7, 17053.5, 18804, 18872, 19141.6, 19271, 19533, and 41136 of, and to

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commissioner in writing 30 days from the cessation. If notice is given, the license shall remain in force for a reasonable length of time to be determined by the rules of the commissioner pending the qualifications, as provided in this chapter, of another manager. If the licensee fails to notify the commissioner within the 30-day period, his or her license shall be subject to suspension or revocation and may be reinstated only upon the filing of an application for reinstatement, payment of the reinstatement fee, if any is due, and the qualification of a manager as provided herein.

(d) Every manager shall renew his or her authority by satisfying the requirements of Article 8 (commencing with Section 14090).

SEC. 120. Section 1295.5 of the Labor Code is amended to read:

1295.5. (a) Notwithstanding Section 1391 of this code or Section 49116 of the Education Code, minors 14 years of age and older may be employed during the hours permitted by subdivision (b) to perform sports-attending services in professional baseball as enumerated in subsection (b) of Section 570.35 of Title 29 of the Code of Federal Regulations. No employer may employ a minor 14 or 15 years of age to perform sports-attending services in professional baseball without the prior written approval of either the school district of the school in which the minor is enrolled or the county board of education of the county in which that school district is located.

(b) Any minor 14 or 15 years of age who performs sports-attending services in professional baseball pursuant to subdivision (a) may be employed outside of school hours until 12:30 a.m. during any evening preceding a nonschoolday and until 10 p.m. during any evening preceding a schoolday. No employer may employ a minor 14 or 15 years of age to perform sports-attending services in professional baseball pursuant to subdivision (a) for more than five hours in any schoolday, for more than 18 hours in any week while school is in session, for more than eight hours in any nonschoolday, or for more than 40 hours in any week that school is not in session. An employer may employ a minor 16 or 17 years of age outside of school hours to perform sports-attending services in professional baseball pursuant to subdivision (a) for up to five hours in any schoolday.

(c) The school authority issuing the permit to the minor to perform sports-attending services in professional baseball shall both (1) provide the local office of the Division of Labor Standards Enforcement with a copy of the permit within five business days after the date the permit is issued and (2) monitor the academic achievement of the minor to ensure that the educational progress of the minor is being maintained or improves during the period of employment.

SEC. 121. Section 1776 of the Labor Code, as amended by Section 3 of Chapter 757 of the Statutes of 1997, is amended to read:

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement, shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall become operative January 1, 2003.

SEC. 122. Section 1813 of the Labor Code, as amended by Section 5 of Chapter 757 of the Statutes of 1997, is amended to read:

1813. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which the workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him or her under the contract.

This section shall become operative January 1, 2003.

SEC. 123. Section 3710.3 of the Labor Code is amended to read:

3710.3. Whenever a stop order has been issued pursuant to Section 3710.1 to a motor carrier of property subject to the jurisdiction and control of the Department of Motor Vehicles or to a household goods carrier, passenger stage corporation, or charter-party carrier of passengers subject to the jurisdiction and control of the Public Utilities Commission, the director shall transmit

effect on or before January 1, 1999, amends, amends and renumbers, adds, repeals and adds, or repeals any section contained in that article, chapter, part, title, or division.

Assembly Bill No. 1569

CHAPTER 443

An act to amend Section 1777.1 of the Labor Code, and to amend Section 4107 of, and to add Section 6109 to, the Public Contract Code, relating to public works.

[Approved by Governor September 13, 1998. Filed with Secretary of State September 14, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1569, Committee on Labor and Employment. Public works: contractor eligibility.

Under existing law, whenever a contractor or subcontractor performing a public works project is found by the Labor Commissioner to be either in violation of certain provisions of law, with intent to defraud, or in willful violation of those provisions of law, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest is ineligible to bid on or to receive a public works contract for specified periods of time.

This bill would provide that the commissioner may also deny a contractor or subcontractor the ability to bid on or be awarded a contract for a public works contract, or to perform work as a subcontractor on a public works project, if he or she is found to be in violation of those laws under those same circumstances.

The bill also would require, not less than semiannually, the commissioner to publish and distribute to awarding bodies a list of contractors that are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project, as specified.

This bill would provide that any contract on a public works project entered into between a contractor and a debarred subcontractor is void.

This bill also would provide that a public entity may not permit a contractor or subcontractor who is ineligible to bid or work on, or be awarded, a public works project, as specified, to bid on, be awarded, or perform work as a subcontractor on, a public works project, and would require that every public works project contain a provision regarding this prohibition.

The people of the State of California do enact as follows:

SECTION 1. Section 1777.1 of the Labor Code is amended to read:

1777.1. (a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible for a period of not less than one year or more than three years to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(c) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

Not less than semiannually, the Labor Commissioner shall publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project pursuant to this chapter. The list shall contain the name of the contractor, the Contractor's State License Board license number of the contractor, and the effective period of debarment of the contractor.

(d) The Labor Commissioner shall adopt rules and regulations for the administration and enforcement of this section, the definition of terms, and appropriate penalties.

SEC. 2. Section 4107 of the Public Contract Code is amended to read:

4107. A prime contractor whose bid is accepted may not:

(a) Substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in Section 4107.5, consent to the substitution of another person as a subcontractor in any of the following situations:

(1) When the subcontractor listed in the bid after having had a reasonable opportunity to do so fails or refuses to execute a written contract, when that written contract, based upon the general terms, conditions, plans and specifications for the project involved

or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.

(2) When the listed subcontractor becomes bankrupt or insolvent.

(3) When the listed subcontractor fails or refuses to perform his or her subcontract.

(4) When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor as set forth in Section 4108.

(5) When the prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions set forth in Section 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error.

(6) When the listed subcontractor is not licensed pursuant to the Contractors License Law.

(7) When the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

(8) When the listed subcontractor is ineligible to work on a public works project pursuant to Section 1777.1 or 1777.7 of the Labor Code.

Prior to approval of the prime contractor's request for the substitution the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified shall have five working days within which to submit written objections to the substitution to the awarding authority. Failure to file these written objections shall constitute the listed subcontractor's consent to the substitution.

If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

(b) Permit a subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the original bid, without the consent of the awarding authority, or its duly authorized officer.

(c) Other than in the performance of "change orders" causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which his or her original bid did not designate a subcontractor.

SEC. 3. Section 6109 is added to the Public Contract Code, to read:

6109. (a) A public entity, as defined in Section 1100, may not permit a contractor or subcontractor who is ineligible to bid or work on, or be awarded, a public works project pursuant to Section 1777.1 or 1777.7 of the Labor Code to bid on, be awarded, or perform work as a subcontractor on, a public works project. Every public works project shall contain a provision prohibiting a contractor from performing work on a public works project with a subcontractor who is ineligible to perform work on the public works project pursuant to Section 1777.1 or 1777.7 of the Labor Code.

(b) Any contract on a public works project entered into between a contractor and a debarred subcontractor is void as a matter of law. A debarred subcontractor may not receive any public money for performing work as a subcontractor on a public works contract, and any public money that may have been paid to a debarred subcontractor by a contractor on the project shall be returned to the awarding body. The contractor shall be responsible for the payment of wages to workers of a debarred subcontractor who has been allowed to work on the project.

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Senate Bill No. 1328

CHAPTER 757

An act to amend, add, and repeal Sections 1775, 1776, and 1813 of the Labor Code, relating to public works.

[Approved by Governor October 7, 1997. Filed with Secretary of State October 7, 1997.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1328, Brulte. Public works: prevailing wages.

Existing law requires, except for public works projects of $1,000 or less, not less than the general prevailing rate of per diem wages to be paid to all workers employed on a public works project. Existing law imposes upon the contractor a penalty of $50 for each calendar day, or portion thereof, for each worker paid less than that prevailing rate for work performed for the contractor under the public works contract or for work performed for any subcontractor under the contractor. Existing law also requires the contractor to pay the difference in the amount of the prevailing wage rate that was due each employee of the contractor or a subcontractor and the amount that was actually paid to each employee.

This bill would make subcontractors that violate the above-described prevailing wage requirement liable for the applicable penalty and amounts due workers of the subcontractor who were paid wages less than, and in violation of, prevailing wage requirements. The bill would provide that, if a worker employed by a subcontractor on a public works project is not paid the prevailing wage by the subcontractor, the prime contractor of the project is not liable for any of those penalties or amounts otherwise due under that existing law unless the prime contractor had knowledge of that failure of the subcontractor or unless the prime contractor failed to perform certain duties specified in the bill.

The bill would require a contractor to withhold moneys due a subcontractor in an amount sufficient to pay the wages that are the subject of a claim filed with the Division of Labor Standards Enforcement, as directed by the division, if the body awarding the public works contract has not withheld sufficient moneys to pay the wage claims. The bill would require the contractor to pay those moneys to the subcontractor after receipt of notification that the claim has been resolved, or to pay those moneys to the awarding body, under certain circumstances. The bill would require unpaid wages determined owed to workers who cannot be located after a diligent search by the Labor Commissioner to be deposited in the Industrial Relations Unpaid Wage Fund.

Existing law authorizes the Division of Labor Standards Enforcement to maintain an action in any court of competent jurisdiction to recover from a contractor engaged in public works the penalties and other amounts determined by the Labor Commissioner to be due when the contractor has not paid the prevailing wage. Existing law requires the division to commence this action not later than 90 days after the filing of a valid notice of completion or not later than 90 days after acceptance of the public work, whichever last occurs.

This bill would increase the time period for commencing that action from 90 days to 180 days after either of those events, whichever last occurs.

Existing law imposes upon a contractor a penalty of $25 for each worker employed in the execution of a public works contract by the contractor or by any subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of specified law.

This bill would make that penalty applicable to subcontractors violating those provisions. The bill would impose a state-mandated local program by requiring the body awarding a public works contract to report violations of these working-hours requirements to the division, rather than to the officer authorized to pay the contractor, as is provided by existing law.

The changes made by the bill to existing law would be repealed on January 1, 2003.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or

her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

This section shall become operative on January 1, 2003.

SEC. 2. Section 1775 is added to the Labor Code, to read:

1775. (a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her.

The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or the willful failure by the contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor or subcontractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. If the Division of

Labor Standards Enforcement determines that employees of a subcontractor were not paid the general prevailing rate of per diem wages and if the body awarding the contract under which the employees performed work did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the contractor shall withhold an amount of moneys due the subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by the Division of Labor Standards Enforcement. The contractor shall pay any money retained from and owed to a subcontractor upon receipt of notification by the Division of Labor Standards Enforcement that the wage complaint has been resolved. If notice of the resolution of the wage complaint has not been received by the contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, whichever occurs later, the contractor shall pay all moneys retained from the subcontractor to the awarding body. The moneys shall be retained by the awarding body pending the final decision of an enforcement action, and be forwarded to the Labor Commissioner for disbursement pursuant to subdivision (d) if the subcontractor does not prevail in the action. Wages for workers who cannot be located after a diligent search by the Labor Commissioner shall be deposited in the Industrial Relations Unpaid Wage Fund pursuant to subdivision (c) of Section 96.7. Penalties shall be paid into the General Fund.

If the subcontractor prevails in the enforcement action, the awarding body shall release any funds retained pursuant to this subdivision to the contractor within 10 working days from the date of the final decision of the court.

(d) To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section or Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the division, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor and subcontractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor and subcontractor to establish that the penalties and amounts demanded in the action are not due. The contractor and subcontractor shall be

jointly and severally liable in an enforcement action for any wages due. Following entry of a judgment for joint and several liability, the division shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim for wages against the contractor. From the amount collected from the subcontractor, the wage claim shall be satisfied prior to the amount being applied to penalties.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

(e) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

SEC. 3. Section 1776 of the Labor Code is amended to read:

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

This section shall become operative January 1, 2003.

SEC. 4. Section 1776 is added to the Labor Code, to read:

1776. (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the

records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

SEC. 5. Section 1813 of the Labor Code is amended to read:

1813. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him under the contract.

This section shall become operative January 1, 2003.

SEC. 6. Section 1813 is added to the Labor Code, to read:

1813. The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work,

the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

SEC. 7. All contracts that are governed by Section 1775, 1776, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720 of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects.

SEC. 8. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Notwithstanding Section 17580 of the Government Code, unless otherwise specified, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

O

CHAPTER 17

An act to amend Sections 30, 1680, 2052.5, 2365, 3041.1, 3041.3, 7044.2, 9884, 10250.2, 17206, 24071.2, and 25662 of, and to amend and renumber Section 11018.11 of, the Business and Professions Code, to amend Sections 1365 and 1375 of, and to amend and renumber Sections 1861.607 and 1861.608 of, the Civil Code, to amend Section 1201 of the Commercial Code, to amend Sections 8450, 15301, 15320, 15327, 15356, 15357, 15359, 15359.2, 42238.145, 44254, 52335.9, 52487, and 76002 of, to amend and renumber the heading of Article 6 (commencing with Section 60350) of Chapter 2 of Part 33 of, and to repeal Section 87869 of, the Education Code, to amend Sections 2157 and 12106 of, and to repeal the heading of Division 0.5 of, the Elections Code, to amend and renumber the heading of Division 14 (commencing with Section 10100) of the Family Code, to amend Sections 17207, 21301, and 21304 of the Financial Code, to amend Sections 3332, 12648, 12815, 13144, and 46003.5 of the Food and Agricultural Code, to amend Sections 951, 8670.7, 8670.13.2, 8670.21, 11504, 15363.7, 15379.28, 30054, 30061, 30064, 50030, and 65850.2 of the Government Code, to amend Sections 1226, 1250.2, 1367, 1585, 11758.46, 13113, 19183, 19825, 19881, 25143.2, 25179.8, 25299.92, 25330.4, 25532, 25534, 25538, 25548.1, 33459.1, 33493.4, 34120, 41751, 44081, 44243.5, and 129885 of, to amend and renumber Sections 11527.3 and 27604 of, and to amend the heading of Article 11 (commencing with Section 25299.90) of Chapter 6.75 of Division 20 of, the Health and Safety Code, to amend Sections 742.33, 10123.13, 10145.3, 10164.2, 10509.963, and 10509.975 of the Insurance Code, to amend Sections 1777.5 and 6500 of the Labor Code, to amend Sections 186.2, 273.1, 290, 290.4, 311, 350, 831.5, 1295, 1529, 4415, 7500, 7501, 7515, 11106, 12033, 12071, 12072, 12078, 12084, and 12403.7 of, to amend the heading of Article 8 (commencing with Section 12800) of Chapter 6 of Title 2 of Part 4 of, and to repeal Sections 269, 312.6, 312.7, and 667.61 of, the Penal Code, to amend Sections 4576.1, 6817, 42010, 42350, 43210, and 43211 of, and to repeal Section 3493 of, the Public Resources Code, to amend Sections 368, 489.1, 740.4, 5322, and 125105 of the Public Utilities Code, to amend Sections 401.11, 2188.8, 2611.7, 4528, 10753, and 19141.6 of, to amend and renumber Sections 410.10 and 19442 of, to amend, repeal, and add Section 69.5 of, and to repeal Section 401.10 of, the Revenue and Taxation Code, to amend Sections 3016, 22651.2, and 40513 of the Vehicle Code, to amend Section 13399.3 of the Water Code, to amend Sections 207.1, 366.21, 5778, 7325, 11462, and 14490 of, and to repeal Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of, the Welfare and Institutions Code, and to amend Section 6 of Chapter 920 of the

delivery date shown on an express, certified, or registered mail receipt form of the United States Postal Service or by a commercial carrier, if delivered by commercial carrier, or the earlier of (1) two business days after the request was postmarked by the United States Postal Service or (2) one business day before the date stamped received by the insurer or servicing agent. For purposes of this subdivision, "business day" has the meaning set forth in subdivision (g) of Section 1215. Postmarks generated by postage meters not located at an office of the United States Postal Service are to be disregarded.

(g) This section does not alter a contractual provision governing calculation of cash or surrender or other values. The effective date established by subdivision (b) is intended to establish a date certain on which a policyholder may rely in determining when the 45-day period specified in subdivision (a) begins to run. Subdivision (b) is not intended to advance a date otherwise provided by contract that is triggered by a request to surrender. An insurer may request information in addition to that listed in subdivision (b). However, an insurer's request for additional information does not delay an effective date established by a policyholder's compliance with subdivision (b).

SEC. 89. Section 10509.963 of the Insurance Code is amended to read:

10509.963. If the commissioner has reason to believe that any insurer has violated this chapter, the commissioner may request and the insurer shall file both of the following:

(a) An example of the annual report to the policy owner with notice of adverse change in nonguaranteed elements.

(b) An example of an illustration.

SEC. 90. Section 10509.975 of the Insurance Code is amended to read:

10509.975. (a) A life insurer shall provide to all prospective insureds a buyer's guide prior to accepting the applicant's initial premium or premium deposit. However, if the policy for which application is made contains an unconditional refund provision of at least 10 days, the buyer's guide shall be delivered with the policy or prior to delivery of the policy.

(b) For the purposes of this chapter, a buyer's guide is a document that contains, and is limited to, the current buyer's guide recommended for use by the National Association of Insurance Commissioners.

SEC. 91. Section 1777.5 of the Labor Code is amended to read:

1777.5. Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he

or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee that includes an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There is an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman or, in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. The joint apprenticeship committee has the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but, where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

SEC. 92. Section 6500 of the Labor Code is amended to read:

6500. (a) For those employments or places of employment that by their nature involve a substantial risk of injury, the division shall require the issuance of a permit prior to the initiation of any practices, work, method, operation, or process of employment. The permit requirement of this section is limited to employment or places of employment that are any of the following:

addition, of any article, chapter, part, title, or division of any code by this act shall not become operative if any section of any other act that is enacted by the Legislature during the 1997 calendar year and takes effect on or before January 1, 1998, amends, amends and renumbers, adds, repeals and adds, or repeals any section contained in that article, chapter, part, title, or division.

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CHAPTER 589

An act to amend Sections 1680, 1696, 2353, 2612, 2664, 2770.10, 2878, 3750, 4869, 7028.1, 7045, 7159, 7163, 9793, 10236.2, and 19617.7 of, to amend and renumber Section 17510.8 of, and to repeal Section 10161.75 of, the Business and Professions Code, to amend Sections 43.93, 712, 1363.2, 1689.7, and 1942.4 of the Civil Code, to amend Sections 116.232, 473.1, 483.010, 483.015, and 1174.2 of the Code of Civil Procedure, to amend Section 4406 of the Commercial Code, to amend Sections 8804, 14504.2, 17878, 32241, 32242, 32243, 32244, 32245, 41320.1, 42238.15, 44010, 44253.6, 47602, 47605, 48204, 51220, 52772, 56345, 60004, 66301, 69274, 88116, 88127, 89701, and 94367 of, and to amend and renumber Sections 1597.95 and 67358 of, the Education Code, to amend Section 3567 of, and to repeal Section 23512.2, as added by Chapter 219 of the Statutes of 1992, of, the Elections Code, to amend Section 1107 of the Evidence Code, to amend Section 13080 of the Financial Code, to amend Section 3203 of the Fish and Game Code, to amend Sections 14611, 15071.5, 58110, and 74734.5 of, and to amend the heading of Article 4 (commencing with Section 58591) of Chapter 6 of Part 1 of Division 21 of, the Food and Agricultural Code, to amend Sections 3549.1, 13923, 15436, 20024.002, 25830.1, 51021, 53312.7, 53313.5, 53340.2, 53830.5, 65250, 65583.1, 66020, and 68560.5 of the Government Code, to amend and renumber Section 6832 of the Harbors and Navigation Code, to amend Sections 372, 1250, 1428, 1569.692, 1569.73, 11100, 11370.9, 11650, 11837, 11838.4, 15076, 17033, 17060, 18420, 18421, 19870, 25163, 25179.13, 25244.19, 25698, 25817.1, 32126, and 36005 of the Health and Safety Code, to amend Sections 1776 and 3852 of the Labor Code, to amend Sections 290, 290.3, 374.8, 422.75, 457.1, 549, 602, 653m, 853.6, 999t, 1000.6, 1001.65, 1048.1, 1203.1g, 1463.007, 1465.5, 4532, 6242, 12022.9, and 12288.5 of, the Penal Code, to amend Sections 8572 and 8574 of the Probate Code, to amend Section 10332 of the Public Contract Code, to amend Sections 30301, 30340, and 42774 of the Public Resources Code, to amend Sections 1802 and 99243 of the Public Utilities Code, to amend Sections 53, 75.11, 214.02, 6201.3, 8272, 8273, 9272, 9273, 9276, 17207, 19405, 23801, 24347.5, 25962, 30459.2, 30459.3, 32472, 32473, 40096, 40212, 40213, 41172, 41173, 43523, 43524, 45862, 45868, 45869, 45870, 45871, 46153, 50156.2, 50156.10, 50156.12, 50156.13, 50156.15, and 50156.16 of, and to repeal Sections 17208, 17208.1, 17208.2, 17208.3, 24347.6, 24347.7, 24347.8, and 24347.9 of, the Revenue and Taxation Code, to amend Section 30158 of, and to amend and renumber

88720

SEC. 105. Section 32126 of the Health and Safety Code is amended to read:

32126. The board of directors may provide for the operation and maintenance through tenants of the whole or any part of any hospital acquired or constructed by it pursuant to this division, and for that purpose may enter into any lease agreement that it believes will best serve the interest of the district; provided, that a lease entered into with a nonprofit corporation for the operation of any hospital shall be in accordance with subdivision (p) of Section 32121, and that any lease for the operation of any hospital shall require the tenant or lessee to conform to and abide by Section 32128. No lease for the operation of an entire hospital shall run for a term in excess of 30 years. No lease for the operation of less than an entire hospital shall run for a term in excess of 10 years.

SEC. 106. Section 36005 of the Health and Safety Code is amended to read:

36005. No judicial action attacking or otherwise questioning the validity of the action of a state agency or a local public entity in giving final approval to a proposal or application which may result in housing assistance benefiting persons of low income without obtaining prior approval pursuant to Article XXXIV of the California Constitution shall be brought prior to the notice of funding commitment by the state agency or the adoption of a resolution or ordinance by the legislative body of the local public entity approving the proposal or application, nor may any such action be brought at any time after 60 days from the date of the notice of funding commitment or the date of adoption of the ordinance or resolution approving the proposal, as appropriate.

SEC. 107. Section 1776 of the Labor Code is amended to read:

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public

shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

SEC. 108. Section 3852 of the Labor Code is amended to read:

1, 1994, and that amends, amends and renumbers, adds, repeals and adds, or repeals a section amended, amended and renumbered, repealed and added, or repealed by this act, shall prevail over this act, whether that act is enacted prior to, or subsequent to, this act. The repeal, or repeal and addition, of any article, chapter, part, title, or division of any code by this act shall not become operative if any section of any other act amends, amends and renumbers, adds, repeals and adds, or repeals any section contained in that article, chapter, part, title, or division.

CHAPTER 1342

An act to amend Sections 1727, 1731, 1732, 1733, 1772, 1773.2, 1775, and 1776 of, and to repeal and add Section 1730 of, the Labor Code, relating to public works employment, and making an appropriation therefor.

[Approved by Governor September 30, 1992. Filed with Secretary of State September 30, 1992.]

The people of the State of California do enact as follows:

SECTION 1. Section 1727 of the Labor Code is amended to read:

1727. Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.

SEC. 2. Section 1730 of the Labor Code is repealed.

SEC. 3. Section 1730 is added to the Labor Code, to read:

1730. Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job.

SEC. 4. Section 1731 of the Labor Code is amended to read:

1731. If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the wages and penalties shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the Labor Commissioner for disbursement pursuant to Section 1775 if the contractor does not prevail in the action. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

SEC. 5. Section 1732 of the Labor Code is amended to read:

1732. Notwithstanding any other provision of law, the time for action by the contractor or his or her assignee for the recovery of wages or penalties is limited to the 90-day period and suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or his or her assignees with reference to those wages or penalties.

SEC. 6. Section 1733 of the Labor Code is amended to read:

1733. Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

SEC. 7. Section 1772 of the Labor Code is amended to read:

1772. Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

SEC. 8. Section 1773.2 of the Labor Code is amended to read:

1773.2. The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

SEC. 9. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if

the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

SEC. 10. Section 1776 of the Labor Code is amended to read:

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public

for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Ch. 3.5 (commencing with Sec. 6250), Div. 7, Title 1, Gov. C.) and the Information Practices Act of 1977, (Title 1.8 (commencing with Sec. 1798) Pt. 4, Div. 3, Civ. C.) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this

section.

CHAPTER 1343

An act to amend Sections 25143.2 and 25200.5 of, to add Section 25158.4 to, and to add and repeal Sections 25158.2 and 25158.3 of, the Health and Safety Code, and to amend Section 21151.1 of the Public Resources Code, relating to hazardous waste.

[Approved by Governor September 30, 1992. Filed with Secretary of State September 30, 1992.]

The people of the State of California do enact as follows:

SECTION 1. Section 25143.2 of the Health and Safety Code is amended to read:

25143.2. (a) Recyclable materials are subject to the requirements of this chapter and the regulations adopted by the department to implement this chapter which apply to hazardous wastes, unless the department issues a variance pursuant to Section 25143, or except as provided otherwise in subdivision (b), (c), or (d) or the regulations adopted by the department pursuant to Sections 25150 and 25151. For the purposes of this section, recyclable material does not include infectious waste.

(b) Except as otherwise provided in subdivisions (e), (f) and (g), recyclable material which is managed in accordance with Section 25143.9 and is or will be recycled by any of the following methods shall be excluded from classification as a waste:

(1) Used or reused as an ingredient in an industrial process to make a product, if the material is not being reclaimed.

(2) Used or reused as a safe and effective substitute for commercial products, if the material is not being reclaimed.

(3) Returned to the original process from which the material was generated, without first being reclaimed, if the material is returned as a substitute for raw material feedstock, and the process uses raw materials as principal feedstocks.

(c) Except as otherwise provided in subdivision (e), any recyclable material may be recycled at a facility which is not authorized by the department pursuant to the applicable hazardous waste facilities permit requirements of Article 9 (commencing with Section 25200) if either of the following requirements is met:

(1) The material is a petroleum refinery waste containing oil which is converted into petroleum coke at the same facility at which the waste was generated, unless the resulting coke product would be identified as a hazardous waste under this chapter. A waste subject to this paragraph is exempt from this chapter to the same extent the waste is exempt from subsections (q), (r), and (s) of Section 6924 of Title 42 of the United States Code.

CHAPTER 913

An act to amend Section 125.6 of the Business and Professions Code, to amend Sections 51, 51.5, 51.8, 52, 53, 54, 54.1, 54.2, 54.3, and 54.8 of the Civil Code, to amend Section 224 of the Code of Civil Procedure, to amend Sections 44100, 44101, 44337, and 44338 of the Education Code, to amend Sections 754 and 754.5 of the Evidence Code, to amend Sections 4450, 4500, 11135, 12920, 12921, 12926, 12931, 12940, 12944, 12993, 19230, 19231, 19232, 19233, 19234, 19235, 19237, and 19702 of, to add Section 12940.3 to, and to repeal Section 12994 of, the Government Code, to amend Section 19952 of the Health and Safety Code, to amend Section 1735 of the Labor Code, to amend Section 365.5 of the Penal Code, to amend Sections 2881 and 99155.5 of, and to add Section 2881.2 to, the Public Utilities Code, to amend Section 2557 of the Streets and Highways Code, and to amend Section 336 of the Vehicle Code, relating to disabled persons.

[Approved by Governor September 24, 1992. Filed with Secretary of State September 25, 1992.]

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 (Public Law 101-336) and to retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990.

SEC. 2. Section 125.6 of the Business and Professions Code is amended to read:

125.6. Every person who holds a license under the provisions of this code is subject to disciplinary action under the disciplinary provisions of this code applicable to such person if, because of the

discrimination in adverse actions or rejections on probation shall be filed in accordance with Sections 19175 and 19575.

(i) When an employee of the appointing authority refuses, or threatens to refuse, to cooperate in the investigation of a complaint of discrimination, the appointing authority may seek assistance from the board. The board may provide for direct investigation or hearing of the complaint, the use of subpoenas, or any other action which will effect the purposes of this section.

SEC. 35. Section 19952 of the Health and Safety Code is amended to read:

19952. (a) Any person, or public or private firm, organization, or corporation, who owns or manages places of public amusement and resort including theaters, concert halls, and stadiums shall provide seating or accommodations for physically disabled persons in a variety of locations within the facility, to the extent that such variety can be provided while meeting fire and panic safety requirements of the State Fire Marshal, so as to provide such persons a choice of admission prices otherwise available to members of the general public.

(b) Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

(c) The requirements of this section shall apply with respect to publicly and privately owned facilities or structures for the purposes specified in subdivision (a) for which a building permit or a building plan for new construction has been issued on or after January 1, 1985.

(d) In no case shall this section be construed to prescribe a lesser standard of accessibility or usability than provided by regulations of the federal Architectural and Transportation Barriers Compliance Board adopted to implement the Americans with Disabilities Act of 1990 (Public Law 101-336).

SEC. 36. Section 1735 of the Labor Code is amended to read:

1735. No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

SEC. 37. Section 365.5 of the Penal Code is amended to read:

365.5. (a) Any blind person, deaf person, or physically disabled person who is a passenger on any common carrier, airplane, motor vehicle, railway train, motorbus, streetcar, boat, or any other public conveyance or mode of transportation operating within this state, shall be entitled to have with him or her a specially trained guide dog, signal dog, or service dog.

(b) No blind person, deaf person, or physically disabled person and his or her specially trained guide dog, signal dog, or service dog shall be denied admittance to hotels, restaurants, lodging places, places of public accommodation, amusement, or resort or other

in which case Sections 25, 25.1, and 25.3 of this bill shall not become operative.

(c) Section 25.3 of this bill incorporates amendments to Section 12993 of the Government Code proposed by this bill, AB 311, and AB 1178. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1993, (2) all three bills amend Section 12993 of the Government Code, and (3) this bill is enacted after AB 311 and AB 1178, in which case Sections 25, 25.1, and 25.2 of this bill shall not become operative.

CHAPTER 1224

An act to amend Sections 1773.5, 1775, and 1777.5 of, to add Sections 1720.4, 1771.5, 1771.6, 1771.7, and 1777.1 to, and to repeal and add Section 1777.7 of, the Labor Code, relating to public works.

[Approved by Governor October 1, 1989. Filed with Secretary of State October 1, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 1720.4 is added to the Labor Code, to read:

1720.4. For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on behalf of, private nonprofit community organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate local or state organization of duly authorized employee representatives of workers employed on public works.

SEC. 2. Section 1771.5 is added to the Labor Code, to read:

1771.5. (a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll

containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

SEC. 3. Section 1771.6 is added to the Labor Code, to read:

1771.6. Notwithstanding Sections 1730, 1731, and 1734, any political subdivision which enforces this chapter in accordance with Section 1771.5 shall, at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, deposit all penalties or forfeitures withheld from any contract payment in the general fund of the political subdivision. Any court collecting any fines or penalties under the criminal provisions of this chapter, or any of the labor laws pertaining to public works, when the fines and penalties resulted from enforcement actions by a political subdivision pursuant to Section 1771.5, shall deposit the fines or penalties in the general fund of the political subdivision.

SEC. 4. Section 1771.7 is added to the Labor Code, to read:

1771.7. A contractor may appeal an enforcement action by a political subdivision pursuant to Section 1771.5 to the Director of Industrial Relations. Any ruling by the director shall be final and, notwithstanding Section 1732, any appeal shall waive the contractor's right to bring court action on the same issue.

SEC. 5. Section 1773.5 of the Labor Code is amended to read:

1773.5. The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

SEC. 6. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the

amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both to pay each worker in full, the money shall be prorated among all workers.

SEC. 7. Section 1775 of the Labor Code is amended to read:

1775. The employer shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or under subcontract by the subcontractor. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the employer, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due an employer to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the employer, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due under this section. This action shall be commenced not later than six months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than six months after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the employer for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the employer to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

"Employer," as used in this section, means the contractor or the subcontractor, whichever one employs the worker.

SEC. 8. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all wages and penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and

in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the wages and penalties due under this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. The division may maintain a court action whether or not it has an assignment of the wage claim of the worker. No issue other than that of the liability of the contractor for the wages and penalties due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and, if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

SEC. 9. Section 1775 of the Labor Code is amended to read:

1775. The employer shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or under subcontract by the subcontractor. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the employer, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due an employer to cover all wages and penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the, employer the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with

in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the wages and penalties due under this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. The division may maintain a court action whether or not it has an assignment of the wage claim of the worker. No issue other than that of the liability of the contractor for the wages and penalties due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

SEC. 9. Section 1775 of the Labor Code is amended to read:

1775. The employer shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or under subcontract by the subcontractor. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the employer, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due an employer to cover all wages and penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the, employer the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with

the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the wages and penalties due under this section. This action shall be commenced not later than six months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than six months after acceptance of the public work, whichever last occurs. The division may maintain a court action whether or not it has an assignment of the wage claim of the worker. No issue other than that of the liability of the employer for the wages and penalties due shall be determined in the action, and the burden shall be upon the employer to establish that the wages and penalties demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

"Employer," as used in this section, means the contractor or the subcontractor, whichever one employs the worker.

SEC. 10. Section 1777.1 is added to the Labor Code, to read:

1777.1. (a) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period of not less than one year or more than three years. The period of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(b) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter. These periods of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(c) Any determination by the Labor Commissioner shall be made after a full investigation by the Labor Commissioner and a fair and impartial hearing and reasonable notice.

(d) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(e) The Labor Commissioner shall promulgate rules and regulations for the administration and enforcement of this section,

the definition of terms, and appropriate penalties.

SEC. 11. Section 1777.5 of the Labor Code is amended to read:

1777.5. Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices

work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in such area exceeds a

ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

SEC. 12. Section 1777.7 of the Labor Code is repealed.

SEC. 13. Section 1777.7 is added to the Labor Code, to read:

1777.7. (a) In the event a contractor or subcontractor willfully fails to comply with Section 1777.5, the Director of Industrial Relations shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on, or to receive, any public works contract for a period of up to one year

for the first violation and for a period of up to three years for the second and subsequent violations. Each period of debarment shall run from the date the determination of noncompliance by the Administrator of Apprenticeship becomes an order of the California Apprenticeship Council.

(b) A contractor or subcontractor who violates Section 1777.5 shall forfeit as a civil penalty the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(c) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first time violation and with the concurrence of the joint apprenticeship committee, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(e) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

SEC. 14. (a) Section 7 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by both this bill and AB 254. It shall only become operative if (1) both bills are enacted and become effective January 1, 1990, (2) each bill amends Section 1775 of the Labor Code, and (3) SB 197 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 254, in which case Sections 6, 8, and 9 of this bill shall not become operative.

(b) Section 8 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by both this bill and SB 197. It shall only become operative if (1) both bills are enacted and become effective January 1, 1990, (2) each bill amends Section 1775 of the Labor Code, (3) AB 254 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after SB 197 in which case Sections 6, 7, and 9 of this bill shall not become operative.

(c) Section 9 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by this bill, AB 254, and SB 197. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1990, (2) all three bills amend Section 1775 of the Labor Code, and (3) this bill is enacted after AB 254 and SB 197, in which case Sections 6, 7, and 8 of this bill shall not become operative.

CHAPTER 278

An act to amend Section 1720 of the Labor Code, relating to public works.

[Became law without Governor's signature. Filed with Secretary of State August 7, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 1720 of the Labor Code is amended to read:

1720. As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

SEC. 2. This act shall become operative only if Assembly Bill 680 is enacted in the 1989–90 Regular Session of the Legislature and adds Section 143 to the Streets and Highways Code authorizing the Department of Transportation to enter into agreements with private entities for the construction by, and lease to, private entities of public transportation demonstration projects. In that case, this act shall become operative on the operative date of Assembly Bill 680, or as soon as possible thereafter.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the

California Constitution.

CHAPTER 160

An act to amend Sections 6736.1, 7085.5, 10177, 17577.2, 19022, and 22444 of, to amend and renumber Sections 6032, 19549.9, and 24045.10 of, to amend and renumber the heading of Chapter 8 (commencing with Section 18600) of Division 8 of, and to repeal Section 22454 of, the Business and Professions Code, to amend Sections 1799.99 and 3294 of, and to amend the headings of Division First (commencing with Section 25), Division Second (commencing with Section 654), Division Third (commencing with Section 1427), and Division Fourth (commencing with Section 3274) of, the Civil Code, to amend Sections 1013a, 2017, and 2025 of the Code of Civil Procedure, to amend Section 42923 of, to amend and renumber Sections 51770, 54965, and 67175 of, to amend and renumber the headings of Article 7.3 (commencing with Section 51775) of Chapter 5 of Part 28 of, Article 2.5 (commencing with Section 52130) of Chapter 7 of Part 28 of, and Article 5 (commencing with Section 92650) of Chapter 6 of Part 57 of, to add Article 4 (commencing with Section 39180) to Chapter 2 of Part 23 of, to repeal Article 4 (commencing with Section 39170) of Chapter 2 of Part 23 of, to repeal the heading of Article 2 (commencing with Section 56430) of Chapter 4.4 of Part 30 of, and to repeal Chapter 2 (commencing with Section 99100) of Part 65 of, the Education Code, to amend Sections 3520, 3795, 5025, 5215, 5330, 10228.1, and 14821 of the Elections Code, to amend Section 18357 of the Financial Code, to amend Section 3950 of, to amend and renumber the heading of Article 3 (commencing with Section 7360) of Chapter 2 of Part 2 of Division 6 of, and to add Section 3950 to, the Fish and Game Code, to amend Sections 221, 33519, 77059, and 77194 of, to amend the heading of Chapter 1 (commencing with Section 24501) of Part 1 of Division 12 of, to add Article 40 (commencing with Section 38891) to Chapter 5 of Part 3 of Division 15 of, and to repeal Article 40 (commencing with Section 39991) of Chapter 5 of Part 3 of Division 15 of, the Food and Agricultural Code, to amend Sections 811.6, 3540, 3541.3, 3544.1, 3544.7, 3548.2, 4216, 6103.2, 12805, 15364.74, 16366.9, 17004.6, 20017.98, 26256, 26261, 31726, 65996, 73360, 74131, and 77002 of, to amend and renumber Sections 53080, 54994.2, 61765.12, and 82048.5 of, to amend and renumber the heading of Title 7.8 (commencing with Section 68055) of, to repeal Section 15819.20 of, to repeal Chapter 12 (commencing with Section 76000) of Title 8 of, and to repeal the heading of Chapter 2 (commencing with Section 68055) of Title 7.8 of, the Government Code, to amend Section 654.5 of the Harbors and Navigation Code, to amend Sections 1268.5, 1336.2, 1343, 1437, 1502, 1575.3, 1575.4, 1599.84, 1728.2, 1728.3, 25158, 25534, 26594.3, 44031, and 50748.1 of, to amend and renumber Sections 199.27, 1170, 1171, 1172, 1173, 1367.4, 1596.889, 1596.891, 1597.11, 11811.5, 25122.55, and 40715 of, to amend and renumber the headings of Chapter 3.3 (commencing with Section 1568.10), Chapter 3.3 (commencing with Section 1569), and Chapter 3.2 (commencing with Section 1570) of Division 2 of, and the heading

like amounts under all valid coverages for the loss, and for the return of the portion of the premiums paid as shall exceed the pro-rata portion for the amount so determined. For the purpose of applying this provision when other coverage is on a provision of service basis, the "like amount" of the other coverage shall be taken as the amount which the services rendered would have cost in the absence of the coverage.

SEC. 120. Section 10369.6 of the Insurance Code is amended to read:

10369.6. A disability policy may contain a provision in the form set forth in this section. If the provision is included in a policy which also contains the provision set forth in Section 10369.5, there shall be added to its caption the phrase, "* * * other benefits." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the commissioner. The definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and to any other coverage the inclusion of which may be approved by the commissioner. In the absence of that definition the terms shall not include group insurance, or benefits provided by union welfare plans or by employer or employee benefit organizations. For the purpose of applying this policy provision with respect to any insured, any amount of benefit provided for the insured pursuant to any compulsory benefit statute, including any workers' compensation or employers' liability statute, whether provided by a governmental agency or otherwise, shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying this provision, no third party liability coverage shall be included as "other valid coverage."

Insurance With Other Insurers: If there is other valid coverage, not with this insurer, providing benefits for the same loss on other than an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability for the benefits under this policy shall be for the proportion of the indemnities otherwise provided under this policy for the loss as the like indemnities of which the insurer had notice, including the indemnities under this policy, bear to the total amount of all like indemnities for the loss, and for the return of the portion of the premium paid as shall exceed the pro rata portion for the indemnities thus determined.

SEC. 121. Section 12760 of the Insurance Code, as added by Chapter 820 of the Statutes of 1981, is repealed.

SEC. 122. Section 1733 of the Labor Code is amended to read:

1733. Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the penalties or forfeitures without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court

in the case and the burden shall be on the plaintiff to establish his or her right to the penalties or forfeitures withheld. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

SEC. 123. Section 1812 of the Labor Code is amended to read:

1812. Every contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each worker employed by him or her in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Standards Enforcement.

SEC. 124. Section 3800 of the Labor Code is amended to read:

3800. (a) Every county or city which requires the issuance of a permit as a condition precedent to the construction, alteration, improvement, demolition or repair of any building or structure shall require that each applicant for the permit have on file or file one of the following:

(1) A certificate of consent to self-insure issued by the Director of Industrial Relations.

(2) A certificate of workers' compensation insurance issued by an admitted insurer.

(3) An exact copy or duplicate thereof certified by the director or the insurer.

The certificate of insurance shall state that there is in existence a valid policy of workers' compensation insurance in a form approved by the Insurance Commissioner. The certificate shall show the expiration date of the policy. No insurer shall issue a certificate unless the full deposit premium on the policy has been paid, and the insurer shall give the county or city at least 10 days' advance notice of the cancellation of the policy.

(b) This section shall not apply in either of the following cases:

(1) The permit is for one hundred dollars ($100) or less.

(2) The applicant for the permit signs a certificate which reads as follows, or the wording of which has been approved by the Director of Industrial Relations:

"I certify that in the performance of the work for which this permit is issued I shall not employ any person in any manner so as to become subject to the workers' compensation laws of California."

If, after making the certificate, the applicant for the permit should become subject to the workers' compensation provisions of this code, he or she shall forthwith comply with the provisions of Section 3700 or his or her permit is revoked.

SEC. 125. Section 1191 of the Military and Veterans Code is amended to read:

1191. (a) Every district may do all of the following:

(1) Provide and maintain memorial halls, assembly halls,

in that article, chapter, part, title, or division.

CHAPTER 1054

An act to add Chapter 2 (commencing with Section 21000) to Part 3 of Division 2 of the Public Contract Code, relating to public agencies, and making an appropriation therefor.

[Approved by Governor September 25, 1983. Filed with Secretary of State September 26, 1983.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 2 (commencing with Section 21000) is added to Part 3 of Division 2 of the Public Contract Code, to read:

CHAPTER 2. BIDDING ON PUBLIC CONTRACTS

Article 1. Legislative Intent and Definitions

21000. This chapter shall be known and may be cited as the "Uniform Public Construction Cost Accounting Act."

21001. The Legislature finds and declares that there is a statewide need to promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state. This chapter provides for the development of cost accounting standards and an alternative method for the bidding of public works projects by public entities.

21002. (a) "Public agency" for purposes of this chapter, means a city, county, city and county, including chartered cities and chartered counties, any special district, and any other agency of the state for the local performance of governmental or proprietary functions within limited boundaries.

(b) "Representatives of the construction industry" for purposes of this chapter, means a general contractor, subcontractor, or labor representative with experience in the field of public works construction.

(c) "Public project" means any of the following:

(1) Construction, reconstruction, erection, alteration, renovation,

improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

(2) Painting or repainting of any publicly owned, leased, or operated facility.

(3) In the case of a publicly owned utility system, "public project" shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(d) "Public project" does not include maintenance work. For purposes of this section, "maintenance work" includes all of the following:

(1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.

(2) Minor repainting.

(3) Resurfacing of streets and highways at less than one inch.

(4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

(5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(e) For purposes of this chapter, "facility" means any plant, building, structure, ground facility, utility system, subject to the limitation found in paragraph (3) of subdivision (c), real property, streets and highways, or other public work improvement.

Article 2. California Uniform Construction Cost Accounting Commission

21100. There is hereby created the California Uniform Construction Cost Accounting Commission. The commission is comprised of 14 members appointed by the Controller as follows:

(a) Three members who shall each have at least 10 years of experience with, or providing professional services to, a general contracting firm engaged, during that period, in public works construction in California.

(b) Two members who shall each have at least 10 years of experience with, or providing professional services to, a firm or firms engaged, during that period, in subcontracting for public works construction in California.

(c) Two members who shall each be a member in good standing of, or have provided professional services to, an organized labor union with at least 10 years of experience in public works construction in California.

(d) Seven members who shall each be experienced in, and knowledgeable of, public works construction under contracts let by public agencies; two each representing cities, counties, respectively,

and two representing school districts (one with an average daily attendance over 25,000 and one with an average daily attendance under 25,000), and one member representing a special district. At least one of the two county representatives shall be a county auditor or his or her designee.

21101. The Controller, in an effort to select highly qualified commission members, shall solicit from organized representatives of the construction industry and public agencies recommendations for appointments to the commission.

21102. At least one commission member of the six representing the construction industry and at least one of the six representing public agencies shall have previous accounting experience.

21103. The commission members shall select a chairperson from among its membership. The chairperson shall serve as chair for a term of one year from the date of selection or February 1, whichever comes first. In no event shall two consecutive chairpersons be appointees representing either the construction industry or public agencies.

21104. (a) The members of the commission shall hold office for terms of three years, and until their successors are appointed, except as otherwise provided for in this section.

(b) In the case of members initially appointed by the Controller, two representing the construction industry and two representing public agencies shall be appointed to serve until July 1, 1985; two representing the construction industry and two representing public agencies shall be appointed to serve until July 1, 1986; and three representing the construction industry and three representing public agencies shall be appointed to serve until July 1, 1987.

(c) Members may be reappointed for subsequent terms of three years.

21105. (a) The Controller shall make available for the conduct of the commission's business, such staff and other support as does not conflict with the accomplishment of the other business of the office of the Controller.

(b) Each member of the commission shall serve without compensation, but shall be reimbursed for travel and other expenses necessarily incurred in the performance of the member's duties.

(c) The commission may accept grants from federal, state, or local public agencies, or from private foundations or individuals, in order to assist it in carrying out its duties, functions, and powers under this chapter.

21106. The commission shall meet not less than once each year, at a time and place chosen by its membership.

21107. The commission shall do all of the following:

(a) After due deliberation and study, recommend for adoption by the Controller, uniform construction cost accounting procedures for implementation by public agencies in the performance of, or in contracting for, construction on public projects. The procedures shall, to the extent deemed feasible and practicable by the

commission, incorporate, or be consistent with construction cost accounting procedures and reporting requirements utilized by state and federal agencies on public projects, and be uniformly applicable to all public agencies which elect to utilize the uniform procedures. As part of its deliberations and review, the commission shall take into consideration relevant provisions of Office of Management and Budget Circular A-76.

(b) Recommend for adoption by the Controller, procedures and standards for the periodic evaluation and adjustment, as necessary, of the monetary limits specified in Section 21202.

(c) Submit its recommendations to the Controller not later than January 1, 1985. The commission shall report to the Legislature, no later than June 30, 1984, concerning its progress in the development and implementation of the uniform construction cost accounting procedures. Thereafter, the commission shall make an annual report to the Legislature with respect to its activities and operations, together with those recommendations as it deems necessary.

21108. The Controller shall, upon receipt of the commission's recommendations, review and evaluate the recommended procedures and either formally adopt or reject the recommended procedures within 90 days of submission by the commission.

21109. Upon determining that the recommended uniform construction cost accounting procedures will serve the best interests of the state and public agencies, and upon formal adoption by the Controller, the Controller shall promulgate the uniform procedure for all public agencies electing to participate, together with instructions for their adoption and implementation by any public agency.

21110. In accordance with procedures and standards adopted pursuant to Section 21107, every five years the commission shall consider whether there have been material changes in public construction costs and make recommendations to the Controller regarding adjustments in the monetary limits prescribed by Section 21202, but in no case shall the amount, as adjusted, be less than fifteen thousand dollars ($15,000). Any adjustment shall be effective beginning with the fiscal year which commences not less than 60 days following the Controller's notification to affected public agencies of the adjustment.

Article 3. Public Projects: Alternative Procedure

21200. This article applies only to a public agency whose governing board has by resolution elected to become subject to the uniform construction cost accounting procedures set forth in Article 2 (commencing with Section 21100) and which has notified the Controller of that election. In the event of a conflict with any other provision of law relative to bidding procedures, this article shall apply to any public agency which has adopted a resolution and so notified the Controller.

21201. Nothing in this article shall prohibit a board of supervisors or a county road commissioner from utilizing, as an alternative to the procedures set forth in this article, the procedures set forth in Article 25 (commencing with Section 20390) of Chapter 1.

21202. (a) Public projects of fifteen thousand dollars ($15,000) or less may be performed by the employees of a public agency by force account or by negotiated contract.

(b) Public projects of twenty-five thousand dollars ($25,000) or less may be let to contract by purchase order procedures as set forth in this article.

(c) Public projects of more than twenty-five thousand dollars ($25,000) but less than one hundred thousand dollars ($100,000), may be let to contract by informal bidding procedures.

(d) Public projects of one hundred thousand dollars ($100,000) or more shall, except as otherwise provided in this article, be let to contract by formal bidding procedure.

21203. It shall be unlawful to split or separate into smaller work orders or projects any project for the purpose of evading the provisions of this article requiring work to be done by contract after competitive bidding.

21204. (a) Each public agency subject to this article shall adopt ordinances or regulations providing for formal and informal bidding procedures as required by this article for public projects conducted by that public agency.

(b) Each public agency which elects to become subject to the uniform construction accounting procedures set forth in Article 2 (commencing with Section 21100), shall enact a purchase order ordinance to govern the selection of contractors to perform public projects pursuant to subdivision (b) of Section 21202. The ordinance shall include all of the following:

(1) The public agency shall maintain a list of all qualified contractors, identified according to categories of work.

(2) Before awarding a public project contract, at least three bids must be received by the public agency unless any of the following occurs:

(A) The product or service is proprietary.

(B) All of the qualified contractors on the list have been solicited, but less than three bids have been received.

(3) The public agency shall solicit a sufficient number of qualified contractors from the list in order to obtain three bids.

(4) If at least three bids are not obtained as a result of the first bidding procedure, the public agency shall solicit qualified contractors until either three bids are received or all the contractors on the list have been solicited.

(5) Nothing shall prohibit the public agency from soliciting all contractors on the list for a particular project.

21205. In cases of great emergency, as determined by the governing body of the public agency, including, but not limited to, states of emergency defined in Section 8558 of the Government

Code, when repair or replacements are necessary to permit the continued conduct of the operation or services of a public agency or to avoid danger to life or property, the governing body by majority vote, may proceed at once to replace or repair any public facility without adopting plans, specifications, strain sheets, or working details, or giving notice for bids to let contracts. The work may be done by day labor under the direction of the governing body, by contract, or by a combination of the two. The governing body, by majority vote, may delegate to the appropriate county administrative officer or city manager the power to declare a public emergency subject to confirmation by the governing body, by a four-fifths vote, at its next meeting.

21206. Notice inviting informal bids shall be published at least once and publication shall be completed at least 24 hours before the time scheduled for opening of the bids. The public agency may cause the notice to be printed as display advertising in such form and style as it deems appropriate. The notice shall describe the project in general terms and state a closing date and time for submission of the informal bids. Publication of notice pursuant to this section shall be in a newspaper of general circulation printed and published within the jurisdiction of the public agency, or, if there is no newspaper printed and published within the jurisdiction of the public agency, in a newspaper of general circulation which is circulated in the jurisdiction of the public agency, and in addition, in a construction trade publication circulated within the jurisdiction of the public agency; or, if there is no newspaper which is circulated within the jurisdiction of the public agency, publication shall be by posting the notice in at least three public places within the jurisdiction of the public agency as have been designated by ordinance or regulation of the public agency as places for the posting of its notices. In addition to notice required by this section, the public agency may give other notice as it deems proper.

21207. Notice inviting formal bids shall state the time and place for the receiving and opening of sealed bids and distinctly describe the project. The notice shall be published at least 30 days before the date of opening the bids in a newspaper of general circulation, printed and published in the jurisdiction of the public agency, and also in a construction trade publication circulated within the jurisdiction of the public agency; or, if there is no newspaper or construction trade publication printed and published within the jurisdiction of the public agency, in a newspaper of general circulation which is circulated within the jurisdiction of the public agency, or, if there is no newspaper or construction trade publication which is circulated within the jurisdiction of the public agency, publication shall be by posting the notice in at least three places within the jurisdiction of the public agency as have been designated by ordinance or regulation of the public agency as places for the posting of its notices. In addition to notice required by this section, the public agency may give such other notice as it deems proper.

21208. (a) In its discretion, the public agency may reject any bids presented. If after the first invitation for bids all bids are rejected, after reevaluating its cost estimates of the project, the public agency shall have the option of either of the following:

(1) Abandoning the project or readvertising for bids in the manner described by this article.

(2) By passage of a resolution by a four-fifths vote of its governing body declaring that the project can be performed more economically by the employees of the public agency, may have the project done by force account without further complying with this article.

(b) If a contract is awarded, it shall be awarded to the lowest responsible bidder. If two or more bids are the same and the lowest, the public agency may accept the one it chooses.

(c) If no bids are received, the project may be performed by employees of the public agency by force account, or by informal bidding procedures set forth in Section 21204 without further complying with this article.

21209. The governing body of the public agency shall adopt plans, specifications, and working details for all public projects of more than one hundred thousand dollars ($100,000).

21210. Any person may examine the plans, specifications, or working details, or all of these, adopted by the public agency for any project.

21211. This article does not apply to the construction of any public building used for facilities of juvenile forestry camps or juvenile homes, ranches, or camps established under Article 15 (commencing with Section 880) of Chapter 2 of Part 1 of Division 2 of the Welfare and Institutions Code, if a major portion of the construction work is to be performed by wards of the juvenile court assigned to those camps, ranches, or homes.

21212. The commission shall review the accounting procedures of any participating public agency where an interested party presents evidence that the work undertaken by the public agency falls within any of the following categories:

(a) Is to be performed by a public agency after rejection of all bids, claiming work can be done less expensively by the public agency.

(b) Exceeded the force account limits.

(c) Has been improperly classified as maintenance.

21213. In those circumstances as set forth in subdivision (a) of Section 21212, a request for commission review shall be by letter received by the commission not later than five days from the date the public agency has rejected all bids. In those circumstances set forth in subdivision (b) or (c) of Section 21212, a request for commission review shall be by letter received by the commission not later than five days from the date an interested party formally complains to the public agency. The commission review shall commence immediately and conclude within 30 days from the receipt of the request for commission review. During the review of a project that falls within

subdivision (a) of Section 21212, the agency shall not proceed on the project until a final decision is received by the commission.

21214. The commission shall prepare written findings. Should the commission find that the provisions of this chapter or of the uniform cost accounting procedures provided for in this chapter were not complied with by the public agency, the following steps shall be implemented by that agency:

(a) On those projects set forth in subdivision (a) of Section 21212, the public agency has the option of either (1) abandoning the project, or (2) awarding the project to the lowest responsible bidder.

(b) On those projects set forth in subdivision (b) or (c) of Section 21212, the public agency shall present the commission's findings to its governing body and that governing body shall conduct a public hearing with regard to the commission's findings within 30 days of receipt of the findings.

21215. (a) No later than January 1, 1985, the commission shall recommend, for adoption by the Controller, written procedures implementing the accounting procedures review provided for in this article.

(b) The Controller shall, upon receipt of the commission's recommendation, review and evaluate the recommended procedures and either formally adopt or reject the recommended procedures within 90 days of submission of the commission.

SEC. 2. The sum of thirty-seven thousand five hundred dollars ($37,500) is hereby appropriated from the General Fund to the Controller for the purposes of Chapter 2 (commencing with Section 21000) of Part 3 of Division 2 of the Public Contract Code.

CHAPTER 681

An act to amend Section 1776 of the Labor Code, relating to public works wages.

[Approved by Governor September 9, 1993. Filed with Secretary of State September 11, 1993.]

The people of the State of California do enact as follows:

SECTION 1. Section 1776 of the Labor Code is amended to read:

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

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(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(d) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(e) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(f) In the event of noncompliance with the requirements of this section, the contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. Should noncompliance still be evident after the 10-day period, the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(g) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations

shall fix the responsibility for compliance with this section on the prime contractor.

(h) The director shall adopt rules consistent with the California Public Records Act, (Ch. 3.5 (commencing with Sec. 6250), Div. 7, Title 1, Gov. C.) and the Information Practices Act of 1977, (Title 1.8 (commencing with Sec. 1798) Pt. 4, Div. 3, Civ. C.) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

CHAPTER 449

An act to amend Section 1771 of the Labor Code, relating to public works projects.

[Approved by Governor September 11, 1981. Filed with Secretary of State September 12, 1981.]

The people of the State of California do enact as follows:

SECTION 1. Section 1771 of the Labor Code is amended to read:

1771. Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

CHAPTER 992

An act to amend Sections 11139.5, 11340.2, 11501, 11554, 19702.5, 19704, and 50085.5 of, and to add Part 2.8 (commencing with Section 12900) to Division 3 of Title 2 of, the Government Code, to repeal Part 5 (commencing with Section 35700) of Division 24 of the Health and Safety Code, to amend Sections 56, 1735, and 3096 of, and to repeal Part 4.5 (commencing with Section 1410) of Division 2 of, the Labor Code, relating to the reorganization of the executive branch of the California state government.

[Approved by Governor September 19, 1980. Filed with Secretary of State September 21, 1980.]

The people of the State of California do enact as follows:

SECTION 1. Section 11139.5 of the Government Code is amended to read:

11139.5. The Secretary of the Health and Welfare Agency, with the advice and concurrence of the Fair Employment and Housing Commission, shall establish standards for determining which persons are protected by this article and guidelines for determining what practices are discriminatory. The secretary, with the cooperation of the Fair Employment and Housing Commission, shall assist state agencies in coordinating their programs and activities and shall consult with such agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of the provisions of the article.

SEC. 1.5. Section 11340.2 of the Government Code is amended to read:

11340.2. (a) The Office of Administrative Law is hereby established in state government. The office shall be under the direction and control of an executive officer who shall be known as the director. There shall also be a deputy director. The director's term and the deputy director's term of office shall be coterminous with that of the appointing power, except that they shall be subject to reappointment.

(b) The director and deputy director shall have the same qualifications as a hearing officer and shall be appointed by the Governor subject to the confirmation of the Senate.

SEC. 2. Section 11501 of the Government Code is amended to read:

11501. (a) This chapter applies to any agency as determined by the statutes relating to that agency.

(b) The enumerated agencies referred to in Section 11500 are:

Accountancy, State Board of
Aging, State Department of
Air Resources Board, State
Alcohol and Drug Abuse, State Department of

indicating or in any wise suggesting or pertaining to the race, color, religion, sex, or marital status of any person. Notwithstanding the provisions of this section, subsequent to employment, ethnic, marital status, and gender data may be obtained and maintained for research and statistical purposes when safeguards preventing misuse of the information exist as approved by the Fair Employment and Housing Commission except that in no event shall any notation, entry, or record of such data be made on papers or records relating to the examination, appointment, or promotion of an individual.

SEC. 7. Section 50085.5 of the Government Code is amended to read:

50085.5. (a) Every local agency shall provide to the Fair Employment and Housing Commission a copy of any affirmative action plan and subsequent amendments to such plan adopted by the local agency.

(b) Every local agency which is required by federal law, rule or regulation to submit an annual statistical survey of the employment of the agency to the United States Equal Employment Opportunity Commission shall annually, commencing with January 1, 1975, submit a copy of such survey to the Fair Employment and Housing Commission.

(c) Such reports and information shall constitute public records.

SEC. 8. Part 5 (commencing with Section 35700) of Division 24 of the Health and Safety Code is repealed.

SEC. 9. Section 56 of the Labor Code is amended to read:

56. The work of the department shall be divided into at least six divisions known as the Division of Industrial Accidents, the Division of Occupational Safety and Health, the Division of Labor Standards Enforcement, the Division of Labor Statistics and Research, the Division of Apprenticeship Standards, and the State Compensation Insurance Fund.

SEC. 10. Section 1735 of the Labor Code is amended to read:

1735. No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

SEC. 11. Part 4.5 (commencing with Section 1410) of Division 2 of the Labor Code is repealed.

SEC. 12. Section 3096 of the Labor Code is amended to read:

3096. Complaints alleging discrimination against any person in the selection or training of that person in any apprenticeship training program because of the race, religious creed, color, national origin, ancestry, or sex of such person shall be filed with the Fair Employment and Housing Commission pursuant to Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code. Whenever such a complaint is filed with the

commission, the commission shall immediately send a copy of the complaint to the Administrator of Apprenticeship for investigation and action by the Division of Apprenticeship Standards pursuant to this chapter and rules and procedures prescribed by the California Apprenticeship Council. The division shall hold at least one open hearing relative to the complaint during the 21-day period following the day upon which the division receives a written copy of the complaint. If the commission finds that the complaint is not being processed in accordance with this chapter and such rules and procedures, or if the commission finds that the division has not taken action which has resolved the complaint within 30 days, the commission shall report such findings in writing to the administrator, who upon verification may cause the division to take conclusive action prior to the 61st day following the day upon which a written copy of the complaint was filed with the division. Notwithstanding any other provision of this section, the administrator shall, upon request of, and after written report by, the commission, relieve the division of the case and assign it to the commission, on or before the 61st day following the day upon which a written copy of the complaint was filed with the division. Upon receipt of such assignment, the commission shall immediately proceed to act upon the complaint. The commission shall hold at least one open hearing within 14 days following the day of assignment. The commission shall complete its investigations and any attempts to eliminate any unlawful practices discovered and shall issue an accusation thereon or advise the complainant that the evidence does not warrant further proceedings thereon, within 30 days after the complaint is assigned to the commission. The commission shall prepare such findings, determinations, and orders for issuance by the administrator, who shall notify the complainant and shall make available his findings within 10 days after review of such findings by the commission. Such findings, determinations and orders shall be subject to further legal processes as set forth in this chapter. In the event there is no action by the division or the commission within 101 days after the filing of a complaint with the commission, the person claiming to be aggrieved may bring a civil action under this part within one year after such 101st day.

The Division of Apprenticeship Standards shall inform the commission of the number and disposition of all complaints handled by the division pursuant to this section for inclusion in the commission's report to the Governor and the Legislature as required by law.

CHAPTER 962

An act to amend Section 1720.2 of the Labor Code, relating to public works wages.

[Approved by Governor September 18, 1980. Filed with Secretary of State September 19, 1980.]

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The people of the State of California do enact as follows:

SECTION 1. Section 1720.2 of the Labor Code is amended to read:

1720.2. For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exist:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

CHAPTER 373

An act to amend Sections 2491, 2507, 2532.2, 2537, 2736.5, 3906, 6787, 9889.61, 10100, 10153.7, 10156, 10156.2, 10171, 10171.2, 10201, 10209.5, 10210, 10214.5, 10215, 10216.5, 10239.35, 17910, 20880.5, and 23957 of, to amend and renumber Sections 2160, as amended and renumbered by Chapter 1161 of the Statutes of 1978, 2525.17, as added by Chapter 267 of the Statutes of 1975, 2530, as added by Chapter 1191 of the Statutes of 1977, 24045.3, as added by Chapter 400 of the Statutes of 1975, the heading of Article 12 (commencing with Section 850) of Chapter 1 of Division 2 of, and the heading of Article 3 (commencing with Section 7339) of Chapter 10 of Division 3 of, to add Article 10.5 (commencing with Section 725) to Chapter 1 of Division 2 of, and to repeal Sections 700, as added by Chapter 509 of the Statutes of 1977, 2193.78, 7327, 7328, 7430.5, 7514.2, as added by Chapter 892 of the Statutes of 1974, 7514.2, as added by Section 2 of Chapter 1214 of the Statutes of 1974, and 10206.5 of, the Business and Professions Code, to amend Sections 3334, and 5110 of, and to repeal Sections 22.3, 227aa, and 718c, Title 4 (commencing with Section 504) of Part 4 of Division 1, the heading of Title 7 of Part 4 of Division 2, as enacted in 1872, Title 11 (commencing with Section 2527) of Part 4 of Division 3, and the heading of Chapter 4 of Title 14 of Part 4 of Division 3, as enacted in 1872, of, the Civil Code, to amend Sections 337.15, 682.1, and 690.3 of, to add Section 1062.5 to, and to repeal Section 583.1 of, the Code of Civil Procedure, to amend Section 6106 of the Commercial Code, to amend Sections 6321, 7235, 14073, 15507, and 25013 of, and to repeal Part 9 (commencing with Section 25800)

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such operations are done on the premises owned or operated by the same employer who produced the products referred to herein, including all operations incidental thereto.

(b) Notwithstanding subdivision (a), no employer shall employ any minor 16 years of age or over in any industry, business, or establishment described in subdivision (a) for more than six hours on a day when such minor is required by law to attend school, or more than 20 hours in any school week in which the minor is required by law to attend school.

(c) The employment of any minor at agricultural, horticultural, viticultural, or domestic labor during the time the public schools are not in session, or during other than school hours, when the work performed is for or under the control of his parent or guardian and is performed upon or in connection with premises owned, operated or controlled by the parent or guardian; but nothing herein shall permit children under school age to work at such occupations, while the public schools are in session.

(d) The employment of any minor by engineers engaged in survey work as part of a survey crew in the field.

(e) The full-time employment of minors who meet all other legal employment requirements, if they are exempt from compulsory school attendance under Section 48231 of the Education Code.

SEC. 231. The heading of Article 5 (commencing with Section 1860) of Chapter 1 of Part 7 of Division 2 of the Labor Code is amended to read:

Article 5. Securing Workers' Compensation

SEC. 232. Section 1861 of the Labor Code is amended to read:

1861. Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: "I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

SEC. 233. The heading of Division 4 (commencing with Section 3200) of the Labor Code is amended to read:

DIVISION 4. WORKERS' COMPENSATION AND INSURANCE

SEC. 234. The heading of Division 4.5 (commencing with Section 6100) of the Labor Code is amended to read:

DIVISION 4.5. WORKERS' COMPENSATION AND INSURANCE: STATE EMPLOYEES NOT OTHERWISE COVERED

Public Resources Code is repealed.

SEC. 619. The heading of Division 10 of the Public Resources Code is repealed.

SEC. 620. The heading of Chapter 1 of Division 10 of the Public Resources Code is repealed.

SEC. 621. The heading of Chapter 2 of Division 10 of the Public Resources Code is repealed.

SEC. 622. The heading of Chapter 3 of Division 10 of the Public Resources Code is repealed.

SEC. 623. The heading of Chapter 2 (commencing with Section 11300) of Division 5 of the Vehicle Code, as added by Chapter 3 of the Statutes of 1959, is repealed.

SEC. 624. The heading of Chapter 2 of Part 4 of Division 11 of the Water Code is repealed.

SEC. 625. The heading of Article 4 of Chapter 5 of Part 5 of Division 11 of the Water Code is repealed.

SEC. 626. The heading of Chapter 2.5 of Part 8 of Division 12 of the Water Code is repealed.

SEC. 627. The heading of Article 1 of Chapter 2.5 of Part 8 of Division 12 of the Water Code is repealed.

SEC. 628. Any section of any act enacted by the Legislature during the 1979 portion of the 1979–80 Regular Session, which takes effect on or before January 1, 1980, and which amends, amends and renumbers, adds, repeals and adds, or repeals a section amended, amended and renumbered, repealed and added, or repealed by this act, shall prevail over this act, whether such act is enacted prior to or subsequent to this act.

CHAPTER 1249

An act to amend Sections 1775 and 1777.7 of, to amend and renumber Section 3098 of, to add Section 1722.1 to, and to repeal and add Section 1776 to, the Labor Code, relating to public works contracts, and making an appropriation therefor.

[Approved by Governor September 26, 1978. Filed with Secretary of State September 27, 1978.]

The people of the State of California do enact as follows:

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SECTION 1. Section 1722.1 is added to the Labor Code, to read:

1722.1. For the purposes of this chapter, the terms "contractor" and "subcontractor" shall include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in such capacity, when working on public works pursuant to Article 1 (commencing with Section 1720) and Article 2 (commencing with Section 1770) of Chapter 1 of Part 7 of Division 2 of the Labor Code.

SEC. 2. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each workman paid less than the prevailing rates as determined by the director for such work or craft in which such workman is employed for any public work done under the contract by him or by any subcontractor under him. The difference between such prevailing wage rates and the amount paid to each workman for each calendar day or portion thereof for which each workman was paid less than the prevailing wage rate shall be paid to each workman by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that the provisions of this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813 of this chapter, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify, provided that in the case of a workman claiming the difference between the prevailing wage rate and the amount paid him the awarding body has first been given the notice mentioned in Section 1190.1 of the Code of Civil Procedure, the Division of Labor Standards Enforcement of such violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided for herein. Such action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of such public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in such action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in such action are not due.

Out of any money withheld or recovered or both there shall first be paid the amount due each workman and if insufficient funds are withheld or recovered or both to pay each workman in full the money shall be prorated among all such workmen.

SEC. 3. Section 1776 of the Labor Code is repealed.

SEC. 4. Section 1776 is added to the Labor Code, to read:

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to such employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request to the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. The public shall not be given access to such records at the principal office of the contractor.

(c) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested such records within 10 days after receipt of a written request.

(d) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(e) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(f) In the event of noncompliance with the requirements of this section, the contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects such contractor must comply with this section. Should noncompliance still be evident after such 10-day period, the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor

Standards Enforcement, such penalties shall be withheld from progress payments then due.

(g) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(h) The director shall adopt rules consistent with the California Public Records Act, (Ch. 3.5 (commencing with Sec. 6250), of Div. 7, Title 1, Gov. C.) and the Information Practices Act of 1977, (Title 1.8 (commencing with Sec. 1798) Pt. 4, Div. 3, Civ. C.) governing the release of such records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

SEC. 5. Section 1777.7 of the Labor Code is amended to read:

1777.7. (a) In the event a contractor willfully fails to comply with the provisions of Section 1777.5, such contractor shall:

(1) Be denied the right to bid on any public works contract for a period of one year from the date the determination of noncompliance is made by the Administrator of Apprenticeship; and

(2) Forfeit as a civil penalty in the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding the provisions of Section 1727, upon receipt of such a determination the awarding body shall withhold from contract progress payments then due or to become due such sum.

(b) Any such determination shall be issued after a full investigation, a fair and impartial hearing, and reasonable notice thereof in accordance with reasonable rules and procedures prescribed by the California Apprenticeship Council.

(c) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if such awarding body is an entity other than the state.

The interpretation and enforcement of Sections 1777.5 and 1777.7 shall be in accordance with the rules and procedures of the California Apprenticeship Council.

SEC. 6. Section 3098 of the Labor Code is amended and renumbered to read:

1773.3. An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

SEC. 7. The sum of twenty-seven thousand five hundred dollars

($27,500) is hereby appropriated from the General Fund to the Department of Industrial Relations for the purposes of this act.

CHAPTER 423

An act to amend Section 1773.2 of the Labor Code, relating to public works wages.

[Approved by Governor August 27, 1977. Filed with Secretary of State August 27, 1977.]

The people of the State of California do enact as follows:

SECTION 1. Section 1773.2 of the Labor Code is amended to read:

1773.2. The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in such call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

CHAPTER 1179

An act to amend Section 1070 of the Education Code, and to amend Sections 1777.5, 1777.6, 3071, 3073, 3075, 3076, 3077.5, and 3096 of, and to add Sections 3074.3, and 3075.1 to, the Labor Code, relating to apprenticeship, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 20, 1976. Filed with Secretary of State September 22, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 1777.5 of the Labor Code is amended to read:

1777.5. Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the action by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall notify the appropriate dispatch agency of such approval in order for the contractor or subcontractor to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required

to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contracts of general contractors involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

The Administrator of Apprenticeship's may grant an exemption pursuant to this section to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis. In such cases member contractors will not be

required to submit individual applications for approval to the local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.

SEC. 2. Section 1777.5 of the Labor Code is amended to read:

1777.5. Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship

standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contracts of general contractors involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is

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replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.

SEC. 3. Section 1777.6 of the Labor Code is amended to read:

1777.6. It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as registered apprentices on any public works, on the ground of the race, religious creed, color, national origin, ancestry, sex, or age, except as provided in Section 3077, of such employee.

SEC. 4. Section 3071 of the Labor Code is amended to read:

3071. The California Apprenticeship Council shall meet at the call of the Director of Industrial Relations and shall aid him in formulating policies for the effective administration of this chapter.

Thereafter the California Apprenticeship Council shall meet quarterly at a designated date and special meetings may be held at the call of the chairman. The California Apprenticeship Council shall establish standards for minimum wages, maximum hours, working conditions for apprentice agreements, hereinafter in this chapter referred to as labor standards, which in no case shall be lower than those prescribed by this chapter; shall issue such rules and regulations as may be necessary to carry out the intent and purpose of this chapter, which shall include regulations governing equal opportunities in apprenticeship, affirmative action programs which include women and minorities in apprenticeship, and other on-the-job training, and criteria for selection procedures with a view particularly toward eliminating criteria not relevant to qualification for training employment or more stringent than is reasonably necessary; shall foster, promote, and develop the welfare of the apprentice and industry, improve the working conditions of apprentices, and advance their opportunities for profitable employment; shall insure that selection procedures are impartially administered to all applicants for apprenticeship; shall gather and promptly disseminate information through apprenticeship and training information centers; and shall maintain on public file in all high schools and field offices of the Department of Employment Development the name and location of the local area apprenticeship committees, the filing date, and minimum requirements for application of all registered apprenticeship programs. The California Apprenticeship Council shall make biennial reports through the Director of Industrial Relations of its activities and findings to the Legislature and to the public.

SEC. 5. Section 3073 of the Labor Code is amended to read:

3073. The administrator, or his duly authorized representative shall administer the provisions of this chapter; act as secretary of the California Apprenticeship Council; cooperate in the formation of joint apprenticeship committees and advise with them on problems affecting labor standards; may enter joint agreements with the Employment Development Department outreach education and employment programs, and educational institutions on the operation of apprenticeship information centers, including positive efforts to achieve information on equal opportunity and affirmative action programs for women and minorities; shall supervise and recommend apprenticeship agreements as to these standards and perform such other duties associated therewith as the California Apprenticeship Council may recommend. The administrator shall coordinate the exchange, by the California Apprenticeship Council, the apprenticeship program sponsors, the Fair Employment Practices Commission, community organizations, and other interested persons, of information on available minorities and women who may serve as apprentices.

SEC. 5.5. Section 3074.3 is added to the Labor Code, to read:

3074.3. In providing related and supplemental instruction

pursuant to Section 3074, and notwithstanding the provisions of Sections 5753 and 5753.1 and subdivisions (c) and (d) of Section 11251 of the Education Code, the Superintendent of Public Instruction and the Chancellor of the California Community Colleges shall recognize registration in an apprenticeship program approved by the Division of Apprenticeship Standards in the Department of Industrial Relations as an acceptable prerequisite to enrollment into such related and supplemental classes of instruction.

SEC. 6. Section 3075 of the Labor Code is amended to read:

3075. Local or state joint apprenticeship committees may be selected by the employer and the employee organizations, in any trade in the state or in a city or trade area, whenever the apprentice training needs of such trade justifies such establishment. Such joint apprenticeship committees shall be composed of an equal number of employer and employee representatives. All selection and disciplinary proceedings for apprentices or prospective apprentices shall be duly noticed to such individuals. The Division of Apprenticeship Standards shall audit all such proceedings.

SEC. 7. Section 3075.1 is added to the Labor Code, to read:

3075.1. It is the public policy of this state to encourage the utilization of apprenticeship as a form of on-the-job training, when such training is cost-effective in developing skills needed to perform public services. State and local public agencies shall make a diligent effort to establish apprenticeship programs for apprenticeable occupations in their respective work forces. In furtherance of this policy, public agencies shall take into consideration (a) the extent to which a continuous supply of trained personnel is readily available to public agencies to meet their skill requirements in the various occupations which are determined to be apprenticeable, and (b) the application of established programs in the private sector, where appropriate. Public sector apprenticeship programs should be fully compatible with affirmative action goals for the participation of minorities and women in apprenticeship programs.

SEC. 8. Section 3076 of the Labor Code is amended to read:

3076. The function of the joint apprenticeship committee shall be to work in an advisory capacity with employers and employees in matters regarding schedule of operations, application of wage rates, working conditions for apprentices, the number of apprentices which shall be employed in the trade under apprentice agreements under this chapter, in accordance with labor standards set up by the California Apprenticeship Council except as specific written authority is delegated to the joint apprenticeship committee by the parent bodies they represent; and to aid in the adjustment of apprenticeship disputes as they affect labor standards. The joint apprenticeship committee shall establish selection procedures which specify minimum requirements for formal education or equivalency, physical examination, if any, subject matter of written tests and oral interviews, and any other criteria pertinent to the selection process; shall specify the relative weights of all factors which determine

selection to an apprenticeship program; shall submit in writing to the Administrator of Apprenticeship an official statement of each selection procedure including filing date and location of the joint apprenticeship committee; shall provide a copy of the selection procedures to each applicant; shall provide in writing to each applicant not selected an official explanation setting forth the reason or reasons for the nonselection, copies of which explanation shall be retained as a public record in the files of the joint apprenticeship committee for a period of three years; and shall implement affirmative action programs for minorities and women in accordance with the rules, regulations, and guidelines of the California Apprenticeship Council.

SEC. 9. Section 3077.5 of the Labor Code is amended to read:

3077.5. No association of employers, organization of employees, or joint committee administering an apprenticeship training program under this chapter shall provide a maximum age for apprentices.

The provisions of this section shall not apply to any apprenticeship program established pursuant to any collective-bargaining contract or agreement entered into prior to the operative date of this section.

SEC. 10. Section 3096 of the Labor Code is amended to read:

3096. Complaints alleging discrimination against any person in the selection or training of that person in any apprenticeship training program because of the race, religious creed, color, national origin, ancestry, or sex of such person shall be filed with the State Fair Employment Practice Commission pursuant to Part 4.5 (commencing with Section 1410) of Division 2 of this code. Whenever such a complaint is filed with the commission, the commission shall immediately send a copy of the complaint to the Administrator of Apprenticeship for investigation and action by the Division of Apprenticeship Standards pursuant to this chapter and rules and procedures prescribed by the California Apprenticeship Council. The division shall hold at least one open hearing relative to the complaint during the 21-day period following the day upon which the division receives a written copy of the complaint. If the commission finds that the complaint is not being processed in accordance with this chapter and such rules and procedures, or if the commission finds that the division has not taken action which has resolved the complaint within 30 days, the commission shall report such findings in writing to the administrator, who upon verification may cause the division to take conclusive action prior to the 61st day following the day upon which a written copy of the complaint was filed with the division. Notwithstanding any other provision of this section, the administrator shall, upon request of, and after written report by, the commission, relieve the division of the case and assign it to the commission, on or before the 61st day following the day upon which a written copy of the complaint was filed with the division. Upon receipt of such assignment, the commission shall immediately proceed to act upon the complaint. The commission shall hold at

least one open hearing within 14 days following the day of assignment. The commission shall complete its investigations and any attempts to eliminate any unlawful practices discovered and shall issue an accusation thereon or advise the complainant that the evidence does not warrant further proceedings thereon, within 30 days after the complaint is assigned to the commission. The commission shall prepare such findings, determinations, and orders for issuance by the administrator, who shall notify the complainant and shall make available his findings within 10 days after review of such findings by the commission. Such findings, determinations and orders shall be subject to further legal processes as set forth in this chapter. In the event there is no action by the division or the commission within 101 days after the filing of a complaint with the commission, the person claiming to be aggrieved may bring a civil action under this part within one year after such 101st day.

The Division of Apprenticeship Standards shall inform the commission of the number and disposition of all complaints handled by the division pursuant to this section for inclusion in the commission's report to the Governor and the Legislature as required by this code.

SEC. 11. Section 1070 of the Education Code is amended to read:

1070. The governing board of any school district may provide in each school within the district an organized and functioning counseling program. Counseling shall include, but not be limited to, the following:

(a) Educational counseling, in which the pupil is assisted in planning and implementing his immediate and long-range educational program.

(b) Career counseling, in which the pupil is assisted in assessing his or her aptitudes, abilities, and interests in order to make realistic career decisions. Such career counseling shall include encouraging students, including women and minorities, to seek apprenticeship training.

(c) Personal counseling, in which the pupil is helped to develop his ability to function with social and personal responsibility.

(d) Evaluating and interpreting test data.

(e) Counseling and consultation with parents and staff members on learning problems and guidance programs for pupils.

For purposes of this section, a person performing counseling services to pupils shall be a school counselor possessing a valid credential with a specialization in pupil personnel services and assigned specific times to directly counsel pupils regarding their educational, vocational, and social adjustment.

A governing board of a school district which offers such counseling services, may contract with the governing boards of any other school districts, or private schools, or other public and private agencies or organizations, to render such counseling services. In so contracting, the governing board of a school district shall not contract at less than cost to a private school, or private agency or organization.

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Nothing in this section shall be construed as prohibiting persons participating in an organized advisory program approved by the governing board of a school district, and supervised by a school district counselor, from advising pupils pursuant to the organized advisory program.

Notwithstanding any provisions of this section to the contrary, any person who is performing such counseling services pursuant to law authorizing the performance thereof in effect before the effective date of this section shall be authorized to continue to perform such services on and after the effective date of this section without compliance with the additional requirements imposed by this section.

SEC. 12. There are no state-mandated local costs in this act that require reimbursement under Section 2231 of the Revenue and Taxation Code because there are no new duties, obligations or responsibilities imposed on local government by this act.

SEC. 13. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order that the California Community Colleges and adult education programs may continue to offer classroom training to apprentices on an uninterrupted basis, it is necessary that this act take effect immediately.

SEC. 14. It is the intent of the Legislature, if this bill and Assembly Bill No. 2466 are both chaptered and become effective on or before January 1, 1977, both bills amend Section 1777.5 of the Labor Code, and this bill is chaptered after Assembly Bill No. 2466, that Section 1777.5 of the Labor Code, as amended by Section 1 of Assembly Bill No. 2466, be further amended on the effective date of this act in the form set forth in Section 2 of this act to incorporate the changes in Section 1777.5 proposed by this bill. Therefore, if this bill and Assembly Bill No. 2466 are both chaptered and become effective on or before January 1, 1977, and Assembly Bill No. 2466 is chaptered before this bill and amends Section 1777.5, Section 2 of this act shall become operative on the effective date of this act and Section 1 of this act shall not become operative.

CHAPTER 1174

An act to amend Section 1735 of the Labor Code, and to amend Section 453 of the Public Utilities Code, relating to sex discrimination.

[Approved by Governor September 21, 1976. Filed with Secretary of State September 22, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 1735 of the Labor Code is amended to read:

1735. No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such persons, except as provided in Section 1420, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

SEC. 2. Section 453 of the Public Utilities Code, as amended by Chapter 447 of the Statutes of 1975, is amended to read:

453. (a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status. A person who has exhausted all administrative remedies with the commission may institute a suit for injunctive relief and reasonable attorney's fees in cases of an alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees.

(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(d) No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether

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local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state, or local legislation or regulations.

(e) The commission may determine any question of fact arising under this section.

SEC. 3. Section 453 of the Public Utilities Code, as amended by Chapter 447 of the Statutes of 1975, is amended to read:

453. (a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status. A person who has exhausted all administrative remedies with the commission may institute a suit for injunctive relief and reasonable attorney's fees in cases of an alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees.

(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(d) No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state, or local legislation or regulations; provided that until December 31, 1976, any such prohibitions shall not apply to any notice or statement relating to matters affecting rates or service to customers or subscribers where the public utility has requested and received the prior approval of the commission.

(e) The commission may determine any question of fact arising under this section.

SEC. 4. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to that section nor shall there be an appropriation made by this act because the Legislature recognizes that during any legislative session a variety of changes to laws relating to crimes and infractions may cause both increased and decreased costs to local governmental entities and school districts which, in the aggregate, do not result in

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significant identifiable cost changes.

SEC. 5. It is the intent of the Legislature, if this bill and Senate Bill No. 1683 are both chaptered and become effective on or before January 1, 1977, both bills amend Section 453 of the Public Utilities Code, and this bill is chaptered after Senate Bill No. 1683, that Section 453 of the Public Utilities Code, as amended by Section 1 of Senate Bill No. 1683, be further amended on the effective date of this act in the form set forth in Section 3 of this act to incorporate the changes in Section 453 proposed by this bill. Therefore, if this bill and Senate Bill No. 1683 are both chaptered and become effective on or before January 1, 1977, and Senate Bill No. 1683 is chaptered before this bill and amends Section 453, Section 3 of this act shall become operative on the effective date of this act and Section 2 of this act shall not become operative.

SEC. 6. It is the intent of the Legislature, if this bill and Assembly Bill No. 497 are both chaptered and become effective on or before January 1, 1977, both bills amend Section 453 of the Public Utilities Code, and this bill is chaptered after Assembly Bill No. 497, that Section 453 of the Public Utilities Code, as amended by Section 1 of Assembly Bill No. 497, be further amended on the effective date of this act in the form set forth in Section 3 of this act to incorporate the changes in Section 453 proposed by this bill. Therefore, if this bill and Assembly Bill No. 497 are both chaptered and become effective on or before January 1, 1977, and Assembly Bill No. 497 is chaptered before this bill and amends Section 453, Section 3 of this act shall become operative on the effective date of this act and Section 2 of this act shall not become operative.

CHAPTER 861

An act to amend Section 14311.5 of the Government Code and Section 1771 of the Labor Code, relating to public works.

[Approved by Governor September 9, 1976. Filed with Secretary of State September 10, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 14311.5 of the Government Code is amended to read:

14311.5. In all state projects where federal funds are involved, no bid submitted or contract thereafter awarded shall be invalidated by the failure of the bidder or contractor to be properly licensed in accordance with the laws of this state, nor shall any such contractor be denied payment under any such contract because of such failure; provided, however, that the first payment for work or material under such contract shall not be made by the State Controller unless and until the Registrar of Contractors certifies to him that the records of the Contractors State License Board indicate that such contractor was or became properly licensed between the time of bid opening and the making of the certification. Any bidder or contractor not so licensed shall be subject to all legal penalties imposed by such laws, including but not limited to any appropriate disciplinary action by the Contractors State License Board. The department shall include a statement to that effect in the standard form of prequalification questionnaire and financial statement.

SEC. 2. Section 1771 of the Labor Code is amended to read:

1771. Except for public works projects of five hundred dollars ($500) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workmen employed on public works.

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This section is applicable only to work performed under contract and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

CHAPTER 599

An act to amend Section 1776 of the Labor Code, relating to public works wages.

[Approved by Governor August 26, 1976. Filed with Secretary of State August 27, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 1776 of the Labor Code is amended to read:

1776. Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice or worker employed by him in connection with the public work. The contractor's and subcontractor's payroll records shall be available for inspection at all reasonable hours, and a copy shall be made available to the employee or his authorized representative, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards. The body awarding the contract may charge a reasonable fee for copying such records. The body awarding the contract shall be required to retain the records filed pursuant to this section for 90 days after completion of the contract. After a complaint has been filed with the awarding body or the Division of Labor Standards Enforcement alleging that a contractor or subcontractor has paid less than the prevailing wage on a public works project, the contractor or subcontractor shall upon written notice from either the awarding body or the Division of Labor Standards Enforcement within 10 days file with the body awarding the contract a certified copy of the payroll records.

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be an appropriation made by this act because self-financing authority is provided in this act to cover such costs.

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CHAPTER 538

An act to amend Section 1777.5 of, and to add Section 1777.7 to, the Labor Code, relating to apprenticeship standards.

[Approved by Governor August 24, 1976. Filed with Secretary of State August 24, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 1777.5 of the Labor Code is amended to read:

1777.5. Nothing in this chapter shall prevent the employment of properly indentured apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is indentured.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

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When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area of the site of the public work. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, shall, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall, employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each eight journeymen, the Division of Apprenticeship Standards shall grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contracts of general contractors involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under

a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Law Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.

SEC. 2. Section 1777.7 is added to the Labor Code, to read:

1777.7. In the event a licensed contractor willfully fails to comply with the provisions of Section 1777.5, such licensee shall be denied the right to bid on any public works contract for a period of one year from the date the determination of noncompliance is made by the Administrator of Apprenticeship and, notwithstanding the provisions of Section 1727, upon receipt of such a determination the awarding body shall withhold from contract progress payments then due or to become due the sum of five thousand dollars ($5,000). Any determination shall be issued after a full investigation, a fair and impartial hearing, and reasonable notice thereof in accordance with reasonable rules and procedures prescribed by the California Apprenticeship Council. Any funds withheld by the awarding body pursuant to this section shall be released to the contractor upon

issuance of an order to that effect by the administrator, or upon completion of the contract.

The interpretation and enforcement of Sections 1777.5 and 1777.7 shall be in accordance with the rules and procedures of the California Apprenticeship Council.

SEC. 3. No appropriation is made by this act, nor is any obligation created thereby under Section 2231 of the Revenue and Taxation Code, for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act.

CHAPTER 733

An act to amend Section 22002 of the Public Contract Code, and to amend Section 125223 of the Public Utilities Code, relating to transit.

[Approved by Governor September 24, 1989. Filed with Secretary of State September 25, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 22002 of the Public Contract Code is amended to read:

22002. (a) "Public agency," for purposes of this chapter, means a city, county, city and county, including chartered cities and chartered counties, any special district, and any other agency of the state for the local performance of governmental or proprietary functions within limited boundaries. "Public agency" also includes a nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.

(b) "Representatives of the construction industry" for purposes of

this chapter, means a general contractor, subcontractor, or labor representative with experience in the field of public works construction.

(c) "Public project" means any of the following:

(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

(2) Painting or repainting of any publicly owned, leased, or operated facility.

(3) In the case of a publicly owned utility system, "public project" shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(d) "Public project" does not include maintenance work. For purposes of this section, "maintenance work" includes all of the following:

(1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.

(2) Minor repainting.

(3) Resurfacing of streets and highways at less than one inch.

(4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

(5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(e) For purposes of this chapter, "facility" means any plant, building, structure, ground facility, utility system, subject to the limitation found in paragraph (3) of subdivision (c), real property, streets and highways, or other public work improvement.

SEC. 2. Section 125223 of the Public Utilities Code is amended to read:

125223. Contracts for the purchase of supplies, equipment, and materials in excess of twenty thousand dollars ($20,000) shall be awarded to the lowest responsible bidder after competitive bidding, except in an emergency declared by the vote of two-thirds of the membership of the board.

CHAPTER 281

An act to amend Section 15716 of the Education Code and to amend Sections 1770, 1773, 1773.1, and 1773.6 of, to repeal and add Section 1773.7 to, and to repeal Section 1773.3 of, the Labor Code, relating to wages on public works.

[Approved by Governor June 25, 1976. Filed with Secretary of State June 26, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 15716 of the Education Code is amended to read:

15716. The governing board of the school district shall obtain the general prevailing rate of per diem wages from the Director of the Department of Industrial Relations for each craft, classification or type of workman needed for the construction of the building and shall specify in the resolution and in the notice, required by Section 15712, or in the resolution required by Section 15712.5 and in the lease or agreement made pursuant to this article (commencing at Section 15701), what the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality is for each craft, classification or type of workmen needed for the construction of the building. The holidays upon which such rate shall be paid need not be specified by the governing board, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workmen employed on the project.

Any agreement or lease entered into pursuant to this article shall require that such general prevailing rates will be paid. It shall also require that work performed by any workman employed upon the project in excess of eight hours during any one calendar day shall be permitted only upon compensation for all hours worked in excess of eight hours per day at not less than 1½ times the basic rate of pay. There may also be included in leases or agreements entered into pursuant to this article any other requirements with respect to matters related to the subject of this section which the governing board deems necessary or desirable.

SEC. 2. Section 1770 of the Labor Code is amended to read:

1770. The Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.

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SEC. 3. Section 1773 of the Labor Code is amended to read:

1773. The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

SEC. 4. Section 1773.1 of the Labor Code is amended to read:

1773.1. Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in Section 1773.8, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workman needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids.

SEC. 5. Section 1773.3 of the Labor Code is repealed.

SEC. 6. Section 1773.6 of the Labor Code is amended to read:

1773.6. If during any quarterly period the Director of Industrial

Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

SEC. 7. Section 1773.7 of the Labor Code is repealed.

SEC. 8. Section 1773.7 is added to the Labor Code, to read:

1773.7. The provisions of Section 11250 of the Government Code shall not be applicable to Sections 1773, 1773.4, and 1773.6.

SEC. 9. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be an appropriation made by this act because the duties, obligations or responsibilities imposed on local governmental entities or school districts by this act are such that related costs are incurred as part of their normal operating procedures.

Exhibit 5
Copies of Regulations Cited

been filed, and after consideration of such exceptions the director shall decide that the exceptions to the report of the service do raise substantial and material factual issues, he shall direct the hearing officer to issue a notice of hearing, whereupon the procedures for a hearing and the issuance of the hearing officer's report provided for in subsection (e) of this section (including the provision for filing exceptions to the hearing officer's report) shall be followed. The director may adopt the recommendations of the hearing officer issued under subsection (d) or the report of the hearing officer issued under subsection (e) as his own. The service shall thereafter promptly proceed to take such action as may be called for by the decision of the director, after which the proceedings will be closed.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875. Runoff Elections.

(a) The service shall conduct a runoff election, without further order of the director, when an election in which a ballot providing for not less than three choices (i.e. at least two representatives and "neither" or "none") results in no choice receiving a majority of the valid ballots cast, which runoff election shall be held promptly following final disposition of any challenges, objections or exceptions which followed the prior election as provided in Section 15870. Only one runoff election shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are employed in an eligible category on the date of the runoff election shall be the only employees eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and "neither" or "none" is equally divided among the several choices, or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the director shall declare the first election a nullity and shall conduct another election among the three choices which received the greatest number of ballots in the original election; provided that in the event there was a tie in the original election between the third and fourth choices or among the third, fourth and other choices, the director shall in the runoff election include on the ballot all such tied choices. In the event two or more choices receive the same number of ballots, and if either (1) there are no challenged ballots which would affect the results of the election, or (2) after all challenges have been disposed of it is found that all eligible voters have cast valid ballots, there shall be no runoff election and the petition shall be dismissed. Only one such further election pursuant to this subsection (d) may be held.

(e) The provisions of Section 15870 above shall be applicable to a runoff election.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875.1. Relevant Federal Law.

In resolving questions of representation, the Director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. New section filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 2.3. Election Procedure Under San Francisco Bay Area Rapid Transit District Law

NOTE: Authority cited for Group 2.3: Section 54, Labor Code and Section 28851, Public Utilities Code.

HISTORY

1. New Group 2.3 (§§ 15900–15926) filed 1–5–73; effective thirtieth day thereafter (Register 73, No. 1).
2. Repealer of Group 2.3 (Sections 15900–15926) filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 3. Payment of Prevailing Wages upon Public Works

Article 1. Definitions

§ 16000. Definitions.

The following terms are defined for general use in these regulations within Group 3, Payment of Prevailing Wages Upon Public Works and Group 4, Awarding Body Labor Compliance Programs:

Area of Determination. The area of determining the prevailing wage is the "locality" and/or the "nearest labor market area" as determined by the Director. In determining the area, the mobility of each craft, classification and type of work will be considered.

Awarding body. Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.

Bid. Any proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind.

Certified. The affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

Chief of DAS. Chief of Division of Apprenticeship Standards or a duly authorized representative.

Chief of DLSE/Labor Commissioner. Chief of the Division of Labor Standards Enforcement or a duly authorized representative.

Chief of DLSR. Chief of the Division of Labor Statistics and Research or a duly authorized representative.

Coverage. This means being subject to the requirements of Part 7, Chapter 1 of the Labor Code as a "public work." This includes all formal coverage determinations issued by the Director of Industrial Relations.

DAS. Division of Apprenticeship Standards.

Date of Notice or Call for Bids. The date the first notice inviting bids was published in a newspaper of general circulation or promulgated in a legally sufficient manner which results in a contract being awarded with or without competitive bidding. This may also be referred to as the Bid Advertisement Date.

Days. Unless otherwise specified means calendar days.

DLSE. The Division of Labor Standards Enforcement.

DLSR. The Division of Labor Statistics and Research.

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Effective Date. The date upon which the determinations of the Director go into effect. This date is ten days after the issue date of the determination.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

Expiration Date. The date upon which the determinations of the Director are subject to change.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight-time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Helper. Any subjourneyman classification traditionally used to assist a journeyman. Under no circumstance may the Helper classification be used to replace statutorily required Apprentices.

Identify or Give Notice of Identity. This means to state the name, job title, address and current telephone number of a person or entity.

Interim Determination. Those determinations of the Director issued between the quarterly updates.

Issue Date–Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

LCP. A labor compliance program initiated and enforced by an awarding body in accordance with these regulations.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded.

Mistake, Inadvertence, or Neglect. Mistake, inadvertence, or neglect in failing to pay the correct general rate of per diem wages means the lack of knowledge that any reasonable person would also be expected to have under the same or similar circumstances.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Predetermined Changes. Definite changes to the basic hourly wage rate, overtime, holiday pay rates, and employer payments which are known and enumerated in the applicable collective bargaining agreement

at the time of the bid advertisement date and which are referenced in the general prevailing rate of per diem wages as defined in Section 16000 of these regulations. Contractors are obligated to pay up to the amount that was predetermined if these changes are modified prior to their effective date. Predetermined changes which are rescinded prior to their effective date shall not be enforced.

Prevailing Rate. Includes:

(1) The basic hourly rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers is paid at a single rate; if there is no single rate being paid to a majority, then the single rate (modal rate) being paid to the greater number of workers is prevailing. If there is no modal rate, then an alternate rate will be established by considering the appropriate collective bargaining agreements, Federal rates or other data such as wage survey data, including the nearest labor market area, or expanded survey as provided in Article 4 of these regulations;

(2) Other employer payments as defined in Section 16000 of these regulations and as included as part of the total hourly wage rate, from which the prevailing basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, then the Director may establish a prevailing employer payment rate by the same procedure outlined in subsection (1) above.

(3) The rate for holiday or overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, holidays and overtime (if any) included with the prevailing basic hourly rate of pay shall be prevailing.

Public Entity. For the purpose of processing requests for inspection of payroll records or furnishing certified copies thereof, "public entity" includes: the body awarding the contracts; the Division of Apprenticeship Standards (DAS); or the Division of Labor Standards Enforcement (DLSE).

Public Funds. Includes state, local and/or federal monies.

NOTE: Public funds do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body.

Public Works. See Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

Service upon a Contractor or Subcontractor. This is the process defined in Title 8, California Code of Regulations, (CCR) Section 16801(a)(2)(A).

Serve upon the Labor Commissioner. Delivery of all documents including legal process to the Headquarters of the Labor Commissioner.

Sheltered workshop. A nonprofit organization licensed by the Chief of DLSE employing mentally and/or physically handicapped workers.

Wage Survey. An investigation conducted pursuant to Labor Code Sections 1773 and/or 1773.4 to determine the general prevailing rate of per diem wages for the crafts/classifications in the county(ies) for which the survey questionnaire was designed.

Willful. See Labor Code Section 1777.1(d).

Worker. See Labor Code Sections 1723 and 1772.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1191.5, 1720, 1720.2, 1720.3, 1721, 1722, 1722.1, 1723, 1724, 1770, 1771, 1772, 1773.5, 1776, 2750.5, 3071 and 3093, Labor Code; and Section 21002, Public Contract Code.

HISTORY

1. Repealer of group 3 (articles 1–3, sections 16000–16004, 16100–16101 and 16200–16205) and new group 3 (articles 1–4, sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1–3–77 as an emergency; effective upon filing (Register 77, No 2). For prior history, see Register 56, No. 8.
2. New group 3 (sections 16000–16014, 16100–16109, 16200–16207.9) filed 2–8–78; effective thirtieth day thereafter (Register 78, No. 6).
3. Renumbering and amendment of former sections 16000–16006 and 16008–16019 to section 16000; renumbering and amendment of former section 16100 to section 16002; renumbering and amendment of former section 16101 to section 16203; renumbering and amendment of former sections 16102–16105 to section 16200; renumbering and amendment of former section 16106 to section 16206; renumbering and amendment of former sections 16107(a), (b) and (c) to sections 16201, 16202 and 16205; renumbering and amendment of former section 16108 to section 16204; renumbering and amendment of former section 16200 to section 16300; renumbering and amendment of former sections 16007, 16201, 16202, 16204 and 16206 to section 16302; renumbering and amendment of former section 16207 to section 16303; renumbering and amendment of former sections 16207.2 and 16207.3 to section 16304; renumbering and amendment of former section 16207.5 to section 16100; renumbering and amendment of former section 16207.7 to section 16301; renumbering and amendment of former sections 16207.10–16207.14 to section 16400; renumbering and amendment of former sections 16207.15 and 16207.16 to section 16401; renumbering and amendment of former section 16207.17 to section 16402; renumbering and amendment of former section 16207.18 to section 16403; renumbering and amendment of former section 16207.19 to section 16500; repealer of former sections 16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8; and new sections 16001, 16101 and 16102 filed 2–11–86; effective thirtieth day thereafter (Register 86, No. 7). For prior history, see Registers 82, No. 51; 80, No. 6; 79, No. 19; 72, No. 23 and 72, No. 13.
4. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
5. Repealer of definition of "Predetermined Changes" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
6. Amendment of definition of "Prevailing Rate" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
7. Change without regulatory effect restoring definition of "Predetermined Changes" and repealing amendments to definition of "Prevailing Rate" filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

Article 2. Work Subject to Prevailing Wages

§ 16001. Public Works Subject to Prevailing Wage Law.

(a) General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771.

(1) Any interested party enumerated in Section 16000 of these regulations may file with the Director of Industrial Relations or the Director's duly authorized representative, as set forth in Section 16301 of these regulations, a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code. If such a request is filed by any party other than the awarding body, a copy of the request must be served upon the awarding body, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, when it is filed with the Director.

(2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, any documents, arguments, or authorities it wishes to have considered in the coverage determination process.

(3) All parties to the coverage determination request shall have a continuing duty to provide the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, with relevant documents in their possession or control, until a determination is made. Where any party or parties' agent has a document in their possession, but refuses to release a copy, the Department shall consider that the documents, if released, would contain information adverse to the withholding party's position and may close the record and render a decision on the basis of that inference and the information received.

(b) Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

(c) Field Surveying Projects. Field survey work traditionally covered by collective bargaining agreements is subject to prevailing wage rates when it is integral to the specific public works project in the design, preconstruction, or construction phase.

(d) Residential Projects. Residential projects consisting of single family homes and apartments up to and including four stories are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally–funded or assisted residential projects controlled or carried out by an awarding body.

NOTE: Such projects may require a special determination by the Director which should be requested by the awarding body at least 45 days before the commencement of advertising of the call for bids by the awarding body.

(e) Commercial Projects. All non–residential construction projects including new work, additions, alterations, reconstruction and repairs. Includes residential projects over four stories.

(f) Maintenance. Public works contracts for maintenance are subject to prevailing wage rate payment as set forth in Section 1771 of the Labor Code.

NOTE: See Article 1 for definition of term "maintenance."

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. Amendment of subsection (a) and NOTE and adoption of subsections (a)(1)–(3) and (e) and relettering former subsection (e) to (f) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
2. Amendment of subsection (b) and (d) and NOTE filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
3. Change without regulatory effect repealing amendments to subsections (b) and (d) and NOTE filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

§ 16002. Coverage of Worker.

The determinations of the Director will cover those crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

NOTE: Authority cited: Sections 1723 and 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3 and 1771, Labor Code.

§ 16002.5. Appeal of Public Work Coverage Determination.

(a) Those interested parties enumerated in Section 16000 of these regulations may appeal to the Director of Industrial Relations or the Director's duly authorized representative as set forth in Section 16301 of these regulations a determination of coverage under the public works laws (Labor Code Section 1720 et seq.) regarding either a specific project or type of work under Section 16001(a) of these regulations. Such notice of appeal must be served within 30 days of the issuance of the coverage determination. The party appealing the determination must, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, give written notification to the awarding body and any other identifiable parties.

(b) The notice of appeal shall state the full factual and legal grounds upon which the determination is appealed, and whether a hearing is desired. The decision to hold a hearing is within the Director's sole discretion. The Director may appoint a hearing officer to conduct the hearing and propose a decision on the appeal. The Director shall make the final decision on the appeal.

(c) The authority of the Director to determine coverage of projects under the prevailing wage laws is quasi–legislative, and a final determination on any appeal is subject to judicial review pursuant to the Code of Civil Procedure, Section 1085.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16003. Requests for Approval of Volunteer Labor.

(a) An awarding body wishing to use volunteer labor on what would otherwise be a public works project, pursuant to Labor Code Section 1720.4 shall serve a written request for approval on the Director, not less than 45 days prior to the commencement of work on the facilities or structures.

(b) The request for approval shall fully set forth the awarding body's grounds for belief that the requirements of Labor Code Section 1720.4(a), (b), and (c) are satisfied, and shall list all the crafts and classifications of workers that typically perform the types of work needed for the project.

(c) The request for approval shall identify the unions which represent workers in the crafts or classifications listed in (b) within the locality in which the public work is performed.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1720.4, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 3. Duties, Responsibilities, and Rights of Parties

§ 16100. Duties, Responsibilities and Rights.

The parties listed in this section must comply with the provisions of the Labor Code applicable to the payment of prevailing wages on public works contracts.

(a) Department and Division Authority in Prevailing Wage Issues. The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the Division of Labor Standards Enforcement. The lead agency for the coordination on apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by the law or these regulations.

(b) The Awarding Body shall:

(1) Obtain the prevailing wage rate from the Director in accordance with Labor Code Sections 1771 and 1773.

(2) Specify the appropriate prevailing wage rates, in accordance with Labor Code Sections 1773.2 and 1777.5.

(A) The posting requirement is applicable for each job site.

EXCEPTION: If more than one worksite exists on any project, then the applicable rates may be posted at a single location which is readily available to all workers.

(B) If a wage rate for a craft, classification or type of worker is not published in the Director's general prevailing wage determinations, a request for a special determination should be made by the awarding body to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, at least 45 days prior to the project bid advertisement date.

(3) Notify DAS. See Labor Code Section 1773.3.

(4) Inform prime contractors, to the extent feasible, of relevant public work requirements:

NOTE: Requirement information may be disseminated at a preacceptance of bid conference or in a call for bids or at an award of bid conference.

The public works requirements are:

(A) the appropriate number of apprentices are on the job site, as set forth in Labor Code Section 1777.5.

(B) worker's compensation coverage, as set forth in Labor Code Sections 1860 and 1861.

(C) keep accurate records of the work performed on the public works project, as set forth in Labor Code Section 1812.

(D) inspection of payroll records pursuant to Labor Code Section 1776, and as set forth in Section 16400 (e) of these regulations.

(E) and other requirements imposed by law.

(5) Withhold monies. See Labor Code Section 1727.

(6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771.

(7) Deny the right to bid on public work contracts to contractors or subcontractors who have violated public work laws, as set forth in Labor Code Section 1777.7.

(8) Not permit workers on public works to work more than eight hours a day or 40 hours in any one calendar week, unless compensated at not less than time and a half as set forth in Labor Code Section 1815.

EXCEPTION: If the prevailing wage determination requires a higher rate of pay for overtime work than is required under Labor Code Section 1815, then that higher overtime rate must be paid [, as specified in subsection 16200(a)(3)(F) of these regulations.]

(9) Not take or receive any portion of the workers' wages or accept a fee in connection with a public works project, as set forth in Labor Code Sections 1778 and 1779.

(10) Comply with those requirements as specified in Labor Code Sections 1776(g), 1777.5, 1810, 1813, and 1860.

(c) Contractor–subcontractor.

The contractor and subcontractor shall:

(1) Pay not less than the prevailing wage to all workers, as defined in Section 16000(a) of these regulations, and as set forth in Labor Code Sections 1771 and 1774;

(2) Comply with the provisions of Labor Code Sections 1773.5, 1775, and 1777.5 regarding public works jobsites;

(3) Provide workers' compensation coverage as set forth in Labor Code Section 1861;

(4) Comply with Labor Code Sections 1778 and 1779 regarding receiving a portion of wages or acceptance of a fee;

(5) Maintain and make available for inspection payroll records, as set forth in Labor Code Section 1776;

(6) Pay workers overtime pay, as set forth in Labor Code Section 1815 or as provided in the collective bargaining agreement adopted by the Director as set forth in Section 16200 (a) (3) of these regulations; and

(7) Comply with Section 16101 of these regulations regarding discrimination.

(8) Be subject to provisions of Labor Code Section 1777.7 which specifies the penalties imposed on a contractor who willfully fails to comply with provisions of Section 1777.5.

(9) Comply with those requirements as specified in Labor Code Sections 1810 and 1813.

(10) Comply with other requirements imposed by law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1726, 1727, 1728, 1729, 1770, 1771, 1773, 1773.2, 1773.3, 1773.4, 1773.5, 1774, 1775, 1776, 1777.5, 1777.7, 1778, 1779, 1810, 1811, 1812, 1813, 1815, 1860 and 1861, Labor Code.

HISTORY

1. Amendment of subsection (b)(2)(B) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16101. Discrimination.

See Labor Code Sections 1735, 1777.5, 1777.6, and 3077.5.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1735, 1777.5, 1777.6 and 3077.5, Labor Code.

§ 16102. Interested Party.

An interested party, as defined in Section 16000 of these regulations, may be a source of wage data information, as provided in Section 16200(e) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

Article 4. Wage Determinations

§ 16200. General; Basis for Determining Prevailing Wage Rate.

The Director shall follow those procedures specified in Sections 1773 and 1777.5 of the Labor Code and in these regulations when making a prevailing wage determination.

(a) Collective Bargaining Agreements or Wage Surveys.

(1) Filing of collective bargaining agreements.

(A) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all their collective bargaining agreements, including any and all addenda which modify the agreements, within 10 days of their execution and shall be considered as the basis for a prevailing wage determination whenever on file 30 days before the call for bids on a project.

(B) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code, and Section 16200(a)(1)(A) of these regulations shall be addressed to: Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142.

(C) Collective bargaining agreements filed with the Division of Labor Statistics and Research must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

1. certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or photocopy thereof, or a printed copy of a fully executed agreement showing the names of the signatory parties, except in the case of a printed agreement the Director may require certification;

2. names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement;

3. names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

4. provides the number of workers currently employed under the terms of the agreement and, if practicable, the number of workers in each county within the jurisdiction of the signatory local union or unions;

5. provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

(D) Copies of collective bargaining agreements which are not bona fide shall not be deemed filed. The party filing a contract may be asked to substantiate the assertion that such collective bargaining agreement is bona fide.

(2) Criteria for using collective bargaining agreement wage rates as basis of prevailing wage determinations. Before accepting the collective bargaining agreement wage rate for the applicable craft and locality, DLSR shall take the following factors into consideration:

(A) The geographical area(s) specified in the agreement;

(B) The number of workers covered by the agreement;

(C) If signatory parties to the agreement have workers in the geographical area(s);

(D) If work has been performed in the geographical area(s) specified in the agreement in the past 12 months;

(E) The wage rates determined by the federal government as set forth in Section 16200(b).

(3) Adoption of Collective Bargaining Agreements.

(A) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for each craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate. Only those rates and employer payments specifically enumerated in the definition of "general prevailing rate of per diem wages" in Section 16000 shall be included in the rate adopted.

(B) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director shall incorporate such changes in the determination.

NOTE: A statement must be filed with the Director for any adjustments made to a contract which are not contained in the agreement currently on file with DLSR.

(C) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost–of–living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

(D) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications may be considered.

(E) Holidays. Holidays specifically named in the collective bargaining agreement or determined by wage surveys shall be included in the wage determination. Overtime pay may be required as provided in Section 16200(a)(3)(F) of these regulations.

(F) Overtime. Overtime will be paid as indicated in the wage determination.

EXCEPTION 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 2: If the collective bargaining agreement provides for Saturday and Sunday work at straight–time, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 3: If the awarding body determines that work cannot be performed during normal business hours or work is necessary at off hours to avoid danger to life or property, no overtime is required for the first eight hours in any one calendar day, and 40 hours during any one calendar week.

EXCEPTION 4: No overtime payment is required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

(G) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(I) of these regulations.

(H) Rates for helpers. Rates for helpers will be published when the information available to the Director indicates that a practice of using such a subclassification prevails in a particular area, such as contained in a collective bargaining agreement, and within the parameters of the applicable collective bargaining agreement. In the absence of such determination, the helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor from the 1–5 apprentice–journeyman ratio requirements set forth in Labor Code Section 1777.5.

(I) Credit Available For Actual Payment of Fringe Benefit Costs up to the Prevailing Amount. The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)–(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

(b) Federal Rates. In reviewing rates predetermined for federal public works, the Director will consider those rates published pursuant to the Davis–Bacon Act.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

NOTE: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12–month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(4) the location of the project;

(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(6) the type of construction (e.g. residential, commercial building, etc.);

(7) the approximate cost of construction;

(8) the beginning date and completion date, or estimated completion date of the project;

(9) the source of data (e.g. "payroll records");

(10) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

NOTE: Authority cited: Sections 1773 and 1773.5, Labor Code. Reference: Sections 1770, 1771, 1773, 1773.1, 1773.5, 1773.8, 1777.5, 1810 and 1815, Labor Code.

History

1. Order of Repeal of subsection (a)(3)(E) filed 8–24–88 by OAL pursuant to Government Code section 11340.15 (Register 88, No. 35).
2. Amendment of subsections (a)(1), (a)(3) and (b) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
3. Repealer of subsection (a)(3)(B), subsection relettering, and amendment of newly designated subsections (a)(3)(B), (a)(3)(D), and (a)(3)(F)(3) filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
4. Amendment of subsection (b) filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
5. Change without regulatory effect repealing 12–27–96 amendments filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

§ 16201. General Area Determinations.

When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout an area, the Director shall issue a determination enumerated county by county, but covering the entire area. Such determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.

Note: General determinations are usually issued on a quarterly basis. However, the Director may issue an interim wage determination following the procedures set forth in Section 1773 of the Labor Code, and in these regulations. See Section 16000 as to issue date, and Section 16204 as to effective date of determination. The general determination usually applies where a collective bargaining agreement has been filed and adopted as the prevailing wage rate.

Note: Authority cited: Sections 1773.5 and 1773.6, Labor Code. Reference: Section 1773, Labor Code.

§ 16202. Special Determinations.

(a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

(b) Department of Industrial Relations initiated determination. Where an awarding body does not specify the prevailing wage rate as set forth in Labor Code Section 1773.2, any interested party (as defined in Section 16000 of these regulations) may petition the Director as set forth in Labor Code Section 1773.4 and Section 16302 of these regulations. The Labor Commissioner may, prior to the letting of the bid, request such a determination of the Director.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.4, Labor Code.

§ 16203. Format.

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight–time hourly wage rate.

(2) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workers employed on the project, which is on file with the Director of Industrial Relations."

(3) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16000 of these regulations.

(4) The following statement when applicable. "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8."

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) The applicability of the apprentice rate of per diem wages shall be indicated and furnished upon request.

(d) The dates between which the applicable rate shall be paid for work performed in those periods shall be indicated.

(e) As a supplement to each determination the Director shall make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.5, Labor Code.

§ 16204. Effective Dates of Determination and of Rates Within Determination.

(a) Effective Date of Determination.

(1) All determinations issued will be effective ten (10) days after issuance, provided that requests for copies, reprints or reissuance of prior determinations shall not affect the original effective date unless a new effective date is reflected upon the determination (see subdivision (3) below). Any call for bids put out on or after the effective date of the determination must reflect that determination unless the Director determines that subdivision (4) of this section is applicable, after notification and request by an awarding body.

(2) Determinations issued by the Director will show an issue date and will ordinarily show an expiration date.

(3) All determinations will remain in effect until their expiration date or until modified, corrected, rescinded or superseded by the Director.

(4) Determinations modified, corrected, rescinded or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which a call for bids takes place less than 30 days after the filing of the agreement.

Note: See Section 1773.1 of the Labor Code.

(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

(b) Modification of Effective Date of Determination by Asterisks. Meaning of single and double asterisks. Prevailing wage determinations with a single asterisk (*) after the expiration date which are in effect on the date of advertisement for bids remain in effect for the life of the project. Prevailing wage determinations with double asterisks (**) after the expiration date indicate that the basic hourly wage rate, overtime and holiday pay rates, and employer payments to be paid for work performed after this date have been predetermined. If work is to extend past this date, the new rate must be paid and should be incorporated in contracts entered into now. The contractor should contact the Prevailing Wage Unit, DLSR, or the awarding body to obtain predetermined wage changes. All determinations that do not have double asterisks (**) after the expiration date remain in effect for the life of the project.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.1, Labor Code.

History

1. Amendment of subsections (a)(3) and (b) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
2. Amendment of subsection (a)(3), repealer and new subsection (b) and amendment of Note filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
3. Change without regulatory effect repealing 12–27–96 amendments to section and Note filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

§ 16205. Procedures for Obtaining Prevailing Wage Determinations.

An awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that a special or general prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142. All requests for special pre-

vailing wage determinations must be confirmed in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of workers for which a determination is needed.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

HISTORY

1. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16206. Corrections.

Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination. The Director may correct any error issued in a determination by reissuing such determination.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

Article 5. Petitions to Review Prevailing Wage Determinations

§ 16300. Delegation of Authority.

(a) The Chief of DLSR is the authorized representative of the Director for the purpose of:

(1) Receiving collective bargaining agreements and other documents and papers pertaining to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations;

(2) Gathering information needed to make prevailing wage determinations under Part, Chapter 1, Article 2 of the Labor Code and these regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purpose of the law;,

(3) Issuing prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations; and

(4) Responding to petitions regarding determinations.

(b) The Director reserves the right to make all final determinations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1771, 1772, 1773 et seq., 1774, 1775, 1776, 1777, 1777.5 et seq., 1778, 1779 and 1780, Labor Code.

§ 16301. Referral of Prevailing Wage Issues to Director's Office.

Any new or unresolved issue other than of a routine nature as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party may be referred to the Chief of DLSR as the Director's duly authorized representative for final determination, including appeals of any determination relating either to coverage or to the rate of the prevailing wage rate, subject only to Section 16300(b) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

§ 16302. Petition to Review Prevailing Wage Determinations.

Those interested parties enumerated in Section 1773.4 of the Labor Code, and defined in Section 16000 of these regulations, may file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

(a) Manner of Filing. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed with the Director by mail to the Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, or may be filed in person at 455 Golden Gate Avenue, 5th Floor, San Francisco, CA 94102.

(b) Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these regulations or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body or division upon actual delivery to and receipt by such person, awarding body, or division.

(c) Content of Petition. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(1) The name, address, telephone number and job title of:

(A) the person filing the petition;

(B) the person verifying the petition, if different from the person filing;

(C) if applicable, petitioner's attorney or authorized representative.

(2) Whether the petitioner is an awarding body, a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public works contract;

(3) The nature of petitioner's business, if a prospective bidder, and a designation of each craft, classification, or type of worker represented, or types of workers involved in the public works project.

(4) (A) the official name of the awarding body;

(B) the date on which the call for bids was first published;

(C) the name and location of the newspaper in which such publication was made. An accurate copy of the call for bids as published shall be attached to the petition.

(5) If petitioner is an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city, township, or regional district, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(6) If the petitioner is a prospective bidder, then the parent or subsidiary corporations or associations related to such craft, classification or type of work, if any, shall be specified.

(7) The manner in which the wage rate determined by the Director fails to comply with the provisions of Labor Code Section 1773.

(A) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

1. Whenever such facts relate to a particular employer of such crafts, classifications, or types of workers, the facts stated must identify the employer by name and address and give the number of workers involved.

2. Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16200(a)(1) of these regulations.

3. Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16200(e) of these regulations.

(B) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(C) Where rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

(d) Filing Copy With Awarding Body. If the petitioner is not an awarding body, the petitioner may concurrently with the filing of the original

petition, or otherwise shall within two days thereafter, excluding Saturdays, Sundays and holidays, file a copy of the petition with the awarding body and not later than five days, excluding Saturdays, Sundays and holidays, after the filing of the original petition, the petitioner shall file with the Chief of DLSR an affidavit of the filing with the awarding body. The Director may waive this requirement upon receipt of written confirmation, including a copy of such notification by the petitioner.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773, 1773.1, 1773.4, 1773.5, 1773.8 and 1776, Labor Code.

HISTORY

1. Amendment of subsection (a) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16303. Quasi–Legislative Nature of Authority.

(a) The authority of the Director to establish the prevailing wage for any craft, classification, or type of worker is quasi–legislative. The Director has the discretion to establish these prevailing wages in a quasi–legislative manner which may include an investigation, hearing, or other action. Any hearing under this process is quasi–legislative and is subject to review pursuant to the Code of Civil Procedure Section 1085.

(b) The Director may in his or her discretion initiate an investigation or hold a hearing or take such other action as is reasonably necessary which would best effectuate the purposes of the law and of these regulations, except as such action may be expressly prohibited by law.

NOTE: Authority cited: Section 1773.5, Labor Code; and Winzler & Kelly (1981) 121 C.A. 3d 120; *Western Assn. of Engineers & Land Surveyors v. DIR*, Judicial Council Coord. Proceeding No. 449, Sac. Superior Court No. 285433. Reference: Sections 1770, 1773 and 1773.4, Labor Code; and Section 1085, Code of Civil Procedure.

§ 16304. Hearings.

When a hearing is held, including a petition to review under Labor Code Section 1773.4, it shall be in accordance with the following procedures:

(a) Hearing Procedures.

(1) A time and place of the hearing shall be fixed.

(2) All interested parties made known to the Director shall be notified by registered or certified mail, return receipt requested, of the time and place of the hearing except that, in the event of numerous interested parties or in the event that mailing notices by registered or certified mail could cause an undue delay adverse to the interest of the parties or a timely hearing, the Director may send certified or registered notices to the petitioner and other directly interested parties that have been made known to the Director and mail notices to the other parties, and publish such notices in newspapers.

(3) Notification of the time and place of the hearing shall be at least one week in advance.

(4) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions. The hearing officer may fairly allocate time for such witnesses' testimony in the interest of introducing relevant evidence. Cross examination will be permitted at the discretion of the hearing officer.

(5) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(6) All witnesses testifying before the hearing officer shall testify under oath.

(7) A full transcript of the hearing shall be recorded.

(b) Hearing Officer. The Director may appoint a hearing officer(s). The appointed hearing officer(s) shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations. Either the appointed hearing officer(s) or the Director may request documentation subsequent to the hearing to complete the record, and shall send copies of such additional information to the petitioner, awarding body or other designated interested party or parties.

(c) Subject Matter. The subject matter of a hearing may be initiated by a petition to review, as set forth in Labor Code Section 1773.4.

(d) Decision. The decision of the Director shall reflect a summary of the evidence, findings, or matters of fact and/or law.

The decision shall be sent to all parties no later than 20 days after the hearing, except earlier or later as special circumstances warrant. The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may consider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given to all parties in the same manner as the notice of hearings as specified in Sections 16304(a)(2) and (a)(3) above and the decision upon reconsideration shall be as specified in subdivisions (a)(2) and (a)(3) of this section.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773.4 and 1773.5, Labor Code.

Article 6. Certified Payroll Records: Requests, Content, and Cost

§ 16400. Request for Payroll Records.

(a) Requests may be made by any person for certified copies of payroll records. Requests shall be made to any of the following:

(1) the body awarding the contract, or

(2) any office of the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards.

(b) Requests for certified copies of payroll records pursuant to Section 1776 of the Labor Code may be made by any person. However, any such request shall be in writing and contain at least the following information:

(1) The body awarding the contract;

(2) The contract number and/or description;

(3) The particular job location if more than one;

(4) The name of the contractor;

(5) The regular business address, if known.

NOTE: Requests for records of more than one contractor of subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be accepted; unless contractor and subcontractor responsibilities regarding the project are not clearly defined.

(c) Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty–five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and

(4) Provide for inspection.

(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

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Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A–1–131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name–print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____
A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Withholding of Funds from Contractor—Hearing Procedure

§ 16410. Definitions.

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720–1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New article 7 (sections 16410–16414) and section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New article 7 (sections 16410–16414) and section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New article 7 (sections 16410–16414) and section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New article 7 (sections 16410–16414) and section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16411. Notice to Contractor and Affected Subcontractor.

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16412. Withholding, Retention, or Forfeiture.

(a) When notice has been sent as provided in section 16411, above, the awarding body shall proceed to withhold, retain, or forfeit the amount stated in the notice, pursuant to Labor Code § 1727. Such withholding, retention, or forfeiture shall be subject to the right of a contractor or affected subcontractor to request a hearing, as provided in section 16413, below, and further subject to the right of a contractor or a contractor's assignee to bring suit against the awarding body as provided by Labor Code §§ 1731–1733.

(b) Nothing in these regulations shall extend, or affect in any way, the statutory time limits provided by Labor Code §§ 1731–1733.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16413. Request for Hearing.

(a) A contractor or subcontractor desiring a hearing regarding the withholding, retention, or forfeiture of an amount may request such a hearing by letter postmarked within 30 days of the date of the mailing of the notice provided by section 16411, above, mailed to the awarding body, and to:

DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 GOLDEN GATE AVENUE, 9TH FLOOR
SAN FRANCISCO, CALIFORNIA 94102

(b) A request for hearing shall contain a statement of all factual and legal grounds upon which the withholding is contested, identifying the specific element or elements, issue or issues, being contested, including, but not limited to:

(1) the classification of workers included in the computation of wages found to be due;

(2) the hours worked by such workers;

(3) the prevailing wage requirements applicable to such classifications;

(4) the amounts paid to such workers;

(5) the assessment and computation of statutory penalties;

(6) any erroneous mathematical calculations.

Assertions of fact included in the statement shall be supported by documentary evidence, e.g., time cards, canceled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidence which reflect job assignments, work schedules by days and hours, and evidence of the disbursement by way of cash, check, or in whatever form or manner, of funds to a person or persons by job classification and/or skill, and, if appropriate, declarations under penalty of perjury.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16414. Hearing.

(a) Upon receipt of a timely request for a hearing, the Labor Commissioner, or his or her deputy or agent shall, within 30 days, hold a hearing to determine whether reasonable cause exists to withhold and retain the funds identified in the notice provided under section 16411, above.

(b) The hearing date may be continued at the request of the party seeking the hearing upon a showing of good cause.

(c) The burden of proof at such hearing shall be as provided in Labor Code § 1733.

(d) Within 15 days after the conclusion of the Hearing the Hearing Officer shall issue a decision which affirms, modifies or dismisses the Notice to Withhold. This decision shall consist of a notice of findings, findings, and an order which shall be served on the awarding body and on all parties to the hearing by first class mail at the last known address of the parties on file with the Labor Commissioner. The awarding body shall promptly abide by any decision of the Labor Commissioner with respect to the notice to withhold.

(e) The hearing pursuant to this section shall only determine whether reasonable cause exists for the withholding, retention, or forfeiture of funds pursuant to Labor Code § 1727. A hearing pursuant to this section shall not be deemed to be dispositive as to the contractor's (or affected subcontractor's) compliance with prevailing wage laws. Any decision rendered shall have no res judicata or collateral estoppel effect, and will not preclude the Labor Commissioner from pursuing any action provided by Labor Code § 1775 or any other statutory or common law remedy against any party. Neither the failure of a party to request a hearing nor the Labor Commissioner's decision after a hearing shall preclude the contractor or affected subcontractor from pursuing any other remedy provided by existing law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency, including amendment of subsection (d); operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order, including amendment of subsection (d), transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209–16209.6), see Register 82, No. 51.

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval. The awarding body bears the burden of producing evidence that it meets the criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

(1) Cause for revocation of final approval includes, but is not limited to:

(A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(B) Failure of the awarding body to file timely, complete, and accurate reports to the Director as required by Section 16431 or elsewhere in these regulations.

(b) Interested parties may request the Director revoke final approval of a LCP. A request for revocation shall include evidence of failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take enforcement action after becoming cognizant of a violation of the Labor Code or these regulations. A request for revocation shall also include any other relevant evidence.

(1) Final approval of a LCP may be revoked by the Director based on a request by an interested party after a proceeding conducted as provided in subdivision (a). A copy of the request for revocation shall be provided to the awarding body as part of the notice required under subdivision (a).

(2) As part of a proceeding for revocation of final approval based on a request by an interested party, the Director may require the awarding body to furnish a supplemental report for the period between the ending date of the last annual report filed by the awarding body pursuant to Section 16431 and the date of notice by the Director, and containing the information listed in subdivision (a) of said Section 16431.

(3) Revocation of final approval of a LCP based on a request by an interested party is solely within the discretion of the Director. The duty of an awarding body to carry out its LCP runs solely to the Director and not to any worker, contractor, or interested party. The sole remedy for failure of an awarding body's duty is revocation of approval by the Director.

(c) Upon determining that the request for revocation will be denied without hearing, the Director shall notify the LCP, awarding body and requesting party of the decision and of the reasons therefore by mail.

(d) Upon determining that a hearing is necessary, the parties will be notified and a hearing on cause for revocation of final LCP approval will be held in accordance with the procedures for notice and hearing proceedings set forth in 8 CCR Section 16304.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 3. Notice and Components of LCP

§ 16429. Notice of LCP Approval.

(a) Notice of initial or final approval of an awarding body's LCP shall be given in the Call for Bids and in the contract or purchase order and shall also be posted at the job site. If more than one job site exists or where such posting would endanger public safety, the notice may be posted in the manner prescribed by 8 CCR Section 16100(b).

(b) Notice of an approved LCP shall contain, at the minimum, the effective date of the Director's initial or final approval, a statement that the limited exemption from prevailing wages pursuant to Labor Code Section 1771.5(a) applies to the contract, a telephone number to call for inquiries, questions, or assistance with regard to the LCP, and the name of the agent or office administering the LCP, if different from the awarding body.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16430. Components of LCP.

(a) In accordance with Labor Code Section 1771.5(b), a LCP shall include, but not be limited to, the following requirements:

(1) The Call for Bids and the contract or purchase order shall contain appropriate language concerning the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(2) A prejob conference shall be conducted before commencement of the work with contractors and subcontractors listed in the bid, at which time federal and state labor law requirements applicable to the contract shall be discussed, and copies of suggested reporting forms furnished. A checklist, showing which federal and state labor law requirements were discussed, shall be kept for each conference. A checklist in the format of Appendix A presumptively meets this requirement;

(3) A requirement that certified payroll records be kept by the contractor in accordance with Labor Code Section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body. The awarding body may create a form meeting the minimum requirements of (a) hereinafter "Certified Weekly Payroll." Use of the current version of DIR's "Public Works Payroll Reporting Form" (A–1–131) (New 2–80) constitutes full compliance with this requirement by the awarding body. A copy of this suggested form follows Title 8 CCR Section 16500;

(4) A program for orderly review of payroll records and, if necessary, for audits to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(5) A prescribed routine for withholding penalties, forfeitures, and underpayment of wages for violations of the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(6) All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5(b), Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix A

Suggested Checklist of Labor Law Requirements to Review at Prejob Conference, Section 16430.

The federal and state labor law requirements applicable to the contract are composed of but not limited to the following items:

[The next page is 1414.3.]

(1) The contractor's duty to pay prevailing wages under Labor Code Section 1770 et seq., should the project exceed the exemption amounts;

(2) The contractor's duty to employ registered apprentices on the public works project under Labor Code Section 1777.5;

(3) The penalties for failure to pay prevailing wages (for non–exempt projects) and employ apprentices including forfeitures and debarment under Labor Code Sections 1775 and 1777.7;

(4) The requirement to keep and submit copies upon request of certified payroll records under Labor Code Section 1776, and penalties for failure to do so under Labor Code Section 1776(f);

(5) The prohibition against employment discrimination under Labor Code Section 1777.6; the Government Code, and Title VII of the Civil Rights Act of 1964;

(6) The prohibition against accepting or extracting kickback from employee wages under Labor Code Section 1778;

(7) The prohibition against accepting fees for registering any person for public work under Labor Code 1779; or for filling work orders on public works under Labor Code Section 1780;

(8) The requirement to list all subcontractors under Government Section 4100 et seq;

(9) The requirement to be properly licensed and to require all subcontractors to be properly licensed and the penalty for employing workers while unlicensed under Labor Code Section 1021 and under the California Contractors License Law, found at Business and Professions Code Section 7000 et seq;

(10) The prohibition against unfair competition under Business and Professions Code Section 17200–17208;

(11) The requirement that the contractor be properly insured for Workers Compensation under Labor Code Section 1861;

(12) The requirement that the contractor abide by the Occupational, Safety and Health laws and regulations that apply to the particular construction project;

(13) The requirement to provide affirmative action for women and minorities as required in the Public Contracts Code and in the contract;

(14) The prohibition against hiring undocumented workers, and the requirement to secure proof of eligibility/citizenship from all workers.

§ 16431. Annual Report.

The awarding body shall submit to the Director an annual report on the operation of its LCP within 60 days after the close of its fiscal year, or accompany its request for an extension of initial approval, whichever comes first. The annual report shall contain, at the minimum, the following information:

(1) Number of contracts awarded, and their total value;

(2) The number, description, and total value of contracts awarded which were exempt from the requirement of payment of prevailing wages pursuant to Labor Code Section 1771.5(a);

(3) A summary of penalties and forfeitures imposed and withheld, or recovered in a court of competent jurisdiction;

(4) A summary of wages due to employees resulting from failure by contractors to pay prevailing wage rates, the amount withheld from money due the contractors, and the amount recovered by action in any court of competent jurisdiction.

(b) A LCP whose contract responsibilities are statewide, or which involves widely dispersed and numerous contracts, or which is required to report contract enforcement to federal authorities in a federal format, may adopt a summary reporting format to aggregate small contracts and estimate numbers and dollar values required by (a)(1) and (2). A summary reporting format may be adopted by agreement with the Director after advance notice to interested parties, and a list of parties requesting such notice shall be kept by the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16432. Audits.

(a) Audits may be conducted when deemed necessary by the awarding body and shall be conducted upon request of the Labor Commissioner.

(1) An audit consists of a comparison of payroll records to the best available information as to the actual hours worked and classifications of workers employed on the contract. An audit is sufficiently detailed when it enables the LCP, and the Labor Commissioner in reviewing proposed penalties, to draw reasonable conclusions as to compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code, and to enable accurate computation of underpayment of wages to workers and of applicable penalties and forfeitures. Records shall be made available to show that the audits conducted are sufficiently detailed to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2. An audit record in the form set out in Appendix B presumptively demonstrates sufficiency.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 224, 226, 1773.2, 1776, 1777.5, 1778, 1810, 1815, 1860 and 1861, Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix B

Audit Record Form (suggested for use with Section 16432 audits)

An audit record is sufficiently detailed to "verify compliance with the requirements of Chapter"1, Public Works, of Part 7 of Division 2, when the audit record displays that the following procedures were accomplished:

(1) Audits of the obligation to secure workers' compensation means demanding written evidence of a binder issued by the carrier, or telephone or written inquiry to the Workers' Compensation Insurance Rating Bureau;

(2) Audits of the obligations to employ and train apprentices means inquiry to the program sponsor for the apprenticeable craft or trade in the area of the public works as to: whether contract award information was received, including an estimate of journeyperson hours to be performed and the number of apprentices to be employed; whether apprentices have been requested, and whether the request has been met; whether the program sponsor knows of any amounts sent by the contractor or subcontractor to it for the training trust, or the California Apprenticeship Council; and whether persons listed on the certified payroll in that craft or trade as being paid less than the journeyperson rate are apprentices registered with that program and working under apprentice agreements approved by the Division of Apprenticeship Standards;

(3) Audits of the obligation to pass through amounts made part of the bid for apprenticeship training contributions, to either the training trust or the California Apprenticeship Council, means asking for copies of checks sent, or when the audit occurs more than 30 days after the month in which payroll has been paid, copies of canceled checks;

(4) Audits of "illegal taking of wages" means inspection of written authorizations for deductions (listed in Labor Code Section 224) in the contractor or subcontractor's files and comparison to wage deduction statements furnished employees (Labor Code Section 226), together with an interview of several employees as to any payments not shown on the wage deduction statements;

(5) Audits of the obligation to keep records of working hours, and pay not less than required by Title 8 CCR Section 16200(a)(3)(F) for hours worked in excess of 8 hours are the steps for review and audit of Certified Weekly Payrolls under Title 8 CCR Section 16432;

(6) Audits of the obligations to pay the prevailing per diem wage, means such steps for review and audit of Certified Weekly Payrolls which will produce a report covering compliance in the areas of:

(A) All elements defined as the "General Prevailing Rate of Per Diem Wages" in Title 8 CCR Section 16000, which were determined to be prevailing in the Director's determination which was in effect on the date of the call for bids, available in its principal office, and posted;

(B) All elements defined as "Employer Payments" set forth in Section 16000 of these regulations, which were determined to be prevailing in the Director's determination which was in effect on the date of the call for bids, and pursuant to Labor Code Section 1773.2 was to be specified in the call for bids, made available in its principal office and posted.

Article 4. Limited Exemption from the Requirement to Pay Prevailing Wages

§ 16433. Limited Exemption.

(a) As provided in Labor Code Section 1771.5, an awarding body having a LCP approved by the Director in accordance with these regulations shall not require payment of the general rate of per diem wages or the general rate of per diem wages for holiday and overtime work for any public works project of $25,000 or less when the project is for construction work, or of $15,000 or less when the project is for alteration, demolition, repair, or maintenance work.

(b) A project for construction, alteration, demolition, repair, or maintenance work shall be identified as such in the call for bids, and in the contract or purchase order.

(c) If the amount of a contract subject to subdivision (a) is changed and, as a result, exceeds the applicable limit under which the payment of the general rate of per diem wages is not required, workers employed on the contract after the amount due the contractor has reached the applicable limit shall be paid the general rate of per diem wages for regular, holiday or overtime work, as the case may be.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 5. Enforcement

§ 16434. Duty of Awarding Body.

(a) An awarding body having an initially or finally approved LCP shall have a duty to the Director to enforce the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code and these regulations in a manner consistent with the practice of DLSE, as set forth in Divisions 2 and 3 of the Labor Code, and published regulations thereunder, where substantive standards are not set out by regulations under this Title 8, group 4.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16435. Withholding Contract Payments When Payroll Records are Delinquent or Inadequate.

(a) "Withhold" means to cease payments by the awarding body, or others who pay on its behalf, or agents, to the general contractor. Where the violation is by a subcontractor, the general contractor shall be notified of the nature of the violation and reference made to its rights under Labor Code Section 1729.

(b) "Contracts." Except as otherwise provided by agreement, only contracts under a single master contract, or contracts entered into as stages of a single project, may be the subject of withholding.

(c) "Delinquent payroll records" means those not submitted on the date set in the contract.

(d) "Inadequate payroll records" are any one of the following:

(1) A record lacking the information required by Labor Code Section 1776;

(2) A record which contains the required information but not certified, or certified by someone not an agent of the contractor or subcontractor;

(3) A record remaining uncorrected for one payroll period, after the awarding body has given the contractor notice of inaccuracies detected by audit or record review. Provided, however, that prompt correction will stop any duty to withhold if such inaccuracies do not amount to 1 percent of the entire Certified Weekly Payroll in dollar value and do not affect more than half the persons listed as workers employed on that Certified Weekly Payroll, as defined in Labor Code Section 1776 and Title 8 CCR Section 16401.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1729, 1776, 1777.5, 1778, 1813 and 1815, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16435.5. Withholding Contract Payments Equal to the Amount of Underpayment and Applicable Penalties When, After Investigation, It Is Established That Underpayment Has Occurred.

(a) "Withhold" as defined in Section 16435(a) of these regulations.

(b) "Contracts" as defined in Section 16435(b) of these regulations.

(c) "Amount equal to the underpayment" is the total of the following determined by payroll review, audit, or admission of contractor or subcontractor:

(1) The difference between amounts paid workers and the correct General Prevailing Rate of Per Diem Wages, as defined in Title 8 CCR Section 16000, and determined to be the prevailing rate due workers in such craft, classification or trade in which they were employed and the amounts paid;

(2) The difference between amounts paid on behalf of workers and the correct amounts of Employer Payments, as defined in Title 8 CCR Section 16000 and determined to be part of the prevailing rate costs of contractors due for employment of workers in such craft, classification or trade in which they were employed and the amounts paid;

(3) Estimated amounts of "illegal taking of wages";

(4) Amounts of apprenticeship training contributions paid to neither the program sponsor's training trust nor the California Apprenticeship Council;

(5) Estimated penalties under Labor Code Sections 1775, 1776, 1777.7 and 1813.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1729, 1775, 1776, 1777.5, 1777.7, 1778, 1813 and 1815, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16436. Forfeitures Requiring Approval by the Labor Commissioner.

(a) "Forfeitures" are the amounts of unpaid penalty and wage money assessed by the awarding body for violations of the prevailing wage laws, whether collected by withholding from the contract amount or by suit under the contract, or provisions of this Chapter.

(b) "Failing to pay the correct rate of prevailing wages" means those public works violations which the Labor Commissioner has exclusive authority to approve before they are recoverable by the Labor Compliance Program, and which are appealable by the contractor in court or before the Director under Labor Code Section 1771.7. Regardless of what are defined as "prevailing wages" in contract terms, non–compliance with the following are failures to pay prevailing wages.

(1) Nonpayment of items defined as "Employer Payments" and "General Prevailing Rate of Per Diem Wages" in Title 8 CCR Section 16000 and Labor Code Section 1771.

(2) Payroll records required by Labor Code Section 1776.

(3) Labor Code Section 1777.5, but only insofar as the failure consisted of paying apprentice wages lower than the journeyperson rate to a person who is not an apprentice as defined in Labor Code Section 3077, working under an apprentice agreement in a recognized program.

(4) Labor Code Section 1778, Kickbacks.

(5) Labor Code Section 1779, Fee for registration.

(6) Labor Code Sections 1813, 1815, and Title 8 CCR Section 16200(a)(3)(F) overtime for work over 8 hours in any one day or 40 hours in any one week.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771, 1771.5, 1777.5, 1776, 1779, 1813, 1815 and 3077, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16437. Determination of Amount of Forfeiture by the Labor Commissioner.

(a) Where the LCP of the awarding body requests a determination of the amount of forfeiture, the request shall include a file or report to the Labor Commissioner which contains at least the following information:

(1) The deadline by which contract acceptance of filing of a notice of completion, under Labor Code Section 1775, plus 90 days, will occur;

(2) Any other deadline which if missed would impede collection;

(3) Evidence of violation, in narrative form;

(4) Evidence that an "audit" or "investigation," as defined in Section 16432 of these regulations, occurred;

(5) Evidence that the contractor was given the opportunity to explain why there was no violation, or that any violation was caused by mistake, inadvertence, or neglect, before the forfeiture was sent to the Labor Commissioner, and the contractor either did not do so, or failed to convince the awarding body of its position;

(6) Where the LCP of the awarding body seeks not only amounts of wages but also a penalty as part of the forfeiture, and the contractor has unsuccessfully contended that the cause of violation was mistake, inadvertence, or neglect, a short statement should accompany the proposal for a forfeiture, with a recommended penalty amount pursuant to Labor Code Section 1775;

(7) Where the LCP of the awarding body seeks only wages or a penalty less than $50 per day as part of the forfeiture, and the contractor has successfully contended that the cause of the violation was mistake, inadvertence, or neglect, then the file should include the evidence as to the contractor's knowledge of his or her obligation, including the program's communication to the contractor of the obligation in the bid invitations, at the prejob conference agenda and records, and any other notice given as part of the contracting process. With the file should be a statement, similar to that described in (6), and recommended penalty amounts, pursuant to Labor Code Section 1775;

(8) The previous record of the contractor in meeting his or her prevailing wage obligations.

(9) Whether the LCP has been granted initial, extended initial or final approval.

(b) The file or report shall be served on the Labor Commissioner not less than 30 days before the final payment or, if that deadline has passed, not less than 90 days before the expiration of the deadline to file suit under Labor Code Section 1775.

(c) A copy of the recommended forfeiture and the file or report shall be served on the contractor at the same time as it is sent to the Labor Commissioner. The awarding body may exclude from the documents served on the contractor copies of documents secured from the contractor during an audit, investigation, or meeting if those are clearly referenced in the file or report. Along with the copy served on the contractor shall be a notice stating all deadlines and rights of the contractor to contest the amount of forfeiture. A Notice of Deadlines in the format set out in Appendix C will presumptively fulfill the requirements of this subsection;

(d) The Labor Commissioner shall affirm, reject, or modify the forfeiture in whole or in part as to penalty, and/or wages due.

(e) The Labor Commissioner's determination of the forfeiture is effective on one of the two following dates:

(1) For programs with initial approval or an extension of initial approval pursuant to Section 16426 of these regulations, on the date the Labor Commissioner serves by first class mail, on the political subdivision and on the contractor, an endorsed copy of the proposed forfeiture, or a newly drafted forfeiture statement which sets out the amount of forfeiture approved. Service on the contractor is effective if made on the last address supplied by the contractor in the record. The Labor Commissioner's approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed.

(2) For programs with final approval, approval is effective 20 days after the requested forfeitures are served upon the Labor Commissioner, unless the Labor Commissioner serves a notice upon the parties, within that time period, that this forfeiture request is subject to further review. For such programs, a notice that approval will follow such a procedure will be included in the transmittal of the forfeiture request to the contractor. The Labor Commissioner's final approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of the date of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed, unless some other procedure has been adopted pursuant to 8 CCR Section 16427(d).

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1775, Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix C

Notice of Deadlines

(To Go to Contractor for Forfeitures under Section 16437)

"This document requests the Labor Commissioner of California to approve a forfeiture of money you otherwise would be paid. The [name of the labor compliance program] for the [name of the awarding body having this work done] is asking the Labor Commissioner of California to agree, in 20 days, that the enclosed package of materials indicates that you have violated the law."

"Failure to respond to the [name of the labor compliance program's] request that the Labor Commissioner approve a forfeiture by writing to the Labor Commissioner within 20 days of the date of service (date of postmark) of this document on you may lead the Labor Commissioner to affirm the proposed forfeiture, and may also end your right to contest those amounts further. You must serve any written response on the Labor Commissioner, the [name of the labor compliance program] and [name of the awarding body] by return receipt requested/certified mail. If you serve a written explanation, with evidence, as to why the violation did not occur, or why the penalties should not be assessed, within the 20 day period, it will be considered,"

and

"If you change address, or decide to hire an attorney, it is your responsibility to advise both the [name of the Labor Compliance Program] and the Labor Commissioner by certified mail. Otherwise, notices will be served at your last address on file, and deadlines might pass before you receive such notices."

§ 16438. Deposits of Penalties and Forfeitures Withheld.

(a) Where the involvement of the Labor Commissioner has been limited to a determination of the actual amount of penalty, forfeiture or underpayment of wages, and the matter has been resolved without litigation by or against the Labor Commissioner, the awarding body having a LCP shall deposit penalties and forfeitures in its general fund. If an approved LCP is operated through an agent, penalties and forfeitures shall be deposited as provided in the agreement designating the agent for the awarding bodies involved.

(b) Where collection of fines, penalties or forfeitures results from court action to which the Labor Commissioner and awarding body are both parties, the fines, penalties or forfeitures shall be divided between the general funds of the state and the awarding body, as the court may decide.

(c) All amounts recovered by suit brought by the Labor Commissioner and to which the awarding body is not a party, shall be deposited in the general fund of the state.

(d) All wages and benefits which belong to an employee and are withheld or collected from a contractor or sub–contractor, either by withholding or as a result of court action pursuant to Labor Code Section 1775, and which have not been paid to the employee or irrevocably committed

on the employee's behalf to a benefit fund, shall be deposited with the Labor Commissioner, who shall handle such wages and benefits in accordance with Labor Code Section 96.7.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.6 and 1775, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16439. Appeals of a Labor Compliance Program Enforcement Action.

(a) A contractor may appeal the result of a LCP enforcement action by serving a notice of appeal on the Director of Industrial Relations as an alternative to going to court under Labor Code Section 1732. Such notice must be served within 20 days of the date a determination of forfeiture has been approved by the Labor Commissioner. A copy of the notice of appeal shall be served on the awarding body and the LCP at the same time as it is sent to the Director. Appeal of a LCP enforcement action to the Director of Industrial Relations waives the contractor's right to file suit pursuant to Labor Code Section 1732.

(b) The notice shall state the grounds for the appeal, and whether a hearing is desired. The decision to hold a hearing is within the sole discretion of the Director and shall be dependent upon whether the appeal is timely, the matter is within the scope of Labor Code Section 1732, and the material furnished by the record already in the file is insufficient for a fully informed decision. The Director may appoint a hearing officer to review the record below (subsection (c)), hold a hearing and recommend a decision. The Director shall make the final decision on the appeal.

(c) Upon receipt of a copy of the notice of appeal, the awarding body shall, within 30 days, forward to the Director a full copy of the record of the enforcement proceedings and any further documents, arguments, or authorities it wishes to have considered in the appeals process. Accompanying those materials shall be a declaration of service on the contractor although materials already served in the process of seeking Labor Commissioner approval may be listed rather than re–served.

(d) The Director may request a supplemental report on the activities of the Labor Compliance Program. This report will be an update of the annual report required in 8 CCR Section 16431.

(e) Upon receipt of the notice of appeal, and all documentation referred to in section (c) above, the Director shall have 90 days in which to issue a determination. If additional time is required due to the complexity of the issues, or for other good cause, the Director shall have the right, upon notice to the parties to one 30 day extension of the time in which to issue the determination.

(f) The Director's ruling on the appeal shall be final.

NOTE: Authority cited: Sections 54, 55 and 1773.5, Labor Code. Reference: Section 1771.7, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 6. Severability

§ 16500. Severability.

If any provision of the regulations in Group 3 or Group 4 or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or applications, and to this end the provisions of these regulations are severable.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1773.5, Labor Code.

HISTORY

1. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 8. Debarment

§ 16800. Definitions.

In addition to the definitions of "Contractor," "Subcontractor," "Awarding Body," "Political Subdivision," "Public Works," and any other applicable terms, found in Group 3. Payment of Prevailing Wages upon Public Works, article 17 section 16000, the following terms are defined for general use in this article.

"Substantial Interest" means an interest of twenty percent (20%) of a corporation, limited partnership or similar entity and includes an individual holding the position of responsible managing employee, qualifying responsible managing officer or general partner regardless of the percentage interest in the entity.

"Fraud" means a suggestion, as a fact, of that which is not true, by one who does not believe it to be true; or the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; or the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or a promise, made without any intention of performing it.

"Person" means an individual or legal entity, including, but not limited to, any firm, corporation, partnership, limited partnership, agency, association, organization or trust, and includes, where applicable, the public agencies, awarding bodies and any agent or officer thereof authorized to act for or on behalf of any of the foregoing.

"Firm" means, but is not limited to, any individual, corporation, partnership, limited partnership, agency, association, organization or trust operating a business in the State of California whether or not licensed or permitted to do so.

"Intent to Defraud" means the intent to deceive another person or entity, as defined in this article, and to induce such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property of any kind.

"Deliberately" means premeditated and intentional and does not include inadvertent error.

"Respondent" means any person or entity subject to the proceedings set forth in this article.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

§ 16801. Investigations: Duties, Responsibilities and Rights of the Parties.

(a) Division of Labor Standards Enforcement. The Division of Labor Standards Enforcement (hereinafter "DLSE") may investigate any alleged violation of the provisions of chapter 1, part 7 of the California Labor Code for purposes of enforcing Labor Code section 1777.1. Investigations pursuant to section 1777.1 are for the purpose of determining a Respondent's willful violation, or violation with the intent to defraud, of the provisions of chapter 1, part 7 of the California Labor Code, with the exception of section 1777.5.

(1) Where a preliminary investigation reveals that there is insufficient evidence to continue the investigation, DLSE may close the investigation and shall notify the Respondent and awarding body in writing.

(2) In the event an investigation of any Respondent reveals a violation of Labor Code section 1777.1, DLSE shall notify the awarding body in writing and shall serve upon the Respondent a Notice of Hearing together

with a Statement of Alleged Violations, which shall specifically set forth DLSE's allegations against the Respondent.

(A) Service of both the Notice of Hearing and Statement of Alleged Violations shall be complete when mailed, by first class postage, to the last address of record for the Respondent listed with the State Contractors License Board or, in the event the Respondent is not licensed by the State Contractors License Board, the last known address of the Respondent available to the awarding body or, in the case of a subcontractor, the last known address available to the general contractor with whom the subcontractor contracted in the performance of the public works project under investigation. In the event there is neither an address of record with the State Contractors License Board or the awarding body or general contractor, the Notice of Hearing and Statement of Alleged Violations shall be served pursuant to the provisions of the Code of Civil Procedure, sections 415.10 – 415.50, concerning the service of civil summons.

(B) The Notice of Hearing shall list the date, time and place of the hearing which shall not be scheduled sooner than forty–five days after the date of the mailing of the Notice of Hearing and Statement of Alleged Violations.

(C) The Respondent shall have the opportunity to review and copy such records from the investigative file of DLSE which are not subject to either attorney–client or work product privileges. The Respondent shall be entitled to a reasonable number of subpoenas but shall be liable for any costs of service of the subpoenas, or any other witness or mileage fees incurred.

Mileage and Witness fees shall be set as specified in Government Code section 68093. In the exercise of his or her discretion, the Hearing Officer may limit the number of witnesses subpoenaed either for the purpose of corroboration or for establishing a single material fact in issue, or where the Respondent has not furnished satisfactory evidence that the witness will be able to give necessary and competent testimony material to the issues at the hearing.

[The next page is 1415.]

(D) In presiding over a hearing conducted pursuant to section 1777.1(c), the Hearing Officer shall control the order of presentation of evidence, and shall direct and rule on matters concerning the conduct of the hearing and of those persons appearing. The hearing shall be conducted in an informal setting preserving the rights of the Respondent. The formal rules of evidence shall not apply and any relevant evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. However, no determination shall be made based solely upon any evidence which would not be admissible, over objection, in a court of law in this state.

(E) The hearing shall be phonographically recorded. The Respondent may request a copy of the recording, and shall bear all costs incidental to the preparation of same. The Respondent may arrange to have the hearing reported by a certified court reporter and shall bear all cost incidental thereto. If the record of the hearing is transcribed by the Respondent, a copy thereof shall be provided to the Labor Commissioner free of any cost within five (5) days of such transcription.

(F) Oral evidence at the hearing shall be taken only upon oath or affirmation. The Respondent shall have the right to call and examine witnesses, to introduce exhibits and to rebut the evidence against him or her.

(G) Any Respondent to a proceeding hereunder may, but need not, be represented by legal counsel during the entire course of the investigation, including the hearing.

(H) Continuances of hearings scheduled pursuant to Labor Code section 1777.1(c) ordinarily will not be granted. The Hearing Officer, in the exercise of his or her sound discretion, may grant a continuance of the hearing only upon a showing of extraordinary circumstances and good cause.

(I) At the conclusion of the hearing the Hearing Officer may take the matter under submission or allow the introduction of post hearing briefs. The Hearing Officer shall prepare a Findings of Fact and Conclusions and a proposed Determination which shall contain the recommended penalty, if applicable. The Labor Commissioner or his designee shall have the right to modify, change or adopt the proposed Findings of Fact and Conclusions, the proposed Determination and any recommended penalty. No Determination or penalty shall be final until adopted by the State Labor Commissioner.

(J) The Determination of the Labor Commissioner after the hearing shall be served on the Respondent as provided in subdivision (A), above.

(K) In the event that the Determination of the Labor Commissioner results in an order to debar the Respondent, DLSE shall notify through the Division of Labor Statistics and Research all awarding bodies of such Determination immediately upon service of the Determination on the Respondent. In addition, DLSE shall maintain a record of each and every debarment under the provisions of Labor Code section 1777.1 for a period of 5 years from the date of the debarment, and shall list the name and last known address of the debarred contractor or subcontractor, the date of the debarment and the term of the debarment, and shall make that information available to the public, upon written request, which encloses a self-addressed and stamped envelope.

(b) Awarding Bodies. Any awarding body which has awarded or let a contract or purchase order to be paid for in whole or in part from public funds calling for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind (including the laying of carpet and the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any state agency, including the California State University and University of California) shall, in accordance with Labor Code section 1776(g), inform prime contractors of the requirements of Labor Code section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code 1777.1. The awarding body shall have the right to review the records from the investigative file of DLSE which are not covered by attorney–client or work product privileges, and which are not being utilized in the ongoing investigation of a criminal offense.

(c) Contractors and Subcontractors. All contractors and subcontractors, including Respondents, who have contracted to perform services on a public works project shall comply with Labor Code 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code section 1777.1.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, and Section 92, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

§ 16802. Penalties.

In the event that the Labor Commissioner determines that a violation of chapter 1 of part 7 of the Labor Code has occurred, the Hearing Officer may recommend the penalty to be imposed on the Respondent.

(a) In setting a penalty, due consideration shall be given to the nature of the offense; the amount of underpayment of wages per worker; the experience of the Respondent in the area of public works; and the Respondent's compliance with Labor Code section 1776. The above considerations shall be based upon evidence presented at the hearing and made a part of the record.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

Subchapter 4. Employment of Aliens Not Entitled to Lawful Residence

NOTE: Authority cited: Sections 55 and 59, Labor Code. Reference: Section 2805, Labor Code.

HISTORY

1. New Group 4 (§§ 16209, 16209.1–16209.6) filed 3–24–72 as an emergency; effective upon filing (Register 72, No. 13).
2. Certificate of Compliance filed 6–2–72 (Register 72, No. 23).
3. Repealer of Group 4 (Article 1, Sections 16209, 16209.1–16209.6) filed 12–15–82 by OAL pursuant to Government Code Section 11349.7(j) (Register 82, No. 51).

Subchapter 5. Department of Industrial Relations—Conflict of Interest Code

§ 17000. General Provisions.

The Political Reform Act, Government Code Sections 81000, et seq., requires state and local government agencies to adopt and promulgate Conflict of Interest Codes. The Fair Political Practices Commission has adopted a regulation, 2 Cal. Adm. Code Section 18730, which contains the terms of a standard Conflict of Interest Code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of 2 Cal. Adm. Code Section 18730 and any amendments to it duly adopted by the Fair

Political Practices Commission, along with the attached Appendix in which officials and employees are designated and disclosure categories are set forth, are hereby incorporated by reference and constitute the Conflict of Interest Code of the Department of Industrial Relations.

Pursuant to Section 4(A) of the standard Code, designated employees shall file statements of economic interests with the agency. Upon receipt of the statement of the Director, the agency shall make and retain a copy and forward the original of this statement to the Fair Political Practices Commission.

NOTE: Authority cited: Sections 87300 and 87304, Government Code. Reference: Section 87300, et seq., Government Code.

HISTORY

1. New Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) filed 12–2–77; effective thirtieth day thereafter. Approved by the Fair Political Practices Commission 1–19–77 (Register 77, No. 49).
2. Repealer of Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) and new Group 5 (Section 17000 and Appendix) filed 2–26–81; effective thirtieth day thereafter. Approved by Fair Political Practices Commission 12–1–80 (Register 81, No. 9).

Appendix

Designated Positions	*Assigned Disclosure Categories*
OFFICE OF THE DIRECTOR	
Director, Chief Deputy Director, Deputy Director, all legal classes, Senior Management Analyst	1
Special consultant, Staff Services Manager III, (Fiscal Officer), Associate Budget Analyst, Business Service Officer I & III, Accounting Technician (procurement)	2
LABOR STANDARDS AND INDUSTRIAL WELFARE	
Chief, Deputy Chief, Assistant Chief, Staff Counsel I, II, and III, Legal Counsel	3
Deputy Labor Commissioner II, III and IV and Senior Special Investigator	4
Chairman, Commissioner, Executive Secretary, (Industrial Welfare Commission)	5
Public Member, wage board (Industrial Welfare Commission)	6
INDUSTRIAL ACCIDENTS AND WORKERS' COMPENSATION	
Administrative Director, Assistant Chief, Medical Director, Chief of Permanent Disability Rating Bureau, Chief, Rehabilitation Bureau, Permanent Disability Rating Specialist, (assigned to Benefit Notice Unit)	7
District Medical Director, Medical Examiner, P.D.R. Area Supervisor, P.D.R. Specialist, Information Attorney, Referee WCAB, Referee–in–Charge WCAB (also known as Worker Compensation Judge and Presiding Worker Compensation Judge)	8
Staff Services Manager, Administrative Assistant	9
INDUSTRIAL ACCIDENTS AND WORKERS' COMPENSATION	
Chairman, Commissioner, Secretary and Deputy Commissioner, Deputy Commissioner, Special Counsel, Staff Counsel	10
Program Manager, Consultant, and Field Representative of Office of Self–Insurance Plans	11
INDUSTRIAL SAFETY	
Chief, Deputy Chief, Assistant Chief for Consulting Education and Research, Administrative Assistant, Staff Services Manager	12
Staff Counsel (I, II, III), Senior Special Investigator, Special Staff Investigator, Administrative Chief of Bureau of Investigation	13
Assistant Chief, Regional Manager, District Manager	14
Principal Engineer	15
Senior Safety Engineer, Safety Engineer, Senior Health Physicist, Associate Health Physicist	16
OCCUPATIONAL SAFETY AND HEALTH	
Standards Board: Chairman and members of the Board, Executive Officer, Senior Safety Engineer, Staff Services Analyst	17
Appeals Board: Chairman and members of the Board, Executive Officer, Staff Counsel I, II and III, Administrative Law Judge (Presiding, I, II), Forensic Engineer	17
APPRENTICESHIP	
Chief, Chief Deputy, Assistant Chief, Special Assistant to Chief.	18
Intergroup Relations Coordinator, Area Administrator, Senior Consultant	19
Staff Services Manager	20
LABOR STATISTICS AND RESEARCH	
Chief, Assistant Chief, Senior Research Analyst (Industrial Relations Research)	21
Data Processing Manager, Associate Systems Analyst, Associate Programmer Analyst	22
CONCILIATION	
Supervisor of Conciliation, Conciliator	23
FAIR EMPLOYMENT PRACTICES	
Chairman and Members of Commission, Legal Affairs Officer (Commission), Chief, Assistant Chief, All Legal Classes	24

Disclosure Categories

Category 1

Designated employees assigned to this category must report:

All investments and sources of income.

Category 2

Designated employees assigned to this category must report:

Investments in business entities and sources of income which they know or have reason to know have within the preceding two years contracted, or plan to contract, with the Department of Industrial Relations to provide services, supplies, materials or machinery of any type to the Department.

Category 3

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regula-

tion by or has within the preceding 2 years contracted or plans to contract with the Division of Labor Standards Enforcement.

Category 4

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Labor Standards Enforcement within the geographic area over which they exercise jurisdiction.

Category 5

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Industrial Welfare Commission.

Category 6

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that he or she knows or has reason to know is directly and materially subject to regulation by the Industrial Welfare Commission based on consideration of the recommendations of the wage board to which the public member belongs.

Category 7

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know: (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business; or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents.

Category 8

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know: (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business; or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents, to the extent the business entity or source of income is subject to such regulation or engages in or derives its income from such insurance business within the geographic area over which the employee exercises jurisdiction. Workers' compensation judges performing judicial functions are also subject to the provisions of the California Code of Judicial Conduct.

Category 9

Designated employees assigned to this category must report:

Investments in business entities and sources of income which they know or have reason to know have within the preceding 2 years contracted. or plan to contract, with the Division of Industrial Accidents to provide services, supplies, materials, or machinery of any type to the Division, or have so contracted or plan to contract with the Department to serve the Division in said manner.

Category 10

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know: (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business; or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents.

Category 11

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is a Self–Insurer for purposes of workers' compensation liability, has applied in the last two years or plans to apply for self–insurer status, or engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business or the administration or operation of self–insurance plans.

Category 12

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety or has within the preceding two years contracted or plans to contract with the Division of Industrial Safety.

Category 13

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety.

Category 14

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the geographic area over which they exercise jurisdiction.

Category 15

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the subject matter area over which they exercise jurisdiction.

Category 16

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the subject matter and geographic area over which they exercise jurisdiction.

Category 17

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Board or Unit for which they work.

Category 18

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Apprenticeship Standards or has within the preceding two years contracted or plans to contract with the Division of Apprenticeship Standards.

Category 19

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Apprenticeship Standards within the geographic area over which they exercise jurisdiction.

Category 20

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that she or he knows or has reason to know has within the preceding 2 years contracted, or plans to contract, with the Division of Apprenticeship Standards to provide services, supplies, materials or machinery of any type to the Division, or has so contracted or plans to contract with the Department to so serve the Division.

Category 21

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that he or she knows or has reason to know is directly and materially subject to regulation by the Department of Industrial Relations, engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business, or has within the preceding two years contracted or plans to contract with the Division of Labor Statistics and Research.

Category 22

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know has within the preceding two years contracted or plans to contract with the Division of Labor Statistics and Research to provide services, supplies, materials, or machinery of any type for purposes of data processing, reproduction, or microfilming, to the Division, or has so contracted or plans to contract with the Department to so serve the Division.

Category 23

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know engages in or derives its income from, in whole or in part, a Transit District subject to the jurisdiction of the State Conciliation Service.

Category 24

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Fair Employment Practices Commission.

Subchapter 6. Prevailing Wage Hearings

Article 1. General

§ 17201. Scope and Application of Rules.

(a) These Rules govern proceedings for review of civil wage and penalty assessments and the withholding of contract payments under Articles 1 and 2 of Division 2, Part 7, Chapter 1 (commencing with section 1720) of the Labor Code, as well as any notice assessing penalties for noncompliance with payroll record obligations under Labor Code section 1776. The provisions of Labor Code section 1742 and these Rules apply to all such assessments and notices served on a contractor or subcontractor on or after July 1, 2001 and provide the exclusive method for an Affected Contractor or Subcontractor to obtain review of any such notice or assessment. These Rules also apply to transitional cases in which notices were served but no court action was filed under Labor Code sections 1731–1733 prior to July 1, 2001, in accordance with Section 17270 (Rule 70) below.

(b) These Rules do not govern debarment proceedings under Labor Code section 1777.1, nor proceedings to review determinations with respect to the violation of apprenticeship obligations under Labor Code sections 1777.5 and 1777.7, nor any criminal prosecution.

(c) These Rules do not preclude any remedies otherwise authorized by law to remedy violations of Division 2, Part 7, Chapter 1 of the Labor Code.

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

NOTE: Authority cited: sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742, 1771.5, 1771.6(b), 1773.5, 1776 and 1777.1–1777.7, Labor Code; and Stats. 2000, Chapter 954, §1.

HISTORY

1. New subchapter 6 (articles 1–7, sections 17201–17270), article 1 (sections 17201–17212) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17202. Definitions.

For the purpose of these Rules:

(a) "Affected Contractor or Subcontractor" means a contractor or subcontractor (as defined under Labor Code section 1722.1) to whom the Labor Commissioner has issued a civil wage and penalty assessment pursuant to Labor Code section 1741, or to whom an Awarding Body has issued a notice of the withholding of contract payments pursuant to Labor Code section 1771.6, or to whom the Labor Commissioner or the Division of Apprentice Standards has issued a notice assessing penalties for noncompliance with payroll record obligations under Labor Code section 1776;

(b) "Assessment" means a civil wage and penalty assessment issued by the Labor Commissioner or his or her designee pursuant to Labor Code section 1741, and it also includes a notice issued by either the Labor Commissioner or the Division of Apprenticeship Standards pursuant to Labor Code section 1776;

(c) "Awarding Body" means an awarding body or body awarding the contract (as defined in Labor Code section 1722) that exercises enforcement authority under Labor Code section 1726 or 1771.5;

(d) "Department" means the Department of Industrial Relations;

(e) "Director" means the Director of the Department of Industrial Relations;

(f) "Enforcing Agency" means the entity which has issued an Assessment or Notice of Withholding of Contract Payments and with which a Request for Review has been filed; *i.e.*, it refers to the Labor Commissioner when review is sought from an Assessment, the Awarding Body when review is sought from a Notice of Withholding of Contract Payments, and the Division of Apprenticeship Standards when review is sought from a notice issued by that agency that assesses penalties under Labor Code section 1776;

(g) "Hearing Officer" means any person appointed by the Director pursuant to Labor Code section 1742(b) to conduct hearings and other proceedings under Labor Code section 1742 and these Rules;

(h) "Joint Labor–Management Committee" means a joint labor–management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (section 175a of Title 29 of the United States Code).

(i) "Labor Commissioner" means the Chief of the Division of Labor Standards Enforcement and includes his or her designee who has been authorized to carry out the Labor Commissioner's functions under Chapter 1, Part 7 of Division 2 (commencing with section 1720) of the Labor Code;

(j) "Party" means an Affected Contractor or Subcontractor who has requested review of either an Assessment or a Notice of Withholding of Contract Payments, the Enforcing Agency that issued the Assessment or the Notice of Withholding of Contract Payments from which review is sought, and any other Person who has intervened under subparts (a), (b), or (c) of Rule 08 [Section 17208];

(k) "Person" means an individual, partnership, limited liability company, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character;

(*l*) "Representative" means a person authorized by a Party to represent that Party in a proceeding before a Hearing Officer or the Director, and includes the Labor Commissioner when the Labor Commissioner has intervened to represent the Awarding Body in a review proceeding pursuant to Labor Code section 1771.6(b).

(m) "Rule" refers to a section within this subchapter 6. The Rule number corresponds to the last two digits of the full section number. (For example, Rule 08 is the same as section 17208.)

(n) "Surety" has the meaning set forth in Civil Code section 2787 and refers to the entity that issues the public works bond provided for in Civil Code sections 3247 and 3248 or any other surety bond that guarantees the payment of wages for labor.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 2787, 3247 and 3248, Civil Code; Sections 12a and 12b, Code of Civil Procedure; Sections 6700, 6701, 11405.60 and 11405.70, Government Code; Sections 1720 et seq., 1722, 1722.1, 1726, 1741, 1742, 1742(b), 1771.5, 1771.6, 1771.6(b) and 1776, Labor Code; and 29 U.S.C. §175a.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17203. Computation of Time and Extensions of Time to Respond or Act.

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

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

(c) Where service of any notice, decision, pleading or other document is by first class mail, and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed is extended five days if the place of address is within the State of California, and 10 days if the place of address is outside the State of California but within the United States. However, this Rule shall not extend the time within which the Director may reconsider or modify a decision to correct an error (other than a clerical error) under Labor Code section 1742(b).

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1010–1013, Code of Civil Procedure; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17204. Appointment of Hearing Officers; Delegation of Appointment Authority to Chief Counsel.

(a) Upon receipt of a Request for Review of an Assessment or of a Notice of Withholding of Contract Payments, the Director, acting through the Chief Counsel (*see* subpart (c) below), shall appoint an impartial Hearing Officer to conduct the review proceeding.

(b) The appointed Hearing Officer shall be an attorney employed by the Office of the Director — Legal Unit. However, if no attorney employed by the Office of the Director — Legal Unit is available or qualified to serve in a particular matter, the appointed Hearing Officer may be any attorney or administrative law judge employed by the Department, other than an employee of the Division of Labor Standards Enforcement.

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

(d) The Director's authority under Labor Code section 1742(b) to appoint an impartial Hearing Officer, is delegated in all cases to the Chief Counsel of the Office of the Director or to the Chief Counsel's designated Assistant or Acting Chief Counsel when the Chief Counsel is unavailable or disqualified from participating in a particular matter. This delegation includes all related authority under Rule 40 [Section 17240] below to appoint a different Hearing Officer to conduct all or any part of a review proceeding as well as the authority to consider and decide or to assign to another Hearing Officer for consideration and decision any motion to disqualify an appointed Hearing Officer.

NOTE: Authority cited: Sections 7, 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 11425.30 and 11502(b), Government Code; and Sections 7, 55, 59 and 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17205. Authority of Hearing Officers.

(a) In any proceeding assigned for hearing and decision under the provisions of Labor Code section 1742, the appointed Hearing Officer shall have full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Director, to hold a prehearing conference, to issue a subpoena and subpoena duces tecum for the attendance of a Person and the production of testimony, books, documents, or other things, to compel the attendance of a Person residing anywhere in the state, to certify official acts, to regulate the course of a hearing, to grant a withdrawal, disposition or amendment, to order a continuance, to approve a stipulation voluntarily entered into by the Parties, to administer oaths and affirmations, to rule on objections, privileges, defenses, and the receipt of relevant and material evidence, to call and examine a Party or witness and introduce into the hearing record documentary or other evidence, to request a Party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding, to extend the submittal date of any proceeding, to exercise such other and additional authority as is delegated to Hearing Officers under these Rules or by an express written delegation by the Director, and to prepare a recommended decision, including a notice of findings, findings, and an order for approval by the Director.

(b) There shall be no right of appeal to or review by the Director of any decision, order, act, or refusal to act by an appointed Hearing Officer other than through the Director's review of the record in issuing or reconsidering a written decision under Rules 60 [Section 17260] and 61 [Section 17261] below.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11512, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17206. Access to Hearing Records.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 6250 et seq. Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17207. Ex Parte Communications.

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

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

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

Hearing Officer may determine a matter of procedure or practice based upon a permissible ex–parte communication. The term "matters of procedure or practice" shall be liberally construed.

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

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

(f) To the extent not inconsistent with Labor Code section 1742, the provisions of Article 7 of Chapter 4.5 of Title 2, Division 3, Part 1 (commencing with section 11430.10) of the Government Code governing ex parte communications in administrative adjudication proceedings shall apply to review proceedings conducted under these Rules.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 11430.10–11430.80, Government Code, and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17208. Intervention and Participation by Other Interested Persons.

(a) The Labor Commissioner may intervene as a matter of right in any review from a Notice of Withholding of Contract Payments, either as the Representative of the Awarding Body or as an interested third Party.

(b) A bonding company and any Surety on a bond that secures the payment of wages covered by the Assessment or Notice of Withholding of Contract Payments shall be permitted to intervene as a matter of right in a pending review filed by the contractor or subcontractor from the Assessment or Withholding of Contract Payments in question; *provided that*, intervention is sought at or before the first prehearing conference held pursuant to Rule 31 [Section 17231] below and within either 30 days after the bonding company or Surety was served with a copy of the Assessment or Notice of Withholding of Contract Payments or 30 days after the filing of the Request for Review, whichever is later. Thereafter, any request to intervene by such a bonding company or Surety shall be treated as a motion for permissive participation under subpart (d) of this Rule. A bonding company or Surety shall have the burden of proof with respect to any claim that it did not receive notice of the Assessment or Notice of Withholding of Contract Payments until after the filing of the Request for Review.

(c) The employee(s), labor union, or Joint Labor–Management Committee who filed the formal complaint which led the Enforcing Agency to issue the Assessment or Notice of Withholding of Contract payments shall be permitted to intervene in a pending review filed by the contractor or subcontractor from the Assessment or Withholding of Contract Payments in question; *provided that*, intervention is sought at or before the first prehearing conference held pursuant to Rule 31 [Section 17231] below and there is no good cause to deny the request. Thereafter, any request to intervene by such employee(s), labor union, or Joint Labor–Management Committee shall be treated as a motion for permissive participation as an interested Person under subpart (d) of this Rule.

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

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

(f) No Person shall be required to seek intervention in a review proceeding as a condition for pursuing any other remedy available to that Person for the enforcement of the prevailing wage requirements of Division 2, Part 7, Chapter 1 (starting with section 1720) of the Labor Code.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11440.50(c), Government Code; and Sections 1720 et seq., 1741, 1742 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17209. Representation at Hearing.

(a) A Party may appear in person or through an authorized Representative, who need not be an attorney at law; *however*, a Party shall use the form Authorization for Representation by Non–Attorney [8 CCR 17209(b) (New 1/15/02)] to authorize representation by any non–attorney who is not an owner, officer, or managing agent of that Party.

(b) Upon formal notification that a Party is being represented by a particular individual or firm, service of subsequent notices in the matter shall be made on the Representative, either in addition to or instead of the Party, unless and until such authorization is terminated or withdrawn by further written notice. Service upon an authorized Representative shall be effective for all purposes and shall control the determination of any notice period or the running of any time limit for the performance of any acts, regardless of whether or when such notice may also have been served directly on the represented Party.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section and new form 17209(b) filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

AUTHORIZED REPRESENTATIVE OR PARTY WITHOUT ATTORNEY (Name, Address, and Telephone):	*For ODL use only:*
STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS	
In the matter of the Request for Review of: Requesting Party, vs. Enforcing Agency.	
AUTHORIZATION FOR REPRESENTATION BY NON-ATTORNEY (Rule 9(b))	Case No.: - PWH

(Name of Party) _____ designates the following individual or firm, who is not an attorney at law,* to serve as our authorized representative in this matter and to receive all notices in our behalf unless and until this Authorization is terminated or withdrawn by further written notice.

Specify Name, Address, and Telephone Number of Representative:

_____

_____

_____

_____

Date: _____

. . . . . .

(TYPE OR PRINT NAME OF ! OWNER, ! OFFICER, OR ! MANAGING AGENT WHO IS MAKING THIS DESIGNATION)

_____

(SIGNATURE)

Owner, Officer, or Managing Agent of Party

I accept this authorization.

Date: _____

_____

Authorized Representative

* *This form is not required for an authorized representative who is an Owner, Officer, or Managing Agent of the Party*

§ 17210. Proper Method of Service.

(a) Unless a particular method of service is specifically prescribed by statute or these Rules, service may be made by: (1) personal delivery; (2) priority or first class mailing postage prepaid through the U. S. Postal Service; (3) any other means authorized under Code of Civil Procedure section 1013; or (4) if authorized by the Hearing Officer pursuant to Rule 11 [Section 17211] below, by facsimile or other electronic means.

(b) Service is complete at the time of personal delivery or mailing, or at the time of transmission as determined under Rule 11 [Section 17211] below.

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

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

(e) In each proceeding, the Hearing Officer shall maintain an official address record which shall contain the names and addresses of all Parties and their Representatives, agents, or attorneys of record. Any change or substitution in such information must be communicated promptly in writing to the Hearing Officer. The official address record may also include the names and addresses of interested Persons who have been permitted to participate under Rule 08(d) [Section 17208].

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1013, Code of Civil Procedure; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17211. Filing and Service of Documents by Facsimile or Other Electronic Means.

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

(b) Filings and service by facsimile or other electronic means shall not authorized or accepted as a substitute for another method of service that is required by statute or these Rules, unless the Party served has expressly waived its right to be served in the required manner.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17212. Administrative Adjudication Bill of Rights.

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

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 11415.20, 11425.10 et seq. and 11430.80(b), Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 2. Assessment or Notice and Request for Review

§ 17220. Service and Contents of Assessment or Notice of Withholding of Contract Payments.

(a) An Assessment, a Notice of Withholding of Contract Payments, or a notice assessing penalties under Labor Code section 1776 shall be served on the contractor and subcontractor, if applicable, by first class and certified mail pursuant to the requirements of Code of Civil Procedure section 1013. A copy of the notice shall also be served by certified mail on any bonding company issuing a bond that secures the payment of the wages covered by the Assessment or Notice and to any Surety on a bond, if the identities of such companies are known or reasonably ascertainable. The identity of any Surety issuing a bond for the benefit of an Awarding Body as designated obligee, shall be deemed "known or reasonably ascertainable," and the Surety shall be deemed to have received the notice required under this subpart if sent to the address appearing on the face of the bond.

(b) An Assessment or Notice of Withholding of Contract Payments shall be in writing and shall include the following information:

(1) a description of the nature of the violation and basis for the Assessment or Notice; and

(2) the amount of wages, penalties, and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the Enforcing Agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1.

(c) An Assessment or Notice of Withholding of Contract Payments shall also include the following information:

(1) the name and address of the office to whom a Request for Review may be sent;

(2) information on the procedures for obtaining review of the Assessment or Withholding of Contract Payments;

(3) notice of the Opportunity to Request a Settlement Meeting under Rule 21 [Section 17221] below; and

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

Failure by a contractor or subcontractor to submit a timely Request for Review will result in a final order which shall be binding on the contractor and subcontractor, and which shall also be binding, with respect to the amount due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. Labor Code section 1743.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1013, Code of Civil Procedure; and Sections 1741, 1742, 1743, 1771.6 and 1776, Labor Code.

HISTORY

1. New article 2 (sections 17220–17229) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17221. Opportunity for Early Settlement.

(a) The Affected Contractor or Subcontractor may, within 30 days following the service of an Assessment or Notice of Withholding of Contract Payments, request a meeting with the Enforcing Agency for the purpose of attempting to settle the dispute regarding the Assessment or Notice.

(b) Upon receipt of a timely written request for a settlement meeting, the Enforcing Agency shall afford the Affected Contractor or Subcontractor a reasonable opportunity to meet for such purpose. The settlement meeting may be held in person or by telephone and shall take place before expiration of the 60–day limit for filing a Request for Review under Rule 22 [Section 17222].

(c) Nothing herein shall preclude the Parties from meeting or attempting to settle a dispute after expiration of the time for making a request or after the filing of a Request for Review.

(d) Neither the making or pendency of a request for a settlement meeting, nor the fact that the Parties have met or have failed or refused to meet as required by this Rule shall serve to extend the time for filing a Request for Review under Rule 22 [Section 17222] below.

(e) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, such a settlement meeting shall be admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, such a settlement meeting, other than a final settlement agreement, shall be admissible or subject to discovery in any administrative or civil proceeding.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742, 1742.1 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17222. Filing of Request for Review.

(a) Any Request for Review of an Assessment or of a Notice of Withholding of Contract Wages shall be transmitted in writing to the Enforcing Agency within 60 days after service of the Assessment or Notice. Failure to request review within 60 days shall result in the Assessment or the Withholding of Contract Wages becoming final and not subject to further review under these Rules.

(b) A Request for Review shall be transmitted to the office of the Enforcing Agency designated on the Assessment or Notice of Withholding of Contract Payments from which review is sought.

(c) A Request for Review shall be deemed filed on the date of mailing, as determined by the U.S. Postal Service postmark date on the envelope or the overnight carrier's receipt in accordance with Rule 03(b) [Section 17203(b)] above, or on the date of receipt by the designated office of the Enforcing Agency, whichever is earlier.

(d) An additional courtesy copy of the Request for Review may be served on the Department by mailing to the address specified in Rule 23 [Section 17223] below at any time on or after the filing of the Request for Review with the Enforcing Agency. The service of a courtesy copy on the Department shall *not* be effective for invoking the Director's review authority under Labor Code section 1742; however, it may determine the time within which the hearing shall be commenced under Rule 41(a) [Section 17241(a)] below.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742 and 1771.6(a), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17223. Transmittal of Request for Review to Department.

Within ten (10) days followings its receipt of a Request for Review, the Enforcing Agency shall transmit to the Office of the Director – Legal Unit, the Request for Review and copies of the Assessment or Notice of Withholding of Contract Wages, any Audit Summary that accompanied the Assessment or Notice, and a Proof of Service or other document showing the name and address of any bonding company or Surety entitled to notice under Rule 20(a) [Section 17220(a)] above. The Enforcing Agency shall transmit these items to the following address.

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR - LEGAL UNIT
ATTENTION: LEAD HEARING OFFICER
P.O. BOX 420603
SAN FRANCISCO, CA 94142-0603

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(a) and 1771.6(a), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17224. Disclosure of Evidence.

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

(b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor or Subcontractor the option, at the Affected Contractor or Subcontractor's own expense, to either (A) obtain copies of all such evidence through a commercial copying service or (B) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the Affected Contractor or Subcontractor.

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

(d) The Enforcing Agency shall make evidence available for review as specified in subparts (a) through (c) within 20 days of its receipt of the Request for Review; *provided that*, this deadline may be extended by written request or agreement of the Affected Contractor or Subcontractor. The Enforcing Agency's failure to make evidence available for review as required by Labor Code section 1742(b) and this Rule, shall preclude the Enforcing Agency from introducing such evidence in proceedings before the Hearing Officer or the Director.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(b) and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17225. Withdrawal of Request for Review; Reinstatement.

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742 and 1771.6, Labor Code.

HISTORY

w section filed 1–15–2002; operative 1–15–2002 pursuant to Government de section 11343.4 (Register 2002, No. 3).

§ 17226. Dismissal or Amendment of Assessment or of Notice of Withholding of Contract Payments.

(a) Upon motion to the appointed Hearing Officer, an Enforcing Agency may dismiss or amend an Assessment or Notice of Withholding of Contract Payments as follows:

(1) An Assessment or Notice of Withholding may be dismissed or amended to eliminate or reduce all or part of any claim for wages, dam- or penalties that has been satisfied or that is not warranted under the and circumstances of the case or to conform to an order of the Hearing Officer or the Director.

(2) An Assessment or Notice of Withholding may be amended to eliminate a claim for penalties as to the affected contractor upon a determination that the affected contractor is not liable for same under either Labor Code section 1775(b) [subcontractor's failure to pay prevailing rate] or Labor Code section 1776 (g) [failure to comply with request for certified payroll records].

(3) For good cause, an Assessment or Notice of Withholding of Con- Payments may be amended to revise or increase any claim for wages, damages, or penalties based upon a recomputation or the discovery of new evidence subsequent to the issuance of the original Assessment or Notice.

(b) The Hearing Officer shall grant any motion to dismiss or amend an Assessment or Notice of Withholding downward under subparts (a)(1) or (a)(2) absent a showing that such dismissal or amendment will result in the forfeiture of substantial substantive rights of another Party to the proceeding. The Hearing Officer may grant a motion to amend an Assessment or Notice of Withholding upward under subpart (a)(3) under such terms as are just, including where appropriate the extension of an additional opportunity for early settlement under Rule 21 [Section 17221]. Unless the Hearing Officer determines otherwise, an amended Assessment or Notice of Withholding shall be deemed fully controverted without need for filing an additional or amended Request for Review.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742, 1771.6, 1775(b) and 1776(g), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17227. Early Disposition of Untimely Assessment, Withholding, or Request for Review.

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

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1741, 1742, 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17228. Finality of Assessment or of Withholding of Contract Payments When No Timely Request for Review is Filed; Authority of Awarding Body to Disburse Withheld Funds.

(a) Upon the failure of an Affected Contractor or Subcontractor to file a timely Request for Review under Labor Code section 1742(a) and Rule 22(a) [Section 17222(a)] above, the Assessment or Notice of Withholding of Contract Payments shall become a "final order" as to the Affected Contractor or Subcontractor that the Labor Commissioner may certify and file with the superior court in accordance with Labor Code section 1742(d).

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1727, 1742 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17229. Finality of Notice of Withholding of Contract Payments; Authority of Awarding Body to Recover Additional Funds.

Where a Notice of Withholding of Contract Payments seeks to recover wages, penalties, or damages in excess of the amounts withheld from available contract payments (*see* Rule 20(b)(2) [Section 17220(b)(2)] above), an Awarding Body may recover any excess amounts that become or remain due when the Notice of Withholding of Contract Payments has become final under Labor Code section 1771.6. To recover the excess amounts, the Awarding Body shall transmit to the Labor Commissioner the Notice together with any decision of the Director or court that has become final and not subject to further review. The Labor Commissioner in turn shall certify and file the final order with the superior court in accordance with Labor Code section 1742(d).

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(d) and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 3. Prehearing Procedures

§ 17230. Scheduling of Hearing; Continuances and Tolling.

(a) The appointed Hearing Officer shall establish the place and time of the hearing on the merits, giving due consideration to the needs of all Parties and the statutory time limits for hearing and deciding the matter. Parties are encouraged to communicate scheduling needs to the Hearing Officer and all other Parties at the earliest opportunity. It shall not be a violation of Rule 07 [Section 17207]'s prohibition on ex parte communications for the Hearing Officer or his or her designee to communicate with Parties individually for purposes of clearing dates and times and proposing locations for the hearing. The Hearing Officer may also conduct a prehearing conference by telephone or any other expeditious means for purposes of establishing the time and place of the hearing.

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

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

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

(e) The time limits for hearing and deciding a review proceeding shall also be deemed tolled (1) when proceedings are suspended to seek judicial enforcement of a subpoena or other order to compel the attendance, testimony, or production of evidence by a necessary witness; (2) when the proceedings are stayed or enjoined by any court order; (3) between the time that a proceeding is dismissed and then ordered reinstated under Rule 25 [Section 17225] above; (4) upon the order of a court reinstating or requiring rehearing of the merits of a proceeding; or (5) during the pendency of any other cause beyond the Director's direct control (including but not limited to natural disasters, temporary unavailability of a suitable hearing facility, or absence of budget authority) that prevents the Director or any appointed Hearing Officer from carrying out his or her responsibilities under these Rules.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New article 3 (sections 17230–17237) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17231. Prehearing Conference.

(a) Upon the application of any Party or upon his or her own motion, the appointed Hearing Officer may conduct a prehearing conference for any purpose that may expedite or assist the preparation of the matter for hearing or the disposition of the Request for Review. The prehearing conference may be conducted by telephone or other means that is convenient to the Hearing Officer and the Parties.

(b) The Hearing Officer shall provide reasonable advance notice of any prehearing conference conducted pursuant to this Rule. The Notice shall advise the Parties of the matters which the Hearing Officer intends to cover in the prehearing conference, but the failure of the Notice to enumerate some matter shall not preclude its discussion or consideration at the conference.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11511.5, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17232. Consolidation and Severance.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11507.3, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17233. Prehearing Motions; Cut Off Date.

(a) Any motion made in advance of the hearing on the merits, any opposition thereto, and any further reply shall be in writing and directed to the appointed Hearing Officer. No particular format shall be required; however, the following information shall appear prominently on the first page: (1) the case name (*i.e.*, names of the Parties); (2) any assigned case number; (3) the name of the Hearing Officer to whom the paper is being submitted; (4) the identity of the Party submitting the paper; (5) the nature of the relief sought; and (6) the scheduled date, if any, for the hearing on the merits of the Request for Review. The motion shall also include a Proof of Service, as defined in Rule 10 [Section 17210] above, showing that copies have been served on all other Parties to the proceeding.

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

(c) There shall be no right to a separate oral hearing on any prehearing motion, except in those instances in which an oral hearing has been specially requested by a Party or the Hearing Officer *and* in which the enforcement or forfeiture of a fundamental right is at stake. When the Hear-

ing Officer determines that such an oral hearing is necessary or appropriate, it may be conducted by telephone or other manner that is convenient to the Parties.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b); Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17234. Evidence by Affidavit or Declaration.

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

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

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

(c) If a timely request is made to cross–examine an affiant or declarant under this Rule, the burden of producing that witness at the hearing shall be upon the proponent of the witness. If the proponent fails to produce the witness, the affidavit or declaration may be introduced in evidence, but shall be given only the same effect as other hearsay evidence under Rule 44 [Section 17244].

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Rule 1613, California Rules of Court; Section 11514, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17235. Subpoena and Subpoena Duces Tecum.

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

(b) Subpoenas and subpoenas duces tecum shall be issued by the Hearing Officer at the request of a Party, or by the attorney of record for a Party, in accordance with sections 1985 to 1985.6, inclusive, of the Code of Civil Procedure. The burden of serving a subpoena that has been issued by the Hearing Officer shall be upon the Party who requested the subpoena.

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

(d) Subpoenas and subpoenas duces tecum shall be enforceable through the Contempt and Monetary Sanctions provision set forth in Rule 47 [Section 17247] below. A Party aggrieved by the failure or refusal of any witness to obey a subpoena or subpoena duces tecum shall have the burden of showing to the satisfaction of the Hearing Officer that the subpoena or subpoena duces tecum was properly issued and served and that the testimony or evidence sought was necessary to prove or disprove a significant claim or defense in the proceeding.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1985–1988, Code of Civil Procedure; Section 1563, Evidence Code; Sections 11450.20–11455.30, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17236. Written Notice to Party in Lieu of Subpoena.

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

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

(c) The Hearing Officer shall have authority under Rule 47 [Section 17247] below to sanction a Party who fails or refuses to comply with a written notice to attend that meets the requirements of this Rule and has been timely served in accordance with section 1987 of the Code of Civil Procedure. However, the Hearing Officer may not initiate contempt proceedings against the witness for failing to appear based solely on non–compliance with a written notice to attend served on the Party's attorney. A Party seeking sanctions for another Party's failure or refusal to comply with a written notice to attend shall have the burden of showing to the satisfaction of the Hearing Officer that the written notice to attend was properly issued and timely served and that the testimony or evidence sought was necessary to prove or disprove a significant claim or defense in the proceeding.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1987, Code of Civil Procedure; Sections 11450.50–11455.30, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17237. Depositions and Other Discovery.

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1987, Code of Civil Procedure; Sections 11450.50–11455.30, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 4. Hearings

§ 17240. Notice of Appointment of Hearing Officer; Objections.

(a) Notice of the Appointment of a Hearing Officer under Rule 04 [Section 17204] above shall be provided to the Parties as soon as practi-

cable and no later than when the matter is noticed for a prehearing conference or hearing.

(b) The Director may appoint a different Hearing Officer to conduct and hear the review or to conduct and dispose of any preliminary or procedural matter in a given case.

(c) A Party wishing to object to the appointment of a particular Hearing Officer, including for any one or more of the grounds specified in sections 11425.30 and 11425.40 of the Government Code or section 1742(b) of the Labor Code, shall within 10 days after receiving notice of the appointment and no later than the start of any hearing on the merits, *whichever is earlier*, file a motion to disqualify the appointed Hearing Officer together with a supporting affidavit or declaration. The motion shall be filed with the Chief Counsel of the Office of the Director at the address indicated in Rule 23 [Section 17223] above. Notwithstanding the foregoing time limits, if a Party subsequently discovers facts constituting grounds for the disqualification of the appointed Hearing Officer, including but not limited to that the Hearing Officer has received a prohibited ex parte communication in the pending case, the motion shall be filed as soon as practicable after the facts constituting grounds for disqualification are discovered.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 170.3(c)(1), Code of Civil Procedure; Sections 11425.30 and 11425.40, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New article 4 (sections 17240–17249) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17241. Time and Place of Hearing.

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

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

(c) A suitable location under this section means one that is open and accessible to members of the public and which includes appropriate facilities for the recording of testimony. Any facility that is regularly used by any state agency or by the Awarding Body for public hearings and that will reasonably accommodate the anticipated number of Parties and witnesses involved in the proceeding, is presumed suitable in the absence of a contrary showing. Parties seeking to change the location of a hearing under subpart (b) shall make reasonable efforts to identify, agree upon, and arrange for the availability of a suitable location within a county specified in subpart (b)(1) or (b)(2).

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11425.20, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17242. Open Hearing; Confidential Evidence and Proceedings; and Exclusion of Witnesses.

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

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 777, Evidence Code, Section 11425.20, Government Code, and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17243. Conduct of Hearing.

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

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11513, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17244. Evidence Rules; Hearsay.

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

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11513, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17245. Official Notice.

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 451, 452 and 455, Evidence Code; Section 11515, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17246. Failure to Appear; Relief from Default.

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 473, Code of Civil Procedure; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17247. Contempt and Monetary Sanctions.

(a) If any Person in proceedings before an appointed Hearing Officer disobeys or resists any lawful order or refuses, without substantial justification, to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceedings, or violates the prohibition against ex parte communications under Rule 07 [Section 17207] above, the Hearing Officer may do any one or more of the following: (1) certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20; (2) exclude the Person from the hearing room; (3) prohibit the Person from testifying or introducing certain matters in evidence; and/or (4) establish certain facts, claims, or defenses if the Person in contempt is a Party.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 128.5, Code of Civil Procedure; Sections 11455.10–11455.30, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17248. Interpreters.

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

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

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

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

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

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

(g) The Hearing Officer shall disqualify an interpreter if the interpreter cannot understand and interpret the terms and procedures used in the hearing or prehearing conference, has disclosed privileged or confiden-

tial communications, or has engaged in conduct which, in the judgment of the Hearing Officer, creates an appearance of bias, prejudice, or partiality.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 754, Evidence Code; Sections 11435.05–11435.65 and 68560–68566, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17249. Hearing Record; Recording of Testimony and Other Proceedings.

(a) The Hearing Officer and the Director shall maintain an official record of all proceedings conducted under these Rules. In the absence of a determination under subpart (b) below, all testimony and other proceedings at any hearing shall be recorded by audiotape. Recorded testimony or other proceedings need not be transcribed unless requested for purposes of further court review of a decision or order in the same case.

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

(c) The Parties may, at their own expense, arrange for the recording of testimony and other proceedings through a different means other than the one authorized by the Hearing Officer, *provided that* it does not in any way interfere with the Hearing Officer's control and conduct of the proceedings, and *further provided that*, it shall not be regarded as an official record for any purpose absent a stipulation by all of the Parties or order of the Hearing Officer.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17250. Burdens of Proof on Wages and Penalties.

(a) The Enforcing Agency has the burden of coming forward with evidence that the Affected Contractor or Subcontractor (1) was served with an Assessment or Notice of Withholding of Contract Payments in accordance with Rule 20 [Section 17220]; (2) was provided a reasonable opportunity to review evidence to be utilized at the hearing in accordance with Rule 24 [Section 17224]; and (3) that such evidence provides prima facie support for the Assessment or Withholding of Contract Payments.

(b) If the Enforcing Agency meets its initial burden under (a), the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment or for the Withholding of Contract Payments is incorrect.

(c) With respect to any civil penalty established under Labor Code section 1775, the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 500, 502 and 550, Evidence Code; and Sections 1742(b) and 1775, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17251. Liquidated Damages.

(a) With respect to any liquidated damages for which an Affected Contractor, Subcontractor, or Surety on a bond becomes liable under Labor Code section 1742.1, the Enforcing Agency shall have a further burden of coming forward with evidence to show the amount of wages that remained unpaid as of 60 days following the service of the Assessment or Notice of Withholding of Contract Payments. The Affected Contractor or Subcontractor shall have the burden of demonstrating that he or she had substantial grounds for believing the Assessment or Notice to be in error.

(b) To demonstrate "substantial grounds for believing the Assessment or Notice to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment or Notice was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment or Notice.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(b), 1742.1 and 1773.5, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17252. Oral Argument and Briefs.

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

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

(c) In addition to or as an alternative to post–hearing briefs, the Hearing Officer may also prepare proposed findings or a tentative decision or may designate a Party to prepare proposed findings and thereafter give the Parties a reasonable opportunity to present arguments in support of or opposition to any proposed findings or tentative decision prior to the issuance of a decision by the Director under Rule 60 [Section 17260] below.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17253. Conclusion of Hearing; Time for Decision.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 6. Decision of the Director

§ 17260. Decision.

(a) The appointed Hearing Officer shall prepare a recommended decision for the Director's review and approval. The decision shall consist of a notice of findings, findings, and an order, and shall be in writing and include a statement of the factual and legal basis for the decision, consistent with the requirements of Labor Code section 1742 and Government Code section 11425.50.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1013, Code of Civil Procedure; Section 11425.50, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New article 6 (sections 17260–17264) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17261. Reconsideration.

(a) Upon the application of any Party or upon his or her own motion, the Director may reconsider or modify a decision issued under Rule 60 [Section 17260] above for the purpose of correcting any error therein.

(b) The decision must be reconsidered or modified within 15 days after its date of issuance pursuant to Rule 60(c) [Section 17260(c)]. Thereafter, the decision may not be reconsidered or modified, except that a clerical error may be corrected at any time.

(c) The modified or reconsidered decision shall be served on the Parties in the same manner as a decision issued under Rule 60 [Section 17260].

(d) A Party is not required to apply for reconsideration before seeking judicial review of a decision of the Director. An application for reconsideration made by any Party shall *not* extend the time for seeking judicial review pursuant to Labor Code section 1742(c) unless the Director issues a modified or reconsidered decision within the 15–day time limit prescribed in subpart (b) of this section.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17262. Final Decision; Time for Seeking Review.

(a) The decision of the Director issued pursuant to Section Rule 60 [Section 17260] above shall be the final decision of the Director from which any Party may seek judicial review pursuant to the provisions of Labor Code section 1742(c) and Code of Civil Procedure section 1094.5; *provided however*, that if the Director has issued a modified decision pursuant to and within the 15–day limit of the Director's reconsideration authority under Section Rule 61 [Section 17261] above and Labor Code section 1742(b), the right of review and time for seeking such review shall extend from the date of service of the modified decision rather than the original decision.

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5. Reference: Sections 1013 and 1094.5, Code of Civil Procedure; and Section 1742, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17263. Preparation of Record for Review.

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

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

(c) The pendency of any request for the Department to prepare a hearing record shall *not* extend the time limits for filing a petition for review under Labor Code section 1742(c) and Code of Civil Procedure section 1094.5.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1094.5, Code of Civil Procedure; California Rule of Court 985; Section 68511.3, Government Code; and Section 1742(c), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17264. Request for Participation by Director in Judicial Review Proceeding.

Although the Director should be named as the Respondent in any action seeking judicial review of a final decision, the Director ordinarily will rely upon the Parties to the hearing (as Petitioner and Real Party in Interest) to litigate the correctness of the final decision in the writ proceeding and on any appeal. The Director may participate actively in proceedings raising issues that specifically concern the Director's authority under the statutes and regulations governing the payment of prevailing wages on public work contracts, or the validity of related laws, regulations, or the Director's decisions as to public works coverage or generally applicable prevailing wage rates. Any Party may request the Director to file a response in the action by including a separate written request with any court pleading being served on the Director in accordance with Rule 62(d) [Section 17262(d)]. Any such separate written request should specify briefly what issues are raised by the petition that extend beyond the facts of the case and warrant the Director's participation.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1094.5, Code of Civil Procedure; and Section 1742(c), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 7. Transitional Rule

§ 17270. Applicability of These Rules to Notices Issued Between April 1, 2001 and June 30, 2001.

(a) These Rules shall apply to any notice issued by the Labor Commissioner or an Awarding Body with respect to the withholding or forfeiture of contract payments for unpaid wages or penalties under the prevailing wage laws in effect prior to July 1, 2001; *provided that*, the party seeking review has not commenced a civil action with respect to such notice under the provisions of Labor Code sections 1731–1733 [repealed effective July 1, 2001].

(b) An Affected Contractor or Subcontractor may appeal any such notice served between April 1, 2001 and June 30, 2001 by filing a Request for Review with the Enforcing Agency that issued the notice, in the manner and form specified in Rule 22 [Section 17222] above. Any such Request for Review shall be in writing and shall include a statement indicating the date upon which the contractor or subcontractor was served with the notice of withholding or forfeiture.

(c) This Rule shall *not* extend the time available to appeal the notice under the former law. A Request for Review of a notice issued prior to July 1, 2001 must be filed with the Enforcing Agency within ninety (90) days after service of the notice.

(d) A contractor or subcontractor who has sought review of a notice issued prior to July 1, 2001 by filing a court action under the repealed provisions of Labor Code sections 1731–1733 on or after July 1, 2001, shall, if said action would have been timely under those sections, be afforded the opportunity to dismiss the action without prejudice, after entering into a stipulation that the proceeding be transferred to the Director for hearing in accordance with these Rules. The stipulation shall also provide that the time for commencing a hearing under Rule 41 [Section 17241] shall not begin to run until the case has been formally transferred to and received by the Office of the Director.

(e) Any hearing request made pursuant to Labor Code section 1771.7 [repealed effective July 1, 2001] that has not been heard and decided by a Hearing Officer prior to July 1, 2001 shall be handled in accordance with these Rules.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New article 7 (section 17270) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

* * *

SixTen and Associates
Mandate Reimbursement Services

EXHIBIT B

KEITH B. PETERSEN, MPA, JD, President
252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
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August 23, 2002

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Chapter 938, Statutes of 2001
Test Claim 01-TC-28
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

Please find enclosed a copy of the Declaration of Thomas J. Donner requested by Nancy Patton, the original of which was attached to the above described test claim as Exhibit 2. Since all of our office copies of the test claim include this exhibit, I must assume that the original was attached to the original submission.

Sincerely,

Keith B. Petersen

C: Distribution List Attached

DECLARATION OF THOMAS J. DONNER

Santa Monica Community College District

Test Claim of Clovis Unified School Disrict
Chapter 938, Statutes of 2001

COSM No. _____

Labor Code Section 1720
Labor Code Section 1720.2
Labor Code Section 1720.3
Labor Code Section 1726
Labor Code Section 1727
Labor Code Section 1733
Labor Code Section 1735
Labor Code Section 1741
Labor Code Section 1742
Labor Code Section 1742.1
Labor Code Section 1743
Labor Code Section 1750
Labor Code Section 1770
Labor Code Section 1771
Labor Code Section 1771.5
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Labor Code Section 1777.6
Labor Code Section 1777.7
Labor Code Section 1812
Labor Code Section 1813
Labor Code Section 1861
Public Contract Code Section 22002

Title 8, California Code of Regulations
Section 16000
Sections 16001 through 16003
Sections 16100 through 16102
Sections 16200 through 16206
Sections 16300 through 16304
Sections 16400 through 16403
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Section 16425
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Sections 16429 through 16432
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Section 16500
Sections 16800 through 16802
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Sections 17260 through 17264

Prevailing Wage Rates

I, Thomas J. Donner, Executive Vice President - Business and Administration,

Santa Monica Community College District, make the following declaration and statement.

In my capacity as Executive Vice President - Business and Administration, I am responsible for the award and implementation of public works contracts. I am familiar with the provisions and requirements of the Labor and Public Contract Code Sections and the Title 8 California Code of Regulations enumerated above.

These code sections and regulations require the Santa Monica Community College District to:

1) Pursuant to Labor Code Section 1773 and Title 8, California Code of Regulations, Section 16202, to obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for Public Works.

2) Pursuant to Title 8, California Code of Regulations, Section 16204, to ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations.

3) Pursuant to Title 8, California Code of Regulations Section 16001, to request from the Director of Industrial Relations a coverage determination regarding a specific project or type of work to be performed.

4) Pursuant to Title 8, California Code of Regulations, Section 16302, to file a petition for review of a determination of the Director of Industrial Relations of any rate or rates.

5) Pursuant to Labor Code Section 1773.4 and Title 8, California Code of Regulations Section 16002.5, to appeal an incorrect determination made by the Director of Industrial Relations.

6) Pursuant to Labor Code Section 1773.2, to include a statement of prevailing rate of per diem wages in all calls and advertisements for bids, in the public works contract itself, and to post the statement at all job sites. In lieu of those requirements, the district may include a statement in the call for bids and contract a statement to the effect that copies of the prevailing rate of wages are on file in its principal office.

7) Pursuant to Labor Code Section 1777.1 and Title 8, California Code of Regulations, Section 16800 through 16802, to maintain records of ineligible contractors and subcontractors and to refuse to grant them public works projects of the district.

8) Pursuant to Labor Code Section 1777.3, to send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies.

9) Pursuant to Labor Code Section 1776, when necessary or requested by the Director of Industrial Relations, to inspect and audit payroll records of contractors and subcontractors working on district public works projects.

10) Pursuant to Labor Code Section 1776 and Title 8, California Code of Regulations, Section 16402, when requested by appropriate parties, to obtain and provide copies of the payroll records of the contractors and subcontractors working on

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district public works projects. The records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number.

11) Pursuant to Labor Code Section 1771.5 and Title 8, California Code of Regulations, Sections 16425 through 16439, to comply with all of the requirements of a Labor Compliance Program, when initiated and enforced by the district. These requirements include:

(a) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of the prevailing wage laws;

(b) A prejob conference shall be conducted with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract;

(c) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury

(d) The district shall review, and, if appropriate, audit payroll records to verify compliance with prevailing wage laws;

(e) The district shall withhold contract payments when payroll records are delinquent or inadequate; and

(f) The district shall withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is

established that underpayment has occurred.

12) Pursuant to Labor Code Section 1771.6 and Title 8, California Code of Regulations, Section 17220, to provide contractors and subcontractors, and bonding companies and sureties with Notices of Withholding of Contract Payments when minimum wage law violations are discovered by the district. The notice shall be in writing and include the following information:

(a) A description of the nature of the violation and basis for the notice.

(b) The amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1.

(c) The name and address of the office to whom a Request for Review may be sent.

(d) Information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments.

(e) Notice of Opportunity to request a settlement meeting under Section 17221.

(f) A statement appearing in bold or another type of face, that makes it stand out from other text, to the effect that failure to submit a timely request for review will result in a final order binding on the contractor and subcontractor, and on the bonding company.

13) Pursuant to Labor Code Section 1726, to report any suspected violations of the prevailing wage laws to the Labor Commissioner.

14) Pursuant to Labor Code Section 1726, to withhold contract payments for underpaid wages and for penalties when, through the district's own investigation, the district determines a violation of prevailing wages has occurred.

15) Pursuant to Labor Code Section 1727, to withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner.

16) Pursuant to Labor Code Section 1727, to retain amounts withheld to satisfy a Civil Wage and Penalty Assessment until receiving a final order no longer subject to judicial review.

17) Pursuant to Labor Code Section 1742, after July 1, 2001[1], and Title 8, California Code of Regulations, Section 17220, to comply with all due process requirements for the benefit of contractors and subcontractors when amounts are withheld pursuant to a Civil Wage and Penalty Assessment or a Notice of Withholding of Contract Payments, including the providing of proper and timely notices, allowing them to review evidence relied upon, appearance and participation at hearings and the appeals therefrom.

18) Pursuant to Labor Code Section 1742, after July 1, 2001, to respond to petitions

[1] Prior to July 1, 2001, different procedures and legal remedies were available to contractors and subcontractors. See: former Labor Code Sections 1730, 1731, 1732 and 1733

for writs of mandates filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including the retention of counsel to file timely responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment.

19) Pursuant to Labor Code Section 1742.1 and Title 8, California Code of Regulations, Section 16413, to grant and to participate in settlement meetings requested by contractors or subcontractors in an attempt to settle any disputed issue before formal hearing procedures.

20) Pursuant to Labor Code Section 1771.2, a joint labor-management committee may bring an action against an employer who fails to pay prevailing wages. As a necessary party, the school district would be required to appear and participate in these legal proceedings.

21) Pursuant to Labor Code Section 1776, to furnish copies of payroll records of a contractor or subcontractor to a joint labor management committee obliterated only to prevent disclosure of social security numbers.

Santa Monica Community College District is required to comply with these laws relating to prevailing wage rate laws in all public works projects, as defined, when:

(a) Pursuant to Labor Code Section 1720.2, the construction work is performed according to plans, specifications or criteria furnished by the district and where the district enters into a lease, as lessee, of the completed project during or upon

completion of the construction;

(b) Pursuant to Labor Code Section 1720.3, hauling refuse from a public works site to an outside location;

(c) Pursuant to Labor Code Section 1720, the work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work;

(d) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for maintenance, including landscape maintenance;

(e) Pursuant to Labor Code Section 1720, the work is for installation works;

(f) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for field surveying work traditionally covered by collective bargaining agreements when the work is integral to the specific public works project; and

(g) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for residential and commercial projects when the public work is for student or faculty housing.

It is estimated that the Santa Monica Community College District has incurred, and will incur, in excess of $200 annually in staffing and other costs for the period from July 1, 2000 through June, 2002, to implement these new duties mandated by the state for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the

foregoing is true and correct except where stated upon information and belief and, where so stated, I declare that I believe them to be true.

EXECUTED this 24th day of June, 2002, at Santa Monica, California.

Thomas J. Donner
Executive Vice President
Business and Administration
Santa Monica Community College District

Original List Date: 7/8/2002 **Mailing Information** Completeness Determination

Last Updated: 07/08/2002

List Print Date: 07/08/2002

Mailing List

Claim Number: 01-TC-28

Issue: Prevailing Wage Rate

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Commission on State Manaates

Original List Date: 7/8/2002 **Mailing Information** Completeness Determination

Last Updated: 07/08/2002

List Print Date: 07/08/2002

Claim Number: 01-TC-28

Issue: Prevailing Wage Rate

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TO ALL PARTIES AND INTERESTED PARTIES h commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of Clovis Unified School District, Test Claimant, Re: California Prevailing Wage Law.	Test Claim No: 01-TC-28

Department of Industrial Relations's

Response to Commission On State Mandates

Concerning Petition on Prevailing Wages

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Table of Contents

Introduction

Normally, local agencies bring test claims before the Commission because the state imposes some new burden on them.[1] Here, the Test Claimant essentially is complaining about the reverse: Since 1975, the state has taken on more of local agencies' historic responsibilities for determining and enforcing prevailing wages. To make the prevailing wage duties clearer and enforcement less onerous, the state has relieved local agencies of substantial responsibilities, leaving behind only minimal record keeping tasks. This shift **from** local agencies to the state does not trigger the reimbursement requirements of California Constitution, Article XIIIB. To the extent that there has been any expansion in the scope of public works, the consequent obligation to pay prevailing wages directly affects private contractors and only indirectly affects local governments. An indirect effect on the minimum wage in a labor market does not meet the requirements for subvention.

Test Claim

The Test Claim ("Claim") seeks reimbursement for changes from 1974 to the present in how public works are defined, how prevailing wage rates are determined and how the obligation to pay prevailing wages is enforced. Specifically, the Claim charges 28 specific mandates on local governments. The Claim, in short, seeks a resolution of whether 27 years of changes in California's prevailing wage law has resulted in any new mandates to local governments. (Petition, Statement of Claim, pgs. 128-135, and Exhibits 1 and 2 attached to the Test Claim[2]). Each claim is set out below with the page noted where this response discusses the specific claim.[3]

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[1] For the purposes of public works and prevailing wages, local agencies and school districts are treated identically. Even though Test Claimant is a school district, the issues it raises apply equally to both groups. Throughout this response, therefore, this Respondent will use only the term "local agency" to include both groups defined in Government Code §§ 17518, 17519.

[2] Exhibit 2 does not state any new claim for reimbursement from Exhibit 1 and, therefore, will not be cited. Unless otherwise noted, all references are to the Statement of Claim or, where the Statement of Claim is silent, to Exhibit 1.

[3] Although there may be more orderly ways to analyze the various statutory amendments (such as all coverage issues, all prevailing rate issues, et cetera) this

		For Landscape Maintenance	
26.	Labor Code § 1720	The Requirement To Pay Prevailing Wages Where Public Funds Are Used For Installation Work	22
27.	8 C.C.R. § 16001(c)	The Requirement To Pay Prevailing Wages Where Public Funds Are Used For Certain Forms Of Land Surveying	22
28.	8 C.C.R. § 16001(d)	The Requirement To Pay Prevailing Wages Where Public Funds Used For Construction of Certain Residential Facilities	23

Public Works and Prevailing Wages

With some exceptions noted below, prevailing wages must be paid to construction workers by private contractors on public works.[4] "The California Prevailing Wage Law is a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds." *Road Sprinkler Fitters, Local Union 669 v. G & G Fire Sprinkler, Inc.* (2001) 102 Cal.App.4th 765, 776, 125 Cal.Rptr.2nd 804 (citations omitted). The basic definition of a public work has not changed since well before 1975. A public work is any construction performed under contract paid for in whole or in part with public funds. Compare Labor Code § 1720 [1975 version] and Labor Code § 1720(a)(1) [current version].[5] There are three basic elements to the determination of whether a project is a public work ("coverage determination"): 1) the project must be for construction; 2) the project must be performed under contract and not by public employees (*Bishop v. City of San* Jose (1969) 1 Cal.3rd 56, 81 Cal.Rptr. 465); and 3) the project has to be paid for at least in part with public

[4] The statutory term is General Prevailing Rate of Per Diem Wages. Labor Code §§ 1770, *et al.* This term comes from a period when wages were not calculated on an hourly basis but rather on a daily basis. See, Labor Code § 1810 [definition of a day of work]. The more common vernacular term now used is "prevailing wage," which now is calculated on an hourly basis and will be used throughout this response.

[5] Throughout, Respondents will refer to the 1975 Labor Code as the state of the law as of January 1, 1975 and the 2002 version as the current state of the law. Both versions of the applicable sections of the Labor Code are found in the Appendices, as are all other references. Unless other noted, all references to the Labor Code are the current version.

funds. If a project meets these three requirements, then **all** the work performed is subject to prevailing wages. Labor Code § 1772 [1975 version]. That is, if a local agency funds only a portion of a project, for example, 10 percent of the funding, the private contractors and subcontractors whose workers are on the project have to pay prevailing wages on all the work. Since all of the workers on a public work are employees of private contractors, the obligation to pay prevailing wage applies solely to private employers and not to local agencies. Enforcement was always against a private employer. Local agencies have to ensure that private employers pay the proper prevailing wages, however.

Once a project is a public work, all construction labor has to be paid at or above the prevailing rate.[6] The prevailing rate is that rate most commonly paid for the specific craft or trade in the local geographical area where the construction project takes place. Labor Code §§ 1773, 1773.9.

This means that local agencies have two primary connections to public works and the payment of prevailing wages: they enforce the obligations that private parties have to pay prevailing wages; and they, like private developers, private contractors, and private subcontractors, are subject to whatever changes in the scope of the definition of public work might occur. As seen below, however, subvention is only appropriate when new mandates arise in local agencies' enforcement role.

A Brief History of Public Works and Prevailing Wages Prior to 1975

Determinations of Public Works ("Coverage Determinations") Before 1975, local agencies, such as the Test Claimant, made their own determinations of whether a specific project was a public work. Local agencies had to apply the standards of Labor Code § 1720 described above. There was no formal process to review determinations of coverage determinations made by local agencies. Instead, coverage determination

[6] The statute excepts projects under $1000. Labor Code § 1771. As discussed at Claim numbers 11 and 12, the threshold is raised 15 to 25 times higher, for local agencies (including school districts) that take advantage of the offer in Labor Code § 1771.5 to establish a Labor Compliance Programs ('LCP")

challenges occurred as part of court litigation, where the local agency was sued and had to defend the lawsuit, most often in the context of its enforcement of the prevailing wage law.

Determinations of Prevailing Wage Rate ("Rate Determinations") Local agencies also determined what the prevailing wage rate was. This meant each local agency had to know (or do the investigation and research to find out) what union construction workers received, what non-union construction workers received, and what federal public work construction workers received before it determined what wage rate "prevailed" for a craft, classification, or type of worker. Labor Code § 1773 [1975 version]. Requests to review local agencies' initial rate determinations were directed to the Director of Industrial Relations. Labor Code § 1773.4 [1975 version].[7] That is, if a private potential bidder (such as a contractor or private developer), a union, or a member of the public believed that the specified prevailing wage rate was incorrect, they filed a challenge with the Director of Industrial Relations, and the local agency had to defend its rate determination.

Enforcement Against Private Contractors Enforcement of the obligation to pay prevailing wages was primarily the job of the local agencies. In 1957, the Division of Labor Law Enforcement (now, Division of Labor Standards Enforcement or Labor Commissioner) was permitted by the legislature to assist local agencies. Stats 1957, ch. 398, § 1. However, local agencies remained primarily responsible for enforcement. This meant that local agencies had to monitor each public work project to ensure that prevailing wages were paid. The main enforcement tool available to local agencies was the ability to withhold contract payments to a private contractor for the prevailing wage violations by the contractor or a subcontractor. Labor Code § 1727 [1975 version]. When a dispute arose between the local agency and a contractor or subcontractor over whether payments were properly withheld, the local agency had to defend a civil lawsuit

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[7] The Director delegated this function to the Labor Commissioner until 1977. Compare Cal. Code Regs., tit.8, §§ 16000 et seq. [1956 version] with Cal. Code Regs., tit. 8, § 16000 [1977 version].

brought by the contractor or subcontractor. Labor Code§§ 1730-1734 [1975 version].

A Brief Synopsis of Public Works and Prevailing Wage

Enforcement As of 2002

Coverage Determinations Currently, public works coverage determinations are made by the Director of Industrial Relations upon the request of any interested party, including local agencies. Labor Code § 1773.4. 8 Cal. Code Regs., tit 8, §§ 16001-16002.5 [current version].[8] This does not mean that a request for a coverage determination is a prerequisite for a local agency to proceed with every public work project. Normally, a local agency makes its own determination of public works coverage but can request a Director's coverage determination to resolve close cases. Appeals of coverage determinations to the Director continue to be available. Private contractors and subcontractors continue to be responsible for the actual payment of prevailing wages.

Since the passage of Proposition 13, local agencies have had lower tax revenues with which to pay for the entire cost of public works. See, Koyama, "Financing Local Government In The Post-Proposition 13 Era: The Use And Effectiveness Of Nontaxing Revenue Sources" 22 Pac. L.J. 1333 (1991). Local agencies have, therefore, sought public/private funding mechanisms whereby construction that benefits the public can occur with fewer public dollars. Increasingly, therefore, the fiscal impact of the determination that a project is a public work, and therefore subject to the payment of prevailing wages, is felt not by local agencies but by private developers.[9] The Director continues to issue determinations, some of which are published as precedential, of his interpretation of § 1720. Cal. Code. Regs., tit 8, § 16001 [current version].

Rate Determinations The rates for prevailing wages are now investigated,

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[8] Unless otherwise noted, all references to the California Code of Regulations are to the current version.

[9] In fact, a public agency may pay very little or no money for a project to be a public work. Under Labor Code § 1720(b), public funds can consist of below market transfers of land. *See, California State University, San Marcos*, PW 2002-012 (October 21, 2002). This means that a below market transfer can result in the obligation for a private contractor to pay the prevailing wage but at the same time not increase any public agency cost. See also, Labor Code § 1720(b) [SB 975].

calculated, published ("determined") and defended in court (when challenged) by the Director rather than by local agencies.[10] This relieves local agencies of having the obligation continually to update their research and investigation into what rate is most commonly paid for similar work in the local area. Instead, the Division of Labor Statistics and Research employs 10 to 12 statisticians and clerks to maintain this information and semi-annually publishes rates for each craft and trade by county ("General Determinations"). This information is sent to each local agency when effective. These rates are also available on the World Wide Web. Where a craft, classification or type of worker called for by the local agency's project does not appear in the published General Determinations, the local agency (or any interested party) can request a "special determination" just for the local agency's specific public work. Cal. Code Regs., tit. 8, § 16202. See also, for example, Cal. Code Regs., tit. 8, § 16001(d).

Enforcement The obligation to pay prevailing wages now is primarily enforced either by the Labor Commissioner, although a local agency has a duty to the "take cognizance" of violations, which is a reduction from its prior responsibility to enforce. Labor Code § 1726. Local agencies also enforce prevailing wage payment obligations when they have chosen to exercise their old independence from the Labor Commissioner by being approved and authorized as LCPs. Labor Code § 1771.5. The Labor Commissioner, after an investigation, issues a citation to any contractor or subcontractor violating the prevailing wage law. The Labor Commissioner may request that a local agency withhold funds either from a contractor or subcontractor up to the amount of the citations, just as a local agency did when it was the enforcer. An LCP likewise can order a local agency to withhold contract funds if it determines that a contractor or subcontractor has not been complying with the prevailing wage law. Labor Code § 1771.6.

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[10] For a fuller description of the current methodology for setting prevailing wages (not subject to this claim), see *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal. App. 4th 651, 121 Cal. Rptr.2nd 38.

Currently, the Director performs this arduous task of determining what are prevailing wages. Labor Code § 1770. See, Cal. Code Regs., tit. 8, § 16200. The definition of prevailing wages has not changed substantially since prior to 1975, including the requirement that the wages be set for each local geographic area. The Director, through the Division of Labor Statistics and Research ("DLSR") publishes general prevailing wage determinations twice each year for each craft or trade, by county. Cal. Code Regs., tit. 8, § 16201 [current version]. In addition, DLSR provides special determinations when requested. Cal. Code Regs, tit. 8, § 16202. This work costs the Department approximately $2,071,082.39 per year, based on the prior two and a half fiscal years.[13] This is work local agencies no longer do. Instead, local agencies are required simply to check the most recent determination before advertising a request for bids. See paragraph 2, *infra.*

2. The Obligation To Ensure The Correct Prevailing Wage Prior to 1975, when local agencies determined local prevailing wages, the duty to obtain the correct prevailing wage was subsumed in the requirement that the agencies ensure they were using the correct rate. However, any interested party could request review of the local agency's determination, and the local agency then had to justify its determination. Labor Code § 1773.4 [1975 version].

In exchange for the Director's making rate determinations, local agencies now obtain the correct prevailing wages from the Director. Labor Code § 1770 [current version]. This task no longer requires local agencies to do the actual investigations, surveys, and calculation ("determination") of the prevailing wage. That is, while the local agencies assume the burden of sending a letter, making a phone call, or checking the Department's website, this writing, sending or calling is substantially less expensive than was their prior obligation to investigate and calculate prevailing wages for each craft or trade on public works projects. If the rate obtained is not correct, in the local agency's

[13] See, Declaration of Anthony Mischel, Paragraph 2, Exhibit A.

view, it may challenge the correctness. Labor Code § 1773.4 [current version].

3. The Ability To Request Prevailing Wage Determination Prior to 1975, a prospective bidder, union representative, or local agency could request the Director to review the local agency's determination of the applicable prevailing wage rate. Labor Code § 1773.4; Cal. Code Regs., tit. 8, §§ 16200, *et seq.* [1956 version].

This provision has not changed at all since 1975, and all of the post 1975 regulations apply the provisions of the 1975 version of § 1773.4. The language of the statute continues to be permissive.[14] The provision allows an interested party to either accept the prevailing wage set by the Director or to challenge the wage set. A local agency can either accept the general determination by DLSR for a craft or trade or it can choose to obtain a special determination. Procedural changes were made in 1977 after the Director became responsible for rate determinations. Cal. Code Regs., tit. 8, §§ 16200, *et seq.* [1977 version]. There is nothing in the Labor Code or the Director's regulations that requires such a petition (see, for example, number 28, *infra*). There is no fiscal or other compulsion to use or challenge the general determinations issued by DLSR twice each year.

4. The Ability To File For Administrative Review Of Prevailing Wage Rate Prior to 1975, a prospective bidder, or union representative, could request the Labor Commissioner to review the local agency's determination of the applicable prevailing rate. Labor Code § 1773.4, Cal. Code Regs., tit. 8, § 16200 [1956 version].

After 1975, the responsibility for reviewing prevailing wage rates was transferred to the Director or to the Chief of the Division of Labor Statistics and Research. Cal. Code Regs., tit. 8, § 16200 [1977 version]. Starting well before 1975, this ability to request a

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[14] Labor Code § 1773.4: "Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body **may**, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code." (emphasis added).

review of a prevailing wage rate has never been a requirement; rather, an interested party had the option to seek a review of a rate determination. The local agency now shares the ability of contractors and unions to trigger this review.

5. The Ability To File Administrative Appeal Of Public Work Determination Prior to 1975, there was no explicit procedure for issuing coverage determinations. The Director on request might do so, but there was no formalized process. Local agencies decided whether a project was a public work, and any challenge to this decision was through court litigation between the contractor and the local agency or the Labor Commissioner. Implicit in the right of local agencies and the Labor Commissioner to withhold funds (numbers 14, 15, 16, *infra*) was the ability to make a coverage determination. See, *Lusardi v. Aubry* (1992) 1 Cal.4th 976, 4 Cal.Rptr.2d 837.

Local agencies' ability to determine whether a project is a public work continues to this date. Should a dispute arise over whether a project is a public work, it may still be resolved through administrative litigation between the Labor Commissioner and the affected private contractor over the failure to pay prevailing wages. Alternatively, the Director may be asked to determine whether the project is a public work either by a local agency or an interested party. Local agencies are not required to participate in the Director's review of a project, although they are always asked for their opinion. Starting in approximately 1977, the Director began informally to review coverage determinations. See, *Winzler v. Kelly,* (1981) 121 Cal.App.3rd 120, 174 Cal.Rptr. 744. In approximately 1986, the Director issued regulations formalizing this review process to interpret Labor Code § 1720. Cal. Code Regs., tit. 8, § 16001 [1986 version]. This was pursuant to his authority under the Labor Code. Labor Code § 1773.5 [1975 version]. The Director's authority was affirmed in *Lusardi, supra*, which recognized the inherent ability to make coverage determinations that accompanies enforcement.

6. The Requirement To Notify Contractors Of Prevailing Wage Obligation Prior to 1975, when a local agency announced a bid for a public work, it had to specify in the bid announcement, the bid specification, and the contract itself what general rates would

apply. The local agency had the alternative of keeping a copy of the rates in its office and referring to them in the bid announcement, bid specification, and contract. Labor Code § 1773.2 [1975 version]. Local agencies also had to insert into all public works contracts the requirement to make travel and subsistence payments to workers. Labor Code § 1773.8.

The requirement under § 1773.2 has not changed since 1975. Labor Code § 1773.2 [current version]. Labor Code § 1773.8 was repealed in 1999.

7. The Requirement To Maintain Lists Of Contractors Debarred From Working On Public Works By State Prior to 1975, there was no authority to debar contractors with histories of failing to pay prevailing wages from future public works contracts.

In 1989, the legislature required DLSE to debar contractors with a substantial history of prevailing wage violations from bidding or working on public works. Labor Code § 1777.1 [current version], Stats.1989, ch 1224 § 10. Currently, DLSE determines whether to debar a contractor. The local agency has no responsibility to participate in the proceedings. DLSE sends the lists of contractors whose debarment is final to local agencies who are required to receive these lists. Neither the statute nor the regulations require the local agency to do anything in response to a debarment or to receiving the list from DLSE, although presumably the entire statutory scheme presumes that a local agency cannot sign a contract with a debarred contractor. Labor Code § 1777.1 [current version], Cal Code Regs., tit. 8, §16800 [current version].

This prohibition is not particularly onerous, however, as the debarment list is posted on DIR's website and contains between 12 and 20 contractors for the entire state at any one time.[15]

8. The Requirement To Send Copies Of All Awarded Contracts To State Agency (Division Of Apprenticeship Standards) Prior to 1975, local agencies that awarded contracts for public works that required apprentices had to inform the Department of

[15] See, Declaration of Anthony Mischel, Paragraph 3, Exhibit B.

Industrial Relations' Division of Apprenticeship Standards ("DAS") whenever it awarded such a contract. Labor Code§ 3098.[16] [1975 version] The local agency also had to inform DAS if it found a discrepancy between the number of apprentices on a project as opposed to the number of apprentices who were supposed to be on the job. *Id.*

This requirement has not changed. Labor Code § 1773.3 [current version]

9. The Right To Inspect Certified Payroll Records Prior to 1975, contractors were required to keep accurate records of the name, occupation, and actual wages paid to each worker.[17] Contractors were required to make the records available for inspection to local agencies. Labor Code § 1776 [1975 version].

This provision did not change after 1975 in so far as local agencies were concerned, except as discussed in 10, *infra.* The changes since 1975 have addressed the responsibilities of **private contractors** as to what information must be recorded. As in the pre 1975 version, contractors currently have to provide local agencies with copies of their payroll records, now called certified payroll records ("CPR").

10. The Requirement To Copy Certified Payroll Records Under Certain Circumstances Prior to 1975, there was no provision for local agencies to obtain or copy CPRs. Since local agencies did their own enforcement, however, they routinely obtained them. See number 9, *supra.* Before 1975, the Public Records Act made such information disclosable on demand from the public. See Government Code §§ 6252 ["Local agency" includes school district], 6252 (d) [definition of public record]. The post 1975 amendments to § 1776 did not change local agencies' pre-existing requirements to provide copies of public records (including payroll records) to the public. (See also, number 21, *infra*).

Labor Code § 1776 did not change any local agency requirement in any meaningful way. Test Claimant claims that there is a new mandate because local

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[16] See, Claim p. 14.

[17] The Claim erroneously characterizes this mandatory duty as permissive. See, Claim, p. 19.

agencies now have to make copies of the CPRs on request by members of the public and obliterate certain personal information. First, the requirement to obliterate personal information is not necessarily with the local agency. Labor Code § 1776(e) merely requires that the copy provided to the public by DLSE or the local agency "be obliterated," which can be done by the private contractor. Even if this were a new mandate, there is no need for subvention since Labor Code § 1776(b)(3) authorizes local agencies (as well as contractors and subcontractors) to charge for these copies in advance of providing them. Government Code § 17556(d).

11. The Requirements For Setting Up Voluntary Labor Compliance Program Prior to 1975, Labor Compliance Programs did not exist. All enforcement of the obligation to pay prevailing wages was accomplished by the local agency, with assistance from the Labor Commissioner.

Labor compliance programs offer two inducements to local agencies to enforce the state prevailing wage law. First, they increase the monetary ceiling before a project is subject to prevailing wages. Labor Code § 1771.5. Second, where the LCP elects to enforce, the fines, penalties, and forfeitures collected are deposited in the local agency's treasury. Cal. Code Regs., tit. 8, § 16438. This is an exception to the general rule that fines, penalties, and forfeitures go into the state's General Fund. Labor Code §§ 1730 (repealed 2001), 1731 (repealed 2001) and 1734 [1999 version]. This is not a so-called "carrot and stick" program in that there is no sanction for a local agency that decides not to participate.

Should a local agency choose to become an LCP, there are both initial and continuing requirements it must meet in order to retain its approval status with the Department. These requirements are found at Cal. Code Regs., tit. 8, §§ 16425 to 16500. Nowhere is this program mandated.[18]

12. The Ability To Enforce Independently Prevailing Wage Violations By Voluntary

[18] The Commission should also note that Test Claimant is not an LCP and therefore may not have standing to bring this portion of its Claim.

Labor Compliance Programs Prior to 1975, Labor Compliance Programs did not exist. See comments to number 11, *supra*.

The purpose of becoming an LCP is to be able to enforce prevailing wage violations. As seen in number 11, *supra*, this is a voluntary activity by a local agency.

13. The Obligation To Report Prevailing Wage Violations To Labor Commissioner Prior to 1975, local agencies were required both to "take cognizance" of violations and to withhold funds owed to contractors for prevailing wage violations. Labor Code §§ 1726, 1727. If there were insufficient funds available for withholding, then local agencies notified the Labor Commissioner of the violation. The local agency, with the Labor Commissioner's assistance filed civil lawsuits against the offending contractors. *Id.*

This obligation to report violations to the Labor Commissioner has not changed. Enforcement of prevailing wage violations was removed from local agencies as of 2001, Stats. 2000, ch. 954. In exchange for this reduction in work for local agencies, the legislature added a reporting responsibility. *Id.*[19]. The second paragraph of the current version of § 1726 applies to LCPs.

14. The Obligation To Withhold Payment From Contractors During Investigation Of Possible Prevailing Wage Violations Prior to 1975, local agencies withheld funds owed contractors for prevailing wage violations. Labor Code § 1727. This obligation did not change after 1975. In 2000, as part of the overall change in enforcement, private contractors had to withhold funds from offending subcontractors if the local agency had not withheld sufficient funds. The local agency had no role in this process. Labor Code § 1727(b) [current version].

15. The Obligation To Withhold Payment To Contractor When Contractor Cited By State For Prevailing Wage Violation As seen in numbers 13 and 14, *supra*, the Labor Commissioner did not issue citations against contractors prior to 1975. Local agencies did the bulk of the enforcement.

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[19] This simultaneous reduction of work and minor addition of responsibility is not subject to subvention. Government Code § 17556(e).

Currently, the Labor Commissioner does all the enforcement work, and local agencies do no more than withhold funds when the Labor Commissioner informs them of violations. This is identical to local agencies' historic responsibility to "take cognizance" of violations and withhold payments. See, number 13, 14, *supra,* and number 16, *infra.*

16. Obligation To Retain Payments To Contractor When Contractor Cited By State For Prevailing Wage Violation Until Resolution Of Citation Prior to 1975, a local agency that believed a contractor had failed to pay prevailing wages had to withhold payment until there was a resolution. Labor Code § 1726 [1975 version].

This duty has not changed.

17. The Requirement To Provide Due Process To Contractors Who Are Cited For Prevailing Wage Violations The claim is correct that prior to 1975, there was no administrative adjudication of citations by the Labor Commissioner. Instead, the private contractor's remedy was a civil suit against the awarding body. See description in *G & G Fire Sprinkler* cases, *infra* at n. 20. The awarding body could proffer the defense to the Labor Commissioner. Labor Code § 1733

A new administrative adjudication system was created in Labor Code § 1742.[20] Overall, as seen in number 13, *supra*, this reduces the role of the local agencies. Now, a local agency is no longer even a nominal plaintiff defended by the Labor Commissioner. There is no requirement in the new statute or in the regulations that local agencies participate in the hearing process, (unless the local agency has availed itself of the option to become an LCP.) The regulations specifically define a "party" as "an Affected Contractor or Subcontractor who has requested review of either an Assessment or a

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[20] In 2000, the legislature passed AB 1646, which added new Labor Code §§ 1741 and 1742. Section 1741 provided for a new system of citations by DLSE against contractors and subcontractors who failed to comply with the prevailing wage law.

The legislature passed Stats. 2000, ch. 954 (AB1646) in response to the Ninth Circuit Court of Appeal's decision in *G & G Fire Sprinkler v. Bradshaw*, 204 Fed.3rd 941 (9th Cir. 2000), which held, in part, that a subcontractor's due process rights were violated because the Labor Code did not give them a direct right to challenge withholding by local agencies. After the passage of AB 1646, the Supreme Court reversed the Ninth Circuit in *Lujan v. G& G Fire Sprinkler*, 532 U.S. 189, 121 S.Ct. 1446 (2001).

Notice of Withholding of Contract Payments, the Enforcing Agency that issued the Assessment or the Notice of Withholding of Contract Payments from which review is sought, and any other Person who has intervened under subparts (a), (b), or (c) of Rule 08." Cal. Code Reg., tit 8, § 17202(j).[21] This means that a local agency is not automatically a party to these proceedings and, therefore, has no mandatory duty to participate in them.

A local agency's participation only occurs when it seeks to intervene in a proceeding under Labor Code § 1742. Under the regulation for intervention, a local agency could intervene as "any other person."[22] In fact, no local agency, other than one acting as an LCP, has participated as a party in the more than 450 cases filed since the effective date of the statute, July 1, 2001.[23]

This obligation is less than the pre 1975 enforcement obligation for local agencies.

18. The Ability To Respond To Civil Writs Of Mandate Filed By Contractors For Prevailing Wage Violations Prior to 1975, civil suits were filed against the local agency as the contractor's remedy for withholding and were the initial trial level of whether prevailing wages had been paid. See discussion at number 17, *supra.*

After July 1, 2001, challenges to the decision in the administrative adjudication are brought in civil court under Code of Civil Procedure § 1094.5. Labor Code § 1742(c) [current version]. Unless the local agency becomes an LCP, it does not have to respond to writs of mandate, which is the only method by which to contest the administrative adjudication result. As discussed above, local agencies (other than voluntary intervenors,

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[21] Regulations were approved for the 1742 adjudicative process on January 15, 2002, and the regulations are now codified at Cal. Code Regs., tit 8 §§ 17200 et seq.

[22] "Any other Person may move to participate as an interested Person in a proceeding in which that Person claims a substantial interest in the issues or underlying controversy and in which that Person's participation is likely to assist and not hinder or protract the hearing and determination of the case by the Hearing Officer and the Director. Interested Persons who are permitted to participate under this Rule shall not be regarded as Parties to the proceeding for any purpose, but may be provided notices and the opportunity to present arguments under such terms as the Hearing Officer deems appropriate." Cal. Code Regs., tit. 8, § 17208(d).

[23] See, Declaration of Anthony Mischel, Paragraph 4.

and voluntary LCP's) are not parties to that administrative process, and thus not even nominal parties to the writ.

This obligation is less than the pre 1975 enforcement mandate for local agencies.

19. The Ability To Participate In Settlement Meetings With Contractors Cited For Prevailing Wage Violations

The same response as in number 17, *supra*, applies here.

20. The Ability To Be A Party When Contractor Is Sued By Private Party For Prevailing Wage Violations

The same response as in number 17, *supra*, applies here.

21. The Requirement To Furnish Certified Payroll Records To Joint Labor Management Committee On Request Test Claimant also seeks subvention for its obligations to obtain and to provide copies of CPRs for joint labor-management committees with different obliteration requirements that exist for members of the public. This does not materially change the analysis set forth in number 10, *supra*. The description of the requirement in number 10 applies equally here. The committees were entitled to file requests under the Public Records Act before 1975.

22. The Creation Of A Public Work Under Certain Circumstances When Construction Is Performed To Specific Plans And Specifications Prior to 1975, the definition of a public work included situations where a local agency did not pay for construction of property it was going to lease if certain criteria were met. Under Labor Code 1720.2, a construction project was also a public work if 1) the construction was between private parties (no local agency involvement), 2) the property was owned privately but after construction at least 50% of the assignable space would be leased by a local agency, and 3) the lease was entered into prior to the construction contract.[24]

The only change to Labor Code § 1720.2 was in 1980, which added an alternative to the third criterion. Under the current version of 1720.2, a project is a public work

[24] Construction to an existing lease space paid for by a local agency would be a public work under Labor Code § 1720.

either if the lease was entered into prior to the construction contract or if the lease was entered into prior to the completion of the construction and the construction was done according to "plans, specifications, or criteria furnished" by the local agency. There is no requirement in either version that a local entity enter into a lease for at least 50% of the assignable space of privately owned property. The requirement for the payment of prevailing wages is solely on the property owner and private contractor. Any increased cost (if any exist) on a local agency is indirect at best.

23. The Requirement To Pay Prevailing Rate For Hauling Refuse From A Public Work Prior to 1975, there was no coverage by the prevailing wage law for hauling refuse from a public work project. This meant that refuse hauler was not entitled to prevailing wages, even for removing refuse from a public work.

As of January 1, 2000, refuse haulers are entitled to prevailing wages if they haul refuse from public work in which the local agency is a signatory to the contract. This means the obligation to pay prevailing wage was that of the private refuse hauler or private contractor. In fact, AB 302, which amended § 1720.3, provided that adding local agencies did not create a mandate because the bill created a new crime. See, Stats. 1999, ch. 220, § 3. Therefore, this new provision would not be subject to subvention. Government Code § 17556(g). Presumably the crime created is adding to the list of prevailing wage violations that are crimes. Labor Code § 1777 [current version].

24. The Requirement To Pay Prevailing Wages Where Public Funds Are Used In The Design And Pre-construction Phase Prior to 1975, there was no public pronouncement on whether design and pre-construction activities constituted "construction"

In 2000, the legislature passed SB 1999. Stats. 2000, ch. 881. The relevant part of this amendment to § 1720 was the addition of the sentence "For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." As will be seen, Claim number 27, *infra*, land survey work has long been subject to the obligation to pay prevailing wages under the same theory as with project inspection: both

had prevailing wage determinations prepared that were long standing and occurred very shortly after the Director became responsible for setting prevailing wages. The legislative history for SB 1999 demonstrates that the legislature did not intend any change in the existing interpretation of § 1720:

> This bill codifies much of the department's June 9, 2000, decision by including "inspectors' in the definition of "construction" for purposes of public works. This bill also insures that workers earning the prevailing wage in the construction phase of a project will also be entitled to that wage for the same type of work done during the design and pre-construction phases of a project, even if that work is done pursuant to a services contract or otherwise, as the department found.
>
> (Senate Rules Committee Report, August 23, 2000, Pgs. 3, 5).

On June 9, 2000, the Director, interpreting the pre 1975 version of Labor Code § 1720, found that project inspectors were entitled to prevailing wages if they worked on public works.[25] In the Decision on Appeal, the Director specifically referred to the fact that inspectors involved in the public works had been covered by a prevailing rate determination since at least 1977 as a part of the basis for his decision.

Currently, the use of public funds during the design and pre-construction phase of a project may make the entire project a public work and subject to prevailing wages. This change, however, only affects those projects where the **only public funds used** are in the design and pre-construction phase of a project. That is, if public funds are used in the pre-construction phase as well as construction phase, then the amendments to 1720 adding design and pre-construction do not create a new mandate. As with all other prevailing wage obligations, the direct impact is on private contractors who must pay prevailing wages.

24. The Requirement To Pay Prevailing Wages Where Public Funds Are Used For

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[25] *California State University Northridge, Earthquake Recovery Project*, PW 96-046 (June 9, 2000).

Landscape Maintenance As of 1975, Labor Code § 1771 specifically provided that the private contractors' obligation to pay at least the prevailing wage rate applied to contracts for maintenance work. Labor Code § 1771 [1975 version]; see also, *Franklin v. City of Reverside* (1962) 58 Cal.2nd 114, 23 Cal.Rptr. 401 [landscape maintenance covered].[26]

The Director clarified in later regulations that maintenance work included landscape maintenance, when an issue arose over whether landscape maintenance was covered by § 1771.[27] This restatement of a pre-1975 obligation is not a new requirement.

25. The Requirement To Pay Prevailing Wages Where Public Funds Are Used For Installation Work Prior to 1975, public funds paid for installation was part of the definition of construction under the 1975 version of Labor Code § 1720.[28]

The 2001 amendment to the Labor Code explicitly included installation into the definition of a public work so that private contractors continued to have to pay prevailing wages on all parts of a project if public funds are used to pay for installation work. The addition of the word "installation," therefore, was declarative of the existing interpretation of the basic definition of public work in the 1975 version of § 1720.[29]

26. The Requirement To Pay Prevailing Wages Where Public Funds Are Used For Certain Forms Of Land Surveying Prior to 1975, the Director had not announced that the payment of public funds for any form of land surveying subjected a project to the definition of public work. In 1977, the Director in interpreting the 1975 version of § 1720, found that certain land survey work, if paid for with public funds, made a project into a public work. *See, Winzler v. Kelly, supra.* This decision by the Director was not a

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[26] See, Declaration of Anthony Mischel, Paragraph 5, Exhibit C (Memo, Christine Curtis to Don Vial, March 31, 2977, p. 4).

[27] See, former Public Contracts Code § 21002, now Public Contracts Code § 22002. When landscape maintenance was removed from the calculation of what was part of a "public project" in the Uniform Public Construction Cost Accounting Act, the Director was forced to clarify that this cost accounting change did not remove landscape maintenance from the definition of maintenance in Labor Code § 1771.

[28] See, Declaration of Anthony Mischel, Paragraph 5, Exhibit D Memo, Christine Curtis to Don Vial, February 7, 1977).

[29] See also, *James Madison School District,* PW No. 99-024 (September 22, 1999).

new mandate.

This interpretation of the Labor Code § 1720 was then codified in regulation in 1978. Cal. Code Regs., tit. 8, § 16001(c).[30]

27. The Requirement To Pay Prevailing Wages Where Public Funds Used For Construction of Certain Residential Facilities Cal. Code Regs., tit. 8, § 16001(d) provides that certain residential construction paid for in whole or in part with public funds is a public work. There is a note attached to this section that "such projects may require a Special Determination by the Director..." Test Claimant claims this regulation is a mandate.

In fact, residential construction paid for in whole or in part with public funds has always been a public work under Labor Code § 1720 as it fits in the generic definition of public work. Cal. Code Regs., tit. 8, § 16001(d) is intended for a totally different purpose. General Determination wage rates for construction work are set based on new construction of commercial buildings. There is no published General Determination for residential construction, where wages are traditionally lower than in commercial construction. For certain classes of residential construction (including dormitories four stories or less), the Director will issue a Special Determination. Far from creating a mandate for increased costs to a private contractor, this provision allows the private contractor or private developer potentially to reduce its costs by paying a lower wage rate.

Further, nothing in the Claim suggests that any school district is involved in residential construction.

Analysis of Test Claim

Certain "costs mandated by the state" on local governments, including school districts, are subject to subvention. Government Code § 17550. The Claim procedure was created to ensure that the Legislature, in an effort to balance its own books, did not

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[30] "Field survey work traditionally covered by collective bargaining agreements is subject to prevailing wage rates when it is integral to the specific public works project in the design, preconstruction, or construction phase."

make local agencies pay for services that the state believed should be provided to the public and to provide an administrative mechanism for resolving these claims. *County of Los Angeles v. State of California* (1987) 43 Cal.3rd 46, 56, 233 Cal.Rptr. 38. Therefore, "new programs" or "higher levels of service" imposed on a local agency are entitled to subvention if the legislature or executive branch mandates them. Cal. Const., Art XIIIB, § 6. "[L]ocal entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or increased level of service imposed on them by the state." *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3rd 830, 835, 244 Cal.Rptr. 677. Voluntary acts, even if sanctioned or regulated by state law, are not mandates; and subvention is not allowed. *City of Merced v. State of California* (1984) 153 Cal.App.3rd 777, 200 Cal.Rptr. 642.

"Costs mandated by the state" is very specifically defined in Government Code § 17514. Costs must be incurred by local agencies after July 1, 1980, as a result of one of two occurrences:

1. Any statute enacted on or after January 1, 1975; or
2. Any executive order that implements a statute that was enacted after January 1, 1975.[31]

The new enactment or implementation of a new enactment must mandate a "new program" or "higher level of service".

To obtain subvention, Test Claimant must show it is under a legal compulsion to act as a result of some legislative action after January 1, 1975. Executive orders that were issued after January 1, 1975 to implement pre 1975 enactments do not constitute a mandate. Similarly, where the Director, through his prevailing wage determinations, interprets the scope of the pre 1975 Labor Code, there is no ground to claim a "cost

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[31] "Executive order" is defined in Government Code § 17516 to mean "any order, plan, requirement, rule or regulation..." While this language clearly covers the regulations issued by the Director, it is not so clear that the Director's less formal interpretations of what work is covered within the definition of public work is an executive order.

mandated by the state." It would therefore follow that post 1975 legislative enactments that merely restate prior interpretations based on the law as of January 1, 1975, similarly do not fall within the definition of § 17514 as no new program or higher level of service is being required. See, for example, Government Code § 17556(b).

In this case, all of the Test Claims fail for one or more of three reasons: [32]

1. The alleged change in state law is not a new program or increased level of service
2. The alleged change in state law simply does not exist; or
3. The alleged change in state law is not a mandate but regulation of voluntary activity by local agencies.

Some Changes Are Not "New Programs" Or "Higher Levels of Service" Because The Requirements Do Not Uniquely Affect Governmental Entities.[33]

Some aspects of the Claim fall for the most basic of reasons; the claims are mandates for private parties who deal with local agencies, not for the local agencies themselves. "New programs" or "higher levels of service", if they exist, must be unique to governments. If a change in state law affects a larger population, including the public and private citizens, then the change is not subject to reimbursement. *County of Los Angeles v. State of California, supra.* The Supreme Court held that for a new program or higher level of service to exist:

> We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term ["higher level of service"]-- programs that carry out the **governmental function of providing services to the public**, or laws which, to implement a state policy, **impose unique requirements on local governments** and do not apply generally to all residents and entities in the state

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[32] A list of the claims (similar to the table starting on page 2) with the reasons subvention is not allowed is found at the end of this section. The bases listed for why subvention is not appropriate is not exhaustive.

[33] See, numbers 22, 23, 24, 25, 26, 27, 28.

County of Los Angeles, supra, 4 Cal.3rd at 56

The Court held that a change in workers' compensation benefits that affects all employers (but does not affect employee responsibilities, and is irrelevant to independent contractors, unemployed, or retirees) is not a mandate within the meaning of the Government Code. The Court delineated between those increased costs that only government organization face versus increased costs that both governments and members of the public share alike. Compare, *Carmel Valley Fire Protection v. State of California* (1987) 190 Cal.App.3rd 521, 234 Cal.Rptr. 795 [fire fighting unique government program] and *County of Sacramento v. State of California* (1990) 50 Cal.3rd 51, 266 Cal.Rptr. 139 [paying unemployment insurance premiums not unique government program]

The Test Claimant conflates two broad sets of alleged mandates into a single claim: It has combined coverage and enforcement issues with the **indirect effects** of refinements or changes in the scope of public works ("public works changes"). Changes to how coverage determinations (including rate determinations) are made and how enforcement occurs are clearly unique government functions (collectively "enforcement changes"). Had any of those responsibilities that are mandatory for local agencies increased since 1975, subvention would be required. If anything, as seen below, the mandatory local agencies' responsibilities for enforcement changes have decreased, not increased. The remaining claimed enforcement changes are actually voluntary.

The effect of the Director's coverage determinations, and conforming legislation, however, is on private parties directly. Some of the Claims are that the public works changes increased the number of projects that are considered public works. The alleged increased cost is that prevailing wages have to be paid. Payment of prevailing wages, however, is uniquely a responsibility of private parties, as local agencies are never subject to pay their own employees prevailing wages. Labor Code § 1771. See also, *Bishop v. City of San Jose, supra.* Therefore, any public works changes affect primarily the private parties who hire workers, not local agencies. This includes private developers of blighted areas, developers of large tracts of vacant land that have to provide public infrastructure,

commercial landlords, and all the myriad contractors, subcontractors, haulers, and the like. The expansion of the definition of public works does not affect the local agencies directly.

Even if there were an increased cost of construction because a project is covered as a public work, the cost of the increase is not borne directly by the local agencies; nor is there any reason to think that the entire increase in the cost of construction that is attributable to changes in coverage would necessarily be passed onto the local agency as an increased cost.[34] Therefore, the additional costs that might have arisen to local agencies are "an incidental impact of a law that applies generally to all entities [and] is not the type of expense that the voters had in mind when they adopted section 6 of California Constitution, article XIIIB." *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 277, 99 Cal.Rptr.2nd 333.

Finally, some claimed increased costs of construction may well have been offset by increased funding for school districts. If so, costs associated with any increased mandate would not be subject to subvention. Government Code § 17556(d). For example, Education Code § 17070.65 provides that the Department of General Services shall "provide assistance" to local districts that use the 1998 State Schools Facilities Fund for school construction. As funds have already been made available, subvention would not be appropriate.

Some Claims Are Not Changes In State Law. Local Agencies Have Less Responsibilities Than Before January 1, 1975.[35]

It is a *sine qua non* that state law has to change for grounds to exist for a test claim. As seen above, in many aspects, local agencies are under no new obligations from

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[34] The notion that requiring payment of prevailing wages raises the overall cost of construction is a debatable point. See, submission by State Building Trades Council ("SBTC"). One of the primary findings in the studies submitted by the SBTC is that while prevailing wage rates are higher than, for example, minimum wages, construction costs are often lower because of increased efficiencies. This means that even if a private contractor has to pay more for an hour of labor, this increase does not necessarily equate to an increased cost to the developer.

[35] See, numbers 3, 6, 8, 9, 10, 13, 14, 15, 16, and 21.

1975. For example, parties have always been able to request the Director to review coverage determinations, to seek review of rate determinations, and to appeal coverage determinations. Local agencies have always had to notify contractors of their obligations to pay prevailing wages, withhold funds from illegally operating contractors, *et cetera.* These unchanged responsibilities can be seen by comparing the 1975 and 2002 Labor Codes. These unchanged responsibilities for local agencies, as seen above, are not entitled to subvention. This much should be obvious.

In fact, during the 27 years covered by the Test Claim, the legislature, in an effort to create a statewide system for the payment of prevailing wage coverage and enforcement, has relieved local agencies of much of the responsibilities for prevailing wage enforcement. This has resulted in an overall reduction in how much the local agencies have to do.[36] Some of these reductions have been simultaneous with different responsibilities for local agencies (such as the change from local agencies making rate determinations to requesting them from the Director). None of these reductions have been accounted for in the Claim.

The Director's interpretation of the definition of "construction" in the pre 1975 version of § 1720 are similarly not new mandates that are subject to subvention under Government Code § 17514. For example, the Director relied on the pre 1975 definition of "construction" to include landscape maintenance, land surveying, installation, inspection, and pre-construction activities.[37] Even assuming that the Director's prevailing wage determinations are "executive orders," these determinations do not meet the standard in Government Code § 17514 because these orders merely implemented legislation enacted before January 1, 1975, regardless of when the determinations were issued. Similarly, post 1975 law that puts into law these interpretations of pre 1975 enactments are not changes or new mandates under the precise language of Government Code § 17514.

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[36] See, numbers 1, and 2.
[37] See, numbers 24, 25, 26, and 27.

Some of the Changes Are Not Mandatory.[38]

For a new mandate to occur, the local agency must be under a compulsion to act. *City of Sacramento v. State of California, supra,* 50 Cal.3rd at 51. Local agencies that voluntarily adopt new programs are not eligible for reimbursement. *City of Merced v. State of California, supra,* 153 Cal.App.3rd at 777 [the decision to proceed by eminent domain not a mandatory duty and not reimbursable]. Some of the Claims are not mandates since the new provisions control voluntary programs, such as the LCP provisions and the new administrative appeal system for the failure to pay prevailing wages. These are, in the words of the Supreme Court, "true choices." *City of Sacramento v. State of California, supra,* 50 Cal.3rd at 76.

Conclusion

There are a myriad of reasons why the Claim should be denied in its entirety. Many of the alleged claimed changes in fact are identical requirements that existed in 1975; many of the alleged changes are not new programs nor higher levels of service; and many changes are for programs in which local agencies do not have to participate.

In fact, when it comes to enforcement and to determinations of coverage and prevailing wage rates, local agencies are better off now than they were in 1975. The hard work of making coverage determinations and complying with the exacting requirements to set a prevailing wage rate is no longer a local agencies' responsibility. The primary enforcement responsibility similarly has been lifted from local agencies' shoulders.

The final point is that the scope of what is a public work has admittedly expanded to some degree. The Claim infers, but is not explicit, that the increased scope of what is a public work has increased local agencies' costs. As pointed out above, this is a debatable point, given the overall increased efficiencies of a skilled workforce. It is further debatable when the various funding mechanism that local agencies use to leverage their

[38] See, numbers 3, 4, 5, 7, 11, 12, 17, 18, 19, 20, and 28.

resources are considered. If the Claim is accepted on the issue of the expanded scope of the public works, this Commission is going to have to consider each construction project separately, determining whether the project would have been covered before 1975. If a project would not have been covered before 1975, the Commission will have to determine what the increase in the local agency's portion of each project was, excluding any increase because prevailing wages (as have all wages to all employers) have increased over time. In light of the funding mechanisms such as described in the *CSU, San Marcos* situation, this determination can only be made on a case by case basis. This task easily could consume the entire Commission's time.

For all of these reasons, the Claim should be denied.

Dated: 15 January 2002 13

Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS,
OFFICE OF THE DIRECTOR-LEGAL UNIT

JOHN M. REA, Chief Counsel
GARY J. O'MARA, Counsel
ANTHONY MISCHEL, Counsel

ANTHONY MISCHEL
ATTORNEY FOR DEPARTMENT OF
INDUSTRIAL RELATIONS

Summary of Claims and Reasons For No Subvention

	General Description	Page Discussed	Reason For No Subvention
1.	The Obligation To Obtain Applicable Prevailing Wage	9	No increase
2.	The Obligation To Ensure The Correct Prevailing Wage	10	No increase
3.	The Ability To Request Prevailing Wage Determination	11	No increase; No mandate (voluntary)
4.	The Ability To File For Administrative Review Of Prevailing Wage Rate	11	No mandate (voluntary)
5.	The Ability To File Administrative Appeal Of Public Work Determination	12	No mandate (voluntary)
6.	The Requirement To Notify Contractors Of Prevailing Wage Obligation	12	No increase
7.	The Requirement To Maintain Lists Of Contractors Debarred From Working On Public Works By State	13	No mandate (voluntary)
8.	The Requirement To Send Copies Of All Awarded Contracts To State Agency (Division Of Apprenticeship Standards)	13	No increase
9.	The Right To Inspect Certified Payroll Records	14	No increase
10.	The Requirement To Copy Certified Payroll Records Under Certain Circumstances	14	No increase
11.	The Requirements For Setting Up Voluntary Labor Compliance Program	15	No mandate (voluntary)
12.	The Ability To Enforce Independently Prevailing Wage Violations By Voluntary Labor Compliance Programs	15	No mandate (voluntary)
13.	The Obligation To Report Prevailing Wage Violations To Labor Commissioner	16	No increase
14.	The Obligation To Withhold Payment	16	No increase;

	From Contractors During Investigation Of Possible Prevailing Wage Violations		No new program
15.	The Obligation To Withhold Payment To Contractor When Contractor Cited By State For Prevailing Wage Violation	16	No increase; No new program
16.	Obligation To Retain Payments To Contractor When Contractor Cited By State For Prevailing Wage Violation Until Resolution Of Citation	17	No increase; No new program
17.	The Requirement To Provide Due Process To Contractors Who Are Cited For Prevailing Wage Violations	17	No mandate (voluntary)
18.	The Ability To Respond To Civil Writs Of Mandate Filed By Contractors For Prevailing Wage Violations	18	No mandate (voluntary)
19.	The Ability To Participate In Settlement Meetings With Contractors Cited For Prevailing Wage Violations	19	No mandate (voluntary)
20.	The Ability To Be A Party When Contractor Is Sued By Private Party For Prevailing Wage Violations	19	No mandate (voluntary)
21.	The Requirement To Furnish Certified Payroll Records To Joint Labor Management Committee On Request	19	No increase
22.	The Creation Of A Public Work Under Certain Circumstances When Construction Is Performed To Specific Plans And Specifications	19	No new program
23.	The Requirement To Pay Prevailing Rate For Hauling Refuse From A Public Work	20	No new program
24.	The Requirement To Pay Prevailing Wages Where Public Funds Are Used In The Design And Pre-construction Phase	20	No increase; No new program
25.	The Requirement To Pay Prevailing Wages Where Public Funds Are Used For Landscape Maintenance	21	No increase; No new program
26.	The Requirement To Pay Prevailing Wages Where Public Funds Are Used	22	No increase; No new program

	For Installation Work		
27.	The Requirement To Pay Prevailing Wages Where Public Funds Are Used For Certain Forms Of Land Surveying	22	No increase; No new program
28.	The Requirement To Pay Prevailing Wages Where Public Funds Used For Construction of Certain Residential Facilities	23	No mandate (voluntary); No new program

PROOF OF SERVICE
(Code Civ. Proc. §§ 1013a, 2015.5)

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.
And Affected Parties and State Agencies

COPY

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 2424 Arden Way, Suite 130, Sacramento, CA, 95825.

On January 15, 2003, I served the enclosed **Response to Commission on State Mandates Concerning Petition on Prevailing Wages,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Sacramento, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
B (1 orig.+ 2 copies)	Ms. Shirley Opie Asst. Executive Director Commission on State Mandates 980-Ninth Street, Suite 300 Sacramento, CA 95814	Interested Party
A	Mr. Ramon dela Guardia Deputy Attorney General Department of Justice 1300 I. Street, Suite 125 Sacramento, CA 95814	State Agency
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842	Interested Party
A	Dr. Carol Berg Education Mandated Cost Network 1121 L. Street, Suite 1060 Sacramento, CA 95814	Interested Party
A	Mr. Chuck Cake Acting Director Department of Industrial Relations 770 L. Street, Suite 1160 Sacramento, CA 95814	State Agency
A	Bob Dresser Chief Counsel Labor & Workforce Development Agency 801 K. Street Sacramento, CA 95814	State Agency
A	Executive Director, (E-08) State Board of Education 721 Capitol Mall, Room 558 Sacramento, CA 95814	State Agency

A	Mr. Glenn Haas, Bureau Chief State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816	State Agency
A	Ms. Beth Hunter, Director Centration, Inc. 8316 Red Oak Street, Suite 101 Rancho Cucamonga, CA 91730	Interested Parson
A	Mr. Tom Lutzenberger (A-15) Principal Analyst Department of Finance 915 L. Street, 6th Floor Sacramento, CA 95814	State Agency
A	Mr. Bill McGuire Assistant Superintendent Clovis Unified School District 1450 Herndon Clovis, CA 93611-0599	Claimant
A	Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Interested Person
A	Mr. Keith B. Petersen President SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Claimant
A	Mr. Gerald Shelton, Director (E-8) California Department of Education Fiscal & Administrative Services Division 1430 N. Street, Suite 2213 Sacramento, CA 95814	State Agency
A	Mr. Steve Shields Shields Consulting Group, Inc. 1536 - 36th Street Sacramento, CA 95816	Interested Party

A	Mr. Steve Smith, CEO Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Interested Party
A	Mr. Scott A. Kronland Altschuler, Berzon, Nussbaum, Rubin & Demain 177 Post Street, Suite 300 San Francisco, CA 94108	Interested Party

Executed on January 15, 2003, at Sacramento, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Eileen A. Cruz, Declarant

DECLARATION OF ANTHONY MISCHEL

I, ANTHONY MISCHEL, declare:

1. I am an attorney at law, licensed to practice in this state. I have personal knowledge of the facts contained in this Declaration. I am employed by the Office of the Director of Industrial Relations as a Senior Attorney. I have personal knowledge of the facts contained in this Declaration and could competently testify to them.

2. Attached to this Declaration as Exhibit A is a printout from DIR's budget office containing figures that come directly from the State Controller's Office for the Division which I know to be, and to have been, responsible for determining and publishing the prevailing wage, during the period of the claim, the Division of Labor Statistics and Research (DLSR). This document is a computer printout of figures directly from the official State Controller's Office computer, produced in the ordinary course of state business to record expenditures. It shows the amount spent by DLSR for fiscal years 2000 to 2003 (partial). For fiscal year 2000/2001, DLSR spent $2,081334.09 in salaries and expenses determining and publishing prevailing wage rates. For fiscal year 2001/2002, DLSR spent $2,086,009.41 in salaries and expenses determining and publishing prevailing wage rates. For the fiscal year, to date, DLSR spent $1,010,362.48 in salaries and expenses determining and publishing prevailing wage rates. The two and half year average is $2,071,082.39. Based on these figures, DLSR currently uses approximately 24 personnel years to meet the requirements of issuing general and special prevailing wage determinations.

3. Currently DLSE publishes the list of debarred contractors on its website at http://www.dir.ca.gov/dlse/debar.html. The current list of debarred contractors is attached to this Declaration as Exhibit B. This lists 16 contractors for the entire state of California. To my knowledge over the past 12 months, this list has never exceeded 20 contractors.

DLSR Prevailing Wages	00-01	01-02	02-03
Salaries & Wages	797,895.21	956,095.79	386,348.08
Add Staff Benefits	144,145.80	184,433.90	88,108.28
General Expense	149,259.85	229,259.81	44,836.24
Printing	76,657.53	117,874.64	-123.60
Communications	18,898.02	13,051.21	3,972.44
Postage	7,002.74	10,483.65	734.75
Travel, In-State	16,343.50	25,904.24	6,968.92
Travel, Out of State	2,767.81	121.11	
Training	1,836.44	2,036.83	
Facilities Operations	195,705.18	194,487.72	175,365.67
Consultant and Profes Int	6,135.62	3,562.24	454.12
Consultant and Profes Ext	118,579.79	381.69	7,674.48
Departmental Services	394,569.94	327,216.51	279,686.60
Consolidated Data Services	8,241.63	8,742.12	15,084.77
Data Processing	24,839.74	526.13	1,251.73
Equipment	118,324.87	11,831.82	
Others: Special Adj OEE	130.42		
Total Expenditures for PCA 72031	$2,081,334.09	$2,086,009.41	$1,010,362.48
Total Expenditures for DLSR	$4,010,911.38	$3,777,499.81	$2,021,479.85
Pecentage of DLSR's total Expenditures	51.89%	55.22%	49.98%

DLSE DEBARMENTS

The following contractors have been barred from bidding on, or accepting or performing any public works contracts, either as a contractor or subcontractor, for the period set forth:

NAME OF CONTRACTOR	PERIOD OF DEBARMENT
Ann Chadwick, an individual **Charlie Joseph Chance, an individual** **Contractors Real Estate Corporation** dba Mission Bay Construction 3089 C Clairemont Drive, #293 San Diego, CA 92117 CSLB #486710 exp. 2/28/98	9/1/98 thru 8/31/03 9/1/98 thru 8/31/03 9/1/98 thru 8/31/03
Willie Electric Company; Christopher Albert, an individual 1332 -103rd Avenue Oakland, CA 94603 CSLB #607099 Exp. 11/30/02	2/18/00 thru 2/17/03 2/18/00 thru 2/17/03
Arvindbhai Bhagwandas Tandel, an individual **aka Arvind Tandel** dba All Air Mechanical Company, All Air Mechanical Company, Inc. 233 So. Maple Ave Unit #1 South San Francisco, CA 94080 CSLB #692876 Exp. 8/31/03	9/1/01 thru 8/31/04 9/1/01 thru 8/31/04
Virender Puri, an individual **aka Viri Puri** **ACR, Inc.** **CARV Construction, Inc., a California corporation** 2977 Ygnacio Valley Road, No. 128 Walnut Creek, CA 94598 CSLB #754403 Exp. 09/30/00	10/1/01 thru 9/30/04 10/1/01 thru 9/30/04 10/1/01 thru 9/30/04
Castello, Inc. Morteza Rahimi, an individual Mostafa Beheshti, an individual 480 Corporate Drive Escondido, CA 92029 CSLB #563961 Exp. 04/30/03	9/17/01 thru 9/16/04 9/17/01 thru 9/16/04 9/17/01 thru 9/16/04
Leslie & Legge Corporation James Legge Middleton, an individual Lyn Leslie Oakland, an individual 19416 Business Center Drive Northridge, CA 91326 CSLB #710450 Exp. 7/31/99	8/28/01 thru 8/27/04 8/28/01 thru 8/27/04 8/28/01 thru 2/28/03

Adamski Plumbing, Inc. Joseph C. Adamski, an individual 12226 Exposition Boulevard Los Angeles, CA 90064 CSLB #611100 Exp. 1/31/04	1/24/02 thru 1/23/05 1/24/02 thru 1/23/05
Tapuz Enterprises, Inc. Tomer Rotholz, an individual fdba Gali Landscape & Maintenance Company 6068 Reseda Blvd. Reseda, CA 91335 CSLB #698776 Exp. 11/30/02	3/21/02 thru 3/20/05 3/21/02 thru 3/20/05
Mehta Mechanical Co., Inc. Jagat Mehta, an individual Mohan Mehta, an individual Chandrakala Mehta, an individual 8405 Artesia Blvd. Buena Park, CA 90621 CSLB #573635 Exp. 7/31/02	10/28/02 thru 05/22/05 10/28/02 thru 05/22/05 10/28/02 thru 05/22/05 10/28/02 thru 05/22/05
Precision Builders LTD Kevin Orlando Quarles, as a partner and individually Eric George Gooden, as a partner and individually 10124 S. Broadway Los Angeles, CA 90003 CSLB #730667 Exp. 12/31/98	5/09/02 thru 5/08/05 5/09/02 thru 5/08/05 5/09/02 thru 5/08/05
Anthony Dominick Zanotelli, an individual dba T & S Concrete Company Anthony Dominick Zanotelli, an individual 2157 Sophy Place Redding, CA 96003 CSLB #723042 Exp. 05/31/2002	2/25/02 thru 2/24/05 2/25/02 thru 2/24/05
Robert Daniel Kwake, II, an individual dba Sonlight Electric Robert Daniel Kwake, II, an individual P.O. Box 249 Palo Cedro, CA 96073 CSLB #754415 Exp. 09/30/2002	5/20/02 thru 5/19/05 5/20/02 thru 5/19/05
Russell Nobles Construction, Inc. P.O. Box 1712 Santa Rosa, CA 95402 **Russell Lester Nobles, an individual** P.O. Box 1712 Santa Rosa, CA 95402 CSLB #762622 Exp. 05/31/2003 CSLE #665074 Exp. 02/28/2003	09/01/02 thru 08/31/06 09/01/02 thru 08/31/06
Mohag Construction Co., a California corporation 1290 Bluesail Circle Westlake Village, CA 91361	09/16/02 thru 09/15/05 09/16/02 thru 09/15/05

State of California — Agriculture and Services Agency

Memorandum

lc 1791 Maintenance (Tree Trimmers)

To : Donald Vial
William Becker
Sara Behman
Peter Weiner
Ernie Vivas

Date : March 31, 1977

Subject: "Maintenance" and Prevailing Wage Rates as to Treetrimmers

From : Department of Industrial Relations
Christine Curtis

Issue: Is maintenance covered under public works and how do we determine rates?

1. Facts: DLSR issued a verbal determination that maintenance of foliage on median traffic islands in Pasadena was about $7 an hour. In fact, the industry purports to pay about $3.50 an hour. (I think this is an area in which illegal aliens are heavily employed and this was stated outright by the personnel for the City of Pasadena who handles the contract.)

   The City of Pasadena has listed a rate of $7.65 plus benefits an hour for landscape maintenance in a project booklet for all of the contracts which the city lets (it shows that a general or construction laborer is to receive $7.65 and a landscape gardener is to receive $7.75, see attached Exhibit A). The definition of landscape maintenance clearly is general upkeep of foliage (rather than installation of foliage after construction).

   The city has never let a contract under this as it had been performed by force before. (I forgot to check the rate paid by the city for force work or why the city is stopping its force work except that the city is attempting to cut its work force.) Jim Valentine, the City of Pasadena personnel in charge of the bidding, stated that it only received three bids for the job: two potential bidders refused to bid at the $7 rate; one bidder appears to do all his work himself so will pay no wages (came in second); the highest bidder based his rates on the issued prevailing wage rate of $7+ an hour even though he was the only person who attended a pre-bid meeting and that protested the $7 rate; and the lowest bidder based his bid on the $3.50 rates. The city has not yet awarded the

SURNAME

contract. If we decide that $7 is not the rate, we must do so immediately so that they can republish the call for bids. The city is upset because it will get one-half of the work for the same amount of money if the $7 rate is used. The city agent, of course, wants us to declare: 1) that maintenance is not covered by the contract, or 2) that the rate is lower.

This rate was not written, nor was their request. Before the city could follow up with a letter of request for a determination, the attorney for the lowest bidder asserted that he was going to challenge the rate. This rate had been arrived at by Jim Roeckel by calling to find the master labor agreement.

Bill Cohen, the attorney, and his client arrived at our office Monday afternoon, March 28, at which time he presented me with a typed protest, which appears to be a Section 1773.4 petition for review. Although deficient, according to the regulations, in that there is insufficient information as to the particulars of the bidder or as to the awarding body under Section 16204 of the regulations or as to sufficient information on which to reestablish a rate, the complaint can be amended or the information furnished. An agent of the awarding body has been notified of the request for review. There is a technical failure in that the Chief of Labor Standards and Research was not notified, but I sent her a copy on this on the 29th. On that day, the attorney Cohen sent by mail carrier additional information - the David Bacon wages for San Diego County at $3.25 an hour for general maintenance laborer and a collective bargaining agreement for nonconstruction maintenance workers for San Diego County at $3.43 an hour effective December 1, 1974. (This is a two year old rate).

The Director may request that the petition for review be amended or dismiss it. The latter seems unwarranted, so I recommend that I proceed to obtain additional information. I already asked Jim Roeckel on Tuesday afternoon, January 29th, to call several employers' groups in that area and to get the Davis-Bacon rates. The determination must be made within 20 days from filing the petition or from amendment of the petition (since insufficient material was sent, we will have 20 days from the date we deem the information sufficient.) The decision

must be made soon in deference to the Pasadena contract.

A. Coverage of "Maintenance"

1. The first issue is whether the public works section covers regular maintenance. There is no elaboration in the public works section, and Section 1771 provides merely that prevailing wages should be paid on contracts set for maintenance work.

Cohen asserts that this means "maintenance" on construction so as to mean maintenance construction. He ignores that Section 1720 has other definitions as to public works such as utility districts and street improvement. Why should maintenance be limited to construction? Also, the state is permitting governments to use public funds to hire individuals without protection. What public policy is there behind not protecting the worker by insisting that prevailing wages be used in awarding contracts. Governments use contracts to keep their costs down, but, as the Department charged with protecting the worker, we should not dismiss lightly this category of worker. We would not be artificially inflating the economy or winning higher wages in a nonunionized area if we merely reflect what is the actual prevailing wage rate. We are now inflating the wages by establishing high rates by the practice of calling one union which has master agreements covering large geographic areas, rather than the locality, and by accepting their statement as to the appropriate classification.

Note that the public utilities now are required by statute to pay prevailing wages to contracts for their custodial services (Section 465 of Public Utilities Code, subject of AB 114). The definitions of maintenance we have include general work to maintain a piece of property.

Section 1771 provides that no less than the prevailing rate of wages for work of a similar character in the locality in which the public work is performed shall be paid to all workers employed on public works. The applicability of the section is further defined by the addition of language that prevailing wages must be paid only to work performed

under contract and not to work by force account and that prevailing wages must be paid on contracts let for maintenance work.

As I noted in my memo of February 7, 1977, the statute was amended in 1974 to change "exclusive of maintenance work" to include "maintenance work". The only prior case was Franklin v. City of Riverdale, 58 C. 2d 114 (1962), in which the work of trimming of trees and clearing of brush on electric wires was held to be performing maintenance work so as to be excluded from prevailing wage rates. This case thus interpreted the term "maintenance" to mean exactly what is at issue here. As the term "maintenance" has been so defined or recognized by case law under Section 1771, it seems apparent that statutory inclusion of the term maintenance now means that regular maintenance activity is intended to be covered. This is true regardless of an attempt by Cohen to interpret maintenance as applying only to Section 1720 (a) construction, alteration, demolition or repair work. The addition of maintenance is thus interpreted to be an extension of 1720's definition of public work inartfully done by so specifying in Section 1771, which might have appeared to be the appropriate section as it originally excluded maintenance work.

As to the Pasadena case, the city's description of the job is very clear that they intend regular maintenance to be covered.

Note that landscape maintenance was deemed covered as of December 17, 1976, in Santa Clara County and the rate was $4.85 straight-time, $.44 health and welfare, $.20 pensions, $.19 vacation, $.15 holiday and $.10 training or $5.93 per hour total.

Maintenance thus is included in the requirement of prevailing wages, which, by statement in 1771, applies to the entire chapter. Cohen's first argument that prevailing wages do not include maintenance should be denied.

B. Procedure

The second point that the rate has been incorrectly determined

has merit. The Labor Code Section 1773 should be interpreted by considering many factors.

1. Proper determination of prevailing wage rates once they are deemed to fall within public works.

As in the instance of the water well drillers, there is often a disparity between union wages and the nonunion rates for work which is basically nonconstruction. In these areas, as well as construction areas, I think it imperative to investigate the actual prevailing wage rate in the area. Apparently now all that is being done is one phone call to a large union in the area to see what is their agreement. There is no data or attempt to see if that rate actually prevails. We must immediately follow up Sara Behman's conclusion as to the method of research in the water well drilling instance and make a survey of collective bargaining agreements, Davis Bacon and other data from the industry including both employers and employee organizations. The staff of the Division of Labor Standards and Research has relied upon the outline, stated by Peter Weiner and affirmed by the Director, that we first look to the collective bargaining agreement, then to Davis Bacon and then to the industry data if necessary. This determination procedure should be revised to require collection of all of that data with special emphasis on finding the exact number of persons who are employed in the area. There appears to be insufficient data on hand to support the determination as to the prevailing wage rate. This procedure must be made applicable to all determinations.

2. Determination of proper classification.

The rates will vary, of course, according to the characterization of the work. The water well drilling incident exemplifies this: is it a construction, agricultural, or exploratory drilling classification? In this instance, one challenge is as to general maintenance, general gardening, or landscape gardening. The survey conducted by the division should also pinpoint in each instance the exact nature of the job and the appropriate classification chosen by Division of Labor Standards and Research.

Conclusion:

1. Determine that maintenance is covered.

2. Establish a procedure for investigating the actual coverage of collective bargaining agreements.

3. Establish a procedure for reconciling or choosing among such collective bargaining agreement rates, Davis-Bacon rates, and other data from labor and management to reach a final determination of the prevailing wage rate.

State of California — Agriculture and Services Agency

Memorandum

To : Don Vial, Director

Date : February 7, 1977

Subject: § 1720 of the Labor Code - Interpretation of "Public Works" to Require payment of Prevailing Wage Rates

From : Department of Industrial Relations

Christine C. Curtis
Counsel

ISSUES: How broadly should "public works" be interpreted, so as to invoke payment of prevailing wages on public works? Should "maintenance" activities be included?

Statutes involved: Labor Code § 1720, 1720.2, 1771

CONCLUSION: The Labor Code provisions for prevailing wages should be broadly construed to cover most activities involved with onsite construction or maintenance. Specifically, the statutes should be interpreted administratively to include, in the public works definition, maintenance activities (as specified in § 1771) and other work which arguably falls under the categories specifically outlined in § 1720 (construction, alteration, demolition, or repair work; work done for irrigation, utility, reclamation and improvement districts (except for operation of irrigation systems); street, sewer, or other improvement work supervised by any governmental body; and some instances of carpet laying). The aim would be to examine the nature of the work covered, rather than to be limited by an arbitrary definition of statutory language when none need be im Therefore, strong arguments could be made to include these areas under the public works definition subject to prevail wage rates (in response to list submitted to the Director' office by Leo Connolly):

1. Installation of communication equipment would be covered as an "alteration" or as still part of "construction", § 1720(a) (in fact, the category currently is so covered)

2, 3, 4. Snow, garbage and refuse removal and changing lamps would be covered as "repair" or "maintenance" under § 1720(a) or § 1771 or "street sewer or other improvemer work done under the direction and supervision" of any state public body or of any political subdivision or district, under § 1720(c).

5. Handyman would be covered under "maintenance" or und "repair", under § 1771 or § 1720(a).

6. Note that tree trimmer also now seems to be covered under "maintenance" or "repair" and the 1962 Frankli v. City of Riverside case excluding tree trimmers as "maintenance" was based on exclusion by statute and sh be overturned by the legislative inclusion of "maintena in § 1771 in 1974.

7, 8. Water well drilling and laying irrigation pipe by water agencies would be covered by § 1720(b), "work done for irrigation, utility, reclamation and improv ment districts, and other district (except for the operation of irrigation systems) or by "construction under § 1720(a). (A.G. Op., Jan. 7, 1960 as to floo control districts for construction of conduits, bri and buildings.)

9. Land levelling would be covered by "construction", under § 1720(a).

10. Offsite construction would not be covered.

DISCUSSION:

I. Arguments for broad interpretation of the applicability of prevailing wage rates:

A. General statement of intent of prevailing wage legislation

The courts have not stated that the legislation is to be interpreted broadly, except that the court noted, in Shalz v. Union School Dist. 58 C.A.3d 599 (1943), interpreting the penalties section for failure to pay prevailing wage rates (§ 1775):

"The purpose and intent of the act is plain and its object should not be defeated by overvice construction." (p.606)

The court noted that little had been written concerning the purpose of the California legislation. Sansone Co. v. Dept. of Transp., 55 C.A.3d 434 (1976), which extended the applicability of the prevailing wage rates to truck driver deliveries of aggregate sub-base materials. But the court noted that the purpose of the similar federal Davis-Bacon Act (40 USC § 276a et seq.) was to protect employees of contractors on public works from a substandard wage and to permit employers of union and nonunion workers to act

competitively for public works bids (p.458): "Prevailing wage legislation was designed to benefit the construction worker on public construction under the California prevaili wage law, under the Davis-Bacon Act, and legislative histor of the Davis-Bacon Act" (p.461)

Note that the California Attorney General states that California' prevailing wage law is similar to the Davis-Bacon Act. 54 Ops.ATY.Gen. 34.

As a remedial labor standards act, the Davis-Bacon Act is to be liberally construed, Acting Comptroller's Decision, B-117954, April 20, 1954: the government is not bound by the definition of public works used by the contractor and the union, Comptroller General's Opinion, No. B-150318, June 6, 1963; and "public work" was defined to include any government owned permanent or temporary structure or article, Memorandum No. 95, Workplace Standards Administrator, April 30, 1971, Act applies on the basis of contract as a whole and not by item by item basis and, if work is substantially for construction, alteration or repair, then all work under it is covered, Comptroller General's Opini No. B-150905, May 24, 1963. The establishment of wage rates under the Davis-Bacon Act lists extensive compilation of information, including land clearing, power lines, sewers and excavating. 29 CFR §1.3. Liber construction of Davis-Bacon Act is intended by congressional intent, U.S. v. Aetna Cas. & Sur.Co., 480F.2d 1095 (1973); Drivers, Salesman, Warehouseman, Mills Processors, Cannery, Dairy Emp. and Helpers Local Union No. 695 v. N.L.R.B. 361 F.2d 547.

B. Legislative Classification of the Coverage of Public Works.

The public works definition of § 1720 was recently extended by amendment to § 1771 to specifically include "maintenance work contracts (Stats. 1974, C.1202, p.2593). The statute formerly provided "exclusive of maintenance work". This statutory change would thus invalidate old case law which expressly excluded "maintenance" activities from the covera of the Act, such as Franklin v. City of Riverside, 58 C.2d 114 (1962), in which tree trimmers were held to be performing maintenance work so as to be excluded from the prevaili wage rates. Note was taken of the statutory change of § 1771 in Sansone Co. v. Dept. of Transportation, 55 C.A.3d 434, 461 (2nd Dist.,Feb., 1976), as evidence of legislative consideration of the approrpiate coverage of the prevailing wage rate law.

Note also that the public works definition was extended in § 1720.2 to include some instances of contracting between parties (Stats. 1974, C.1207, p.2228, § 1)

The term maintenance is interpreted thusly by California Case law:

Maintenance covers any activity after completion of construction which preserves, holds or keeps the object the same condition or existing state, including in some in some instances salaries or costs of operations. Holman v. County of Santa Cruz, 91 CA2d 502, 519 (1949). (corresponds with general definition, except for operati given in Words and Phrases).

Note the maintenance definition by IBEW:

For the purpose of this agreement, the term "maintenance has the following meaning: "Maintenance" is the routine recurring work required to keep a facility (plant, build structure, ground facility, utility system, or any real property) in such a condition that it may be continuousl utilized, at its original or designed capacity and effi-ciency, for its intended purposes. (Note attached definit

C. Judicial interpretation of statutory language of public works

Broad interpretation of the statutory language of "demo-lition" and "alteration" in § 1720 reinforces the concep that the court will not narrowly construe the Act to the exact language used. The issue in Priest v. Housing Authority, 275 C.A.2d 751, 754 (2nd Dist.,1969) was whet clearing a lot after the buildings on it were burned constituted "demolition" so as to come under § 1720. The contractors and housing authority argued that it was "removal" rather than"demolition" and thus out of the coverage of the Act. The court held that it was not "co cerned with the meaning attached by the parties to the term 'demolition' but only with the nature of the work d The court noted that "demolition" had not been defined i the code or by court decision and held that it should no defined narrowly as "removal" to exclude this activity, to do so would place a limitation that the leislature di not impose (p.756). The same was held true for the word "alteration", which could also be applied to the work ac vity at issue in the case.

D. Further judicial interpretation of the type of work acti vity covered by the public works.

Judicial interpretation in one case has striven to exten the applicability of the prevailing wage rate, even thou a similar federal case decided under the Davis-Bacon Act had held that a similar activity was not covered. The court in Sansone Co. v. Dept. of Transportation, 55 3d 434 (2nd Dist., 1976) held that truck drivers who del ed aggreggate subbase to a construction site for imme-diate use on the highway construction were to be cov The court's rationale was that the materials were use immediately on the construction site and were functional

related to the construction. Further, the court noted th the goods were not purchased from a standard commercial supplier or from the State of California, but were especially contracted for and the deliveror were subcontract Also, they were delivered from a site adjacent to and est blished exclusively to service the project site. The California court distiguished the case from one interpreting the Davis-Bacon Act (H.B. Zachry Co. v. U.S., 344 F 2d 352 (1965) as the materials used were standard commer materials not especially designed for the project and la a materialman rather than a contractor, and looked to a Wisconsin case holding that truck drivers dumping materi on the roadbed for immediate distribution were functiona related to the process of construction, and hence were subject to prevailing wage rates under Wisconsin law (Gr v. Jones, 23 Wis.2d 551) (Sansone, supra , p.444).

E. Remedy

A temporary restraining order will not be granted until parties exhaust administrative remedy for review and det mination as to prevailing wages. Hoffman v. Pedley Scho Dist., 26 Cal.Rptr.109 (4th Dist., 1963)

II. Arguments for narrow construction of prevailing wage rates:

A. Limitation of the Act

1. Off site construction is exempt (and some limitation over coverage of truckers)

2. Maintenance work was exempt until 1974 (discussed in Sansone, supra.)

3. Local entity work by force work is exempt (only public works contracts are covered)
(Bishop v. City of San Jose, 1 Cal.3d 56 (1969) in whi the court refused to extend the Act and the legislatur then amended section 1771 to reflect the court's decis The court held that prevailing wages in § 1771 can nc be applied under the home rule provisions of Article X of the California Constitution which provides that a county, city, town or township can make all regulations for itself not in conflict with general laws. If a ci claims home rule, it is exempt from general laws of th state unless the intent of the legislature was to pre-empt all such laws. The court held that the legislat did not intend to preempt the field in the area of prevailing wages, and force account work was held exe in Beckwith v. County of Stanislaus, 175.Cal.App.2d 4((1959).

The dissent by Justice Peters contended that the legislature did not intend to allow local governments to be exempt for force account work but intended to preempt the area, especially when viewe in light of Section 1720 which includes force account work and was m to include all public works regardless of their nature, and further that the Attorney General recognized that improvements by county employees would be subject to prevailing rates under 1720(c). (35 Op. Atty Gen. 1,2), (see Atty. Gen. Op., Apr. 17, 1940) -

B. Davis-Bacon Act as narrow model

1. Installation is not normally covered unless there is substantial construction, or integral part of construction. Solicitor of Labor's opinions, No. DB-B, Nov. 6, 1961 and DB 16, Nov. 30, 1961.

2. Material men are not covered.

   See Sansone, supra, p. 442-443.

3. Test is wording of the contract rather than the natur of the work. 40 Op.Comp.Gen. 565 (1961).

C. Final interpretation of the Act of the Court

1. Interpretation of the coverage of the Act is finally a matter of law.

CCC:jn

Priest v. Housing Authority, 275 C.A.2d 751, 7 (2nd Dist. 1969

cc Peter Weiner
Ernie Vivas

CHAPTER 4. ARTISTS' MANAGERS

§ 1700.33 Sending woman or minor to disorderly house as employee

No artists' manager shall send or cause to be sent, any woman or minor * * * as an employee to any house of ill fame, to any house or place of amusement for immoral purpose, to places resorted to for the purposes of prostitution, or to gambling houses, the character of which places the artists' manager could have ascertained upon reasonable inquiry.
(Amended by Stats.1972, c. 579, p. 1005, § 30.)

§ 1700.34 Sending minor to saloon or on-sale liquor establishment

No artists' manager shall send any minor * * * to any saloon or place where intoxicating liquors are sold to be consumed on the premises.
(Amended by Stats.1972, c. 579, p. 1005, § 31.)

§ 1700.44 Hearing and determination of disputes by labor commissioner; appeal; stay of award; bond; certification of no controversy and its service

Supplementary Index to Notes

Bond 1.5
Failure to file bond 1.6
Notice of appeal 1.7

1.5 Bond

Party appealing from labor commissioner's determination in arbitration proceeding under Artists' Managers Act was required to file bond in order to stay enforcement of award although award had not been reduced to judgment by judicial confirmation, even though this section specifying bond referred to bond in sum not exceeding twice amount of "judgment." Buchwald v. Katz (1972) 105 Cal.Rptr. 368, 503 P.2d 1376, 8 C.3d 493.

On appeal from labor commissioner's determination in arbitration proceeding under Artists' Managers Act, superior court may only require bond in order to stay award and erred in requiring bond in order to prosecute appeal and abused discretion in dismissing appeal for failure to post bond. Id.

1.6 Failure to file bond

Where party appealing from labor commissioner's determination in arbitration proceeding under Artists' Managers Act did not file bond, other party was free to enforce commissioner's money award; proper procedure is first to apply to superior court for judicial confirmation and to enforce ensuing judgment. Buchwald v. Katz (1972) 105 Cal.Rptr. 368, 503 P.2d 1376, 8 C.3d 493.

1.7 Notice of appeal

Notice of appeal from determination of labor commissioner in arbitration proceeding under Artists' Managers Act was not required to allege ground for review. Buchwald v. Katz (1972) 105 Cal.Rptr. 368, 503 P.2d 1376, 8 C.3d 493.

2. Review

Superior court on appeal from labor commissioner's determination in proceeding under Artists' Managers Act may call up pleadings or other papers or documents by which parties presented their claims and defenses before commissioner or may require parties to present such claims and defenses in more formal pleadings. Buchwald v. Katz (1972) 105 Cal.Rptr. 368, 503 P.2d 1376, 8 C.3d 493.

This section entitles appealing party to complete new trial that is in no way a review of prior proceedings, rather than to review only by writ of mandate. Id.

PART 7. PUBLIC WORKS AND PUBLIC AGENCIES

CHAPTER 1. PUBLIC WORKS

ARTICLE 1. SCOPE AND OPERATION

Sec.
1720.2 Public works defined [New].

§ 1720. Public works defined

As used in this chapter "public works" means:

(a) Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type. "Public work" shall not include the operation of the

Asterisks * * * indicate deletions by amendment

irrigation or drainage system of any irrigation or reclamation district, except as used in * * * Section 1778 relating to retaining wages.

(c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether such political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(Amended by Stats.1972, c. 717, p. 1306, § 1; Stats.1973, c. 77, p. 120, § 19.)

1972 Amendment. Added subds. (d) and (e).

1973 Amendment. Deleted the words "In sections 1850 to 1851 of this code relating to employment of aliens and" preceding "Section 1778" in subd. (b).

1. In general

The suspension of the Davis-Bacon Act (40 U.S.C.A. § 276a), by the president of the United States does not suspend the operation of California's prevailing wage law (Labor C. § 1720 et seq.), on federally-assisted construction projects subject to the Davis-Bacon Act. 54 Ops.Atty.Gen. 31, 3-23-71.

§ 1720.2 Public works defined

For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but, upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(Added by Stats.1974, c. 1027, p. 2228, § 1.)

Library references
Words and Phrases (Perm.Ed.)

~~§ 1741. Repealed by Stats.1971, c. 438, p. 893, § 138~~

ARTICLE 2. WAGES

Sec.
1773.2 Specification of general wage rate in call for bids [New].

§ 1771. Payment of general prevailing rate

Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workmen employed on public works * * *.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

(Amended by Stats.1974, c. 1202, p. 2593, § 1.)

1974 Amendment. Deleted, at the end of the first paragraph, the words "exclusive of maintenance work."; and added the second paragraph.

§ 1773. Method of determining general prevailing rates; holidays; adoption of rates established by collective bargaining

The body awarding any contract for public work, or otherwise undertaking any public work, shall ascertain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the

Underline indicates changes or additions by amendment

Historical Note

The 1950 amendment referred to the extension and enlargement of sewers within "the", instead of "a", district, and it added at the end of the section the words, "and the acquisition or construction of other works or improvements useful in the proper operation of said sewers".

Library References

Words and Phrases (Perm.Ed.)

§ 5835.3 Maintenance

"Maintenance" as used in this chapter in relation to lighting systems, includes the replacement of any obsolete equipment with new modern equipment found by the board of supervisors or legislative body of a city to be necessary for the proper operation of the district. The replacement of any such obsolete equipment with any such new modern equipment, except for work done by a utility district or a private utility company under contract with the maintenance district, shall be subject to the provisions of Section 5831.

(Added by Stats.1955, c. 201, p. 673, § 2. Amended by Stats.1965, c. 729, p. 2133, § 1.)

Historical Note

The 1965 amendment deleted the word "the" preceding "new modern equipment" and inserted the words "found by the board of supervisors or legislative body of a city to be" following such words.

Library References

Words and Phrases (Perm.Ed.)

§ 5835.4 Lighting maintenance district; accumulative capital outlay fund

The board of supervisors of any lighting maintenance district may provide for the establishment of an accumulative capital outlay fund for the replacement of obsolete lighting system equipment. The fund shall be held in reserve until appropriated in whole or in part to a specific project.

At any time after the creation of the fund, the board may transfer to it any unencumbered surplus funds remaining on hand at the end of the fiscal year after the payment of the expenses of the district.

(Added by Stats.1963, c. 851, p. 2078, § 1.)

Library References

Counties ⇐160.
C.J.S. Counties § 230.

Words and Phrases (Perm.Ed.)

§ 5835.5 Lighting maintenance district; county loan

Pursuant to a resolution adopted by its board of supervisors, a county may lend any available county funds to a county maintenance district for the replacement of obsolete equipment, or to defray un-

Notes of Decisions

In general 1
Condemnation 2

1. In general

Political subdivision acting under § 10500 et seq. may not authorize issuance of bonds and disburse proceeds to "acquire" capital improvements not described as being installed in engineer's report. 40 Ops.Atty.Gen. 125, 9-12-62.

2. Condemnation

Highway commission becomes quasi judicial body to determine necessary matters in condemning land for highway. People v. Olsen (1931) 293 P. 615, 109 C.A. 523.

§ 27. Maintenance

As used in the general provisions and in Divisions 1 and 2 of this code, "maintenance" includes:

(a) The preservation and keeping of rights-of-way, and each type of roadway, structure, safety convenience or device, planting, illumination equipment and other facility, in the safe and usable condition to which it has been improved or constructed, but does not include reconstruction or other improvement.

(b) Operation of special safety conveniences and devices, and illuminating equipment.

(c) The special or emergency maintenance or repair necessitated by accidents or by storms or other weather conditions, slides, settlements or other unusual or unexpected damage to a roadway, structure or facility.

The degree and type of maintenance for each highway, or portion thereof, shall be determined in the discretion of the authorities charged with the maintenance thereof, taking into consideration traffic requirements and moneys available therefor.

(Stats.1935, c. 29, p. 250 § 27. Amended by Stats.1935, c. 263, p. 950; Stats.1959, c. 113, p. 1965, § 1.)

Historical Note

For note concerning 1935 acts affecting this code, see Historical Note under § 1.

Derivation: Stats.1927, c. 794, p. 1563, § 2; Stats.1933, c. 767, p. 2029, § 1.

Library References

Highways ⇐98.
C.J.S. Highways § 177.

Words and Phrases (Perm.Ed.)

Notes of Decisions

1. In general

The right to public use of a highway while road work is being done is subordinated to the right of the public authorities to make improvements in the public interest. Gibson v. State (1962) 25 Cal. Rptr. 234, 209 C.A.2d 468.

Maintenance of public highway is a "governmental activity", to which rule of sovereign immunity applies, as distinguished from a mere ministerial function. Zeppi v. State (1959) 345 P.2d 33, 174 C.A.2d 481.

Where railroad had granted easement to counties to use upper deck of bridge, agreement by which state undertook to make structural changes because of changed conditions due to increased traffic, requiring additional policing, was merely in recognition of state's statutory authority to make structural changes in interest of safety, and did not indicate be

lief of parties that railroad had obligation under agreement to make any change in structure over which easement was granted. Whalen v. Hultz (1953) 259 P.2d 457, 40 C.2d 294.

City was not required to remedy dangerous portion of state highway situated within city or to post warnings of dangerous condition, and was not liable, because of failure to do so, for deaths of driver and occupants of automobile which went off highway and fell to bottom of embankment, because of alleged dangerous condition of highway. Gillespie v. City of Los Angeles (1951) 225 P.2d 522, 36 C.2d 553.

A city cannot be liable for a dangerous or defective condition of a public street or highway unless it has authority to remedy the condition. Id.

Duty to maintain highway in condition safe for travel is on municipal subdivision which holds highway open to public for travel, which duty includes not only duty to maintain surface of highway in condition reasonably safe for travel, but duty of warning traveling public of any other condition which endangers travel. Galiano v. Pacific Gas & Electric Co. (1937) 67 P.2d 988, 20 C.A.2d 531.

Irrespective of who originally constructed bridge or culvert, and irrespective of whether the bridge or the road was first constructed, the county is liable for maintenance of the bridge or culvert once it has been accepted by the county. 26 Ops.Atty.Gen. 282, 12-13-60.

Special road maintenance district in subdivided, unincorporated territory can be formed for the sole purpose of providing street lights in such area and for payment of maintenance and operation thereof by taxation in the district when the board of supervisors determines that lights are necessary for public safety in the area. 14 Ops.Atty.Gen. 115.

§ 28. Partial invalidity

If any provision of this code, or the application thereof to any person or circumstance, is held invalid, the remainder of the code, or the application of such provision to other persons or circumstances, shall not be affected thereby.

(Stats.1935, c. 29, p. 250, § 28.)

Cross References

Constitution, supreme law of land, see Const. art. 1, § 3.
Construction of statutes, see § 5; Code of Civil Procedure § 1858 et seq.; Government Code § 9600 et seq.
Single subject in title of statute, see Const. art. 4, § 9.

Library References

Statutes ⇐61(5). C.J.S. Statutes § 102.

§ 29. Construction

"Construction" includes:

(a) Acquisition of rights-of-way and material sites and the payment of damage claims under Section 14 of Article I of the Constitution.

(b) Construction.

(c) Reconstruction.

(d) Replacement.

(e) Any improvement excepting maintenance as defined in Section 27.

(f) Such improvements, without being limited thereto, may include, where capital outlay is required, provision for special safety conveniences and devices, roadside planting and weed control, and such illumination of streets, roads, highways, and bridges as in the

§ 22012. Maintain

"Maintain" or any of its variants when used in reference to trees includes clipping, spraying, fertilizing, irrigating, propping, treating for disease or injury, and other similar acts which promote the life, growth, health and beauty of trees.

(Added by Stats.1941, c. 79, p. 1017, § 1.)

Derivation: Stats.1931, c. 1106, p. 2325, § 1.

Library References

Words and Phrases (Perm.Ed.)

§ 22013. Tax collector

"Tax collector" includes any body, board, bureau or officer charged with the duty of collecting assessments for a city.

(Added by Stats.1941, c. 79, p. 1017, § 1.)

Derivation: Stats.1931, c. 1106, p. 2325, § 1.

Cross References

Levy, assessment and collection of city taxes, see Government Code § 43000 et seq.

Library References

Municipal Corporations ⇐528.
C.J.S. Municipal Corporations § 1583.

Words and Phrases (Perm.Ed.)

§ 22014. Necessity for publication or notice

No publication or notice other than that provided for in this part shall be necessary to give validity to any proceedings had hereunder.

(Added by Stats.1941, c. 79, p. 1017, § 1.)

Derivation: Stats.1931, c. 1106, p. 2334, § 25.

Cross References

Newspapers, publication of notice, see Government Code § 6000 et seq.

Chapter 2

ADMINISTRATION

Chapter 2 was added by Stats.1941, c. 79, p. 1017, § 1. See Historical Note under heading of Division 4, preceding § 2800.

Cross References

Board, definition, see § 22008.
City council, definition, see § 22007.
Maintain, definition, see § 22012.
Tree, definition, see § 22000.

(b) The installation or construction of statuary, fountains, and other ornamental structures and facilities.

(c) The installation or construction of public lighting facilities.

(d) The installation or construction of any facilities which are appurtenant to any of the foregoing or which are necessary or convenient for the maintenance or servicing thereof, including, grading, clearing, removal of debris, the installation or construction of curbs, gutters, walls, sidewalks, or paving, or water, irrigation, drainage, or electrical facilities.

(e) The maintenance or servicing, or both, of any of the foregoing.
(Added by Stats.1972, c. 630, p. 1168, § 2.)

§ 22526. Incidental expenses

"Incidental expenses" include:

(a) The costs of preparation of the report, including plans, specifications, estimates, diagram, and assessment.

(b) The costs of printing, advertising, and the giving of published, posted, and mailed notices.

(c) Compensation payable to the county for collection of assessments.

(d) Compensation of any engineer or attorney employed to render services in proceedings pursuant to this part.

(e) Any other expenses incidental to the construction or installation of the improvements or to the maintenance and servicing thereof.
(Added by Stats.1972, c. 630, p. 1169, § 2.)

§ 22527. Including

"Including," unless expressly limited, means including without limitation.
(Added by Stats.1972, c. 630, p. 1169, § 2.)

§ 22528. Landscaping

"Landscaping" means trees, shrubs, grass, or other ornamental vegetation.
(Added by Stats.1972, c. 630, p. 1169, § 2.)

§ 22529. Legislative body

"Legislative body" means the legislative body or governing board of any local agency.
(Added by Stats.1972, c. 630, p. 1169, § 2.)

§ 22530. Local agency

"Local agency" means a county, a city and county, a city, or a special district.
(Added by Stats.1972, c. 630, p. 1169, § 2.)

§ 22531. Maintain or maintenance

"Maintain" or "maintenance" means the furnishing of services and materials for the ordinary and usual maintenance, operation, and servicing of any improvement, including:

(a) Repair, removal, or replacement of all or any part of any improvement.

(b) Providing for the life, growth, health, and beauty of landscaping, including cultivation, irrigation, trimming, spraying, fertilizing, or treating for disease or injury.

(c) The removal of trimmings, rubbish, debris, and other solid waste.
(Added by Stats.1972, c. 630, p. 1169, § 2.)

§ 22532. Property owner

"Property owner" means: any person shown as the owner of land on the last equalized county assessment roll; when such person is no longer the owner, then any person entitled to be shown as owner on the next county assessment roll, if such person is known to the local agency; where land is subject to a recorded written agreement of sale, any person shown therein as purchaser.
(Added by Stats.1972, c. 630, p. 1169, § 2.)

LIST OF APPENDICES

Appendix 1 CASES

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California Slurry Seal Association v. Department of Industrial Relations (2002) 121 Cal.Rptr.2d 38, Cal.App.4th District

Carmel Valley Fire Protection District, et al. v. State of California (1987) 190, Cal.App.2nd 521, 234 Cal.Rptr. 795

City of El Monte, et al. v. Commission on State Mandates (2000) 83 Cal.App.4th 266, 99 Cal.Rptr.2nd 333

City of Merced v. State of California (1984) 153 Cal.App.3rd 777, 200 Cal.Rptr 642

City of Sacramento, et al. v. The State of California (1990) 50 Cal.3rd 51, 266 Cal.Rptr 139

Cole, et al. v. Fair Oaks Fire Protection District (1987) 43 Cal.3rd 148, 233 Cal.Rptr 308

County of Los Angeles, et al. v. The State of California (1987) 43 Cal.3rd 46, 233 Cal.Rptr 38

Franklin v. City of Riverside (1962) 58 C.2nd 114, 23 Cal.Rptr. 401

G & G Fire Sprinklers, Inc. v. Bradshaw 204 F.3rd 941(9th Cir., 2000)

Lucia Mar Unified School District, et al. v. Honig (1988) 44 Cal.3rd 830 244 Cal.Rptr. 677

Lujan, et al. v. G & G Sprinklers 532 U.S. 189, 121 S.Ct. 1446 (U.S. Supreme Ct., 2001)

Lusardi Construction Company v. Lloyd W. Aubry, Jr. (1992) 1 Cal. 4th 976, 4 Cal.Rptr.2nd 837

Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc. (2002) 102 Cal.App.4th 765, 125 Cal.Rptr.2nd 804

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Appendix 5 PAST AND CURRENT REGULATIONS

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Appendix 6 DETERMINATIONS

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Appendix 7 LAW REVIEW ARTICLES

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January 13, 2003

By Facsimile & Regular Mail

Ms. Paula Higashi
Executive Officer
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: Request for Extension of Time
Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant

Dear Ms. Higashi:

I am the attorney of record in this matter and represent the Department of Finance.

The comments to the above-named test claim are currently due on January 15, 2003. A prior extension was granted to Department of Finance in November 2002.

I hereby request for an extension of time through January 30, 2003 to file the comments for the client I represent in this matter.

The reason for the extension of time is my schedule, other assignments and the size of the claim. The Clovis prevailing wage test claim is 141 pages long and involves 28 code sections and regulations.

I have not been able to devote the necessary time to the test claim because I am currently working on objections to the proposed writ and judgment in *Plastic Pipe and Fittings Association v. Building Standards Commission, et al.*, Los Angeles Superior Court No. BS 076413 that were due on January 13, 2003. The Attorney General represents six agencies in this matter the preparation and review of the objections and counter judgment and counter writ required a substantial amount of time.

Additionally, I have had not been able to complete the comments on the Prevailing Wage Mandate Claim because of the need to prepare for the January 15, 2003 meeting of the California

Building Standards Commission.

Therefore I request an extension of time of 15 days until January 30, 2003 to submit comments for the Department of Finance regarding this test claim.

This request is made in good faith for the reason stated here and not for the purpose of delay.

I therefore request an extension of time to file the comments in the above-named test claim until January 15, 2003.

Thank you for your attention and consideration of this matter.

Sincerely,

Ramon de la Guardia

RAMON DE LA GUARDIA
Deputy Attorney General

For BILL LOCKYER
Attorney General

RMD:jg

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Appendix 1 CASES

Bishop v. City of San Jose, et al. (1969) 1 Cal. 3rd 56, 81 Cal.Rptr 465

California Slurry Seal Association v. Department of Industrial Relations (2002) 121 Cal.Rptr.2d 38, Cal.App.4th District

Carmel Valley Fire Protection District, et al. v. State of California (1987) 190, Cal.App.2nd 521, 234 Cal.Rptr. 795

City of El Monte, et al. v. Commission on State Mandates (2000) 83 Cal.App.4th 266, 99 Cal.Rptr.2nd 333

City of Merced v. State of California (1984) 153 Cal.App.3rd 777, 200 Cal.Rptr 642

City of Sacramento, et al. v. The State of California (1990) 50 Cal.3rd 51, 266 Cal.Rptr 139

Cole, et al. v. Fair Oaks Fire Protection District (1987) 43 Cal.3rd 148, 233 Cal.Rptr 308

County of Los Angeles, et al. v. The State of California (1987) 43 Cal.3rd 46, 233 Cal.Rptr 38

Franklin v. City of Riverside (1962) 58 C.2nd 114, 23 Cal.Rptr. 401

G & G Fire Sprinklers, Inc. v. Bradshaw 204 F.3rd 941(9th Cir., 2000)

Lucia Mar Unified School District, et al. v. Honig (1988) 44 Cal.3rd 830 244 Cal.Rptr. 677

Lujan, et al. v. G & G Sprinklers 532 U.S. 189, 121 S.Ct. 1446 (U.S. Supreme Ct., 2001)

Lusardi Construction Company v. Lloyd W. Aubry, Jr. (1992) 1 Cal. 4th 976, 4 Cal.Rptr.2nd 837

Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc. (2002) 102 Cal.App.4th 765, 125 Cal.Rptr.2nd 804

Winzler & Kelly, et al. v. Department of Industrial Relations (1981) 121 Cal.App. 3rd 120, 174 Cal.Rptr. 744

or other place where visitors might be. It was, in short, located in a place where it was relatively safe from public intrusion, or so the occupant could reasonably believe. The trash can cannot logically be distinguished from the marijuana plants.

This case does not deal with "open fields," but with the yard adjacent to a private residence. (Compare Hester v. United States (1924) 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898.) The resident cannot reasonably expect privacy in those portions of the yard open to the public, or if not to the public, at least to a substantial number of people. (Compare People v. Terry, supra, 71 A.C. 101, 77 Cal.Rptr. 460, 454 P.2d 36, permitting a search in the common garage of a large apartment building.) Nor can he expect privacy for things in plain sight from such public areas. (People v. Terry, supra, 71 A.C. 101, 77 Cal.Rptr. 460, 454 P.2d 36; People v. Willard, supra, 238 Cal.App.2d 292, 47 Cal.Rptr. 734.) But he can reasonably, and probably does, expect privacy for the remainder of the property. No evidence in this case shows that the marijuana plants could be seen until the officer left the area open to the public and approached to a point approximately one foot from the plants. Consequently, the evidence must be excluded.

PETERS and SULLIVAN, JJ, concur.

460 P.2d 137
1 Cal.3d 56

[56] Charles BISHOP, Plaintiff and Appellant,
v.
CITY OF SAN JOSE et al., Defendants and Respondents.

S. F. 22677.

Supreme Court of California,
In Bank.

Oct. 30, 1969.

Rehearing Denied Nov. 26, 1969.

Action wherein plaintiff, who filed suit as a resident and taxpayer of defendant city, as business agent of labor union local, and as assignee of certain union members employed by the city as electricians, alleged, inter alia, that the city had failed to pay its electricians the prevailing rate of per diem wages for their craft, pursuant to the prevailing wage law. The Santa Clara County Superior Court, O. Vincent Bruno, J., entered judgment against plaintiff, and he appealed. The Supreme Court, Burke, J., held that the setting and payment of salaries for the city's own year-round, full-time, civil service employees were purely municipal affairs to which the prevailing wage law as set forth in the Labor Code was inapplicable.

Judgment affirmed.

Peters, Mosk and Sims, JJ., dissented.

Opinion, Cal.App., 76 Cal.Rptr. 308, vacated.

1. Municipal Corporations ⇐79

As to matters which are of statewide concern, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation. West's Ann.Const. art. 11, §§ 6, 8, 8(j), 11; West's Ann.Labor Code, §§ 1770 et seq., 1771 et seq.; St.1957, p. 4344; St.1965, p. 5122.

2. Municipal Corporations ⇐57, 64, 78, 79

Local governments, whether chartered or not, do not lack the power, nor are they constitutionally forbidden, to legislate on matters not of a local nature, nor is the legislature forbidden to legislate with respect to local municipal affairs of a home rule municipality; rather, in the event of conflict between state and local regulations, or if state legislation discloses an intent to preempt field, the question becomes one of predominance or superiority as between general state laws and local regulations. West's Ann.Const. art. 11, §§ 6, 8, 8(j), 11; West's Ann.Labor Code, §§ 1770 et seq., 1771 et seq.; St.1957, p. 4344; St.1965, p. 5122.

3. Counties ⇐21½
Municipal Corporations ⇐592(1)

In exercising judicial function of deciding whether matter is a municipal affair or of statewide concern, courts will give great weight to legislative purpose in enacting general laws which disclose intent to preempt field to exclusion of local regulation; however, mere fact that legislature has attempted to deal with particular subject on statewide basis is not determinative, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws should the subject be held by courts to be a municipal affair; disapproving In re Hubbard (1964) 62 Cal.2d 119, 127–128, 41 Cal.Rptr. 393, 396 P.2d 809, and City of Redwood City v. Moore (1965) 231 Cal.App.2d 563, 580–581, 42 Cal.Rptr. 72.

4. Labor Relations ⇐1130

Setting and payment of salaries for city's own year-round, full-time, civil service employees were purely municipal affairs to which the prevailing wage law as set forth in the Labor Code was inapplicable. West's Ann.Const. art. 11, §§ 6, 8, 8(j), 11; West's Ann.Labor Code, §§ 1770 et seq., 1771 et seq.,; St.1957, p. 4344; St.1965, p. 5122.

5. Labor Relations ⇐1129

Labor Code section providing that "Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed * * * shall be paid to all workmen employed in public works exclusive of maintenance work" applies only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. West's Ann.Labor Code, § 1771.

6. Statutes ⇐212.1

Statutes are to be interpreted by assuming that the Legislature was aware of the existing judicial decisions.

7. Statutes ⇐220

Failure to make changes in a given statute in a particular respect when the subject is before the legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect.

8. Injunction ⇐22

An injunction would not be issued enjoining defendant city from failing to seek competitive bids for improvement and construction projects involving an expenditure in excess of $2,500, in view of evidence that the city had instituted and was following workable and effective procedures to guard against any violations of its charter requirements with respect to the necessity of competitive bids for projects involving expenditures exceeding $2,500, and in view of evidence that the city intended in good faith to comply with such charter requirements.

Morgan, Beauzay & Hammer, Morgan, Beauzay, Wylie, Ferrari & Leahy, Robert Morgan, Eleanor M. Kraft and Kraft & Kraft, San Jose, for plaintiff and appellant.

Brundage & Hackler, Daniel Feins, Los Angeles, Charles P. Scully and Donald C. Carroll, San Francisco, amici curiae on behalf of plaintiff and appellant.

Ferdinand P. Palla, City Atty., Richard K. Karren, Asst. City Atty., and Harry Kevorkian, Deputy City Atty, for defendants and respondents.

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[1]BURKE, Justice. [1]59

Plaintiff appeals from a judgment declaring the prevailing wage provisions found in certain sections of the Labor

Code to be inapplicable to the employees of defendant city, and denying relief sought by way of injunction and damages.[1] As hereinafter appears, we have concluded that the trial court ruled correctly with respect to the prevailing wage law, that no other ground for reversal has been shown, and that the judgment should be affirmed.

[60] Plaintiff contends that from 1958 to 1966 defendant city unlawfully failed to pay its electricians the prevailing rate of per diem wages for work of a similar character, pursuant to the prevailing wage law (Lab. Code, § 1770 et seq.), and also failed to seek competitive bids for certain improvement and construction projects, pursuant to provisions of the city charter.

The city is a freeholders' charter city organized under the Constitution and laws of this state. Until May 1965 the city operated under its 1915 charter, as amended, and since 1965 it has operated under its 1965 charter, as amended. Both charters contain "home rule" provisions (Cal.Const., art. XI, §§ 6, 8, subd. (j)), and provisions requiring that all public buildings and works costing more than a specified amount shall be done by contract and let to the lowest responsible bidder.[2] Neither charter contains any provisions relating to prevailing wages; however, the city council periodically enacts prevailing wage ordinances.

Plaintiff's assignors are among some 17 electricians employed by the city who work under the city electrician and have performed additions, modification, [61] maintenance and repair of city electrical facilities, buildings and equipment, including street lights, traffic signals, fire alarm boxes

1. Plaintiff instituted this action as a resident and taxpayer of defendant city, as the business agent of a labor union local, and as the assignee of certain union members employed by the city as electricians.

2. *1915* charter, section 89: "All public buildings and works, when the expenditure therefor shall exceed one thousand dollars ($1,000.00), shall be done by contract and shall be let to the lowest responsible bidder, after advertising * * *." (Stats.1957, p. 4344.)

1965 charter, section 1217: "Except as hereinafter otherwise provided, each purchase of supplies and materials the expenditure for which exceeds One Thousand Dollars ($1,000), each purchase of equipment and expenditure for which exceeds Two Thousand Dollars ($2,000) and each specific 'public works project,' hereinafter defined, the expenditure for which (excluding the cost of any materials which the City may have already lawfully acquired therefor) exceeds the amount which a general law City of the State of California may legally expend for a public project (as defined by State law) without a contract let to a lowest responsible bidder after notice, shall be contracted for and let to the lowest responsible bidder after notice; provided, however, that in no event shall the above apply to any specific 'public works project' the expenditure for which (excluding the cost of any materials which the City may have already lawfully acquired therefor) does not exceed Two Thousand Five Hundred Dollars ($2,500).

"* * *

"For purposes of this Section, 'public works project' shall be deemed to mean and is hereby defined as a project for the construction, erection, improvement or demolition of any public building, street, bridge, drain, ditch, canal, dam, tunnel, sewer, water system, fire alarm system, electrical traffic control system, street lighting system, parking lot, park or playground; provided and excepting that 'public works project' shall not be deemed to mean or include the maintenance of any of said things, or any repairs incidental to such maintenance, * * *. Also, the provisions of this Section shall not apply to any of the following: * * * (b) the purchase of any supplies, materials or equipment which can be obtained from only one vendor or manufacturer; * * * (f) work involving highly technical or professional skill where the peculiar technical or professional skill or ability of the person selected to do such work is an important factor in his selection; (g) expenditures deemed by the Council to be of urgent necessity for the preservation of life, health or property, provided the same are authorized by resolution of the Council adopted by the affirmative vote of at least five (5) members of the Council and containing a declaration of the facts constituting the urgency; and (h) situations where solicitation of bids would for any reason be an idle act." (Stats.1965, pp. 5122, 5159.)

and systems, etc. The electricians are civil service employees of the city, and since 1958 have been paid monthly salaries on a year-round, full-time basis,[3] plus extra pay for overtime and holiday work, and plus various other benefits such as holidays, vacation and sick leave, health insurance and retirement benefits. In 1963 the work of the city electricians was approximately 40 percent new construction, but at the time of trial (1965–1966) the workload was only some 16 percent construction with maintenance taking up the other 84 percent.

Plaintiff's complaint focuses on four kinds of work[4] done by the city electricians between 1958 and 1966, assertedly in violation of the prevailing wage law and of the respective $1,000 and $2,500 project limits of the 1915 and the 1965 city charters. (Fn. 2, ante.) The trial court ruled, among other things, that both the four kinds of work and the setting and payment of salaries for the city's own year-round, full-time, civil service employees are purely municipal affairs to which, under the home rule provisions of article XI of the California Constitution, the prevailing wage provisions of Labor Code sections 1771 et seq., relied upon by plaintiff, cannot be applied; that in any event the prevailing wage law does not as a matter of statutory construction apply to the setting of such salaries. The court also found that the city at all times acted in the good faith belief that the prevailing wage provisions do not apply to the salaries paid to its own employees.

At all times since adoption of the Constitution in 1879, section 11 of article XI has specified that "*Any* county, *city*, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." (Italics added.) In 1896 section 6 of article XI was amended to provide a limited amount of autonomy for freeholders' charter cities, and in 1914 sections 6 and 8 of article XI were amended to permit such cities, by appropriate charter amendments, to acquire autonomy with respect to all municipal affairs. A city which adopted such "home rule" amendments thereby gained exemption, with respect to its municipal affairs, from the "conflict with general laws" restrictions of section 11 of article XI.

[1] As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation (the preemption doctrine). (Pac. Tel. & Tel. Co. v. City & County of San Francisco (1959) 51 Cal. 2d 766, 768–769, 336 P.2d 514; Pipoly v. Benson (1942) 20 Cal.2d 366, 369–370, 125 P.2d 482, 147 A.L.R. 515.) 162

[2] As is made clear in the leading case of Pipoly v. Benson, *supra*, local governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality. Instead, in the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations on the other. (See also e. g. Galvan v. Superior Court (1969) 70 A.C. 905, 910–920, 76 Cal.Rptr. 642, 452 P.2d 930; Abbott v. City of Los Angeles (1960) 53 Cal.2d 674, 681–684, 3 Cal.Rptr.

3. The pre-1958 earnings of the electricians are not in issue here, but were apparently based on a union scale.

4. The four kinds of work: (1) fire alarm system; (2) overhead traffic signals; (3) IBM project; (4) miscellaneous electrical work at the municipal airport, in a park, and inside the city hall.

158, 349 P.2d 974, 82 A.L.R.2d 385;[5] Chavez v. Sargent (1959) 52 Cal.2d 162, 176–177, 339 P.2d 801; Agnew v. City of Los Angeles (1958) 51 Cal.2d 1, 5, 330 P.2d 385; Wilson v. Beville (1957) 47 Cal.2d 852, 856–861, 306 P.2d 789; Eastlick v. City of Los Angeles (1947) 29 Cal.2d 661, 665–666, 177 P.2d 558, 170 A.L.R. 225; Southern California Roads Co. v. McGuire (1934) 2 Cal.2d 115, 123, 39 P.2d 412.)

If resolution of that question requires a determination as to whether the matter regulated is a state or a municipal affair, then, as declared in Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 294, 32 Cal.Rptr. 830, 841, 384 P.2d 158, 169, "Because the various sections of article XI fail to define municipal affairs, it becomes necessary for the courts to decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern." In other words, "No exact definition of the term 'municipal affairs' can be formulated, and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case. The comprehensive nature of the power is, however, conceded in all the decisions, * *." (Butterworth v. Boyd (1938) 12 Cal.2d 140, 147, 82 P.2d 434, 438, 126 A.L.R. 838; see also City of Pasadena v. Charleville (1932) 215 Cal. 384, 392, 10 P.2d 745 [5].)

163 Further, the "constitutional concept of municipal affairs * * * changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state. [Citations.]" Pac. Tel. & Tel. Co. v. City & County of San Francisco, *supra*, 51 Cal.2d 766, 771, 775–776, 336 P.2d 514, 517; Butterworth v. Boyd, *supra*.

[3] In exercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts will of course give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation (see Ex parte Daniels (1920) 183 Cal. 636, 639–640, 192 P. 442, 21 A.L.R. 1172), and it may well occur that in some cases the factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern. However, the fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.[6]

5. That the statement appearing in *Abbott* (p. 681 [5] of 53 Cal.2d, p. 163 of 3 Cal.Rptr., p. 979 of 349 P.2d) that "A city has *no power* to legislate upon matters which are not of a local nature" was improvident is made clear by the later opinion of the same author, in Galvan v. Superior Court, *supra*, 70 A.C. 905, 910–920, 76 Cal.Rptr. 642, 452 P.2d 930. (Italics added.)

6. Any statements to the contrary found in In re Hubbard (1964) 62 Cal.2d 119, 127–128, 41 Cal.Rptr. 393, 396 P.2d 809, were not only unnecessary to the decision there but are overruled if they be deemed authoritative. In City of Redwood City v. Moore (1965) 231 Cal.App.2d 563, 580–581, 42 Cal.Rptr. 72, the court was misled into contrary statements by overemphasis on the comment in Professional Fire Fighters, Inc. v. City of Los Angeles, *supra*, 60 Cal.2d 276, 294, 32 Cal.Rptr. 830, 841, 384 P.2d 158, 169, that the question as to whether a matter is of municipal or statewide concern "must be determined [by the courts] from the legislative purpose in each individual instance." As we have noted, the courts will give great weight to the legislative purpose and may be influenced by the

[4] In the present case it clearly appears from the provisions of the prevailing wage law here involved that the Legislature did not intend that that law apply to the setting of the salaries of employees of a city, whether chartered or not.

[5] Section 1771 of the Labor Code,[7] relied upon by plaintiff, is found in chapter 1 of part 7.[8] Part 7 is entitled "Public 164 Works and Public Agencies." Chapter 1 deals with "Public Works" and commences with section 1720. Section 1720 defines public works[9] as used in chapter 1, and section 1724 defines the expression "Locality in which public work is performed."[10] Inasmuch as section 1771 directs that the wage to be paid is that prevailing in the "locality in which the public work is performed," and section 1724 states that that expression encompasses only situations in which a contract to do public work has been awarded, it becomes at once apparent that section 1771 is by its own terms applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces.

Plaintiff also points to the clause in section 1773 directing that the "body awarding any contract for public work, or *otherwise undertaking any public work*, * * *." shall ascertain the prevailing wage rate.[11] (Plaintiff's emphasis.) Again, however, as is clear from the entire provision, from which plaintiff has extracted a portion out of context, the direction to ascertain the prevailing wage not only is tied to the "locality" definition (see fn. 10, *ante*) and thus to the area in which the *contracted work* is to be performed, but the direction of section 1773 is that after such wage has been ascertained it shall be specified in the call for bids for the *contract* and in the *contract*. Accordingly, nothing found in section 1773 lends a scintilla of support to plaintiff's contention that the prevailing wage law was intended by the Legislature to apply to other than public work let out to contract. No useful purpose would be served by here undertaking to detail other sections of the prevailing wage law as set forth in chapter 1 of part 7 of the Labor Code, but it is appropriate to note that the entire tenor thereof discloses a legislative purpose to deal only with contracted public work, and not with work done by a municipality by force account. (See, e. g., §§ 1773.3, 1773.4, 1774, 1775, 1776.)

[6, 7] Additionally, the court so construed the law in Beckwith v. County of Stanislaus (1959) 175 Cal.App.2d 40, 48, 345 P.2d 363, 369, with the declaration that

same factors as was the Legislature; but the view expressed in *Moore, supra*, that the Legislature has "the power to change a municipal affair into a matter of statewide concern," is disapproved.

7. Section 1771, in pertinent part: "Not less than the general prevailing rate of per diem wages for work of a similar character *in the locality in which the public work is performed*, * * * shall be paid to *all workmen employed on public works* exclusive of maintenance work." (Italics added.)

8. Subsequent section references herein are to the Labor Code, unless otherwise stated.

9. For purposes of this opinion it may be assumed, without deciding, that the four kinds of work on which plaintiff's complaint focuses (see fn. 4, *ante*) fall within the section 1720 definition of public works.

10. Section 1724: " 'Locality in which public work is performed' means the county in which the public work is done in cases in which *the contract is awarded* by the State, and means the limits of the political subdivision on whose behalf *the contract is awarded* in other cases." (Italics added.)

It is also noted that as used in chapter 1, "Political subdivision" is defined by section 1721 to include "any" city.

11. The full sentence of section 1773 from which plaintiff has quoted reads in pertinent part: "The body awarding any contract for public work, or otherwise undertaking any public work, *shall ascertain* the general *prevailing* rate of per diem *wages in the locality in which the public work is to be performed* * * * *and* shall *specify in* the *call for bids for* the *contract*, * * * *and in the contract* itself, *what the general prevailing rate of* * * * *wages* * * * *in the locality is* * * *." (Italics added.)

"The prevailing wage and competitive bidding statutes have no application to work undertaken by force account or day labor." Since *Beckwith* the statute has remained unchanged in any aspect material here, although amended in other respects.[12] "Statutes are to be interpreted by assuming that the Legislature was aware of the existing judicial decisions. [Citation.] Moreover, failure to make changes in a given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect." (Williams v. Industrial Acc. Commission (1966) 64 Cal.2d 618, 620, 51 Cal.Rptr. 277, 278, 414 P.2d 405, 406, and cases there cited; Alter v. Michael (1966) 64 Cal.2d 480, 482, 50 Cal.Rptr. 553, 413 P.2d 153; Kusior v. Silver (1960) 54 Cal.2d 603, 618, 7 Cal.Rptr. 129, 354 P.2d 657.)

[8] With respect to the project limitations of $1,000 and $2,500 specified, respectively, in the 1915 and 1965 charters (fn. 2, *ante*), the trial court found and concluded, among other things, that the city has instituted and is following workable and effective procedures to guard against any violations of the requirements of section 1217 of the 1965 charter and intends in good faith to comply with such requirements. Plaintiff has thus shown no impropriety in the denial by the trial court of injunctive relief.

Other than plaintiff's claim that his assignors as city employees would have received higher earnings under the prevailing wage law, which we hold did not apply, plaintiff does not suggest that he made any showing which would controvert the trial court's ruling that neither plaintiff, his assignors, his union, nor members of his union have suffered any loss or damage by reason of the work done by the city's own employees. Accordingly, it is unnecessary in this opinion to attempt to weigh the four kinds of work as against the charter project limitations. Ample preventive remedies are available to taxpayers and citizens in the event of any attempt or threat to violate the public bidding requirements of the charter. We in no way condone any past evasion of those provisions, as public bidding serves many sound governmental purposes. However, in our view plaintiff's requested remedy by way of award for the benefit of his assignors is neither a proper remedy after the event nor a desirable preventive measure, and would fail to reach the real issue of possible violations of the charter.

The judgment is affirmed.

TRAYNOR, C. J., McCOMB, J., and DRAPER, J. pro tem.*, concur.

PETERS, Justice (dissenting).

I disagree with the majority in three fundamental respects: (1) as to the effect to be given to the "home rule" provisions of article XI of the California Constitution; (2) as to the proper construction of section 1720 et seq. of the Labor Code; and (3) as to the effect to be given to the violations of the city's own charter.

I

I cannot agree with the statements in the majority opinion that a city which adopted "home rule" amendments to its charter pursuant to sections 6 and 8 of article XI of the California Constitution "thereby gained exemption, with respect to its municipal affairs, from the 'conflict with general laws' restrictions of section 11 of article XI," that "in the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between gener-

12. See Statutes 1963, chapter 467, page 1320, and chapter 1786, page 3592; Statutes 1965, chapter 283, page 1284; Statutes 1968, chapters 699, 880, 1411.

* Assigned by Chairman of the Judicial Council.

al state laws on the one hand and the local regulations on the other," and that in "[e]xercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts will of course give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation (see Ex parte Daniels (1920) 183 Cal. 636, 639–640, 192 P. 442, 21 A.L.R. 1172), and it may well occur that in some cases the factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern. However, the fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." (pp. 468–469; footnote omitted.)

I cannot agree that in cases where there is a conflict between local and state law or where there is a legislative intent to preempt the field, the problem is whether the subject matter is a municipal rather than state concern. The proper rule is that set forth in Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal.2d 276, 292, 32 Cal.Rptr. 830, 840, 384 P.2d 158, 168, "general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern." In other words, in cases of conflict and preemption, the inquiry ends once a statewide concern is found, and there is no need to weigh the state and municipal concerns or to determine which should predominate.

We applied the principle in *Professional Fire Fighters* where we recognized that the statutory provisions permitting unionization of firemen "may impinge" upon local control but held that since the statutory provisions were part of a scheme of legislation to create uniform fair labor practices throughout the state they were a matter of state concern. (60 Cal.2d at pp. 294–295, 32 Cal.Rptr. 830, 384 P.2d 158.) Twenty-two cases were cited in the *Professional Fire Fighters* opinion "all dealing with various phases of municipal affairs held to be subject to general laws on the basis of statewide concern." (60 Cal.2d at pp. 293–294, 32 Cal.Rptr. at p. 841, 384 P.2d at p. 169.)

The majority has impliedly overruled *Professional Fire Fighters* and these twenty-two cases. There is no justification for this grave departure from existing law. The rigid approach suggested by the majority, that matters are either a municipal affair or of state concern, ignores the basic realities of most situations. Logically, there are four categories. First is the situation where there are solely state concerns, and the subject matters of the municipal regulation and the state statute do not affect municipal affairs. Second is the situation where the subject matter of the municipal regulation and the state statute is a matter which involves both municipal and statewide concerns. Third is the situation where although the subject matter is one ordinarily subject to municipal regulations, such as relations with municipal employees, parts of the subject may also involve matters of statewide concern. Fourth is the situation where the subject matter solely involves municipal affairs and no matters of statewide concern are involved.

The first situation is reflected by Wilson v. Beville, 47 Cal.2d 852, 856–857, 306 P.2d 789, where this court held that claim requirements for the taking of property by eminent domain is not a municipal affair

but is a matter of statewide concern that may be regulated only by the Legislature. (See In re Hubbard, 62 Cal.2d 119, 127, 41 Cal.Rptr. 393, 396 P.2d 809.) The court held invalid a city charter claim-filing provision insofar as it applied to actions in inverse condemnation.[1]

The second situation is reflected by In re Hubbard, *supra,* 62 Cal.2d 119, 127–128, 41 Cal.Rptr. 393, 396 P.2d 809, where we recognized that the regulation of gambling is a matter of both local and statewide concern. We there held that in the absence of conflict with general law "chartered counties and cities have full power to legislate in regard to municipal affairs unless: (1) the subject matter has been so fully and completely covered by general law
168 as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality." (62 Cal.2d at p. 128, 41 Cal. Rptr. at p. 398–399, 396 P.2d at p. 814–815.) It should be pointed out that each of the three categories mentioned in the case is dependent upon a statewide concern, which because of legislative action or the subject matter, takes precedence over municipal affairs.

The third situation is reflected by *Professional Fire Fighters,* where the general subject in issue is a municipal affair but there are also matters of statewide concern. There it was recognized that the relations of a municipality with its employees in general is a matter of municipal concern but that the creation of uniform fair labor practices throughout the state is a matter of state concern and that regulations of a chartered city in conflict with statutes governing labor relations of firemen were invalid. (60 Cal.2d at p. 289, 32 Cal.Rptr. 830, 384 P.2d 158 et seq.)

The fourth situation, where the subject is solely municipal affairs so that enactments of the Legislature will be held invalid as applied to chartered cities and counties, is difficult to illustrate. The only case of this court cited by the majority, and the most recent one that I have found where it was held that legislation could not be validly held applicable to a chartered city or county is City of Pasadena v. Charleville (1932) 215 Cal. 384, 10 P.2d 745, and, as will appear hereinafter, that case should be disapproved. Furthermore, the two most recent cases discussing the problem of conflict between local and state law contain language indicating that the state law must always prevail. (Galvan v. Superior Court, 70 A.C. 905, 910, 76 Cal. Rptr. 642, 452 P.2d 930; Bellus v. City of Eureka, 69 Cal.2d 336, 346, 71 Cal.Rptr. 135, 444 P.2d 711; see also Nat. Milk, etc., Assn. v. City, etc., of San Francisco, 20 Cal.2d 101, 110, 124 P.2d 25.)

I must confess that I find it somewhat incongruous that a chartered city may authorized conduct the state has prohibited, prohibit conduct that the state has authorized, engage in activities that the state has prohibited or refuse to comply with state law where the Legislature has clearly declared its intent that its statutes are to be applicable in and to the chartered city. Nevertheless, cases have continued to state that as to solely municipal affairs, ordi-

1. The majority does not disapprove *Wilson,* although it does disapprove a statement in Abbott v. City of Los Angeles, 53 Cal. 2d 674, 681, 3 Cal.Rptr. 158, 163, 349 P. 2d 974, 979, 82 A.L.R.2d 385, that a "city has no power to legislate upon matters which are not of a local nature." (Ditto Opn., p. 469, fn. 5.) The next succeeding sentence of the *Abbott* opinion, which deals with matters which are a "mixed concern" of both municipalities and the state, makes it clear that the disapproved statement is concerned with matters solely of statewide concern. In my view, we should adhere to the statements of *Abbott* and *Hubbard,* and the holding of *Wilson.*

nances of chartered cities will take precedence over conflicting statutes. (E.g., Professional Fire Fighters, Inc. v. City of Los Angeles, *supra,* 60 Cal.2d 276, 291, 32 Cal. Rptr. 830, 384 P.2d 158; Pipoly v. Benson, 20 Cal.2d 366, 369, 125 P.2d 482, 147 A.L.R. 515.)

If it be assumed that there are some [69] matters so local in nature that the Legislature's power to regulate will be limited to nonchartered cities and counties, it is apparent that such matters must be very rare. Equally rare are cases coming within the first situation where there are no local concerns so that even in the absence of state regulation chartered cities and counties may not act.

Most if not all matters upon which the state or chartered cities and counties legislate fall within the second and third categories where in the absence of conflicting state statutes or state occupation of the field chartered cities and counties may properly act. When the Legislature adopts a conflicting statute or occupies the field in such a case, the ordinance or the local regulation becomes invalid. This is the basis of *Professional Fire Fighters,* where we held that although ordinarily labor relations of municipal employees are a matter of local concern, uniform fair labor practices are a matter of state concern, and when the Legislature adopted a statute establishing uniform fair labor practices, a matter involving statewide concerns, the statute was controlling against conflicting municipal law. In other words, in the overwhelming majority of situations, if not all situations, as stated by Justice Molinari in City of Redwood City v. Moore, 231 Cal. App.2d 563, 580–581, 42 Cal.Rptr. 72, 84, "the Legislature does have the power to change a municipal affair into a matter of statewide concern, and thus impinge upon local control, where it is the legislative purpose to deal with the particular subject matter under discussion on a statewide basis." Accordingly, I cannot agree with the majority that this language should be disapproved.

For the same reason I cannot agree with the majority's disapproval of In re Hubbard, *supra,* 62 Cal.2d 119, 127–128, 41 Cal.Rptr. 393, 396 P.2d 809. Moreover, in disapproving *Hubbard,* the majority fails to deal with the specific problem dealt with there and leaves the law in an uncertain state as to an important problem which often arises in law enforcement. *Hubbard* held that the Long Beach ordinance prohibiting gambling was valid "except insofar as the ordinance may be applied to the 12 games and one class of activity prohibited by Penal Code section 330." (62 Cal.2d at p. 128, 41 Cal.Rptr. at p. 399, 396 P.2d at p. 815.) Under *Hubbard* violations of the Penal Code section are prosecuted under state law, and other gambling infractions under the ordinance. In overruling *Hubbard* the majority does not tell us whether gambling is now to be considered a matter "predominately" of local or statewide concern. I do not understand the majority to repudiate the long-standing rule that where both state and local law prohibit the same conduct, there is a conflict and only one is valid (e.g., In re Sic, 73 Cal. 142, 146–149, 14 P. 405; Ex parte Daniels, *supra,* 183 Cal. 636, 645, 192 P. 442, 21 A.L.R. 1172; Abbott v. City of Los Angeles, *supra,* 53 Cal.2d 674, 683, 3 Cal.Rptr. 158, 349 P.2d 974, 82 A.L.R.2d 385), and prosecutors and judges will be required to guess whether conduct prohibited by both state and local gambling laws should be prosecuted under the state or the local law.

Rather than weigh whether local or state- [70] wide concerns should predominate, I would adhere to the rule of *Professional Fire Fighters,* that even in regard to matters which would otherwise be deemed to be strictly municipal affairs, general law prevails where the subject matter of the general law is of statewide concern. The prevailing wage law clearly reflects statewide concerns. The statutes before us deal with labor relations of persons employed on public works projects and the minimum wages to be paid them. *Professional Fire Fighters,* as we have seen, establishes that the subject of uniform fair labor practices

is a proper subject of statewide concern, and it seems clear that minimum wages for employees is also such a matter. Although municipal employment is obviously a matter of local concern, the Legislature, in view of the statewide concerns, may properly adopt and make applicable to chartered cities and counties the statutes before us.

City of Pasadena v. Charleville, *supra,* 215 Cal. 384, 388–393, 10 P.2d 745, which dealt with the predecessors of the statutes before us, held that the state could not properly require a chartered city to provide for prevailing wages in its call for bids for a contract for a municipal improvement. The court suggested that general minimum wage laws applicable to public and private employees might be unconstitutional under Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785. The *Adkins* case has long been repudiated, and it is now recognized that minimum wages are a proper subject of state concern. (West Coast Hotel Co. v. Parrish (1937) 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703.) City of Pasadena v. Charleville, *supra,* should also be overruled.

II

In concluding that the prevailing wage law as set in chapter I of part 7 of division 2 of the Labor Code deals only with contracted public work and not with work done by force account, the majority largely ignores the first section of the chapter which makes clear that the prevailing wage law is not limited to contracted work but applies also to certain work done by force account. That section, 1720, provides:

"As used in this chapter 'public works' means: (a) Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, * * *.

"(b) Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type. 'Public work' shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, * * *.

"(c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the State, or of any political subdivision or district thereof, whether such political subdivision or district 171 operates under a freeholder's charter or not."

It seems clear that improvement work let by contract would come under subdivision (a) of the section and that unless subdivision (c) is read to include within the definition of "public works" improvement work done by force account, subdivision (c) is meaningless. In addition subdivision (c) expressly provides that it applies to chartered cities and counties.

Section 1771 of the Labor Code requires the payment of the prevailing rate of wages to "all workmen employed on public works exclusive of maintenance work." Section 1771 provides: "Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, *shall be paid to all workmen employed on public works exclusive of maintenance work.*" (Italics added.) It seems clear to me that the scope of the prevailing wage law is set forth by the italicized matter and the definition of "public works" set forth in the first section of the chapter.

Likewise, section 1773 provides that the "body awarding any contract for public work, *or otherwise undertaking any public work,* shall ascertain the general prevailing rate of per diem wages in the locality in which the public work is to be performed * * *." (Italics added.) The italicized words show that the prevailing wage law is not limited to situations where contracts are awarded.

The majority rely upon the phrase "locality in which public work is performed" appearing in sections 1771 and 1773 and defined in section 1724 as showing that the prevailing wage law is only applicable

where contracts are let. Although it is true that section 1724 in defining the quoted term speaks of contracts, this, at most, can only create a conflict within the literal language of sections 1771 and 1773, and it is clear to me that the term "public works" is used in those sections to show the scope of the application of the prevailing wage law whereas the phrase relied upon by the majority is not intended to limit the scope of the law but only to establish the method of computation. In determining the legislative intent as to the scope of the statute, we should look at the language used by the Legislature in the statute to define the scope of the applicability of the prevailing wage law rather than a phrase which merely relates to the computation of the prevailing wage. When this is done, the definition of "public works" as set forth in the first section of the chapter requires the conclusion that the prevailing wage law applies to all workmen employed on public works exclusive of maintenance work whether or not the public works have been let by contract.

The majority also rely on the rule of
172 statutory construction that statutes are to be interpreted by assuming that the Legislature was aware of existing judicial decisions and that the failure to make changes in a statute in a particular respect, although making changes in other respects, is indicative of an intention to leave the law unchanged in that respect. This rule of construction in a proper case is entitled to great weight, but in the circumstances of this case it is entitled to little or no weight. The only judicial construction of the statutes is a statement made without citation of authority in Beckwith v. County of Stanislaus, 175 Cal.App.2d 40, 48, 345 P.2d 363, that the prevailing wage and competitive bidding statutes have no application to work undertaken by force account or day labor. The prevailing wage law was not directly involved in the case, and not only is there no citation to any authority for the statement but, more importantly, the opinion does not cite the prevailing wage statute or any section of the Labor Code. The headnotes of the official report of the case and of the West Publishing Company report (345 P.2d 363–364) make no mention whatsoever of the statement relied upon by the majority. The rule of construction relied upon by the majority is premised on the theory that the Legislature is aware of the judicial construction of the statute, and in the circumstances there is little reason to believe that the Legislature, when it was considering amending the statute in other respects, became aware of the statement in *Beckwith*.

In any event, any weight which the rule of construction relied upon by the majority might be entitled to in the present case is clearly counterbalanced because the Attorney General in two opinions reached a contrary construction of the prevailing wage law. In 1944 he expressly pointed out that construction of improvements by day labor was controlled by section 1771 of the Labor Code. (3 Ops.Cal.Atty.Gen. 399, 401.) In 1960, he pointed out that improvements by county employees, in accordance with the views expressed above, would not come under subdivision (a) of section 1720 which related solely to contracted work but would come under subdivision (c) of the section and that the prevailing wage law was applicable to such improvements. (35 Ops.Cal.Atty.Gen. 1, 2.) Unlike the opinion of the Court of Appeal relied upon by the majority, the opinions of the Attorney General both cited and analyzed the relevant code sections, and, if any weight is to be placed upon legislative inaction, it seems more reasonable to assume that the Legislature in refusing to act was more likely aware of the Attorney General's opinion than of the Court of Appeal opinion.

III

Finally, even if we assume that the prevailing wage law (Lab.Code, § 1720 et seq.), is applicable ordinarily only to contracts for improvements and is not ordinarily applicable to work done by force account, it nevertheless appears that plain-

tiff is entitled to recover in this action. Had the city complied with its own charter, it would, under the undisputed facts, have been required to let a substantial portion of the work by contract, and the persons who performed that work, plaintiff's assignors, would have been entitled to payment of, at least, the prevailing wage. The city should not be permitted to profit from its own wrong in violating its charter, and the workingmen who worked on the improvements should not, because of the city's wrongful violation of its charter, be deprived of the compensation they are entitled to under statute.

I would reverse the judgment.

MOSK, J., and SIMS, J. pro tem.*, concur.

Rehearing denied; PETERS, MOSK and SIMS, JJ., dissenting.

DRAPER and SIMS, JJ., sitting pro tem. in place of TOBRINER and SULLIVAN, JJ., who deemed themselevs disqualified.

* Assigned by the Chairman of the Judicial Council.

ter recommending Wiz seek a tolling agreement. In that letter, Kronemyer told Arthur Tendler that if the court of appeal were to determine Stroock never was Wiz's attorney, it would not be possible for Wiz to assert a malpractice claim. Stroock argues a jury could infer—from this statement and from Arthur Tendler's earlier declaration that Stroock represented Wiz in connection with blue sky issues—that Kronemyer's advice was actually that the success of a malpractice claim hinged on whether the Tendlers got away with "what [they] knew was a false allegation." Stroock is mistaken, because it again confuses an erroneous legal conclusion—that Stroock represented Wiz—with "false declarations," of which there were none.[28]

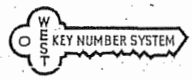
In sum, while the Rosen firm may be faulted for bringing an action based on a theory it knew or should have known was groundless, no evidence supports the claims the Tendlers failed to disclose all the facts, made false factual allegations, or otherwise acted in bad faith in following the firm's advice. Accordingly, summary judgment in their favor was appropriate.

DISPOSITION

The judgment entered in favor of the Tendlers is affirmed. The order granting Rosen's special motion to strike is reversed, and the trial court is directed to vacate its order and enter an order denying the motion. The Tendlers are to recover their costs on appeal, and Stroock is to recover from Rosen the costs attributable to its appeal of the order granting the special motion to strike.

We concur: COOPER, P.J., and RUBIN, J.

28. Stroock makes two other arguments. One is that the trial court erroneously based its rulings on expert opinions proffered by the Tendlers on probable cause, when it is well-established that expert testimony on the legal issue of probable cause is improper. Assuming the expert declarations were addressed to the issue of probable cause, which the Tendlers dispute, the argument is irrelevant, as the trial court's grant of summary judgment was explicitly based solely on the Tendlers' affirmative defense of reliance on the advice of counsel. Stroock also contends the trial court should have granted Stroock's request for a continuance to allow additional discovery, particularly depositions, under Code of Civil Procedure section 437c, subdivision (h), even though "considerable written discovery" had already been conducted. As of the date of the summary judgment hearing on November 21, 2000, Stroock had noticed no depositions, even during an unrelated six-week postponement of the hearing. We see no error in the trial court's denial of Stroock's request.



CALIFORNIA SLURRY SEAL ASSOCIATION, Plaintiff and Appellant,

v.

DEPARTMENT OF INDUSTRIAL RELATIONS et al., Defendants and Respondents,

Southern California District Council of Laborers et al., Interveners and Respondents.

No. G027691.

Court of Appeal, Fourth District, Division 3.

May 21, 2002.

Association of slurry seal contractors filed petition for writ of mandate to challenge decision of Department of Industrial Relations that rescinded prevailing wage

determination for slurry seal workers. The Superior Court, Orange County, No. 00CC02849, John C. Woolley, J., denied writ petition. Association appealed. The Court of Appeal, Moore, J., held that: (1) association had not failed to exhaust its administrative remedies, but (2) Department followed appropriate procedures in rescinding prevailing wage determination.

Affirmed.

1. **Labor Relations ⇐1450**

Under statutory provision establishing method for challenging prevailing rate specified in call for bids, to challenge rescission of prevailing wage determination by Department of Industrial Relations, association of slurry seal contractors was not required to file verified petition to review determination of rate, where there was no call for bids and association did not seek to undo any contract for public work. West's Ann.Cal.Labor Code § 1773.4.

2. **Labor Relations ⇐1451.1**

Association of slurry seal contractors sufficiently exhausted its administrative remedies before seeking judicial review of decision of Department of Industrial Relations to rescind one prevailing wage determination for slurry seal workers without rescinding a second determination; association sent two letters to Department requesting review of both prevailing wages, and Department made clear that it chose not to entertain request to review second determination. West's Ann.Cal.Labor Code § 1773.4.

3. **Labor Relations ⇐1268**

Authority of Department of Industrial Relations pertaining to prevailing wage determinations is quasi-legislative and it has legislative discretion with respect to such decisions.

4. **Mandamus ⇐72**

Mandamus cannot be applied to control discretion as to a matter lawfully entrusted to a governmental agency.

5. **Mandamus ⇐12**

Mandate may lie to compel an exercise of discretion but not to control it, i.e. to order its exercise in a particular manner, unless discretion can be lawfully exercised only one way under the facts.

6. **Mandamus ⇐176**

In granting mandamus relief, court's judicial power relative to legislative acts is severely circumscribed.

7. **Labor Relations ⇐1451.1**

Court independently reviews issues of law involving decisions of Department of Industrial Relations pertaining to the prevailing wage for workers; court will only overturn the Department's quasi-legislative decision if it is arbitrary or capricious or in conflict with the clear terms of the Department's statutory mandate.

8. **Labor Relations ⇐1450**

In rescinding prevailing wage for slurry seal workers, rather than modifying it, which resulted in requirement that entire slurry seal industry pay another prevailing wage, Department of Industrial Relations did not violate statute setting forth method for establishing prevailing rates; Department determined that there was no current collective bargaining agreement setting rates for slurry seal workers per se, and Department then considered additional data. West's Ann.Cal.Labor Code § 1773.

9. **Labor Relations ⇐1268**

Statute setting forth methodology Director of Industrial Relations is required to utilize in determining prevailing wage rate for public work does not require a wage survey, but instead gives Depart-

ment of Industrial Relations discretion to consider one. West's Ann.Cal.Labor Code § 1773.9(b)(1).

10. Labor Relations ⇐1268

Though the Department of Industrial Relations must not determine a prevailing wage before considering relevant collective bargaining agreements, prevailing wages on federal projects, and other pertinent information, nothing in the statutory scheme prevents it from determining that the information provided to it is insufficient to support a wage determination, or that new information has eliminated the basis for an existing determination. West's Ann.Cal.Labor Code § 1773 et seq.

Musick, Peeler & Garrett, Stuart D. Tochner, Los Angeles, and Bethany A. Pelliconi for Plaintiff and Appellant.

John M. Rea, San Francisco, and Anthony Stefan Mischel for Defendants and Respondents Department of Industrial Relations and Stephen J. Smith, as Director, etc.

Reich, Adell, Crost & Cvitan, Alexander B. Cvitan and Esteban Lizardo, Los Angeles, for Interveners and Respondents Southern California District Council of Laborers and Laborers' International Union of North America, Highway & Street Stripers, Local 1184, AFL–CIO.

OPINION

MOORE, J.

At the request of a labor organization, the Department of Industrial Relations (the Department) evaluated whether to rescind a 10–year–old prevailing wage determination for slurry seal workers. The Department rescinded the determination, upon concluding it no longer represented prevailing wage. When the Department did so, another preexisting prevailing wage determination, based on a collective bargaining agreement and previously applicable to only a small segment of the industry, became the prevailing wage determination applicable to all Southern California slurry seal workers.

An association of slurry seal contractors filed a petition for a writ of mandate to challenge the rescission. It claimed the Department abused its discretion in rescinding one prevailing wage determination when the net effect was to supplant it with a second prevailing wage determination which did not in fact represent prevailing wage. The trial court denied the writ petition, holding the Department had not abused its discretion and the association had failed to exhaust its administrative remedies.

The association appeals, reiterating that the Department abused its discretion, and contending the trial court erred in concluding otherwise and in determining the association had failed to exhaust its administrative remedies. Because we agree the Department did not abuse its discretion in rescinding the first prevailing wage determination, we affirm.

I

FACTS

In 1989, the Department issued General Prevailing Wage Determination No. SC–830–X–70–89–1 (the Slurry Seal Workers' Determination) establishing wage rates for various categories of slurry seal workers. The wage rates ranged from $7.99 to $15.15 for workers in Orange, Riverside and San Bernardino Counties.

Subsequently, the Southern California District Council of Laborers and Laborers' International Union of North America,

Highway & Street Stripers, Local 1184, AFL–CIO (the Laborers) requested a wage determination for slurry seal workers based upon the Laborers' collective bargaining agreement. In 1995, the Department granted the request and added slurry seal work into the wage determination affecting the Laborers, then designated as No. SC–23–102–2–96–1 (the Laborers' Determination),[1] at the rate set forth in the Laborers' collective bargaining agreement. Since that time, the Department has published two distinct wage determinations for slurry seal work—the Slurry Seal Workers' Determination and the Laborers' Determination. According to the California Slurry Seal Association (the Association), the Department has periodically increased the slurry seal wage rate in the Laborers' Determination, to correspond with increases set forth in the Laborers' collective bargaining agreement. As of 1999, the slurry seal wage rate under the Laborers' Determination was $18.18.

By letter dated March 5, 1999, the Laborers requested the Department to rescind the Slurry Seal Workers' Determination. The Laborers asserted that the underpinnings of the 10–year–old determination no longer supported it for numerous reasons and the wage rates contained therein were no longer the prevailing rates. Shortly thereafter, the Association, claiming its contractor members performed nearly 98 percent of all California slurry seal work and employed approximately 95 percent of all California slurry seal workers, sent a letter to the Department, requesting it to conduct a wage survey before taking action on the Laborers' request.

The Department set a hearing on the matter. The Association then sent the Department another letter, in which it reiterated its request for a wage survey and indicated there was a need for review of not only the Slurry Seal Workers' Determination, but the Laborers' Determination as well. The Association subsequently sent further correspondence to the Department in which it more clearly articulated a request for the Department to review both of the determinations. The Department chose to limit the scope of the hearing to a review of the Slurry Seal Workers' Determination.

The hearing took place in December 1999. The Association and the Laborers each submitted evidence. The Association characterizes its evidence as "showing that its members were not paying the rate of $18.18 set forth in the Laborers' [ ] Determination."

In February 2000, the Department issued a 20–page memorandum of decision pursuant to which it rescinded the Slurry Seal Workers' Determination because the wage rates set forth therein were not actually prevailing rates. In the memorandum of decision, the Department stated that upon rescission of the Slurry Seal Workers' Determination, slurry seal work would have to be paid in accordance with the Laborers' Determination, which remained in effect. In response to the Association's argument that the Laborers' Determination did not represent prevailing wage either, the Department made several com-

1. The identifying number of the wage determination premised in relevant part on the wage rate for slurry seal work as set forth in the Laborers' collective bargaining agreement has changed from time to time. It was No. SC–23–102–2–96–1 initially and No. SC–23–102–2–99–1 at the time of the Department's decision at issue here. The California Slurry Seal Association informs us the identifier was subsequently changed to No. SC–23–102–2–2000–1. The applicable determinations shall be referred to hereinafter collectively as the "Laborers' Determination."

ments. Among other things, it stated that the accuracy of the Laborers' Determination was not the subject of the proceedings then before it, the Laborers' Determination was properly supported by a current collective bargaining agreement and a predetermined federal rate, and Labor Code section 1773 required the Department to fix a rate *not less than* the prevailing rate (implying a higher rate was permissible).

The Association then filed an application for an order to show cause re preliminary injunction and a petition for a writ of mandate to challenge the action of the Department and its director, Stephen J. Smith, in rescinding the Slurry Seal Workers' Determination, with the effect of making the Laborers' Determination apply to the entire Southern California slurry seal industry. The Laborers filed a motion for leave to intervene, which was granted. The trial court denied both the application for a preliminary injunction and the writ petition. It found that the Department had not abused its discretion in rescinding the Slurry Seal Workers' Determination and that the Association had failed to exhaust its administrative remedies. The Association filed a notice of appeal from the judgment and related orders and rulings.

II

DISCUSSION

A. *Exhaustion of Administrative Remedies*

1. *Background*

In its opposition to the Association's petition for a writ of mandate, the Department said the Association sought to "attack the accuracy" of the Laborers' Determination, but had failed to exhaust its administrative remedies. It stated that the statutory scheme has provided only one method for launching the attack—the filing of a petition pursuant to Labor Code section 1773.4, and the Association had filed no such petition. In ruling on the petition, the trial court found the Association had failed to exhaust its administrative remedies.

The Association appears to interpret this finding as meaning that the trial court was precluded from reaching the merits of any portion of the petition, not just any argument that might be construed as a direct challenge to the Laborers' Determination. The Department does not view it this way. It asserts the finding pertained only to the failure to exhaust administrative remedies with respect to a challenge to the Laborers' Determination, not with respect to a challenge to the rescission of the Slurry Seal Workers' Determination.

The record is unclear. The judgment gives two grounds for denying the writ petition: (1) the Association did not exhaust its administrative remedies; and (2) the Department did not abuse its discretion. It does not specify that the failure to exhaust ground applies only to issues pertaining to the Laborers' Determination itself. While that intention might seem obvious to the Department, because of the way the Department framed its opposition to the writ petition, this is not free from doubt. As the Laborers put it, "the Association presented a petition which focused on the Laborers' Determination, which was not reviewed in the underlying administrative process. As such, the trial court correctly determined that it was unable to reach the merits of the petition as it was presented by the Association." Under either interpretation, however, the doctrine of exhaustion of administrative remedies does not bar judicial review of the matters the Association raises, as we shall explain.

2. Labor Code provisions

[1] Labor Code section 1771 [2] requires that "not less than the general prevailing rate of per diem wages" be paid on public works projects exceeding $1,000. "The body awarding any contract for public work ... shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract." (§ 1773.2.) In order to correctly state the prevailing rate in the call for bids and in the bid specifications, the awarding body shall obtain the requisite information from the Director of the Department of Industrial Relations. (§ 1773.) Certain parties are permitted to challenge the prevailing rate quoted in the call for bids. (§ 1773.4.)

More particularly, section 1773.4 provides in pertinent part: "Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code." This provision clearly establishes the method for challenging a prevailing rate specified in a call for bids. The Department sees the application of section 1773.4 as being even broader, applying in the case before us even when no party sought to challenge the rates set forth in a call for bids.

In support of its position, the Department cites to *Hoffman v. Pedley School Dist.* (1962) 210 Cal.App.2d 72, 26 Cal. Rptr. 109. In *Hoffman*, a union representative filed a complaint to challenge the wage rate being paid under a public works contract. But he had not filed a section 1773.4 petition challenging the prevailing rate as stated in the call for bids. Rather, the representative omitted that step and simply filed a lawsuit four months after the call for bids was published and two months after a contract for the public work had been signed. His motion for a temporary restraining order to block the expenditure of public funds on the contract was denied, and the appellate court affirmed on the basis of failure to exhaust administrative remedies. Clearly, the statute was designed to protect against exactly the sort of challenge the union representative brought. (*Id.* at p. 75, 26 Cal.Rptr. 109.) As the court there explained, the statutory "procedure is reasonably prompt and efficacious and eliminates unconscionable delays in getting public work done." (*Id.* at p. 76, 26 Cal.Rptr. 109.) It sets forth a particular manner and a specific period of time in which a challenge may be made, and limits the number of days for the Department to render its decision. The purpose is for the rates as determined by the Department in response to the petition to be included in the contract, so the work thereunder can be performed promptly. (*Id.* at pp. 75–76, 26 Cal.Rptr. 109; § 1773.4.)

But in the case before us, there was no call for bids and the Association does not seek to undo any contract for public work. While the section 1773.4 procedures dictate the manner for challenging a wage rate quoted in a call for bids, they do not specify the procedures to be followed in a situation such as this, where the Department had already undertaken the review of the prevailing rate for slurry seal work in response to the informal request of an-

2. All subsequent statutory references are to the Labor Code, unless otherwise indicated.

other party. Furthermore, we observe the Department did not require the Laborers to file a section 1773.4 petition in bringing their challenge.

3. Department proceedings

[2] The Laborers are the ones who initiated these proceedings, not the Association. They are the ones who chose to challenge the prevailing rate established by the Slurry Seal Workers' Determination. They did not follow section 1773.4 in commencing that challenge. There was no call for bids at issue and the Laborers filed no petition. They sought the Department's review of the Slurry Seal Workers' Determination by the simple mechanism of a two-page letter requesting rescission. The Association, playing by the same rules as the Laborers, sent the Department a letter of its own requesting the Department to conduct a wage survey before taking action on the matter. The Department, in its discretion, was receptive to the letter-writing method of challenge and notified the parties of its intent to hold a hearing.

Two weeks later, the Association sent the Department a supplemental letter, stating that a hearing limited to the issue whether to rescind the Slurry Seal Workers' Determination would not resolve the problems with the Department's prevailing wage determinations pertaining to slurry seal work. The Association noted that the apposite prevailing wage determinations included both the Slurry Seal Workers' Determination and the Laborers' Determination and that "none of the rates listed in either of those determinations correctly reflect[ed] the current prevailing wages for slurry seal workers in California." In effect, this letter was a request, made in the same form and manner as that utilized by the Laborers to challenge the Slurry Seal Workers' Determination, for the Department to reevaluate the Laborers' Determination at the same time as it reevaluated the Slurry Seal Workers' Determination.

About three months later, the Department sent a formal notice rescheduling the hearing date and detailing the type of evidence the parties should be prepared to present. Absent was any indication that the Department was going to entertain the Association's request as it had the Laborers' request. Consequently, the Association sent further correspondence to the Department in which the Association requested clarification concerning the scope of the hearing "because there [were then] two prevailing wage determinations that ostensibly [applied] to slurry seal workers in Southern California"—the Slurry Seal Workers' Determination and the Laborers' Determination, the latter allegedly inapplicable to 98 percent of all slurry seal work performed in California. The Association asserted it was "not possible to make a decision on the rescission of [the Slurry Seal Workers' Determination] without consideration of whether the [Laborers' Determination] correctly [listed] the prevailing wage for slurry seal workers." The Association further claimed that "since neither of these wage determinations correctly [listed] the prevailing wage for slurry seal workers, a 'rescission' without a modification would be arbitrary and capricious."

After some discussion between the Association and the Department, the Department sent the Association a letter confirming the scope of the hearing. In its letter, the Department's hearing officer reiterated that the participants would be afforded an opportunity to address whether the Slurry Seal Workers' Determination should or should not be rescinded. He also acknowledged that the Association sought modification of that determination, rather than rescission, and stated that the Association would be allowed to present

evidence and argument in support of its position. By this letter, the Department made clear that it chose not to entertain the Association's request to review the Laborers' Determination at the same time as it undertook review of the Slurry Seal Workers' Determination.

No one challenges the Department's discretion in making this choice. Nonetheless, we can see no more the Association could have done to encourage the Department to consider the broader prevailing rate issues as part of the review process it had already undertaken. As an integral part of the proceedings, the Association raised the issue of modification of the Slurry Seal Workers' Determination, pointing out that rescission without modification could result in the Laborers' Determination becoming applicable to the entire Southern California slurry seal industry. We can see no reason why the Association would have been required to find a call for bids to challenge in order to draw this matter to the Department's attention, when the matter was, in essence, already pending before it.[3]

Moreover, before the Slurry Seal Workers' Determination was rescinded, the Association had no reason to file a petition challenging the wage rates contained in the Laborers' Determination. The Laborers' Determination was not applicable to the Association's members until the Slurry Seal Workers' Determination was rescinded without modification. Only then did the Laborers' Determination become a matter of concern to the Association. The Association tried to anticipate this result by drawing the matter to the Department's attention before the situation arose, but to no avail.

4. Issues on appeal

Perhaps more importantly, the Association is not seeking rescission or modification of the Laborers' Determination; it is attacking the Department's decision to rescind the Slurry Seal Workers' Determination without modification, under the totality of the circumstances. The Association frames one legal issue: Did the Department violate statutory mandates, and thus abuse its discretion, in rescinding the Slurry Seal Workers' Determination instead of modifying it to reflect the wage rate actually prevailing, when doing so had the effect of making the preexisting Laborers' Determination applicable to the entire Southern California slurry seal industry?

Neither the Department nor the Laborers contend judicial review of the power of the Department to rescind the Slurry Seal Worker's Determination without modification is barred by the doctrine of exhaustion of administrative remedies. And the scope of the Department's power in this regard is the thrust of this appeal. There is no question the Association's challenge to the Department's compliance with relevant Labor Code provisions in the rescission of the Slurry Seal Workers' Determination is subject to judicial review.

B. Substantive Issues

1. Introduction

[3–6] The Department's authority pertaining to prevailing wage determinations

3. Nonetheless, after it filed its petition for a writ of mandate in the proceedings below, the Association filed petitions challenging the rates for slurry seal work quoted in the calls for bids published by three separate awarding bodies. The Department denied each of those petitions. The Association then filed a petition for a writ of mandate in Riverside County Superior Court (*California Slurry Seal Association v. Department of Industrial Relations* (Super. Ct. Riverside County, 2001, No. RIC 350514)), challenging those three denials. The writ petition was denied by judgment filed April 9, 2001.

is quasi-legislative and it has legislative discretion with respect to such decisions. (*Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1467–1468, 49 Cal.Rptr.2d 208.) The Association here seeks a writ of mandate compelling the Department to exercise that discretion in a certain way. But " 'mandamus cannot be applied to control discretion as to a matter lawfully entrusted to a governmental agency. [Citation.]' " (*Id.* at p. 1468, 49 Cal. Rptr.2d 208.) " 'Mandate may lie to *compel* an exercise of discretion but not to *control* it, i.e. to order its exercise in a particular manner [citation], unless discretion can be lawfully exercised only one way under the facts [citation].' (Italics in original.)" (*Id.* at p. 1469, 49 Cal.Rptr.2d 208.) Our " 'judicial power relative to legislative acts is severely circumscribed.' [Citation.]" (*Ibid.*)

[7] We independently review issues of law involving the Department's decision pertaining to the prevailing wage for slurry seal workers. (*International Brotherhood of Electrical Workers v. Aubry* (1996) 41 Cal.App.4th 1632, 1635–1636, 49 Cal. Rptr.2d 759.) "We will only overturn the [Department's] quasi-legislative decision if it is 'arbitrary or capricious' or in conflict with the clear terms of the [Department's] statutory mandate. [Citations.]" (*Id.* at p. 1636, 49 Cal.Rptr.2d 759.)

2. Labor Code section 1770 et seq.

The Association claims the Department violated the applicable statutory provisions, and thus abused its discretion, when it rescinded the Slurry Seal Workers' Determination while leaving the Laborers' Determination in place to fill the void. It cites to section 1770 et seq.

Section 1770 mandates that "[t]he Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4." The Association maintains that, in making the Laborers' Determination applicable to the entire Southern California slurry seal industry, the Department contravened the mandates of both section 1773 and related section 1773.9.

3. Labor Code section 1773

[8] With respect to prevailing rates, section 1773 provides in pertinent part: "In determining the rates, the Director of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and the rates that may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved. The rate fixed for each craft, classification, or type of work shall be not less than the prevailing rate paid in the craft, classification, or type of work."

The Association contends the Department violated this provision by rescinding the Slurry Seal Workers' Determination, rather than modifying it, and thereby requiring the entire Southern California slurry seal industry to pay the $18.18 wage rate listed in the Laborers' Determination, when that was not a prevailing wage. On a careful reading of section 1773, however, we disagree.

Section 1773 first requires the Department to "ascertain and consider the applicable wage rates established by collective

bargaining agreements...." It did so. It determined there was no current collective bargaining agreement setting rates for slurry seal workers per se, but observed that slurry seal work was included in certain broader worker classifications covered by the Laborers' collective bargaining agreement.

Assuming the Association was correct and the rates set forth in the Laborers' collective bargaining agreement did not actually prevail in the locality, or adopting the Department's viewpoint that there was no applicable collective bargaining agreement at all, section 1773 next directed the Department to consider additional data. Section 1773 continues: "Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned...." This is exactly what the Department did. Before the hearing, the Department sent the parties a formal notice stating they should be prepared to present information pertaining to slurry seal work, including but not limited to: (1) the name, location, owner, type and duration of each public and private project performed in the preceding 12 months in specified geographic areas; (2) peak employment data from each public and private project worked in the preceding 12 months in the specified geographic areas; (3) information regarding trust fund or employer paid benefits for employees on each project; and (4) payroll documents related to each project. In response, both parties provided their evidence to the Department and the Department considered the same. Thus, the Association has not demonstrated any failure on the part of the Department to follow the mandates of section 1773.

4. Labor Code section 1773.9

The methodology the Director of Industrial Relations is required to utilize in determining the prevailing wage rate is set forth in section 1773.9, subdivision (b). (§ 1773.9, subd. (a).) At issue is the following portion of subdivision (b): "The general prevailing rate of per diem wages includes all of the following: [¶] (1) The basic hourly wage rate being paid to a majority of workers engaged in the particular craft, classification, or type of work within the locality and in the nearest labor market area, if a majority of the workers is paid at a single rate. If no single rate is being paid to a majority of the workers, then the single rate being paid to the greatest number of workers, or modal rate, is prevailing. If a modal rate cannot be determined, then the director shall establish an alternative rate, consistent with the methodology for determining the modal rate, by considering the appropriate collective bargaining agreements, federal rates, rates in the nearest labor market area, or other data such as wage survey data."

First, the Association argues section 1773.9 "prohibit[s] the Department from maintaining wage determinations that do not reflect the wage rates that are actually being paid to a majority or the greatest number of workers performing work in any given classification." But the Association fails to recognize that section 1773.9 provides a step-by-step *methodology* for determining the prevailing rate and that all appearances are that the Department followed the individual steps as required.

Step one required the Department to determine whether a basic hourly wage rate was being paid to a majority of workers. It determined this was not the case. In fact, based on the certified payroll records the Association submitted, the Department found the Association's members paid their 200–plus slurry seal employees

more than 100 different basic hourly rates. The Association does not challenge this finding.

Step two provided that, if no single rate was being paid to the majority of workers, then the single rate being paid to the greatest number of workers (the "modal" rate) would be the prevailing rate. The Department determined that the information provided indicated there was no statistically meaningful modal rate, either. Despite the unwieldy array of hourly rates paid by the members of the Association, the Association argues the Department abused its discretion in failing to set the prevailing wage at the rate paid to the greatest number of workers. It contends that "if there is a single wage rate that is common to as few as two or three employees, that rate could constitute a modal rate even if 100 different rates are paid to the remaining employees performing slurry seal work."

Yet the Association, on appeal, identifies no single rate common to as few as two or three employees in a given classification. It appears the Association, when making its presentation to the Department, asserted there was a determinable modal rate for shuttlepersons in certain counties and for squeegeepersons in other counties. In rejecting the assertion, the Department explained at length why the documentation presented in support of it was inconsistent and unreliable. Among other things, the Department cited the testimony of one Association member to the effect that its certified payroll records did not in fact accurately reflect the basic hourly wage paid to its employees. In addition, the Department pointed out that some of the Association's members had failed to produce records for wages paid on private projects, and some had not submitted records for the full 12–month period requested. Given these and other cited irregularities in the evidence, we cannot conclude the Department abused its discretion in determining there was no ascertainable modal rate.

Since no modal rate could be determined, the final step under section 1773.9, subdivision (b)(1) was for the Department to "establish an alternative rate ... by considering the appropriate collective bargaining agreements, federal rates, rates in the nearest labor market area, or other data such as wage survey data." It did indeed consider additional information, as required. As already stated, the Department considered whether there was any applicable collective bargaining agreement, and concluded there was none, except to the extent the Laborers' collective bargaining agreement included slurry seal workers within certain classifications. It also considered whether there were any relevant federal rates. It noted that the United States Department of Labor (DOL) did not have a separate determination for Southern California slurry seal workers, but that those workers were covered by DOL's General Decision Number CA990033. The Department further explained that General Decision Number CA990033 established the rates contained in the Laborers' collective bargaining agreement as prevailing. In addition, the Department considered the information provided by the Association and the Laborers. It fully complied with the section 1773.9 requirements concerning the consideration of information in the decision-making process.

The Association disagrees. It argues section 1773.9 required the Department to conduct a wage survey and it seeks a writ of mandate compelling the Department to perform a survey of the wages the Association's members were paying as of December 1999. The Association contends that because the collective bargaining agree-

ment applied to only a fraction of the industry, the wage rates therein did not represent prevailing wage and the Department was not at liberty to base its prevailing wage determination thereon. The Association then leaps to the conclusion a wage survey was required because a prevailing wage determination could not be based on the collective bargaining agreement. As the Association sees it, wage surveys are mandatory when a modal rate cannot be ascertained from appropriate collective bargaining agreements.

[9] But that very simply is not what the statute says. When no modal rate can be determined, section 1773.9, subdivision (b)(1) requires the Department to consider other information, including, inter alia, collective bargaining agreements, "or other data such as wage survey data." The statute clearly uses disjunctive language, inasmuch as it contains the word "or." In other words, it does not *require* a wage survey, but gives the Department the discretion to consider one. (Cf. *Pipe Trades Dist. Council No. 51 v. Aubry, supra,* 41 Cal.App.4th at p. 1467, 49 Cal.Rptr.2d 208 [language of § 1773 makes clear Department has substantial discretion as to sources it consults in determining prevailing wage].) Indeed, the Association cites no case construing the statute as requiring a wage survey.

While section 1773.9 does not require consideration of a wage survey, it encourages consideration of appropriate collective bargaining agreements. The Association, however, maintains it was unconstitutional for the Department to base its prevailing wage determination on a wage rate established by a collective bargaining agreement applicable to a fraction of the industry. As the Association views it, by doing so, the Department delegated to the Laborers its responsibility to maintain prevailing wage determinations in accordance with the applicable Labor Code provisions. (See *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 354, 28 Cal.Rptr.2d 550. [delegation of legislative rulemaking authority to private parties with pecuniary interest may be unconstitutional].)

But as we have explained, the record indicates the Department complied with the statutory mandates in determining prevailing wage in this matter. The Department did not delegate its responsibility. Rather, it exercised its statutory discretion to consider certain information, including the collective bargaining agreement, in its evaluation process. The final determination was that of the Department, not the Laborers. (See *Independent Roofing Contractors v. Department of Industrial Relations, supra,* 23 Cal.App.4th at pp. 354–355, 28 Cal.Rptr.2d 550 [no unconstitutional delegation of authority when nothing in record suggests that Department failed to exercise legislative discretion in decision to eliminate wage determination or that private party dictated decision].)

5. Additional Arguments

The Association also contends the Department's own summary of the evidence proves the Association's point—that $18.18 was not the prevailing wage, because it was not what the Association members were paying. The Department summarized the wage information provided by each of eight Association members. As stated above, the Department found the Association's members paid their slurry seal employees more than 100 different basic hourly rates. While the Department's summary of those rates shows that the members collectively paid at many rates less than $18.18 for various worker classifications, it also shows that six out of eight of the members paid at certain rates

higher than $18.18. A number of the rates were considerably higher. Indeed, one Association member paid up to $36.88 for certain unidentified classifications.

The Department considered more than 100 different basic hourly rates. As it did so, it grappled with incomplete and inconsistent evidence. At the end of the day, it concluded there was insufficient evidence upon which to base a revised determination. We can hardly substitute our judgment for that of the Department and say what figure it should have picked. (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212–213 & fn. 30, 157 Cal.Rptr. 840, 599 P.2d 31.)

Even though the Association does not propose a figure either, it insists the Department abused its discretion in concluding the Slurry Seal Workers' Determination was obsolete. In an effort to cast blame on the Department, the Association suggests the reason for any obsolescence was the failure of the Department to do a wage survey in the years since the adoption of the Slurry Seal Workers' Determination. Yet at the same time, it attempts to suggest that the determination was not in fact obsolete. This is a stunning suggestion considering the Association states in its opening brief that the evidence it submitted showed "most [of its] members were paying their employees wage rates that exceeded those in the Slurry Seal [Workers'] Determination." It also admitted in pre-hearing correspondence with the Department that none of the rates listed in the Slurry Seal Workers' Determination correctly reflected prevailing wage rates for California slurry seal workers. The Association's change of position on this point is untenable.

6. Conclusion

[10] "Though the Department must not determine a prevailing wage before considering relevant collective bargaining agreements, prevailing wages on federal projects, and other pertinent information, nothing in the statutory scheme prevents it from determining that the information provided to it is insufficient to support a wage determination, or that new information has eliminated the basis for an existing determination. Appellant['s] claim that the Department's act was arbitrary for failure to discover a basis for a different determination is therefore without merit." (*Independent Roofing Contractors v. Department of Industrial Relations, supra*, 23 Cal.App.4th at p. 359, 28 Cal.Rptr.2d 550 [Department's rescission of outdated prevailing wage determination upheld].)

The point of the matter is that the Department concluded the evidence clearly showed the rates set forth in the Slurry Seal Workers' Determination, then over ten years old, were no longer prevailing wage. The issue was whether to rescind that determination, and the Department exercised its discretion to do so. True, that had the effect of making $18.18 the prevailing rate, because the Laborers' Determination then became the only prevailing wage determination for Southern California slurry seal workers remaining in effect. But the Department is empowered, by section 1773, to fix a rate "for each craft, classification, or type of work [that] shall be *not less than* the prevailing rate paid in the craft, classification, or type of work." (Italics added.) This appears to be exactly what the Department did.

The Association insists the Department violated "the statutory mandate of section 1773, which requires that the [Department] not simply accept a rate stated in a collective bargaining agreement at face value, but also determine whether the rate in question is 'actually prevailing' before

authorizing it. [Citations.] [Fn. omitted.]" (*International Brotherhood of Electrical Workers v. Aubry, supra*, 41 Cal.App.4th at p. 1639, 49 Cal.Rptr.2d 759.) The Association overlooks two points. First, the issuance of the Laborers' Determination is not at issue. The decision to issue that determination was made years ago. Second, to the extent we construe the Laborers' Determination as newly establishing the prevailing rate, in the sense that it is being newly applied to the largest segment of the industry, it remains supported by a current collective bargaining agreement and a predetermined federal rate. Moreover, the Department considered the additional data supplied by the Association and the Laborers and followed the requisite statutory methodology in arriving at its result. The data supplied by the Association very simply did not compel the Department to select a figure other than the one contained in the Laborers' Determination. At any rate, if indeed the Association is correct and $18.18 did not represent prevailing wage at the time the Department rendered its decision, it is a result that might have been avoided had the Association provided more complete and carefully prepared documentation.

III

REQUESTS FOR JUDICIAL NOTICE

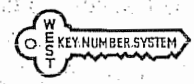
The Association filed a request for judicial notice of certain documents prepared by the Department. The request is granted. (Evid.Code, § 452, subd. (h).) This court will take notice of the documents attached to the Association's request filed on April 13, 2001. The Department filed a request for judicial notice of the judgment filed in *California Slurry Seal Association v. Department of Industrial Relations* (Super. Ct. Riverside County, 2001, No. RIC 350514) and a supplemental request for judicial notice. The request as supplemented is granted. (Evid.Code, § 452, subd. (d).) This court will take notice of the document attached to the supplemental request for judicial notice the Department filed on March 8, 2002.

IV

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

WE CONCUR: SILLS, P.J., and RYLAARSDAM, J.



Steven WHITE, Plaintiff and Appellant,

v.

Gray DAVIS, as Governor, etc., et al., Defendants and Respondents.

Howard Jarvis Taxpayers Association et al., Plaintiffs and Respondents,

v.

Kathleen Connell, as Controller, etc., Defendant and Appellant;

California State Employees Association, Local 1000, SEIU, AFL–CIO, CLC et al., Interveners and Appellants.

[And three other cases.*].

No. B122178 & B123992.

Court of Appeal, Second District, Division 4.

May 29, 2002.

Taxpayer brought action for declaratory and injunctive relief against state offi-

* *Connell v. Superior Court* (B124395); *California State Employees Assn. v. Superior Court* (B124397); *California Correctional Peace Officers Assn. v. Superior Court* (B124398).

190 Cal.App.3d 521

[521] CARMEL VALLEY FIRE PROTECTION DISTRICT et al., Petitioners and Respondents,

v.

STATE of California et al., Respondents and Appellants.

RINCON DEL DIABLO MUNICIPAL WATER DISTRICT et al., Petitioners and Respondents,

v.

STATE of California et al., Respondents and Appellants.

COUNTY OF LOS ANGELES, Petitioner and Respondent,

v.

STATE of California et al., Respondents and Appellants.

Civ. B006078, Civ. B011941, Civ. B011942.

Court of Appeal, Second District, Division 5.

Feb. 19, 1987.

As Modified March 10, 1987.

Review Denied May 14, 1987.

Consolidated appeals arose from actions of the Los Angeles Superior Court, Norman L. Epstein, Jack T. Ryburn, JJ., concerning unsuccessful efforts of local agencies to secure reimbursement of state-mandated costs. The Court of Appeal, Eagleson, J., held that: (1) State waived its right to contest findings of Board of Control concerning whether costs incurred by local agencies were state-mandated; (2) State was collaterally estopped from attacking Board's findings; (3) executive orders requiring local governments to purchase protective equipment and clothing for fire fighters constituted type of "program" that was subject to constitutional imperative of subvention by State; (4) trial court order did not violate separation of powers doctrine; (5) legislature's plenary power to regulate worker safety did not affect rights of local agencies to reimbursement; and (6) claims were not time barred.

Judgment modified and as modified affirmed.

1. **Estoppel** ⇐52.10(2)

Waiver occurs where there is existing right, actual or constructive knowledge of its existence, and either actual intention to relinquish it, or conduct so inconsistent with intent to enforce right as to induce reasonable belief that it has been waived.

2. **Estoppel** ⇐52.10(4)

Doctrine of waiver applies to rights and privileges afforded by statute.

3. **States** ⇐184.34

State's failure to seek judicial review of State Board of Control's findings in test claim asserted by county for reimbursement for protective clothing and equipment purchased for its fire fighters, together with State's acquiescence in Board's findings by seeking appropriation to satisfy validated claims, waived State right to contest Board's findings. West's Ann.Cal.C.C.P. §§ 338, subd. 1, 1094.5; West's Ann.Cal.Rev. & T.Code §§ 2253.5, 2255(a) (Repealed).

4. **Administrative Law and Procedure** ⇐501

Elements of administrative collateral estoppel are that agency acted in judicial capacity, that it resolved disputed issues properly before it, and that all parties were provided with opportunity to fully and fairly litigate their claims.

5. **Administrative Law and Procedure** ⇐501

States ⇐123

State was collaterally estopped from attacking State Board of Control's findings in test claim asserted by county seeking reimbursement from State for protective clothing and equipment purchased by county pursuant to executive order; at time of hearings, Board proceedings were sole ad-

ministrative remedy available to local agency seeking reimbursement for state-mandated costs, hearings were adversarial in nature and allowed for presentation of evidence by claimant, Department of Finance, and any other affected agency, and issues in case were fully litigated.

6. **Administrative Law and Procedure** ⇐501

States ⇐123

For administrative collateral estoppel purposes, state agencies required by writ of mandate to reimburse county for cost of protective clothing and equipment purchased for fire fighters pursuant to executive order were in privity with those state agencies that testified before State Board of Control hearing on issue of reimbursement of costs.

7. **Judgment** ⇐665, 713(1), 714(1)

Prior judgment on question of law decided by court is conclusive in subsequent action between same parties where both causes involved arose out of same subject matter or transaction, and where holding judgment to be conclusive will not result in injustice.

8. **Administrative Law and Procedure** ⇐501

Questions of law decided by administrative agency invoke collateral estoppel doctrine only when determination of conclusiveness will not work injustice.

9. **Estoppel** ⇐52.10(4)

Doctrine of waiver is inapplicable if litigant has no actual or constructive knowledge of his rights.

10. **States** ⇐123

Executive orders mandating purchase of protective clothing for fire fighters were type of "program" subject to constitutional imperative of subvention when legislature or state agency mandates new program or higher level of service on any local government. West's Ann.Cal. Const. Art. 13B, § 6.

See publication Words and Phrases for other judicial constructions and definitions.

11. **States** ⇐123

Finding either that state agency has mandated program to carry out governmental functions of providing services to public, or that law has been passed which, to implement state policy, imposes unique requirement on local government and does not apply generally to all residents and entities of State, is required to trigger imperative of subvention under constitutional article that provides when legislature or state agency mandates new program or higher level of service on any local government, State shall provide subvention of funds to reimburse local government. West's Ann.Cal. Const. Art. 13B, § 6.

12. **Constitutional Law** ⇐70.1(12)

Court order, directing that funds already appropriated by legislature for State Department of Industrial Relations for Prevention of Industry Injuries and Deaths of California Workers be spent to reimburse county for state-mandated costs in connection with purchase of protective clothing and equipment for fire fighters permissibly compelled performance of ministerial duty and did not violate separation of powers principles. West's Ann.Cal. Const. Art. 3, § 3.

13. **States** ⇐134

Court's ability to compel satisfaction of judgment against State from current unexpended, unencumbered appropriation does not require that past administrative practice support judgment for reimbursement or that appropriations affected by court's order specifically refer to particular expenditure in question.

14. **States** ⇐123

Federal Occupational Safety and Health Administration does not have jurisdiction over fire departments of any political subdivision of State; thus, county's obedience to executive order requiring purchase of protective clothing and equipment for its fire fighters did not fall under "federally mandated" exception to State's obligation to reimburse county for state-man-

dated costs. West's Ann.Cal.Rev. & T.Code § 2206.

See publication Words and Phrases for other judicial constructions and definitions.

15. Statutes ⇐107(1), 109.7

Statutory provision violates "single subject rule," which requires that statute have only one subject matter and that subject be clearly expressed in its title, only if it does not promote main purpose of act or does not have necessary and natural connection with that purpose.

See publication Words and Phrases for other judicial constructions and definitions.

16. Statutes ⇐107(7)

Language of special appropriations bill prohibiting State Board of Control from processing certain claims did not reasonably relate to bill's stated purpose of increasing funds available for reimbursing claims of governmental subdivisions, and therefore, was invalid under single subject rule. West's Ann.Cal. Const. Art. 4, § 9.

17. Statutes ⇐107(7)

Annual budget bill must only concern subject of appropriations to support annual budget and may not constitutionally be used to substantially amend or change existing statutory law.

18. Constitutional Law ⇐190
States ⇐129

Budget control language of special appropriations bill was invalid as retroactive disclaimer of county's right to reimbursement for debts incurred in prior years by local agencies. St.1981, c. 1090, § 1 et seq.

19. States ⇐123

Constitutional article vesting legislature with unlimited plenary power to create and enforce complete workers' compensation system did not provide exception to obligation of State to reimburse local agency for compliance with safety orders mandated by state. West's Ann.Cal.Rev. & T.Code § 2207; § 2231 (Repealed); West's Ann.Cal. Const. Art. 13B, § 6; Art. 14, § 4.

20. States ⇐123

Claims of county for reimbursement of expenses for state-mandated protective clothing and equipment for fire fighters were reimbursable even to extent that expenses were incurred prior to effective date of constitutional amendment mandating reimbursements. West's Ann.Cal. Const. Art. 13B, § 6.

21. Limitation of Actions ⇐66(3)

County's right of action in traditional mandamus to require State to fulfill its duty to reimburse county for expenditures incurred in supplying its fire fighters with state-mandated protective clothing and equipment did not accrue until legislation was enacted without appropriations and it became clear that State had breached its duty to reimburse; thus, mandamus action brought within three years of enactment of legislation denying appropriation, was timely. West's Ann.Cal.C.C.P. §§ 335, 338, subd. 1; West's Ann.Cal.Rev. & T.Code § 2255(a) (Repealed).

22. Counties ⇐209

Statute which provides that if legislature deletes from local government claims bill funding for state mandate, local agency may file action in declaratory relief to declare mandate unenforceable and enjoin enforcement was inapplicable to county seeking reimbursement for expenses incurred pursuant to executive order mandating that county furnish its fire fighters with protective clothing and equipment, where statute did not become operative until after State Board of Control had rendered its decision finding costs reimbursable, until after funding was deleted by legislature, and until after litigation was commenced by county to obtain reimbursement. West's Ann.Cal.Gov.Code § 17612(b); West's Ann. Cal.Rev. & T.Code § 2207; § 2231 (Repealed); West's Ann.Cal. Const. Art. 13B, § 6.

23. Administrative Law and Procedure ⇐229

Party is not required to exhaust remedy that was not in existence at time action was filed.

24. States ⇐193

Statute which states that if legislature deletes from local government claims bill funding for state-mandated new program, local government may file action in declaratory relief to declare mandate unenforceable and enjoin its enforcement is purely discretionary course of action and does not provide local government with only remedy available if funding is not provided. West's Ann.Cal.Gov.Code § 17612(b).

25. Constitutional Law ⇐38

Constitution of State is supreme and any statute in conflict therewith is invalid.

26. Set-Off and Counterclaim ⇐8(1)

Under equitable principle of offset, either party to transaction involving mutual debts and credits can strike or balance, holding himself owing or entitled only to net difference.

27. States ⇐199

County could satisfy its claims for reimbursement from State for state-mandated programs by offsetting fines and forfeitures due State, while State could not use its statutory offset authority until county was fully reimbursed; identified fines and forfeitures were collected by county for statutory law violations, State did not come into actual possession of funds until they were transferred, and State was manifestly reluctant to reimburse county for its expenses. West's Ann.Cal.Gov.Code §§ 12419.5, 17561; West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Rev. & T.Code § 2207; §§ 2231, 2231(a) (Repealed).

28. States ⇐126

Order enjoining State from directly or indirectly reverting reimbursement award sum from general fund line item accounts, and from otherwise dissipating that sum in manner that would make it unavailable to satisfy court's judgment that county was entitled to reimbursement for expenses mandated by State, did not violate Government Code section governing reversion of undisbursed balances. West's Ann.Cal. Gov.Code § 16304.1.

29. States ⇐184.10

Auditor controller of county was not indispensable party to county's action seeking reimbursement of expenses incurred in purchase of protective clothing and equipment for fire fighters mandated by state executive order; auditor controller was indirectly represented in proceedings by participation of his principal, the county, as party litigant. West's Ann.Cal.C.C.P. §§ 389, 389(a); West's Ann.Cal.Gov.Code §§ 24000(d, e), 26880.

30. States ⇐184.10

Funds created by collection of fines and forfeitures by county were not indispensable parties to county's action seeking reimbursement from State for state-mandated expenses; action was not in rem proceeding, and ownership of particular stake was not in dispute, but rather, action was to compel ministerial obligation imposed by law. West's Ann.Cal.C.C.P. § 389.

31. States ⇐171

By relying on invalid budget control language, State could not avoid its obligation to pay interest to county on county's claim for reimbursement for state-mandated programs. St.1981, c. 1090 § 3; West's Ann.Cal.Civ.Code § 3287(a).

32. Appeal and Error ⇐842(8)

Appellate court is not limited by interpretation of statutes given by trial court.

33. Appeal and Error ⇐1154

Appellate court reviewing entry of money judgment against State is empowered to add directive that trial court order be modified to include charging orders against funds appropriated by subsequent Budget Acts.

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[529] John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Asst. Atty. Gen., and Marilyn K. Mayer and Carolyn Hunter, Deputy Attys. Gen., for respondents and appellants State of California et al.

Ross & Scott, William D. Ross and Diana P. Scott for petitioners and respondents

Carmel Valley Fire Protection District et al.

Ross & Scott, William D. Ross and Diana P. Scott for petitioners and respondents Rincon Del Diablo Municipal Water District et al.

DeWitt Clinton, Co. Counsel, and Amanda F. Susskind, Deputy Co. Counsel, for petitioner and respondent County of Los Angeles.

EAGLESON, Associate Justice.

These consolidated appeals arise from three separate trial court proceedings concerning the heretofore unsuccessful efforts of various local agencies to secure reimbursement of state-mandated costs.

Case No. 2d Civ. B006078 (Carmel Valley et al. case) was the first matter decided by the trial court. The memorandum of decision in that case was judicially noticed by the trial court which heard the consolidated matters in 2d Civ. B011941 (Rincon et al. case) and 2d Civ. B011942 (County of Los Angeles case). Issues common to all three cases will be discussed together [530] under the *County of Los Angeles* appeal, while issues unique to the other two appeals will be considered separately.

We identify the parties to the various proceedings in footnote 1.[1] For literary convenience, however, we will refer to all appellants as the "State" and all respondents as the "County" unless otherwise indicated.

APPEAL IN CASE NO. 2 CIVIL B011942

(County of Los Angeles Case)

FACTS AND PROCEDURAL HISTORY

County employs fire fighters for whom it purchased protective clothing and equipment, as required by Title 8, California Administrative Code, sections 3401–3409, enacted in 1978 (executive orders). County argues that it is entitled to State reimbursement for these expenditures because they constitute a state-mandated "new program" or "higher level of service." County relies on Revenue and Taxation Code section 2207 and former section 2231, and California Constitution, article XIII B, section 6 to support its claim.[2,3,4]

1. *2d Civ. B006078:* The petitioners below and respondents on appeal are Carmel Valley Fire Protection District, City of Anaheim, Aptos Fire Protection District, Citrus Heights Fire Protection District, FairHaven Fire Protection District, City of Glendale, City of San Luis Obispo, County of Santa Barbara and Ventura County Fire Protection District.

The respondents below and appellants here are State of California, Kenneth Cory and Jesse Marvin Unruh.

2d Civ. B011941: The petitioners below and respondents on appeal are Rincon Del Diablo Municipal Water District, Twenty-Nine Palms Water District, Alpine Fire Protection District, Bonita-Sunnyside Fire Protection District, Encinitas Fire Protection District, Fallbrook Fire Protection District, City of San Luis Obispo, Montgomery Fire Protection District, San Marcos Fire Protection District, Spring Valley Fire Protection District, Vista Fire Protection District and City of Coronado.

Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, State Board of Control, Kenneth Cory, State Controller, Jesse Marvin Unruh, State Treasurer, and Mark H. Bloodgood, Auditor-Controller, County of Los Angeles.

2d Civ. B011942: The County of Los Angeles is the petitioner below and respondent on appeal. Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, Kenneth Cory, and Jesse Marvin Unruh.

All respondents on appeal are conceded to be "local agencies," as defined in Revenue and Taxation Code section 2211.

2. The pertinent parts of Revenue and Taxation Code section 2207 provide: "'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program, [¶] (b) Any executive order issued after January 1, 1973, which mandates a new program; [¶] (c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973...."

3. The pertinent parts of former Revenue and Taxation Code section 2231, subdivision (a) provide: "The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207." This section was repealed (Stats.1986, ch. 879, § 23), and replaced

4. See note 4 on page 800.

[531]County filed a test claim with the State Board of Control (Board) for these costs incurred during fiscal years 1978–1979 and 1979–1980.[5] After hearings were held on the matter, the Board determined on November 20, 1979, that there was a state mandate and that County should be reimbursed. State did not seek judicial review of this quasi-judicial decision of the Board.

Thereafter, a local government claims bill, Senate Bill 1261 (Stats.1981, ch. 1090, p. 4191) (S.B. 1261) was introduced to provide appropriations to pay some of County's claims for these state-mandated costs. This bill was amended by the Legislature to delete all appropriations for the payment of these claims. Other claims of County not provided for in S.B. 1261 were contained in another local government claims bill, Assembly Bill 171 (Stats.1982, ch. 28, p. 51) (A.B. 171). The appropriations in this bill were deleted by the Governor. Both pieces of legislation, sans appropriations, were enacted into law.[6]

On September 21, 1984, following these legislative rebuffs, County sought reimbursement by filing a petition for writ of mandate (Code Civ.Proc., § 1085) and complaint for declaratory relief. After appropriate responses were filed and a hearing was held, the court executed a judgment on February 6, 1985, granting a peremptory writ of mandate. A writ of mandate was issued and other findings and orders made. It is from this judgment of [532]February 6, 1985, that State appeals. The relevant portions of the judgment are set forth verbatim below.[7]

by Government Code section 17561. We will refer to the earlier code section.

4. The pertinent parts of section 6, article XIII B of the California Constitution, enacted by initiative measure, provide: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶].... [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." This constitutional amendment became effective July 1, 1980.

5. County filed its test claim pursuant to former Revenue and Taxation Code section 2218, which was repealed by Statutes 1986, chapter 879, section 19.

Additionally, the Board is no longer in existence. The Commission on State Mandates has succeeded to these functions. (Gov.Code, §§ 17525, 17630.)

6. The final legislation did include appropriations for other local agencies on other types of approved claims.

7. "1. The Court adjudges and declares that funds appropriated by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund may properly be and should be spent for the reimbursement of state-mandated costs incurred by Petitioner as established in this action.

"2. A peremptory writ of mandamus shall issue under the seal of this Court, commanding Respondent State of California, through its Department of Finance, to give notification in writing as specified in Section 26.00 of the Budget Act of 1984 (Chapter 258, Statutes of 1984) of the necessity to encumber funds in conformity [with] this order and, unless the Legislature approves a bill that would enact a general law, within 30 days of said notification that would obviate the necessity of such payment, Respondent Kenn[e]th Cory, the State Controller of the State of California, or his successors in office, if any, shall draw warrants on funds appropriated for the State Department of Industrial Relations for the 1984–85 Budget Year in account numbers 8350–001–001, 8350–001–452, 8350–001–453, and 8350–001–890 as implemented in Chapter 258 Statutes of 1984, sufficient to satisfy the claims of Petitioner, plus interest, as set forth in the motion and accompanying writ of mandamus. Said writ shall also issue against Jessie Marvin Unruh, the State Treasurer of the State of California, and his successors in office, if any, commanding him to make payment on the warrants drawn by Respondent Kenneth Cory.

"3. Pending the final disposition of this proceeding, or the payment of the applicable reimbursement claims and interest as set forth herein, Respondents, and each of of [*sic*] them, their successors in office, agents, servants and employees and all persons acting in concert [or] participation with them, are hereby enjoined and restrained from directly or indirectly expending from the 1984–85 General Fund Budget of the State Department of Industrial Relations as is more particularly described in paragraph

[533] CONTENTIONS

State advances two basic contentions. It first asserts that the costs incurred by County are not state mandated because they are not the result of a "new program," and do not provide a "higher level of service." Either or both of these requirements are the sine qua non of reimbursement. Second, assuming a "new program" or "higher level of service" exists, portions of the trial court order aimed at assisting the reimbursement process were made in excess of the court's jurisdiction.

These contentions are without merit. We modify and affirm all three judgments.

DISCUSSION

I

ISSUE OF STATE MANDATE

The threshold question is whether County's expenditures are state mandated. The right to reimbursement is triggered when the local agency incurs "costs mandated by the state" in either complying with a "new program" or providing "an increased level of service of an existing program." [8] State advances many theories as to why the Board erred in concluding that these expenditures are state-mandated costs. One of these arguments is whether the executive orders are a "new program" as that phrase has been recently defined by our Supreme Court in *County of Los Angeles*

number 2 hereinabove, any sums greater than that which would leave in said budget at the conclusion of the 1984–85 fiscal year an amount less than the reimbursement amounts on the aggregate amount of $307,685 in this case, together with interest at the legal rate through payment of said reimbursement amounts. Said amounts are hereinafter referred to collectively as the 'reimbursement award sum'.

"4. Pending the final disposition of this proceeding or the payment of the reimbursement award sum at issue herein, Respondents, and each of them, their successors in office, agents, servants and employees, and all persons acting in concert or participation with them, are hereby enjoined and restrained from directly or indirectly reverting the reimbursement award sum from the General Fund line-item accounts of the Department of Industrial Relations to the General Funds of the State of California and from otherwise dissipating the reimbursement award sum in a manner that would make it unavailable to satisfy this Court's judgment.

"5. In addition to the foregoing relief, Petitioner is entitled to offset amounts sufficient to satisfy the claims of Petitioner, plus interest, against funds held by Petitioner as fines and forfeitures which are collected by the local Courts, transferred to the Petitioner and remitted to Respondents on a monthly basis. Those fines and forfeitures are levied, and their distribution provided, as set forth in Penal Code Sections 1463.02, 1463.03, 14[6]3.5[a], and 1464; Government Code Sections 13967, 26822.3 and 72056, Fish and Game Code Section 13100; Health and Safety Code Section 11502 and Vehicle Code Sections 1660.7, 42004, and 41103.5.

"6. The Court adjudges and declares that the State has a continuing obligation to reimburse Petitioner for costs incurred in fiscal years subsequent to its claim for expenditures in 1978–79 and 1979–80 fiscal years as set forth in the petition and the accompanying motion for the issuance of a writ of mandate.

"7. The Court adjudges and declares that deletion of funding and prohibition against accepting claims for expenditures incurred as a result of the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 as contained in Section 3 of Chapter 109[0], Statutes of 1981 were invalid and unconstitutional.

"8. The Court adjudges and declares that the expenditures incurred by Petitioner as a result of the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 were not the result of any federally mandated program.

"9. A peremptory writ of mandamus shall issue under the seal of this Court commanding Respondent State Board of Control, or its successor-in-interest, to hear and approve the claims of Petitioner for costs incurred in complying with the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 subsequent to fiscal year 1979–80.

"...

"11. The Court adju[d]ges and declares that the State Respondents are prohibited from offsetting, or attempting to implement an offset against moneys due and owing Petitioner until Petitioner is completely reimbursed for all of its costs in complying with the state mandate of Title 8, California Administrative Code Sections 3401 through 3409."

8. This language is taken from Revenue and Taxation Code section 2207 and former section 2231. Article XIII B, section 6 refers to "higher" level of service rather than "increased" level of service. We perceive the intent of the two provisions to be identical. The parties also use these words interchangeably.

v. State of California (1987) 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202.

|534As we shall explain, State has waived its right to challenge the Board's findings and is also collaterally estopped from doing so. Additionally, although State is not similarly precluded from raising issues presented by the *State of California* case, we conclude that the executive orders are a "new program" within the meaning of article XIII B, section 6.

A. *Waiver*

[1, 2] We initially conclude that State has waived its right to contest the Board's findings. Waiver occurs where there is an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that it has been waived. (*Medico-Dental Etc. Co. v. Horton & Converse* (1942) 21 Cal.2d 411, 432, 132 P.2d 457; *Loughan v. Harger-Haldeman* (1960) 184 Cal.App.2d 495, 502–503, 7 Cal.Rptr. 581.) A right that is waived is lost forever. (*L.A. City Sch. Dist. v. Landier Inv. Co.* (1960) 177 Cal.App.2d 744, 752, 2 Cal.Rptr. 662.) The doctrine of waiver applies to rights and privileges afforded by statute. (*People v. Murphy* (1962) 207 Cal.App.2d 885, 888, 24 Cal.Rptr. 803.)

[3] State now contends to be an aggrieved party and seeks to dispute the Board's findings. However, it failed to seek judicial review of that November 20, 1979 decision (Code Civ.Proc., § 1094.5) as authorized by former Revenue and Taxation Code section 2253.5. The three-year statute of limitations applicable to such review has long since passed. (*Green v. Obledo* (1981) 29 Cal.3d 126, 141, fn. 10, 172 Cal.Rptr. 206, 624 P.2d 256; Code Civ. Proc., § 338, subd. (1).)

In addition, State, through its agents, acquiesced in the Board's findings by seeking an appropriation to satisfy the validated claims. (Former Rev. & Tax.Code, § 2255, subd. (a).) On September 30, 1981, S.B. 1261 became law. On February 12, 1982, A.B. 171 was enacted. Appropriations had been stripped from each bill. State did not then seek review of the Board determinations even though time remained before the three-year statutory period expired. This inaction is clearly inconsistent with any intent to contest the validity of the Board's decision and results in a waiver.

B. *Administrative Collateral Estoppel*

We next conclude that State is collaterally estopped from attacking the Board's findings. Traditionally, collateral estoppel has been applied to bar relitigation of an issue decided in a prior court proceeding. In order for the doctrine to apply, the issues in the two proceedings must |535be the same, the prior proceeding must have resulted in a final judgment on the merits, and the same parties or their privies must be involved. (*People v. Sims* (1982) 32 Cal.3d 468, 484, 186 Cal.Rptr. 77, 651 P.2d 321.)

[4] The doctrine was extended in *Sims* to apply to a final adjudication of an administrative agency of statutory creation so as to preclude relitigation of the same issues in a subsequent criminal case. Our Supreme Court held that collateral estoppel applies to such prior adjudications where three requirements are met: (1) the administrative agency acted in a judicial capacity; (2) it resolved disputed issues properly before it; and (3) all parties were provided with the opportunity to fully and fairly litigate their claims. (*Id.* at p. 479, 186 Cal.Rptr. 77, 651 P.2d 321.) All of the elements of administrative collateral estoppel are present here.

[5] The Board was created by the state Legislature to exercise quasi-judicial powers in adjudging the validity of claims against the State. (*County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 452, 206 Cal.Rptr. 626.) At the time of the hearings, the Board proceedings were the sole administrative remedy available to local agencies seeking reimbursement for state-mandated costs. (Former Rev. &

Tax.Code, § 2250.) Board examiners had the power to administer oaths, examine witnesses, issue subpoenas, and receive evidence. (Gov.Code, § 13911.) The hearings were adversarial in nature and allowed for the presentation of evidence by the claimant, the Department of Finance, and any other affected agency. (Former Rev. & Tax.Code, § 2252.)

The record indicates that the state mandate issues in this case were fully litigated before the Board. A representative of the state Division of Occupational Safety and Health and the Department of Industrial Relations testified as to why County's costs were not state mandated. Representatives f the various claimant fire districts in turn offered testimony contradicting that view. The proceedings culminated in a verbatim transcript and a written statement of the basis for the Board's decision.

State complains, however, that some of the traditional elements of the collateral estoppel doctrine are missing. In particular, State argues that it was not a party to the Board hearings and was not in privity with those state agencies which did participate.

[6] "[T]he courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government. [Fn. omitted.]" (*Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 398, 29 Cal.Rptr. 657, 380 P.2d 97.) As we stated in our introduction of the parties in this case, the party known 1536as "State" is merely a shorthand reference to the various state agencies and officials named as defendants below. Each of these defendants are agents of the State of California and had a mutual interest in the Board proceedings. They are thus in privity with those state agencies which did participate below (e.g., Occupational Safety and Health Division).

[7] It is also clear that even though the question of whether a cost is state mandated is one of law (*City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781, 200 Cal.Rptr. 642), subsequent litigation on that issue is foreclosed here. A prior judgment on a question of law decided by a court is conclusive in a subsequent action between the same parties where both causes involved arose out of the same subject matter or transaction, and where holding the judgment to be conclusive will not result in an injustice. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230, 123 Cal.Rptr. 1, 537 P.2d 1250; *Beverly Hills Nat. Bank v. Glynn* (1971) 16 Cal.App.3d 274, 286–287, 93 Cal.Rptr. 907; Rest.2d Judgments, § 28, p. 273.)[9]

Here, the basic issues of state mandate and the amount of reimbursement arose out of County's required compliance with the executive orders. In either forum—Board or court—the claims and the evidentiary and legal determination of their validity would be considered in similar fashion.

Furthermore, a determination of conclusiveness would not work an injustice. As we have noted, the Board was statutorily created to consider the validity of the various claims now being litigated. Processing of reimbursement claims in this manner was the only administrative remedy available to County. If we were to grant State's request and review the Board's determination de novo, we would, in any event, adhere to the well-settled principle of affording "great weight" to "the contemporaneous administrative construction of the enactment by those charged with its enforcement...." (*Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921, 156 P.2d 1.)

There is no policy reason to limit the application of the collateral estoppel doctrine to successive court proceedings. In *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 679, 159 Cal.Rptr. 56, the doctrine was applied to bar relitigation in a subsequent civil proceeding on a zoning issue previously decided by a city board of permit appeals. We similarly hold

9. As it happened, the entire Board determination involved a question of law since the dollar amount of the claimed reimbursement was not disputed.

that the questions of law decided by the Board are binding in all of the subsequent civil proceedings presented here. State therefore is collaterally [537]estopped to raise the issues of state mandate and amount of reimbursement in this appeal.

C. *Executive Orders—A "New Program" Under Article XIII B, Section 6*

[8–10] The recent decision by our Supreme Court in *County of Los Angeles v. State of California, supra,* 233 Cal.Rptr. at p. 38, 729 P.2d at p. 202 presents a new issue not previously considered by the Board or the trial court. That question is whether the executive orders constitute the type of "program" that is subject to the constitutional imperative of subvention under article XIII B, section 6.[10] We conclude that they are.

[11] In *State of California,* the Court concluded that the term "program" has two alternative meanings: "programs that carry out the governmental function of providing services to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Id.* 233 Cal.Rptr. at p. 43, 729 P.2d at p. 208, emphasis added.) Although only one of these findings is necessary to trigger reimbursement, both are present here.

First, fire protection is a peculiarly governmental function. (*County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481, 105 Cal.Rptr. 374, 503 P.2d 1382.) "Police and fire protection are two of the most essential and basic functions of local government." (*Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107, 133 Cal.Rptr. 649.) This classification is not weakened by State's assertion that there are private sector fire fighters who are also subject to the executive orders. Our record on this point is incomplete because the issue was not presented below. Nonetheless, we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classical governmental function.[11]

[538]The second, and alternative, prong of the *State of California* definition is also satisfied. The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not apply generally to all residents and entities in the State but only to those involved in fire fighting.

These facts are distinguishable from those presented in *State of California.* There, the court held that a state-mandated increase in workers' compensation benefits did not require state subvention because the costs incurred by local agencies were only an incidental impact of laws that applied generally to all state residents and entities (i.e., to all workers and all governmental and nongovernmental employers). Governmental employers in that setting were indistinguishable from private employers who were obligated through insur-

10. State is not precluded from raising this new issue on appeal. Questions of law decided by an administrative agency invoke the collateral estoppel doctrine only when a determination of conclusiveness will not work an injustice. Likewise, the doctrine of waiver is inapplicable if a litigant has no actual or constructive knowledge of his rights. Since the *State of California* rule had not been announced at the time of the Board or trial court proceedings herein, the doctrines of waiver and collateral estoppel are inapplicable to State on this particular issue. Both parties have been afforded additional time to brief the matter.

11. County suggests that to the extent private fire brigades exist, they are customarily part-time individuals who perform the function on a part-time basis. As such, they are excluded by the balance of the definitional term in Title 8, California Administrative Code section 3402, which provides, in pertinent part: "... The term [fire fighter] does not apply to emergency pickup labor or other persons who may perform first-aid fire extinguishment as collateral to their regular duties."

ance or direct payment to pay the statutory increases.

State of California only defined the scope of the word "program" as used in California Constitution, article XIII B, section 6. We apply the same interpretation to former Revenue and Taxation Code section 2231 even though the statute was enacted much earlier. The pertinent language in the statute is identical to that found in the constitutional provision and no reason has been advanced to suggest that it should be construed differently. In any event, a different interpretation must fall before a constitutional provision of similar import. (*County of Los Angeles v. Payne* (1937) 8 Cal.2d 563, 574, 66 P.2d 658.)

II

ISSUE OF WHETHER COURT ORDERS EXCEEDED ITS JURISDICTION

A. *The Court Has Not Ordered An Appropriation In Violation Of The Separation Of Powers Doctrine*

State begins its general attack on the judgment by citing the longstanding principle that a court order which directly compels the Legislature to appropriate funds or to pay funds not yet appropriated violates the separation of powers doctrine. (Cal. Const., art. III, § 3; art. XVI, § 7; *Mandel v. Myers* (1981) 29 Cal.3d 531, 540, 174 Cal.Rptr. 841, 629 P.2d 935.)[12] State [539] observes (and correctly so) that the relevant constitutional (art. XIII B, § 6) and statutory (Rev. & Tax.Code, § 2207 & former § 2231) provisions are not appropriations measures. (See *City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 398, 231 Cal.Rptr. 686.) Since State otherwise discerns no manifest legislative intent to appropriate funds to pay County's claims (*City & County of S.F. v. Kuchel* (1948) 32 Cal.2d 364, 366, 196 P.2d 545), it concludes that the judgment unconstitutionally compels performance of a legislative act.

State further argues that the judiciary's ability to reach an existing agency support appropriation (State Department of Industrial Relations) (fn. 7, ¶ 1, *ante*) has been approved in only two contexts. First, the court can order payment from an existing appropriation, the expenditure of which has been legislatively prohibited by an unconstitutional or unlawful restriction. (*Committee to Defend Reproductive Rights v. Cory* (1982) 132 Cal.App.3d 852, 856, 183 Cal.Rptr. 475.) Second, once an adjudication has finally determined the rights of the parties, the court may compel satisfaction of the judgment from a current unexpended, unencumbered appropriation which administrative agencies routinely have used for the purpose in question. (*Mandel v. Myers, supra*, 29 Cal.3d at p. 544, 174 Cal.Rptr. 841, 629 P.2d 935.) State insists that these facts are not present here.

County rejoins that a writ of traditional mandate (Code Civ.Proc., § 1085) is the correct method of compelling State to perform a clear and present ministerial legal obligation. (*County of Sacramento v. Loeb, supra*, 160 Cal.App.3d at pp. 451–452, 206 Cal.Rptr. 626.) The ministerial obligation here is contained in California Constitution, article XIII B, section 6 and in Revenue and Taxation Code section 2207 and former section 2231. These provisions require State to reimburse local agencies for state-mandated costs.

[12] We reject State's general characterization of the judgment by noting that it only affects an existing appropriation. It declares (fn. 7, ¶ 1, *ante*) that only funds already "*appropriated* by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund"

12. Article III, section 3 of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Article XVI, section 7 of the California Constitution provides: "Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant."

shall be spent for reimbursement of County's state-mandated costs. (Emphasis added.) There is absolutely no language purporting to require the Legislature to enact appropriations or perform any other act that might violate separation of powers principles. By simply ordering the State Controller to draw warrants and directing the State Treasurer to pay on already-appropriated funds (fn. 7, ¶ 2, *ante*), the judgment permissibly compels performance of a ministerial duty: "[O]nce funds have already been appropriated by legislative action, a court transgresses no constitutional principle when it orders the State Controller or other similar official to make appropriate expenditures[540] from such funds. [Citations.]" (*Mandel v. Myers, supra*, 29 Cal.3d at p. 540, 174 Cal.Rptr. 841, 629 P.2d 935.)

As we will discuss in further detail below, the subject funds (fn. 7, ¶ 1, *ante*) were saddled with an unconstitutional restriction (fn. 7, ¶ 7, *ante*). However, *Mandel* establishes that such a restriction does not necessarily infect the entire appropriation. There, the Legislature had improperly prohibited the use of budget funds to pay a court-ordered and administratively approved attorney's fees award. The court reasoned that as long as appropriated funds were "reasonably available for the expenditures in question, the separation of powers doctrine poses no barrier to a judicial order directing the payment of such funds." (*Id.* at p. 542, 174 Cal.Rptr. 841, 629 P.2d 935.) The court went on to find that money in a general "operating expenses and equipment" fund was, by both the Budget Act's terms and prior administrative practice, reasonably available to pay the attorney's fees award.

[13] Contrary to State's argument, *Mandel* does not require that past administrative practice support a judgment for reimbursement from an otherwise available appropriation. Although there was evidence of a prior administrative practice of paying counsel fees from funds in the "operating expenses and equipment" budget, this fact was not the main predicate of the court's holding. Rather, the decisive factor was that the budget item in question functioned as a "catchall" appropriation in which funds were still reasonably available to satisfy the State's adjudicated debt. (*Id.* at pp. 543–544, 174 Cal.Rptr. 841, 629 P.2d 935.)

Another illustration of this principle is found in *Serrano v. Priest* (1982) 131 Cal.App.3d 188, 182 Cal.Rptr. 387. Plaintiffs in that case secured a judgment against the State of California for $800,000 in attorney's fees. The judgment was not paid, and subsequent proceedings were brought against State to satisfy the judgment. The trial court directed the State Controller to pay the $800,000 award, plus interest, from funds appropriated by the Legislature for "operating expenses and equipment" of the Department of Education, Superintendent of Public Instruction and State Board of Education. (*Id.* at p. 192, 182 Cal.Rptr. 387.) This court affirmed that order even though there was no evidence that the agencies involved had ever paid court-ordered attorney's fees from that portion of the budget. Relying on *Mandel*, we concluded that funds were reasonably available from appropriations enacted in the Budget Act in effect at the time of the court's order, as well as from similar appropriations in subsequent Budget Acts.

State also incorrectly asserts that the appropriations affected by the court's order must specifically refer to the particular expenditure in question in order to be available. This notion was summarily dismissed in *Mandel v. Myers, supra*, 29 Cal.3d at pp. 543–544, 174 Cal.Rptr. 841, 629 P.2d 935. Likewise, in *Committee to Defend*[541] *Reproductive Rights v. Cory, supra*, 132 Cal.App.3d at pp. 857–858, 183 Cal.Rptr. 475, the court decreed that payments for Medi-Cal abortions could properly be ordered from monies appropriated for other Medi-Cal services, even though this use had been specifically prohibited by the Legislature.

Applying these various principles here, we note that the judgment (fn. 7, ¶ 2, *ante*) identified funds in account numbers 8350–001–001, 8350–001–452, 8350–001–453 and

8350–001–890 as being available for reimbursement. Within these 1984–85 account appropriations for the Department of Industrial Relations were monies for Program 40, the Prevention of Industrial Injuries and Deaths of California Workers. The evidence clearly showed that the remaining balances on hand would cover the cost of reimbursement. Since it is conceded that the fire fighting protective clothing and equipment in this case was purchased to prevent deaths and injuries to fire fighters, these funds, although not specifically appropriated for the reimbursement in question, were generally related to the nature of costs incurred by County and are therefore reasonably available for reimbursement.

B. *Legislative Disclaimers, Findings And Budget Control Language Are No Defense To Reimbursement*

As a general defense against the order to reimburse, State insists that the Legislature has itself concluded that the claimed costs are not reimbursable. This determination took the combined form of disclaimers, findings and budget control language. State interprets this self-serving legislation, as well as the legislative and gubernatorial deletions, as forever sweeping away State's obligation to reimburse the state-mandated costs at issue. Consequently, any order that ignores these restrictions on payment would amount to a court-ordered appropriation. As we shall conclude, these efforts are merely transparent attempts to do indirectly that which cannot lawfully be done directly.

The seminal legislation that gave rise to the 1978 executive orders was enacted by Statutes 1973, chapter 993, and is labeled the California Occupational Safety and Health Act (Cal/OSHA). It is modeled after federal law and is designed to assure safe working conditions for all California workers. A legislative disclaimer appearing in section 106 of that bill reads: "No appropriation is made by this act ... for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on...." The stated reason for this decision not to appropriate was that the cost of implementing the Act was "minimal on a statewide basis in relation to the effect on local tax rates." (Stats.1973, ch. 993, § 106, p. 1954.)

[1,2] Again, in 1974, the Legislature stated: "Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section, nor shall there be an appropriation made by this act, because the Legislature finds that this act and any executive regulations or safety orders issued pursuant thereto merely implement federal law and regulations." (Stats.1974, ch. 1284, § 106, p. 2787.) This statute amended section 106 of Statutes 1973, chapter 993, and was a post facto change in the stated legislative rationale for not providing reimbursement.

Presumably because of the large number of reimbursement claims being filed, the Legislature subsequently used budget control language to confirm that compliance with the executive orders should not trigger reimbursement. Some of this legislation was effective September 30, 1981, as part of a local agency and school district reimbursement bill. The control language provided that "[t]he Board of Control shall not accept, or submit to the Legislature, any more claims pursuant to ... Sections 3401 to 3409, inclusive, of Title 8 of the California Administrative Code." (Stats. 1981, ch. 1090, § 3, p. 4193.) [13]

Further control language was inserted in the 1981, 1983 and 1984 Budget Acts. (Stats.1981, ch. 99, § 28.40, p. 606; Stats. 1983, ch. 324, § 26.00, p. 1504; Stats.1984, ch. 258, § 26.00.) This language prohibits encumbering appropriations to reimburse costs incurred under the executive orders, except under certain limited circumstances.

State first challenges the trial court's finding that expenditures mandated by the

13. When Governor Brown deleted the appropriations from A.B. 171, he stated that he was relying on the pronouncements in Statutes 1974, chapter 1284 and Statutes 1981, chapter 1090.

executive orders were not the result of a federally mandated program (fn. 7, ¶ 8, *ante*), despite the legislative finding in Statutes 1974, chapter 1284, section 106. We agree with the court's decision that there was no federal mandate.

The significance of this no-federal-mandate finding is revealed by examining past changes in the statutory definition of state-mandated costs. As thoroughly discussed in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 196–197, 203 Cal.Rptr. 258 disapproved on other grounds in *County of Los Angeles v. State of California, supra*, 233 Cal.Rptr. at p. 44, fn. 10, 729 P.2d at p. 208, fn. 10, the concept of federally mandated costs has provided local agencies with a financial escape valve ever since passage of the "Property Tax Relief Act of 1972." (Stats.1972, ch. 1406, § 1, p. 2931.) That act limited local governments' power to levy property taxes, while requiring that they be reimbursed by the State for providing compulsory increased levels of service or [543] new programs. However, under Revenue and Taxation Code section 2271, "costs mandated by the federal government" were not subject to reimbursement and local governments were permitted to levy taxes in addition to the maximum property tax rate to pay such costs.

On November 6, 1979, the limitation on local government's ability to raise property taxes, and the duty of the State to reimburse for state-mandated costs, became a part of the California Constitution through the initiative process. Article XIII B, section 6, enacted at that time, directs state subvention similar in nature to that required by the pre-existing provisions of Revenue and Taxation Code section 2207 and former section 2231. As a defense against this duty to reimburse local agencies, the Legislature began to insert disclaimers in bills which mandated costs on local agencies. It also amended Revenue and Taxation Code section 2206 to expand the definition of nonreimbursable "costs mandated by the federal government" to include the following: "costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state."

In applying this definition here, State offers nothing more than the bare legislative finding contained in Statutes 1974, chapter 1284, section 106. State contends that a federally mandated cost cannot, by definition, be a state-mandated cost. Therefore, if the cost is federally mandated, local agency reimbursement is not required. Although State's argument is correct in the abstract, neither the facts nor federal law support the underlying assumption that there is a federal mandate.[14]

Both the Board and the court had in evidence a letter from a responsible official of the federal Occupational Safety and Health Administration (OSHA). The letter emphasizes the independence of state and federal OSHA standards: "OSHA does not have jurisdiction over the fire departments of any political subdivision of a state whether the state has elected to have its own state plan under the OSHA act or not.... [¶] More specifically, in 1978, the State of California promulgated standards applicable to fire departments in California. Therefore, California standards, rather than [544] federal OSHA standards, are applicable to fire departments in that state...." This theme is also reflected in a section of

14. We address this subject only because the trial court found that the costs were not federally mandated. Actually, State cannot raise this issue on appeal because of the waiver and administrative collateral estoppel doctrines. We note, however, where there is a quasi-judicial finding that a cost is state mandated, there is an implied finding that the cost is not federally mandated; the two concepts are mutually exclusive.

Moreover, our task is aided by the fact that interpretation of statutory language is purely a judicial function. Legislative declarations are not binding on the courts and are particularly suspect when they are the product of an attempt to avoid financial responsibility. (*City of Sacramento v. State of California, supra*, 156 Cal.App.3d at pp. 196–197, 203 Cal.Rptr. 258.)

OSHA which expressly disclaims jurisdiction over local agencies such as County. (29 U.S.C. § 652, subd. (5).) Accordingly, as a matter of law, there are no federal standards for local government structural fire fighting clothing and equipment.

[14] In short, while the Legislature's enactment of Cal/OSHA to comply with federal OSHA standards is commendable, it certainly was not compelled. Consequently, County's obedience to the 1978 executive orders is not federally mandated.

The trial court also properly invalidated the budget control language in Statutes 1981, chapter 1090, section 3 (fn. 7, ¶ 7, *ante*) because it violated the single subject rule.[15] This legislative restriction purported to make the reimbursement provisions of Revenue and Taxation Code section 2207 and former section 2231 unavailable to County.

[15] The single subject rule essentially requires that a statute have only one subject matter and that the subject be clearly expressed in the statute's title. The rule's primary purpose is to prevent "log-rolling" in the enactment of laws. This disfavored practice occurs where a provision unrelated to a bill's main subject matter and title is included in it with the hope that the provision will remain unnoticed and unchallenged. By invalidating these unrelated clauses, the single subject rule prevents the passage of laws which otherwise might not have passed had the legislative mind been directed to them. (*Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1196, 219 Cal.Rptr. 664.) However, in order to minimize judicial interference in the Legislature's activities, the single subject rule is to be construed liberally. A provision violates the rule only if it does not promote the main purpose of the Act or does not have a necessary and natural connection with that purpose. (*Metropolitan Water Dist. v. Marquardt* (1963) 59 Cal.2d 159, 172–173, 28 Cal.Rptr. 724, 379 P.2d 28.)

The stated purpose of chapter 1090 is to increase funds available for reimbursing certain claims. It describes itself as an "act making an appropriation to pay claims of local agencies and school districts for additional reimbursement for specified state-mandated local costs, awarded by the State Board of Control, and declaring the urgency thereof, to take effect immediately." (Stat.1981, ch. 1090, p. 4191.) There is nothing in this introduction[545] alerting the reader to the fact that the bill prohibits the Board from entertaining claims pursuant to the Cal/OSHA executive orders. The control language does not modify or repeal these orders, nor does it abrogate the necessity for County's continuing compliance therewith. It simply places County's claims reimbursement process in limbo.

[16, 17] This special appropriations bill is similar in kind to appropriations in an annual budget act. Observations that have been made in connection with the enactment of a budget bill are appropriate here. "[T]he annual budget bill is particularly susceptible to abuse of [the single subject] rule. 'History tells us that the general appropriation bill presents a special temptation for the attachment of riders. It is a necessary and often popular bill which is certain of passage. If a rider can be attached to it, the rider can be adopted on the merits of the general appropriation bill without having to depend on its own merits for adoption.' [Citation.]" (*Planned Parenthood Affiliates v. Swoap, supra*, 173 Cal.App.3d at p. 1198, 219 Cal.Rptr. 664.) Therefore, the annual budget bill must only concern the subject of appropriations to support the annual budget and may not constitutionally be used to substantively amend or change existing statutory law. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394, 211 Cal.Rptr. 758, 696 P.2d 150.) We see no reason to apply a

15. Article IV, section 9 of the California Constitution reads: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended."

less stringent standard to a special appropriations bill. Because the language in chapter 1090 prohibiting the Board from processing claims does not reasonably relate to the bill's stated purpose, it is invalid.

[18] The budget control language in chapter 1090 is also invalid as a retroactive disclaimer of County's right to reimbursement for debts incurred in prior years. This legislative technique was condemned in *County of Sacramento v. Loeb, supra,* 160 Cal.App.3d at p. 446, 206 Cal.Rptr. 626. There, the Legislature had enacted a Government Code section which prohibited using appropriations for any purpose which had been denied by any formal action of the Legislature. The State attempted to use this code section to uphold a special appropriations bill which had deleted County's Board-approved claims for costs which were incurred prior to the enactment of the code section. The court held that the code section did not apply retroactively to defeat County's claims: "A retroactive statute is one which relates back to a previous transaction and gives that transaction a legal effect different from that which it had under the law when it occurred.... 'Absent some clear policy requiring the contrary, statutes modifying liability in civil cases are not to be construed retroactively.'" (*Id.* at p. 459, 206 Cal.Rptr. 626, quoting *Robinson v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907, 912, 159 Cal.Rptr. 791.) Similarly, the control language in chapter 1090 does not apply retroactively to County's prior, Board-approved claims.

[19] Finally, the control language in section 28.40 of the 1981 Budget Act and section 26.00 [16] of the 1983 and 1984 Budget Acts does not work to defeat County's claims. (Stats.1981, ch. 99, § 28.40, p. 606; Stats.1983, ch. 324, § 26.00, p. 1504; Stats. 1984, ch. 258, § 26.00.) This section is comprised of both substantive and procedural provisions. We are concerned primarily with those portions that purport to exonerate State from its constitutionally and statutorily imposed obligation to reimburse County's state-mandated costs.

The writ of mandate directed compliance with the procedural provisions of these sections and is not a point of dispute on appeal. Subsection (a) affords the Legislature one last opportunity to appropriate funds which are to be encumbered for the purpose of paying state-mandated costs, an invitation repeatedly rejected. Subsection (b) directs that the Department of Finance notify the chairpersons of the appropriate committees in each house and chairperson of the Joint Legislative Budget Committee of the need to encumber funds. Presumably, the objective of this procedure is to give the Legislature another opportunity to amend or repeal substantive legislation requiring local agencies to incur state-mandated costs. Again, the Legislature declined to act. Legislative action pursuant to subsection (b) could arguably ameliorate the plight of local agencies prospectively, but would be of no practical assistance to a local agency creditor seeking reimbursement for costs already incurred.

The first portion of each section, however, imposes a budgetary restriction on encumbering appropriated funds to reimburse for state-mandated costs arising out of compliance with the executive orders, absent a specific appropriation pursuant to subparagraph (b). For the reasons stated above, this substantive language is invalid under the single subject rule. It attempts

16. Each of these sections contains the following language: "No funds appropriated by this act shall be encumbered for the purpose of funding any increased state costs or local governmental costs, or both such costs, arising from the issuance of an executive order as defined in section 2209 of the Revenue and Taxation Code or subject to the provisions of section 2231 of the Revenue and Taxation Code, unless (a) such funds to be encumbered are appropriated for such purpose, or (b) notification in writing of the necessity of the encumbrance of funds available to the state agency, department, board, bureau, office, or commission is given by the Department of Finance, at least 30 days before such encumbrance is made, to the chairperson of the committee in each house which considers appropriations and the Chairperson of the Joint Legislative Budget Committee, or such lesser time as the chairperson of the committee, or his or her designee, determines."

to amend existing statutory law and is unrelated to the Budget Acts' main purpose of appropriating funds to support the annual budget. (*Association for Retarded Citizens v. Department of Developmental Services, supra*, 38 Cal.3d at p. 394, 211 Cal.Rptr. 758, 696 P.2d 150.) Now unfettered by invalid restrictions, the appropriations involved in this case are reasonably available for reimbursement.

|547C. *The Legislature's Plenary Power To Regulate Worker Safety Does Not Affect The Right To Reimbursement*

[19] State contends that article XIV, section 4 of the California Constitution vests the Legislature with unlimited plenary power to create and enforce a complete workers' compensation system. It postulates that the Legislature may determine that the interest in worker safety and health is furthered by requiring local agencies to bear the costs of safety devices. This non sequitur is advanced without citation of authority.

Article XIV, section 4 concerns the power to enact workers' compensation statutes and regulations. It does not focus on the issue of reimbursement for state mandated costs, which is covered by Revenue and Taxation Code section 2207 and former section 2231, and article XIII B, section 6. Since these latter provisions do not effect a pro tanto repeal of the Legislature's plenary power over workers' compensation law (see *County of Los Angeles v. State of California, supra*, 233 Cal.Rptr. at p. 38, 729 P.2d at p. 202), they do not conflict with article XIV, section 4.

Moreover, even though the reimbursement issue has come before the Legislature repeatedly since 1972, no law has been enacted to exempt compliance with workers' compensation executive orders from the mandatory reimbursement provisions of Revenue and Taxation Code section 2207 and former section 2231. Likewise, article XIII B, section 6 does not provide an exception to the obligation to reimburse local agencies for compliance with these safety orders.

D. *Pre–1980 Claims Are Reimbursable Under Article XIII B, Section 6, Effective July 1, 1980*

[20] State further argues that to the extent County's claims for fiscal years 1978–79 and 1979–80 are predicated on the subvention provisions of article XIII B, section 6, they fall within a "window period" of nonreimbursement. This assertion emanates from section 6, subdivision (c), which states that the Legislature "[m]ay, but need not," provide reimbursement for mandates enacted before January 1, 1975. State reasons that because the constitutional amendment did not become effective until July 1, 1980, claims for costs incurred between January 1, 1975 and June 30, 1980, need not be reimbursed.

This notion was rejected in *City of Sacramento v. State of California, supra*, 156 Cal.App.3d at p. 182, 203 Cal.Rptr. 258 on behalf of local agencies seeking reimbursement of unemployment insurance costs mandated by a 1978 statute. Basing its decision on well-settled principles of constitutional interpretation |548and upon a prior published opinion of the Attorney General, the court interpreted section 6, subdivision (c) as follows: "[T]he Legislature *may* reimburse mandates enacted prior to January 1, 1975, and *must* reimburse mandates passed after that date, but does not have to begin such reimbursement until the effective date of article XIII B (July 1, 1980)." (*Id.* at p. 191, 203 Cal.Rptr. 258, emphasis in original.) In other words, the amendment operates on "window period" mandates even though the reimbursement process may not actually commence until later.

We agree with this reasoning and find costs incurred by County under the 1978 executive orders subject to reimbursement under the Constitution.

E. *Claims Under Revenue And Taxation Code Section 2207 And Former Section 2231 Are Not Time-Barred*

State collaterally asserts that to the extent County bases its claims on Revenue and Taxation Code section 2207 and former

section 2231, they are barred by Code of Civil Procedure sections 335 and 338, subdivision (1). This omnibus challenge to the order directing payment has no merit.

Code of Civil Procedure section 335 is a general introductory section to the statute of limitations for all matters except recovery of real property. Code of Civil Procedure section 338, subdivision (1) requires "[a]n action upon a liability created by statute" to be commenced within three years.

[21] A claimant does not exhaust its administrative remedies and cannot come under the court's jurisdiction until the legislative process is complete. (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 77, 222 Cal.Rptr. 750.) Here, County pursued its remedy before the Board and prevailed. Thereafter, as required by law, appropriate legislation was introduced. Both the Board hearings and the subsequent efforts to secure legislative appropriations were part of the legislative process. (Former Rev. & Tax. Code, § 2255, subd. (a).) It was not until the legislation was enacted sans appropriations on September 30, 1981 (S.B. 1261) and February 12, 1982 (A.B. 171) that it became unmistakably clear that this process had ended and State had breached its duty to reimburse. At these respective moments of breach, County's right of action in traditional mandamus accrued. County's petition was filed on September 21, 1984, within the three-year statutory period.[17] (*Lerner v. Los Angeles City Board of Education, supra*, 59 Cal.2d at p. 398, 29 Cal. Rptr. 657, 380 P.2d 97.)

1549F. *Government Code Section 17612's Remedy For Unfunded Mandates Does Not Supplant The Court's Order*

State continues its general attack on the order directing payment by arguing that the Legislature has "defined" the remedy available to a local agency if a mandate is unfunded. That remedy is found in Government Code section 17612, subdivision (b) and reads: "If the Legislature deletes from a local government claims bill funding for a mandate, the local agency ... *may* file in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Emphasis added.) (See also former Rev. & Tax.Code, § 2255, subd. (c), eff. October 1, 1982.)

State hints that this procedure is the only remedy available to a local agency if funding is not provided. At oral argument, State admitted that this declaration of enforceability and injunction against enforcement would be prospective only. This remedy would provide no relief to local agencies which have complied with the executive orders.

[22, 23] We conclude that section 17612, subdivision (b) is inapplicable here because it did not become operative until January 1, 1985. It was not in place when the Board rendered its decision on November 20, 1979; when funding was deleted from S.B. 1261 (September 30, 1981) and A.B. 171 (February 12, 1982); or when this litigation commenced on September 21, 1984. A party is not required to exhaust a remedy that was not in existence at the time the action was filed. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 912, fn. 9, 141 Cal.Rptr. 133, 569 P.2d 727.) To abide by this post facto legislation now would condone legislative interference in a specific controversy already assigned to the judicial branch for resolution. (*Serrano v. Priest, supra*, 131 Cal.App.3d at p. 201, 182 Cal.Rptr. 387.)

[24, 25] Also, this remedy is purely a discretionary course of action. By using the permissive word "may," the Legislature did not intend to override article XIII B, section 6 and Revenue and Taxation Code section 2207 and former section 2231. These constitutional and statutory imprimaturs each impose upon the State an obligation to reimburse for state-mandated

17. Technically, State has waived the statute of limitations defense because it was not raised in its answer. (*Ventura County Employees' Retirement Association v. Pope* (1978) 87 Cal.App.3d 938, 956, 151 Cal.Rptr. 695.)

costs. Once that determination is finally made, the State is under a clear and present ministerial duty to reimburse. In the absence of compliance, traditional mandamus lies. (Code Civ.Proc., § 1085.) [18]

[550] G. *The Court's Order Properly Allows County The Right Of Offset*

As the first in a series of objections to portions of the judgment which assist in the reimbursement process, State argues that the court has improperly authorized County to satisfy its claims by offsetting fines and forfeitures due to State. (Fn. 7, ¶ 5, *ante.*) The fines and forfeitures are those found in Penal Code sections 1463.02, 1463.03, 1463.5a and 1464; Government Code sections 13967, 26822.3 and 72056; Fish and Game Code section 13100; Health and Safety Code section 11502; and Vehicle Code sections 1660.7, 42004 and 41103.5.[19]

Broadly speaking, these statutes require County to periodically transfer all or part of the fines and forfeitures collected by it for specified law violations to the State Treasury. They are to be held there "to the credit" of various state agencies, or for payment into specific funds. State contends that since these statutes require mandatory, regular transfers and do not expressly permit diversion for other purposes, the court had no power to allow County to offset. State cites no authority for this contention.

[26] The right to offset is a long-established principle of equity. Either party to a transaction involving mutual debits and credits can strike or balance, holding himself owing or entitled only to the net difference. (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 362, 113 Cal.Rptr. 449, 521 P.2d 441.) Although this doctrine exists independent of statute, its governing principle has been partially codified (Code Civ. Proc., § 431.70) (limited to cross-demands for money).

The doctrine has been applied in favor of a local agency against the State. In *County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 159 Cal.Rptr. 1, for example, the court of appeal upheld a trial court's decision to grant a writ of mandate that ordered funds awarded the County under a favorable judgment to be offset against its current liabilities to the State under the Medi-Cal program. The court stated that such an order does not interfere with the "Legislature's control over the 'submission, approval and enforcement of budgets. . . .' " (*Id.* at p. 592, 159 Cal.Rptr. 1, quoting Cal. Const., art. IV, § 12, subd. (e).)

[27] The order herein likewise does not impinge upon the Legislature's exclusive power to appropriate funds or control budget matters. The identified [551] fines and forfeitures are collected by the County for statutory law violations. Some of these funds remain with the County, while others are transferred to the State. State's portions are uncertain as to amount and date of transfer. State does not come into actual possession of these funds until they are transferred. State's holding of these funds "to the credit" of a particular agency, or for payment to a specific fund, does not commence until their receipt. Until that time, they are unencumbered, unrestricted and subject to offset.

H. *State's Use Of Its Statutory Offset Authority Was Properly Enjoined*

State further contends that the trial court exceeded its jurisdiction by enjoining

18. We leave undecided the question of whether this type of legislation could ever be held to override California Constitution, article XIII B, section 6. The Constitution of the State is supreme. Any statute in conflict therewith is invalid. (*County of Los Angeles v. Payne, supra,* 8 Cal.2d at p. 574, 66 P.2d 658.)

Similarly, former Revenue and Taxation Code section 2255, subdivision (c) cannot abrogate the constitutional directive to reimburse.

19. At oral argument, County conceded that the order authorizing offset of Fish and Game Code section 13100 fines and forfeitures is inappropriate. These collected funds must be spent exclusively for protection, conservation, propagation or preservation of fish, game, mollusks, or crustaceans, and for administration and enforcement of laws relating thereto, or for any such purpose. (Cal. Const., art. XVI, § 9; 20 Ops.Atty.Gen. 110.)

the exercise of State's statutory offset authority until County is fully reimbursed. (Fn. 7, ¶ 11, *ante*.)[20] This order complimented that portion of the order discussed, *infra*, which allowed County to temporarily offset fines and forfeitures as an aid in the reimbursement process.

State correctly observes that it has not unlawfully used its offset authority during the course of this dispute. However, State has not needed to do so because it has adopted other means of avoiding payment on County's claims. In view of State's manifest reluctance to reimburse, and its otherwise unencumbered statutory right of offset, the trial court was well within its authority to prevent this method of frustrating County's collection efforts from occurring. (See *County of Los Angeles v. State of California* (1984) 153 Cal.App.3d 568, 200 Cal.Rptr. 394.)

I. *The Injunction Against Reversion Or Dissipation Of Undisbursed Appropriations Is Proper*

[28] State continues that the order (fn. 7, ¶ 4, *ante*) enjoining it from directly or indirectly reverting the reimbursement award sum from the general fund line item accounts, and from otherwise dissipating that sum in a manner that would make it unavailable to satisfy this court's judgment violates Government Code section 16304.1.[21] This section reverts undisbursed[552] balances in any appropriation to the fund from which the appropriation was made. No authority is cited for State's proposition. To the contrary, *County of Sacramento v. Loeb, supra*, 160 Cal.App.3d at pp. 456–457, 206 Cal.Rptr. 626 expressly confirms this type of ancillary remedy as a legitimate exercise of the court's authority to assist in collecting on an adjudicated debt, the payment of which has been delayed all too long.

That portion of the order restraining reversion is particularly innocuous because it only affects undisbursed balances in an appropriation. At the time of reversion, it is crystal clear that these remaining funds are unneeded for the primary purpose for which appropriated; otherwise, they would not exist. Moreover, that portion of the order restraining dissipation of the reimbursement award sum in a manner that would make it unavailable to satisfy a court's judgment is similarly a proper exercise of the court's authority. By not reimbursing County for the state-mandated costs, State would be contravening its constitutional and statutory obligations to subvent. To the extent it is not reimbursed, County would be compelled, contrary to law, to bear the cost of complying with a state-imposed obligation.

J. *The Auditor Controller And The Specified Funds Are Not Indispensable Parties*

State next contends that the Auditor Controller of Los Angeles County and the "specified" fines and forfeitures County was allowed to offset are indispensable

20. Government Code section 12419.5 provides: "The Controller may, in his discretion, offset any amount due a state agency from a person or entity, against any amount owing such person or entity by any state agency. The Controller may deduct from the claim, and draw his warrants for the amounts offset in favor of the respective state agencies to which due, and, for any balance, in favor of the claimant.... The amount due any person or entity from the state or any agency thereof is the net amount otherwise owing such person or entity after any offset as in this section provided." (See also *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 975–976, 185 Cal.Rptr. 49.)

21. Government Code section 16304.1 provides: "Disbursements in liquidation of encumbrances may be made before or during the two years following the last day an appropriation is available for encumbrance.... Whenever, during [such two-year period], the Director of Finance determines that the project for which the appropriation was made is completed and that a portion of the appropriation is not necessary for disbursements, such portion shall, upon order of the Director of Finance, revert to and become a part of the fund from which the appropriation was made. Upon the expiration of two years ... following the last day of the period of its availability, the undisbursed balance in any appropriation shall revert to and become a part of the fund from which the appropriation was made...."

parties. Failure to join them in the action or to serve them with process purportedly renders the trial court's order void as in excess of its jurisdiction.[22] State cites only the general statutory definition of an indispensable party (Code Civ.Proc., § 389) to support this assertion.

[29] The Auditor Controller is an officer of the County and is subject [553]to the direction and control of the County Board of Supervisors. (Gov.Code, §§ 24000, subds. (d), (e), 26880; Los Angeles County Code, § 2.10.010.) He is indirectly represented in these proceedings because his principal, the County, is the party litigant. Additionally, he claims no personal interest in the fines and forfeitures and his pro forma absence in no way impedes complete relief.

[30] The funds created by the collected fines and forfeitures also are not indispensable parties. This is not an in rem proceeding, and the ownership of a particular stake is not in dispute. Rather, this is an action to compel a ministerial obligation imposed by law. Complete relief may be afforded without including the specified funds as a party.

K. *County Is Entitled To Interest*

[31] State insists that an award of interest to County unfairly penalizes State for not paying claims which it was prohibited by law from paying under Statutes 1981, chapter 1090, section 3. This argument is unavailing.

Civil Code section 3287, subdivision (a) allows interest to any person "entitled to recover damages certain, or capable of being made certain by calculation." Interest begins on the day that the right to recover vests in the claimant. By its own terms, this section applies to any judgment debtor, "including the state ... or any political subdivision of the state."

The judgment orders interest at the legal rate from September 30, 1981, for reimbursement funds originally contained in S.B. 1261, and from February 12, 1982, for the funds originally contained in A.B. 171. These are the respective dates that the bills were enacted without appropriations. As we concluded earlier, County's cause of action did not arise and its right to recover did not vest until this legislative process was complete. County offers no authority to suggest that any other vesting date is appropriate.

Furthermore, State cannot avoid its obligation to pay interest by relying on the invalid budget control language in Statutes 1981, chapter 1090, section 3. "An invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest under Civil Code section 3287, subdivision (a)." (*Olson v. Cory* (1983) 35 Cal.3d 390, 404, 197 Cal. Rptr. 843, 673 P.2d 720.)

APPEAL IN CASE NO. 2
CIVIL B011941

(Rincon et al. Case)

The procedural history and legal issues raised in the *Rincon et al.* appeal are essentially similar to those discussed in the County of Los Angeles matter.

[554]County, although not a party to this underlying trial court proceeding, filed a test claim with the Board. All parties agree that County represented the interests of the named respondents here.

The Board action resulted in a finding of state-mandated costs. It further found that Rincon et al. were entitled to reim-

22. Code of Civil Procedure section 389, subdivision (a) provides: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

bursement in the amount of $39,432. After the Legislature and the Governor, respectively, deleted the funding from the two appropriations bills, S.B. 1261 and A.B. 171, Rincon et al. filed a petition for writ of mandate and declaratory relief. This action was consolidated for hearing in the trial court with the action in B011942 (County of Los Angeles matter). The within judgment was also signed, filed and entered on February 6, 1985. The reimbursement order was directed against the 1984–85 budget appropriations. State appeals from that judgment.

The court here included a judicial determination that the Board, or its successors, hear and approve the claims of certain other respondents for costs incurred in connection with the state-mandated program. (Fn. 7, ¶ 9, *ante*.) This special directive was necessary because the claims of these respondents (petitioners below) have not yet been determined.[23] Since we have ruled that State is barred by the doctrines of waiver and administrative collateral estoppel from raising the state mandate issue, the validity of these claims becomes a question of law susceptible to but one conclusion, and mandamus properly lies. (*County of Sacramento v. Loeb, supra*, 160 Cal.App.3d at p. 453, 206 Cal.Rptr. 626.) This portion of the order also underscores, for the Board's edification, the determination that the statutory restriction on the Board authority to proceed is invalid.[24]

Once again, our determinations and conclusions in the County of Los Angeles matter are equally applicable here.

APPEAL IN CASE NO. 2
CIVIL B006078

(Carmel Valley et al.)

Again, the procedural history and legal issues raised in this appeal are essentially similar to those discussed in the County of Los Angeles matter.

County filed a test claim with the Board. All parties agree that the County represented the interests of the named respondents here.

[555]On December 17, 1980, the Board found that a state mandate existed and that specific amounts of reimbursement were due several respondents totalling $159,663.80. Following the refusal of the Legislature to appropriate funds for reimbursement, Carmel Valley et al. filed a petition for writ of mandate and declaratory relief on January 3, 1983. Judgment was entered on May 23, 1984. The reimbursement order was directed against 1983–84 budget appropriations.

The judgment differs from the other two because it does not decree a specific reimbursement amount. The trial court determined that even though the Board had approved the claims, the State was not precluded from contesting that determination. The court's reasons were that the State, in its answer, had denied that the money claimed was actually spent, and that Board approval had not been implemented by subsequent legislation. The court concluded that the reimbursement process, of which the Board action was an intrinsic part, was "aborted."

We disagree with this portion of the court's analysis. The moment S.B. 1261 and A.B. 171 were enacted into law without appropriations, Carmel Valley et al. had exhausted their administrative remedies and were entitled to seek a writ of mandate. At the time of trial, State was barred by the doctrines of waiver and administrative collateral estoppel from contesting the state mandate issue or the amount of reimbursement. The trial court therefore should have rendered a judgment for the amount of reimbursement. Having failed to do so, this fact-finding responsibility falls upon this court. Although we

23. Responding to the budget control language directing it to refuse to process these claims, the Board declined to hear these matters.

24. Because certain claims have not yet been processed, we assume that the issue of the amount of reimbursement may still be at large. Our record is not clear on this point.

ordinarily are not equipped to handle this function, the writ of mandate in this case identifies the amount of the approved claims as $159,663.80. We accordingly will amend the judgment to reflect that amount.

The trial court also predicated its judgment for Carmel Valley et al. solely on the basis of Revenue and Taxation Code section 2207 and former section 2231. In doing so, the court did not have the benefit of the decision in *City of Sacramento v. State of California, supra,* 156 Cal.App.3d at p. 182, 203 Cal.Rptr. 258.[25] That case held that mandates passed after January 1, 1975, must be reimbursed pursuant to article XIII B, section 6 of the California Constitution, but that reimbursement need not commence until July 1, 1980. In light of this rule, we conclude that the trial court's decision ordering reimbursement is also supported by article XIII B, section 6.

[556]State raises another point specific to this particular appeal. In its answer to the writ petition, State admitted that the local agency expenditures were state mandated. Consequently, the issue was not contested at the trial court level. However, State vigorously contends here that it is not bound by its trial court admissions because the state mandate issue is purely a question of law.

[32] State is correct in contending that an appellate court is not limited by the interpretation of statutes given by the trial court. (*City of Merced v. State of California, supra,* 153 Cal.App.3d at p. 781, 200 Cal.Rptr. 642.) However, State's victory on this point is Pyrrhic. Regardless of how the issue is characterized, State is precluded from contesting the Board findings on appeal because of the independent application of the doctrines of waiver and administrative collateral estoppel. These doctrines would also have applied at the trial court level if State's answer had raised the issue of state mandate in the first instance.

We also reject State's argument, advanced for the first time on appeal, that the executive orders of 1978 initially implement legislation enacted prior to January 1, 1975, and that state reimbursement is therefore discretionary. (Cal. Const., art. XIII B, § 6, subd. (c).) Again, State is barred by the doctrines of waiver and administrative collateral estoppel from arguing that costs incurred under the executive orders are not subject to reimbursement.

State continues that the *Carmel Valley* judgment against the Department of Industrial Relations is erroneous. Since the department was never made a party in the suit, nor served with process, the resulting judgment reflects a denial of due process and is in excess of the court's jurisdiction. (See Code Civ.Proc., § 389; fn. 22, *ante.*)

This assertion is but a variant of the same argument advanced in the *County of Los Angeles* case, *supra,* which we rejected as meritless. The Department is part of the State of California. (Lab.Code, § 50.) State extensively argued the Department's position and even offered into evidence a declaration from the chief of fiscal accounting of the Department. As stated earlier, agents of the same government are in privity with each other. (*People v. Sims, supra,* 32 Cal.3d at p. 487, 186 Cal.Rptr. 77, 651 P.2d 321.)

Ross v. Superior Court, supra, 19 Cal.3d at p. 899, 141 Cal.Rptr. 133, 569 P.2d 727 demonstrates how, through the notion of privity, a government agent can be held in contempt for knowingly violating a court order issued against another agent of the same government. There, a court in an earlier proceeding had decided that defendant Department of Health and Welfare must pay unlawfully withheld welfare benefits to qualified recipients. The County Board of Supervisors, [557]who were not parties to this action, knew about the court's order but refused to comply. The Supreme Court affirmed a trial court decision holding the Board in contempt for violating the

25. The decision in *City of Sacramento, supra,* was filed just one day before the trial court signed the written order in this case. The Revenue and Taxation Code sections on which the court relied were operational before the costs claimed in this case were incurred.

order directing payment. The court reasoned that, as an agent of the Department of Health and Welfare, the Board did not collectively or individually need to be named as a party in order to be bound by a court order of which they had actual knowledge.

The determinations and conclusions in the County of Los Angeles case are likewise applicable here.

MODIFICATION OF JUDGMENTS IN ALL THREE APPEALS

The trial court judgments ordering reimbursement from specific account appropriations were entered many months ago. We will affirm these judgments and thereby validate the trial courts' determination that funds already appropriated for the State Department of Industrial Relations were reasonably available for payment at the time of the courts' orders.

Due to the passage of time, we requested State at oral argument to confirm whether the appropriations designated in the respective judgments are still available for encumbrance. State's counsel responded by rearguing that the weight of the evidence did not support the trial courts' findings that specific funds were reasonably available for reimbursement. Counsel further hinted that the funds may not actually be available.

We hope that counsel for the State is mistaken. But in order to emphasize our strong and unequivocal determination that the local agency petitioners be promptly reimbursed, we will take judicial notice of the enactment of the 1985–86 Budget Act (Stats.1985, ch. 111) and the 1986–87 Budget Act (Stats.1986, ch. 186). (*Serrano v. Priest, supra,* 131 Cal.App.3d at p. 197, 182 Cal.Rptr. 387.) Both acts appropriate money for the State Department of Industrial Relations and fund the identical account numbers referred to in the trial courts' judgments. They are:

Account Numbers	1985–86 Budget Act	1986–87 Budget Act
8350–001–001	$94,673,000	$106,153,000
8350–001–452	2,295,000	2,514,000
8350–001–453	2,859,000	2,935,000
8350–001–890	16,753,000	17,864,000

[33] An appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent Budget Acts. (*Serrano v. Priest, supra,* 131 Cal.App.3d at pp. 198 & 201, 182 Cal. Rptr. 387.) We do so here with respect to all three judgments.

[558] DISPOSITION

2d Civ. B011942 (County of Los Angeles Case)

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: "If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985–86 and 1986–87 Budget Acts."

(2) The words "Fish and Game Code Section 13100" are deleted from paragraph 5.

(3) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985–86 and 1986–87 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

2d Civ. B011941 (Rincon et al. Case)

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: "If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985–86 and 1986–87 Budget Acts.

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985–86 and 1986–87 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

2d Civ. B006078 (Carmel Valley et al. Case)

The judgment is modified as follows:

[559](1) The following sentences are added to paragraph 2: "The reimbursement amounts total $159,663.80. If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985–86 and 1986–87 Budget Acts."

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985–86 and 1986–87 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

ASHBY, Acting P.J., and HASTINGS, J., concur.

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[891]**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Daniel Lee YOUNG, Defendant and Appellant.

B012755.

Court of Appeal, Second District, Division 7.

Feb. 23, 1987.

Review Denied May 13, 1987.

Defendant was convicted in the Superior Court, Los Angeles County, Jacqueline L. Weiss, J., of one count of first-degree murder and 48 counts of attempted murder, as a result of defendant's act of driving automobile down crowded sidewalk, and defendant appealed. The Court of Appeal, Kriegler, J., assigned, held that: (1) defendant was not entitled to appointment of particular psychiatrist to assist defense counsel in phrasing questions during trial; (2) defendant was not entitled to instruction of involuntary intoxication; (3) jury was sufficiently instructed that express malice was element of attempted murder; (4) defendant's preoffense psychiatric records were properly excluded; and (5) defendant was not entitled to instruction on consequences of verdict of not guilty by reason of insanity.

Affirmed.

1. Automobiles ⇐355(13)

Attempted murder conviction was sufficiently supported by evidence that victim was one of the pedestrians struck and injured by defendant when he drove his car on sidewalk.

2. Costs ⇐302.4

Attempted murder defendant was not entitled to appointment of particular psychiatrist, to exclusion of all others, to assist counsel in presentation of defense.

3. Costs ⇐302.2(1)

State need not purchase for indigent defendant all assistance his wealthier counterpart might buy.

4. Costs ⇐302.4

Attempted murder defendant was not entitled to appointment of psychiatrist to assist defense counsel in framing questions, absent showing that two court-appointed psychiatrists needed additional information.

5. Criminal Law ⇐489

Trial court did not unduly restrict direct examination of court-appointed psychiatric experts where experts were allowed to testify as to their opinions of attempted

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CITY OF EL MONTE et al.,
Plaintiffs and Appellants,

v.

COMMISSION ON STATE MANDATES, Defendant and Respondent;

Department of Finance, Real Party in Interest and Respondent.

No. C025631.

Court of Appeal, Third District.

July 27, 2000.

Rehearing Denied Aug. 23, 2000.

Review Denied Nov. 1, 2000.*

City petitioned for writ of administrative mandate, challenging decision of Commission on State Mandates which denied its claim for state reimbursement for funds redevelopment agency was required to pay to local school districts. The Superior Court, Sacramento County, No. 95CS02704, Cecily Bond, J., denied petition, and city appealed. The Court of Appeal, Scotland, P.J., held that: (1) Educational Revenue Augmentation Fund (ERAF) legislation, shifting a portion of redevelopment agency funds to local schools, did not create a reimbursable state mandate, and (2) city received fair hearing before Commission.

Affirmed.

1. States ⇐111

Educational Revenue Augmentation Fund (ERAF) legislation, shifting a portion of redevelopment agency funds to local schools, did not create a reimbursable state mandate for purposes of constitutional provision requiring state to provide subvention of funds to reimburse local governments for costs of new programs or additional services mandated by state law. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Health & Safety Code §§ 33020, 33678, 33681.

2. States ⇐111

A reimbursable state mandate under constitutional provision requiring state to provide subvention of funds to reimburse local governments for costs of new programs or additional services mandated by state law is not commensurate with any "additional costs" that a local government may be required to bear; additional expense to a local agency arising as an incidental impact of a law that applies generally to all entities is not the type of expense that the voters had in mind when they adopted provision. West's Ann.Cal. Const. Art. 13B, § 6.

3. States ⇐111

A reimbursable mandate is created, for purposes of constitutional provision requiring state to provide subvention of funds to reimburse local governments for costs of new programs or additional services mandated by state law, only when the state imposes on a local government a new program or an increased level of service under an existing program. West's Ann.Cal. Const. Art. 13B, § 6.

4. States ⇐111

Decision of Commission on State Mandates satisfied requirement that an adjudicative decision set forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or order, where decision addressed pure question of law, and fully discussed the issues and agency's resolution of them.

5. States ⇐111

City was not prejudiced by alleged failure of Commission on State Mandates to hear city's claim for state reimbursement within a reasonable time, or by Commission's acceptance of position papers from Department of Finance that were allegedly submitted late and were not properly served upon city, where issue considered by Commission was one of law, not of fact, and Commission resolved issue correctly. West's Ann.Cal.Gov.Code § 17555; Cal.Code Regs. title 2, § 1187.1.

* Kennard, J., dissented.

[268]Law Offices of William D. Ross, William D. Ross, Carol B. Sherman and J. Robert Flandrick, Los Angeles, for Plaintiffs and Appellants.

Gary D. Hori, Legal Counsel, Camille Shelton, Staff Counsel, Commission on State Mandates for Defendant and Respondent.

[269]Daniel E. Lungren and Bill Lockyer, Attorneys General, Linda A. Cabatic and Pete Southworth, Deputy Attorneys General, for Real Party in Interest and Respondent.

SCOTLAND, P.J.

In this appeal from the trial court's denial of a petition for writ of administrative mandate, we are called upon to determine whether legislation requiring local redevelopment agencies to contribute to a local Educational Revenue Augmentation Fund (ERAF) constituted a reimbursable state mandate under article XIII B, section 6 of California's Constitution.

As we shall explain, we agree with the trial court that the legislation did not constitute a reimbursable state mandate and that plaintiffs were accorded a fair hearing before the Commission on State Mandates. Accordingly, we shall affirm the judgment.

BACKGROUND

The Legislature has "found and declared that there exist in many communities blighted areas which constitute physical and economic liabilities, requiring redevelopment in the interest of the health, safety, and general welfare of the people of these communities and of the state." (Health & Saf.Code, § 33030.) Thus, it is the policy of our state to utilize all appropriate means to promote the sound development and redevelopment of blighted areas. (Health & Saf.Code, § 33037.) To that end, the Legislature enacted the Community Redevelopment Law. (Health & Saf.Code, § 33000 et seq.)

The redevelopment process begins when a community forms a redevelopment agency and, after appropriate proceedings, designates an area as a redevelopment or project area. (See *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 27, 214 Cal.Rptr. 788.) The agency then must formulate a redevelopment plan that is adopted by the local government body. (*Ibid.*) The agency has broad powers to implement the redevelopment plan, but lacks the authority to impose a tax to finance its efforts. (*Ibid.*) In this respect, a redevelopment agency is permitted to accept financial or other assistance from any public or private source, may borrow money, and may issue bonds. (*Ibid.*; Health & Saf.Code, §§ 33600–33602.)

The most important method of financing employed by a redevelopment agency is what is known as tax increment financing. (See Health & Saf.Code,[270] § 33670 et seq.) This method of financing is explicitly authorized by article XVI, section 16 of our state Constitution. Tax increment financing presupposes that redevelopment will increase property values, and hence increase the tax base, of properties in the project area. Pursuant to a tax increment financing plan, the taxing agencies that are entitled to an allocation of taxes paid upon properties in a redevelopment area continue to receive an allocation based upon the assessment roll last equalized prior to the effective date of the ordinance approving the redevelopment plan. (Cal. Const., art. XVI, § 16, subd. (a).) Tax receipts in excess of that amount are paid into a special fund of the redevelopment agency for the payment of "the principal of and interest on loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed or otherwise) incurred by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project." (Cal. Const., art. XVI, § 16, subd. (b).) In other words, the taxing agency receives the same amount of money it would have received under the assessed valuation of the project area in

the absence of redevelopment, and the redevelopment agency receives the increment attributable to new construction and revitalization. (*Bell Community Redevelopment Agency v. Woosley, supra*, 169 Cal.App.3d at p. 27, 214 Cal.Rptr. 788.)

The Community Redevelopment Law and tax increment financing have long been a part of California law. (*Brown v. Community Redevelopment Agency* (1985) 168 Cal.App.3d 1014, 1017, 214 Cal.Rptr. 626.) However, some uncertainty with respect to redevelopment agencies and tax increment financing arose as the result of the addition of articles XIII A and XIII B to our state Constitution, and their failure to specifically address community redevelopment. (*Bell Community Redevelopment Agency v. Woosley, supra*, 169 Cal.App.3d at p. 29, 214 Cal.Rptr. 788.)

California Constitution, article XIII A, added in 1978 and familiarly known as Proposition 13, imposes taxing limitations upon local governments. In addition to limiting property taxes to one percent of full market value, "to be collected by the counties and apportioned according to law to the districts within the counties," article XIII A imposes a requirement of a two-thirds majority vote for the imposition of special taxes. (Cal. Const., art. XIII A, § 1, subd. (a), § 4.) Article XIII A does not preclude a local government from imposing or raising special taxes, but the supermajority vote requirement makes it more difficult to do so. (*Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 105, 211 Cal.Rptr. 133, 695 P.2d 220.) This was intended to inhibit a local government from avoiding property tax limitations by shifting the tax burden to other forms of tax. (*Ibid.*)

[2] California Constitution, article XIII B, added in 1979, imposes government spending limitations upon the state and local governments. With respect to local governments, the limitation is accomplished by restricting total annual appropriations to the appropriations limit for the prior year, adjusted for the change in the cost of living and the change in population, except as otherwise provided in that article. (Cal. Const., art. XIII B, § 1.) The essential thrust of article XIII B is to prohibit a government entity from spending more on programs funded with taxes than it spent in the prior year, adjusted for inflation and population changes. (*Huntington Park Redevelopment Agency v. Martin, supra*, 38 Cal.3d at p. 107, 211 Cal.Rptr. 133, 695 P.2d 220.) In view of the local tax limitations imposed by article XIII A and the spending limitations imposed upon local governments by article XIII B, article XIII B includes section 6 which, with certain exceptions, requires the state to provide a subvention of funds for the costs of any new program or higher level of service imposed upon local governments by the Legislature or any state agency. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 61, 233 Cal.Rptr. 38, 729 P.2d 202.)

In view of the uncertainty with respect to tax increment financing after the addition of articles XIII A and XIII B to our state Constitution, the Legislature enacted Health and Safety Code section 33678 as urgency legislation. (Added by Stats.1980, ch. 1342, § 1, pp. 4750–4751, eff. Sept. 30, 1980; amended by Stats.1993, ch. 942, § 35, pp. 5380–5381.) Subdivision (a) of that section provides: "This section implements and fulfills the intent of this article and of Article XIII B and Section 16 of Article XVI of the California Constitution. The allocation and payment to an agency of the portion of taxes specified in subdivision (b) of Section 33670 [the tax increment] for the purpose of paying principal of, or interest on, loans, advances, or indebtedness incurred for redevelopment activity, as defined in subdivision (b) of this section, shall not be deemed the receipt by an agency of proceeds of taxes levied by or on behalf of the agency within the meaning or for the purposes of Article XIII B of the California Constitution, nor shall such portion of taxes be deemed receipt of proceeds of taxes by, or an appropriation subject to limitation of, any other public body

within the meaning or for purposes of Article XIII B of the California Constitution or any statutory provision enacted in implementation of Article XIII B. The allocation and payment to an agency of this portion of taxes shall not be deemed the appropriation by a redevelopment agency of proceeds of taxes levied by or on behalf of a redevelopment agency within the meaning or for purposes of Article XIII B of the California Constitution."

The constitutional validity of Health and Safety Code section 33678 was considered in *Brown v. Community Redevelopment Agency, supra*, 168 |272Cal.App.3d 1014, 214 Cal.Rptr. 626. There, it was contended that funds received by a redevelopment agency pursuant to a tax increment funding plan are "proceeds of taxes" subject to the appropriations limit of article XIII B. (*Id.* at p. 1018, 214 Cal.Rptr. 626.) The Court of Appeal disagreed, finding article XIII B to be vague and uncertain with respect to tax increment financing, and finding the legislative clarification in Health and Safety Code section 33678 to be neither arbitrary and unreasonable, nor repugnant to the literal language of article XIII B. (*Id.* at p. 1020, 214 Cal.Rptr. 626.) The same conclusion was reached by another Court of Appeal in a virtually contemporaneous decision. (*Bell Community Redevelopment Agency v. Woosley, supra*, 169 Cal.App.3d at pp. 33–34, 214 Cal.Rptr. 788; see also *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 987, 64 Cal.Rptr.2d 270.)

It was upon this background that, in 1992, the Legislature enacted what the parties refer to as the ERAF legislation. (Stats.1992, chs. 699, 700.) ERAF stands for Educational Revenue Augmentation Fund. The ERAF legislation, which was enacted in response to a shortfall in state revenues and a period of severe fiscal difficulty brought about by the well-known economic recession of that time period (Stats.1992, ch. 699, § 36, p. 3114; ch. 700, § 5, p. 3125), affected local government entities, including redevelopment agencies. Because the dispute in this case involves only the effect of the ERAF legislation on redevelopment agencies, we shall confine our discussion of it to redevelopment agencies.

In chapter 699, the ERAF legislation amended Health and Safety Code section 33020 to include, in the definition of "redevelopment," payments to school and community college districts in the 1992–1993 fiscal year. (Stats.1992, ch. 699, § 3, p. 3084.) Health and Safety Code section 33681 was enacted to require a redevelopment agency to make certain payments to local school and community college districts. (Stats.1992, ch. 699, § 7, pp. 3087–3089.) This version of Health and Safety Code section 33681, which was superseded before it became operative, would have required redevelopment agencies to pay an amount equal to 15 percent of all taxes allocated to it during the 1992–1993 fiscal year, less applicable credits, to each school and community college district that is an affected taxing entity of the agency. (Stats.1992, ch. 699, § 7, pp. 3087–3089.)[1] Section 33683 was added to the Health and Safety Code to provide that sums paid pursuant to |273the ERAF legislation with property tax revenues are to be deducted from the property tax dollars deemed to have been received by the agency for purposes of determining whether the tax allocation and financing limitations in the redevelopment plan (Health & Saf.Code,

1. In support of this provision, the Legislature enacted Health and Safety Code section 33680, which contains certain findings and declarations. (Stats.1992, ch. 699, § 7, pp. 3086–3087.) Among other things, the Legislature found that the purposes of the Community Redevelopment Law are dependent upon an adequate and financially solvent school system, that redevelopment agencies historically have provided financial assistance to schools which benefit and serve the project area, that the reduced funds available to the state made it necessary for redevelopment agencies to provide additional assistance to schools, and that the payments to be made to schools and community college districts are of benefit to redevelopment project areas.

§§ 33333.2, 33333.4), or pursuant to any agreement or court order, have been reached (Stats.1992, ch. 699, § 7, pp. 3089–3090).

In chapter 699, the ERAF legislation also enacted Revenue and Taxation Code section 97.03, dealing with the allocation of property tax revenues. (Stats.1992, ch. 699, § 12, pp. 3093–3096.)[2] In relevant part, in subdivision (d), that provision established in each county an Educational Revenue Augmentation Fund into which certain tax receipts would be paid and then allocated to school and community college districts in the county.

In chapter 700, the ERAF legislation enacted a different version of Health and Safety Code section 33681, which superseded the one enacted in chapter 699. (Stats.1992, ch. 700, § 1.5, pp. 3115–3116.) The new version provided a formula for determining a redevelopment agency's contribution to schools and community college districts and provided for deposit of such contributions into the county ERAF fund established pursuant to Revenue and Taxation Code section 97.03. The measure includes subdivision (c), which provides: "In order to make the allocation required by this section, an agency may use any funds that are legally available and not legally obligated for other uses, including, but not limited to, reserve funds, proceeds of land sales, proceeds of bonds or other indebtedness, lease revenues, interest, and other earned income. No moneys held in a low-and moderate-income fund as of July 1, 1992, may be used for this purpose." (Stats.1992, ch. 700, § 1.5, p. 3116.) Subdivision (e) declares such sums to be an indebtedness of the redevelopment project to which they relate, payable through tax increment financing. (Stats.1992, ch. 700, § 1.5, p. 3116.) This version of section 33681 added subdivision (f) to provide: "It is the intent of the Legislature, in enacting this section, that these allocations directly or indirectly assist in the [274] financing or refinancing, in whole or in part, of the community's redevelopment projects pursuant to Section 16 of Article XVI of the California Constitution."[3]

The effect of the 1992 ERAF legislation was to require redevelopment agencies to make a payment into the county ERAF fund for distribution to local school and community college districts. The City of El Monte Community Redevelopment Agency claims that, pursuant to the 1992 ERAF legislation, it was required to allocate $118,138.57 for that purpose. The City of El Monte asserts that, as a result of an agency shortfall, it was required to lend funds to the agency for payment of its ERAF contributions.[4] Pursuant to Government Code procedures (§ 17500 et seq.), El Monte filed test claim number CSM–4439 with the Commission on State Mandates (the Commission), seeking state reimbursement for these costs.

In 1993, while claim number CSM–4439 was pending, the Legislature enacted additional ERAF legislation. (Stats.1993, chs.68, 566.) The effect of the 1993 ERAF legislation was to require a redevelopment agency to make payments into the county

2. Property taxes are collected by counties and then apportioned and disbursed pursuant to legislative formulae. (Cal. Const., art. XIII A, § 1; Rev. & Tax Code, § 95 et seq.; see *Bell Community Redevelopment Agency v. Woosley*, *supra*, 169 Cal.App.3d at p. 32, 214 Cal.Rptr. 788.)

3. Chapter 700 included a new and superseding version of Revenue and Taxation Code section 97.03. (Stats.1992, ch. 700, § 4, pp. 3120–3125.) With respect to redevelopment agencies, the new version was identical to the version in chapter 699.

4. Although the ERAF legislation also required cities, counties, and other taxing entities to contribute to the local ERAF fund, the City of El Monte does not contest any direct effect upon it in this proceeding. The City of El Monte joins this litigation solely by reason of the loan of funds to its redevelopment agency. For convenience, we will adopt the nomenclature of the appellants and refer to them collectively as El Monte.

ERAF fund during the 1993–1994 and 1994–1995 fiscal years. (Stats.1993, ch. 68, §§ 1, 2, 4, amending Health & Saf.Code, §§ 33020, 33680, and adding § 33681.5.)[5] El Monte filed test claim number CSM–4465, asserting that it had incurred state mandated costs in the amount of $34,638.52 for the 1993–1994 fiscal year as the result of the 1993 ERAF legislation.

The Commission adopted a lengthy decision denying claim number CSM–4439. It subsequently adopted a decision denying claim number CSM–4465 on the same grounds. In denying the claims, the Commission concluded (1) the ERAF legislation did not impose a new program or higher level of service on redevelopment agencies; (2) tax increment revenues are not "proceeds of taxes" within the meaning of article XIII B, section 6 of the Constitution, and the provisions of article XIII B, including section 6, are not applicable to [275]tax increment financing; (3) the payments to an ERAF fund by redevelopment agencies represent an allocation of funds among local government entities rather than a shift in costs from the state to a local entity, and the decision in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318 is inapplicable because in this instance long-standing educational responsibilities remain with local school districts; and (4) the ERAF legislation does not impose reimbursable costs on a redevelopment agency because, pursuant to Health and Safety Code section 33683 (Stats.1992, ch. 699, § 7, pp. 3089–3090), the agency may recoup its costs by excluding such payments from its tax receipt and financing limitations.

El Monte petitioned for a writ of administrative mandate. (Code Civ. Proc., § 1094.5; Gov.Code, § 17559.) The trial court upheld the Commission's decision. The court rejected El Monte's procedural attacks upon the Commission proceedings, holding El Monte had failed to substantiate that it was denied a fair hearing or otherwise prejudiced by an irregularity. With respect to the substantive claim, the court found dispositive the Commission's conclusion that the ERAF legislation represented an allocation of taxes among local entities rather than a shift of state responsibilities to local agencies. Judgment was entered denying the petition for a writ of mandate.

DISCUSSION

I

State Mandate

[1] Before considering El Monte's substantive contentions, it will be useful to identify certain matters that are not in issue.

First, El Monte notes that in the Commission proceedings the Department of Education admitted that payments to county ERAF funds were distributed to local school and community college districts with an equal reduction of state payments to those districts. This factual admission is consistent with the ERAF legislation. In enacting this legislation, the Legislature specified that it was dealing with a current shortfall in state revenues and a period of severe fiscal difficulty. (Stats.1992, ch. 699, § 36, p. 3114; Stats.1992, ch. 700, § 5, p. 3125.) In support of the ERAF legislation, the Legislature adopted Health and Safety Code section 33680, subdivision (c), which provides among other things: "[B]ecause of the reduced funds available to the state to assist schools and community colleges which benefit and serve redevelopment project areas during the 1992–93 fiscal year, it is necessary [276]for redevelopment agencies to make additional payments to assist the programs and operations of these schools

5. In Chapter 566, the 1993 ERAF legislation added section 33681.3 to the Health and Safety Code to provide an equitable adjustment for certain redevelopment agencies for their payments during the 1992–1993 fiscal year. (Stats.1993, ch. 566, § 1, p. 2812.) This provision is beneficial to the agencies that qualify and is not at issue here.

and colleges in order to ensure that the objectives stated in this section can be met." (Stats.1992, ch. 669, § 7, p. 3087.) It is undeniable that a purpose behind the ERAF legislation was to compel redevelopment agencies to provide support for schools and community colleges during a period when the state was unable to adequately provide such support. However, the validity of the state's reduction of its payments to school districts is not in issue. El Monte lacks standing to complain of the state's reduced payments to schools. (*County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1449, 29 Cal.Rptr.2d 103.) Moreover, article XVI, sections 8 and 8.5 of our state Constitution, added by Proposition 98 at the November 1988 General Election, upon which El Monte places heavy reliance, recognizes the historical fluidity of the fiscal relationship between local governments and schools, which we will discuss, *post*. Accordingly, the fact that the ERAF legislation was accompanied by a reduction of state payments to local school and community college districts is not dispositive.

Second, we are not here concerned with the validity of the ERAF legislation. As noted previously, the Legislature made certain findings and declarations in support of this legislation. (See p. 336, fn. 1, *ante*.) The Legislature found that it is appropriate for redevelopment agencies to provide assistance to local schools and community colleges, that such support serves the purposes of community redevelopment, and that such assistance may properly be treated as indebtedness payable through tax increment financing within the meaning of article XVI, section 16 of our state Constitution. (Health & Saf. Code, § 33680.) El Monte does not challenge the validity of those determinations or of the ERAF legislation. In fact, El Monte emphasizes that the validity of the legislation is not in issue. The sole issue presented with respect to the ERAF legislation is whether the compelled contributions constitute a state mandate for which a subvention of funds is required pursuant to article XIII B, section 6 of the Constitution.

Third, we are not concerned with the Legislature's determination, embodied in Health and Safety Code section 33678, that redevelopment agencies and tax increment financing pursuant to article XVI, section 16 of the Constitution are not subject to the local government appropriations limitations of article XIII B. As we have noted, that determination has been upheld in the Courts of Appeal. (*Bell Community Redevelopment Agency v. Woosley, supra*, 169 Cal.App.3d at pp. 33–34, 214 Cal.Rptr. 788; *Brown v. Community Redevelopment Agency, supra*, 168 Cal.App.3d at p. 1020, 214 Cal.Rptr. 626.) El Monte does not ask us to reject those decisions and find that redevelopment agencies and tax increment financing are in fact subject to the government spending limitations of article XIII B.

[277] El Monte asks only that we find the subvention requirements of section 6 of article XIII B are applicable in this instance.

California Constitution, article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

In addressing the meaning and scope of this provision, we do not write on a clean slate; fortunately, we have the benefit of extensive judicial consideration of the mat-

ter. When we consider El Monte's claim in light of existing authorities, we are satisfied, on two alternative grounds, that the ERAF legislation did not constitute a reimbursable state mandate with respect to redevelopment agencies. We will discuss these grounds seriatim.

A. *Allocation of Revenues*

[2] A reimbursable state mandate is not commensurate with any "additional costs" that a local government may be required to bear. (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at pp. 55–57, 233 Cal.Rptr. 38, 729 P.2d 202.) The additional expense to a local agency arising as an incidental impact of a law that applies generally to all entities is not the type of expense that the voters had in mind when they adopted section 6 of article XIII B. (*Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d at p. 835, 244 Cal.Rptr. 677, 750 P.2d 318.)

[3] A reimbursable mandate is created only when the state imposes on a local government a new program or an increased level of service under an existing program. (*Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d at p. 835, 244 Cal.Rptr. 677, 750 P.2d 318.)

In *Lucia Mar Unified School Dist. v. Honig, supra*, upon which El Monte places primary reliance, the Legislature had enacted a measure to require local school districts to contribute part of the costs of educating pupils from the district at state schools for the severely handicapped. Before and after the measure, the state retained complete administrative control over the special schools. Before the measure, the state had borne the entire cost of operating 1278 such schools. Under these circumstances, the Supreme Court found that the measure constituted a "new program" within the meaning of the subvention requirement because otherwise the requirement "would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government...." (*Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.) [6]

The decision in *Lucia Mar Unified School Dist. v. Honig* turned on the dual factors that (1) before the measure, the state had borne the entire cost of the special schools, and (2) before and after the measure, the state retained administrative control over the special schools. (44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318, especially fn. 8 [noting the decision involved the "new program" rather than "higher level of service" aspect of the subvention requirement]; see also *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 99, fn. 20, 61 Cal.Rptr.2d 134, 931 P.2d 312.) As will be seen, neither of these factors is applicable in this case.

The matter of funding education is a shared responsibility between state and local taxpayers. (See, e.g., Ed.Code, § 14000.) The division of this responsibility has been in a state of flux since 1971, as the result of certain developments, including the decision in *Serrano v. Priest* (1971) 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 holding that equal protection requires equal funding of schools, and the addition to the Constitution of article XIII A limiting local property taxation. (See *California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1526–1527, 7 Cal.Rptr.2d 699; see also *County of Los Angeles v. Sasaki, supra*, 23 Cal.App.4th at pp. 1450–1452, 29 Cal.Rptr.2d 103 [noting that by fiscal year 1991–1992, the share of local property tax revenue allocated to K–14 schools had dropped to 35 percent from the 53 percent that it had been in the

6. In *Lucia Mar Unified School Dist. v. Honig*, the Supreme Court did not decide that the measure constituted a reimbursable state mandate. The possible existence of reasonable alternatives to the use of state-operated schools left open the question whether the contributions were mandated, and the court deferred to the Commission for resolution of that issue. (*Lucia Mar, supra*, 44 Cal.3d at pp. 836–837, 244 Cal.Rptr. 677, 750 P.2d 318.)

1977–1978 fiscal year (at p. 1452, 29 Cal. Rptr.2d 103)].)

Nevertheless, it is clear that, before the enactment of the ERAF legislation, a substantial, although variable, portion of local property tax revenues were utilized for the support of schools. In this respect, a utilization of local property taxes in support of schools and community colleges is not a "new program" within the meaning of the decision in *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318.

El Monte cites *Butt v. State of California* (1992) 4 Cal.4th 668, at page 681, 15 Cal.Rptr.2d 480, 842 P.2d 1240, for the proposition that education is the [279] ultimate responsibility of the state. The principle is undeniable, and indeed this court has noted and relied upon the state's plenary authority over education. (*California Teachers Assn. v. Hayes, supra*, 5 Cal.App.4th at pp. 1524–1525, 7 Cal.Rptr.2d 699.) However, that principle does not resolve the issue presented in this case. (See *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1814–1815, 53 Cal.Rptr.2d 521.)

Only the state is sovereign and, in a broad sense, all local governments, districts, and the like are subdivisions of the state. (*Allied Amusement Co. v. Bryam* (1927) 201 Cal. 316, 320, 256 P. 1097; *Petition East Fruitvale Sanitary Dist.* (1910) 158 Cal. 453, 457, 111 P. 368.) However, it is the State of California's policy to provide for the maximum feasible degree of local autonomy. (See Cal. Const., art. XI.) Thus, the Legislature has established a policy of providing, to the extent feasible, autonomy for local school districts. (Ed. Code, § 14000; see *Butt v. State of California, supra*, 4 Cal.4th at p. 681, 15 Cal. Rptr.2d 480, 842 P.2d 1240.) And for a variety of purposes, school districts have been held to be separate political entities rather than "the state." (*Butt v. State of California, supra*, at p. 681, 15 Cal.Rptr.2d 480, 842 P.2d 1240.)

Any doubt with respect to the "local government" status of school districts under article XIII B is resolved by the article itself, which provides that, for its purposes, " 'Local government' means any city, county, city and county, school district, special district, authority, or other political subdivision of or within the State." (Cal. Const., art. XIII B, § 8, subd. (d).) For purposes of article XIII B, school districts are local government and not the state.

Since neither of the determinative factors in *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318, is present here, that decision is not controlling. This, of course, does not resolve the question whether the ERAF legislation constitutes a reimbursable mandate; it merely means that *Lucia Mar Unified School Dist. v. Honig* does not provide the answer.

The answer, we conclude, is in the decision of *City of San Jose v. State of California, supra*, 45 Cal.App.4th 1802, 53 Cal. Rptr.2d 521.

City of San Jose v. State of California involved a claim that legislation authorizing counties to charge cities and other local governments for the costs of booking arrestees into the county jail constituted a reimbursable state mandate. The Court of Appeal rejected a contention that counties should be considered to be agents of the state and said: "Thus for purposes of subvention analysis, it is clear that counties and cities were intended to be treated alike as part of 'local government'; both are considered local agencies or political subdivisions of the State. Nothing in article XIII B prohibits [280] the shifting of costs between local governmental entities." (*City of San Jose v. State of California, supra*, 45 Cal.App.4th at p. 1815, 53 Cal. Rptr.2d 521.)

The ERAF legislation was, in part, an exercise of the Legislature's authority to apportion property tax revenues. (*San Miguel Consolidated Fire Protection Dist. v. Davis* (1994) 25 Cal.App.4th 134, 148–149, 30 Cal.Rptr.2d 343.) It was merely the most recent adjustment in the histori-

cal fluidity of the fiscal relationship between local governments and schools. (*County of Los Angeles v. Sasaki, supra*, 23 Cal.App.4th at p. 1457, 29 Cal.Rptr.2d 103.)[7]

Pursuant to the decision in *City of San Jose v. State of California, supra*, 45 Cal.App.4th 1802, 53 Cal.Rptr.2d 521, the shift of a portion of redevelopment agency funds to local schools did not create a reimbursable state mandate.

B. *Applicability of Article XIII B, Section 6 to Redevelopment Agencies*

We find a second and alternative ground for concluding that the ERAF legislation did not impose a reimbursable state mandate on redevelopment agencies.

In *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 280 Cal.Rptr. 92, 808 P.2d 235, the Supreme Court held that the subvention requirement of article XIII B, section 6 must be read in light of its textual and historical context and that, when so considered, subvention is required only when the costs in question can be recovered solely from tax revenues, i.e., "proceeds of taxes." (*Id.* at pp. 486–487, 280 Cal.Rptr. 92, 808 P.2d 235; Cal. Const., art. XIII B, § 8, subd. (c).)[8]

In the ERAF legislation, however, the Legislature provided that a redevelopment agency's obligations for the local ERAF fund could be paid from [281] any legally available source, including the tax increment payable to the agency under Health and Safety Code section 33670 and article XVI, section 16 of California's Constitution. Pursuant to Health and Safety Code section 33678, an agency's tax increment may not be deemed to be the proceeds of taxes within the meaning of article XIII B.

It follows that the ERAF legislation did not impose costs on redevelopment agencies that can be recovered solely from tax revenues within the meaning of article XIII B and thus, under the reasoning of *County of Fresno v. State of California, supra*, 53 Cal.3d at pp. 486–487, 280 Cal. Rptr. 92, 808 P.2d 235, the ERAF legislation did not impose a reimbursable state mandate.

Our conclusion is consistent with the holding in *Redevelopment Agency v. Commission on State Mandates, supra*, 55 Cal.App.4th 976, 64 Cal.Rptr.2d 270. In that case, a redevelopment agency claimed the legislative requirement that a portion of its tax increment be placed into a Low and Moderate Income Housing Fund constitut-

7. The decisions in *San Miguel Consolidated Fire Protection Dist. v. Davis, supra*, 25 Cal.App.4th 134, 30 Cal.Rptr.2d 343, and *County of Los Angeles v. Sasaki, supra*, 23 Cal.App.4th 1442, 29 Cal.Rptr.2d 103, upheld the ERAF legislation against a variety of legal attacks. However, those decisions did not involve redevelopment agencies and tax increment financing peculiar to those agencies, and did not involve the question whether the ERAF legislation could constitute a reimbursable state mandate. Consequently, those decisions are not dispositive of issues presented here.

8. El Monte has asked us to take judicial notice of certain materials, including (1) the California ballot pamphlet for the November 6, 1979, Special Election, at which article XIII B was added to the Constitution, and (2) excerpts of the Journal of the Assembly for the 1975–1976 Regular Session, concerning statutory reimbursement provisions that preceded the addition of article XIII B to the Constitution. (Rev. & Tax.Code, former §§ 2207, 2231.) These materials are submitted in support of El Monte's claim that reimbursement is required for any costs a local government incurs as the result of state action. In *County of Los Angeles v. State of California, supra*, 43 Cal.3d at pages 55 to 57, 233 Cal.Rptr. 38, 729 P.2d 202, the Supreme Court considered the preexisting statutory scheme but nevertheless concluded that the constitutional subvention requirement is not implicated whenever any additional costs are imposed on a local government. In *County of Fresno v. State of California, supra*, 53 Cal.3d at pages 486 and 487, 280 Cal.Rptr. 92, 808 P.2d 235, the Supreme Court held that the constitutional provision requires a subvention only when the costs imposed can be recovered solely through tax revenues. Under principles of stare decisis, we are bound by those authorities. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) Thus, we deny the request for judicial notice.

ed a reimbursable state mandate. The agency maintained that, although it was exempt from the appropriation limits of article XIII B, it nevertheless was entitled to claim reimbursement for state-mandated costs pursuant to that article. The Court of Appeal disagreed, concluding the same policies which support exempting tax increment financing from the appropriations limits of article XIII B also support denying reimbursement pursuant to section 6 of that article. (*Id.* at p. 987, 64 Cal.Rptr.2d 270.)

Under the narrow scope in which El Monte pursues this litigation, we find the reasoning of the decision in *Redevelopment Agency v. Commission on State Mandates, supra*, 55 Cal.App.4th at page 987, 64 Cal.Rptr.2d 270, to be compelled by the reme Court's decision in *County of Fresno v. State of California, supra*, 53 Cal.3d at pages 486, 280 Cal.Rptr. 92, 808 P.2d 235 through 487. El Monte does not challenge the validity of Health and Safety Code section 33678, which precludes a redevelopment agency's tax increment from being considered to be the proceeds of taxes for purposes of article XIII B. Absent a successful challenge to that legislative determination, the decision in *County of Fresno v. State of California* forecloses a reimbursable mandate. In other words, a redevelopment agency cannot accept the benefits of Health and [282] Safety Code section 33678 while asserting an entitlement to reimbursement under article XIII B, ion 6.

C. *Summary*

For these two, alternative reasons, we agree with the Commission and the trial court that the ERAF legislation did not impose a reimbursable state mandate upon redevelopment agencies.[9]

II

Procedural Issues

[4] El Monte argues the Commission's decision fails to meet the requirements of *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 113 Cal.Rptr. 836, 522 P.2d 12, which held that an adjudicative decision by an administrative agency must set forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or order. (*Id.* at p. 515, 113 Cal.Rptr. 836, 522 P.2d 12.) However, as we have noted (see fn. 9, *ante*), the two bases for decision we have discussed present pure questions of law, to be resolved upon existing statutory, constitutional, and decisional authorities. The Commission's decision fully discussed the issues and its resolution of them, and was sufficient under the decision in *Topanga Assn. for a Scenic Community v. County of Los Angeles, supra.*

[5] El Monte complains the Commission failed to hear El Monte's claim within a reasonable time, as required by Government Code section 17555 as it then read (Stats.1984, ch. 1459, § 1, p. 5118), and California Code of Regulations, title 2, section 1187.1. El Monte also complains the Commission accepted position papers from the Department of Finance, over El Monte's objection that the papers were submitted late and were not properly served upon it. The Commission declined to strike the Department of Finance's submissions, reasoning that the submissions consisted of legal arguments rather than factual assertions; the Commission already was familiar with the legal arguments presented; and El Monte in fact

9. Unlike these reasons, which are pure questions of law, the third basis relied upon by the Commission, i.e., that the ERAF legislation provided a means of recoupment, can involve certain factual considerations. (See *County of Fresno v. State of California, supra*, 53 Cal.3d at p. 487, 280 Cal.Rptr. 92, 808 P.2d 235 [sufficiency of recoupment alternatives was at issue]; *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d at p. 837, 244 Cal.Rptr. 677, 750 P.2d 318 [reasonableness of alternatives was at issue].) We need not, and do not, address the third ground relied upon by the Commission.

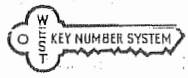
obtained copies of the submissions and was able to respond.

We agree with the trial court that El Monte has failed to show cognizable prejudice with respect to these assertions. The issue presented is one of law [283] not fact. We cannot assume the Commission would have reached an erroneous legal conclusion in the absence of the errors asserted by El Monte, and we cannot base a finding of prejudice upon the possibility the Commission would have reached an erroneous legal conclusion. To the contrary, we must affirm, regardless of procedural errors, if the decision was the legally correct resolution of the case. (Cal. Const., art. VI, § 13; *Conservatorship of Fadley* (1984) 159 Cal.App.3d 440, 442, 446–447, 205 Cal. Rptr. 572; *Stafford v. People* (1956) 144 Cal.App.2d 79, 81, 300 P.2d 231.) [10]

DISPOSITION

The judgment is affirmed.

DAVIS, J., and MORRISON, J., concur.



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[67] **KIMBERLY H., Petitioner,**

v.

The SUPERIOR COURT of San Diego County, Respondent;

San Diego County Health and Human Services Agency, Real Party in Interest.

No. D035464.

Court of Appeal, Fourth District, Division 1.

July 28, 2000.

At time of six-month child dependency review hearing, mother who was denied reunification services with dependent child requested a contested hearing be set on issue of substantial probability of return of the child to her custody by the 12-month date. The Superior Court, San Diego County, J510854C, Glorene Franco, Referee, denied mother's request and set hearing to terminate mother's parental rights. Mother sought review by filing petition for extraordinary relief. The Court of Appeal, Work, J., held that mother was not entitled to set a contested hearing on issue of substantial probability of return of child to her custody.

Petition denied.

1. Infants ⇐203

Mother who was denied reunification services with her child was not entitled to set contested hearing on issue of substantial probability of return of child to her custody, in absence of a motion to change, modify, or set aside court order or to terminate jurisdiction of court; if reunification services had not been provided to father, case would have been referred to termination of parental rights hearing upon denial of services to mother, and to allow mother to delay reference to such hearing without any showing of changed circumstances would defeat purpose of timely providing child with permanent and safe home. West's Ann.Cal.Welf. & Inst. Code §§ 361.5, 366.26, 388.

2. Infants ⇐203

Parents in termination of parental rights proceedings generally have a right to a contested hearing on issues to be determined by the court; however, such a right does not apply where the court has

10. El Monte's claims of prejudice concern the burdens of bearing unreimbursed contributions to the county ERAF fund, and the difficulties in making financial projections and budget decisions prior to obtaining a decision on its claims. We recognize, as did the Commission, the frustration procedural delays may cause. However, since the Commission reached the legally correct decision, the asserted errors did not prejudice El Monte with respect to the only matter at issue here, the reimbursability of its ERAF contributions. In that sense, El Monte has failed to establish cognizable prejudice.

Grimshaw v. Ford Motor Co., supra, 119 Cal.App.3d at p. 801, 174 Cal.Rptr. 348.) Defendant, to rebut plaintiff's evidence, needed to show the lack of foreseeability of plaintiff's use, not its own intentions. Again, the conduct of defendant is not in issue, but the adequacy of the product itself.

DEVELOPING TECHNOLOGY

[10] Finally, defendant claims that because car seats were a part of a "developing technology and changing state of the art," conduct of other manufacturers was relevant. Defendant contends that *Grimshaw* and *Titus*, wherein the appellate courts upheld the disallowance of custom and practice evidence and instructions, are distinguishable from the present case as the available alternative designs were well known throughout the respective industries. We disagree.

Evidence of what other manufacturers were doing would be admissible if offered to show capability; here, it was mere practice. Proof that no alternate, safer design was feasible also would be admissible in the weighing process which compares risks with benefits. The uncertain quality of an available alternate design may be relevant to punitive damages; however, admission of such evidence does not open the door to proof that others in the trade were failing to use knowledge available to them.

CONCLUSION

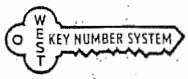
Erroneous admission of evidence requires reversal only when, absent error, "plaintiff would have stood a reasonable chance of obtaining a more favorable verdict. [Citations.]" (*Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 579, 525, 113 Cal.Rptr. 561.) In the present case admission of several pieces of irrelevant evidence clearly disadvantaged plaintiff. With the court's imprimatur, the jury was allowed to hear and consider the prevalency of similar child carrier devices, the fact that none of these products carried a warning against use in a car, and that none of these products lacking warnings had been recalled by the federal government. The jury's attention was inexorably shifted toward the reasonableness of defendant's behavior and turned away from the design of the Infantseat.

The giving of appropriate jury instructions can reduce the prejudicial effect of erroneously admitted evidence. (See 6 Witkin, Cal.Procedure (2d ed. 1971 pt. I) Appeal, § 312, p. 4291.) Here, however, the jury instructions, combined with the judge's earlier remarks, only served to exacerbate, rather than cure the prejudice.

Because the errors flowing from the misuse of the term state of the art were so serious and almost amounted to an informal direction of a defense verdict, we need not address other claimed errors, including other instructional errors, the admission of information concerning Medi-Cal payments, and the defense comment to the jurors that plaintiff "would be taken care of" in any event.

The judgment is reversed.

PAULINE DAVIS HANSON, Acting P.J., and MARTIN, J., concur.



153 Cal.App.3d 777

CITY OF MERCED, Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al., Defendants and Respondents.

Civ. 7590 (F001626).

Court of Appeal, Fifth District.

March 27, 1984.

Hearing Denied May 24, 1984.

By petition for writ of mandamus and complaint for declaratory judgment city sought to compel payment of its claim against State for cost of business goodwill it incurred in an eminent domain proceed-

ing. The Superior Court, Merced County, George G. Murry, J., concluded that State was liable to city for payment of business goodwill, but that court could not order subvention from state funds, and city appealed. The Court of Appeal, Hamlin, J., held that city's payment for business goodwill in condemnation proceeding it elected to pursue did not constitute a state-mandated cost, and thus it was not entitled to reimbursement of such cost from State.

Affirmed.

1. Eminent Domain ⇐255

Since question whether cost of goodwill city incurred in eminent domain proceeding was state-mandated was purely a question of law, this question could be argued on appeal, even though it was not raised in trial court.

2. Appeal and Error ⇐842(8)

Court of Appeal is not limited by interpretation of statutes by the trial court.

3. Statutes ⇐219(1)

Administrative interpretations of statutes should be accorded great respect and followed if not clearly erroneous.

4. States ⇐123

City's payment for business goodwill in condemnation proceeding it elected to pursue did not constitute a state-mandated cost, and thus city was not entitled to reimbursement from State for such cost.

Steven F. Nord, City Atty., Merced, for plaintiff and appellant.

John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Asst. Atty. Gen., and Geoffrey L. Graybill, Deputy Atty. Gen., Sacramento, for defendants and respondents.

OPINION

|779 HAMLIN, Associate Justice.

THE CASE

By its petition for writ of mandamus and its complaint for declaratory judgment plaintiff sought to compel payment of its claim against the State of California (the State) for costs of business goodwill it incurred in an eminent domain proceeding as a result of the enactment of chapter 1275, Statutes of 1975. Specifically, plaintiff asked the court to order the State Controller to pay plaintiff $71,350, plus interest, from a "State budget line item he deems appropriate" or, alternatively, to direct the State Controller to pay the amount from a line item the court deems appropriate. The trial court concluded that the State was liable to plaintiff for payment of business goodwill, but that the court could not order subvention from state funds. It therefore entered judgment denying the peremptory writ of mandamus. Plaintiff filed a timely notice of appeal.

|780 On appeal, defendants argue for the first time, as we believe they may, that plaintiff's payment for business goodwill in a condemnation proceeding it elected to pursue does not constitute a state-mandated cost. We agree and find it unnecessary to discuss the other contentions of the parties.

THE FACTS

We include only a brief statement of the undisputed facts which are essential to resolution of the pivotal legal issue involved, i.e., whether plaintiff's payment for business goodwill in the proceeding it initiated to condemn property for its use is a state-mandated cost.

On April 8, 1980, the Merced County Superior Court entered a final order of condemnation in the case entitled *City of Merced v. Rodney Barbour and Thomas L. Barbour.* This order required plaintiff to pay, along with other sums, $71,350 allocated to loss of goodwill pursuant to the provisions of Code of Civil Procedure section 1263.510. Plaintiff applied to the State for reimbursement of that amount under the provisions of Revenue and Taxation Code section 2201 et seq. Plaintiff's application for reimbursement was directed to the State Board of Control. That board approved plaintiff's claim. It was included, along with other similar claims, as a line item in chapter 1090, Statutes of 1981.

The Legislature deleted from chapter 1090 all claims seeking reimbursement for business goodwill under chapter 1275, Statutes of 1975 (1275 claims). Additionally, the Legislature included in chapter 1090, as amended, a direction that the Board of Control not accept, or submit to the Legislature, any more 1275 claims.

After plaintiff received notice of the above-mentioned action of the Legislature, it initiated this case.

DISCUSSION

I. *The State may assert a new legal theory on appeal.*

Defendants admitted in their answer to the petition for writ of mandamus that chapter 1275, Statutes of 1975, mandated a new program or increased level of service under provisions of the Revenue and Taxation Code. At the hearing on the petition, defendants stipulated to the same effect and added that plaintiff had not requested that mandate. For the first time on appeal, defendants argue that in governmental-entity-initiated eminent domain proceedings payment for business goodwill pursuant to the requirements of chapter 1275, Statutes of 1975, is not a state-mandated cost subject to reimbursement by the State. Defendants admit this represents a change
781 in their position but that they mistakenly took a position in the trial court inconsistent with the clear manifestation of the intent of the Legislature.

To support their position that defendants may argue on appeal at variance with their answer and admission in the trial court, defendants rely on *Barton v. Owen* (1977) 71 Cal.App.3d 484, 139 Cal.Rptr. 494. There the plaintiff sought medical treatment from defendant for acute sinusitis. After a series of unsuccessful treatments, plaintiff developed a brain abscess which resulted in a prefrontal lobotomy. The plaintiff tried the case on the theory that the physician was negligent in not taking a culture and sensitivity test as part of his diagnosis. He did not prevail. On appeal, plaintiff argued the trial court erred in instructing the jury on contributory negligence. Additionally, plaintiff stated a new theory that failure to take the culture and sensitivity test was negligence as a matter of law. The court allowed the new legal theory on appeal.

[1, 2] Plaintiff points to 3 Witkin, California Procedure (2d ed. 1971) Pleadings, sections 342–344, pages 2009–2011, for the general rule that an admission of fact may not be argued differently on appeal. We agree, but that is not what defendants seek to do. Here, the question of whether a cost is state-mandated is purely a question of law. This court is not limited by the interpretation of statutes by the trial court. (See *In re Davis* (1978) 87 Cal.App.3d 919, 921, 151 Cal.Rptr. 29; *Barton v. Owen, supra*, 71 Cal.App.3d at p. 491, 139 Cal. Rptr. 494.) Thus defendants may argue their new legal theory on appeal.

II. *Payment of goodwill is not a state-mandated cost.*

By this appeal, plaintiff seeks to compel reimbursement of its payment for business goodwill in a proceeding to acquire property under its power of eminent domain. Plaintiff can succeed only if the payment for which it seeks reimbursement was a state-mandated cost. Our decision on this issue turns upon the meaning of various statutory provisions. In examining the relevant statutes we apply the basic rules of statutory construction stated by the court in *Marin Hospital Dist. v. Rothman* (1983) 139 Cal.App.3d 495, 498–499, 188 Cal.Rptr. 828.

> "The meaning of a statute must, in the first instance, be sought in the language in which it is framed, and if that is plain the sole judicial function is to enforce it according to its terms [citation]; where the language is clear there is no room for interpretation [citation]. And courts will not determine the *wisdom*, desirability, or propriety of statutes enacted by the Legislature. [Citation.]
>
> "'Moreover, "every statute should be construed with reference to the whole system of law of which it is a part so

782 that all may be harmonized and have effect." ' (*Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645 [335 P.2d 672] ....) We inquire further into 'the whole system of law of which [Government Code section 26912] is a part.' " (Emphasis in original.)

[3] Also applicable in this case is the rule that administrative interpretations of statutes should be accorded great respect and followed if not clearly erroneous. (*Noroian v. Department of Administration* (1970) 11 Cal.App.3d 651, 655, 89 Cal. Rptr. 889.) We also rely on extrinsic aids such as the history of relevant statutes, committee reports, and the legislative debates. (*Ibid.*)

Revenue and Taxation Code section 2231, subdivision (a), includes a direction that: "The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207....", Section 2207, in turn, provides in pertinent part: " 'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program; ..."

Chapter 1275, Statutes of 1975 (Code Civ. Proc., § 1230.010 et seq.) revised and recodified the eminent domain laws of this state. The revisions included a new requirement that, upon proof of satisfaction of four stated conditions, the owner of a business conducted on the condemned property is entitled to compensation for loss of goodwill (Code Civ.Proc., § 1263.510).[1]

The costs for which plaintiff seeks reimbursement in this proceeding were incurred by reason of this newly imposed obligation to compensate for loss of business goodwill.[2] This squarely presents the issue which we conclude is dispositive of plaintiff's appeal, i.e., is the increased cost so incurred as a result of enactment of chapter 1275, Statutes of 1975, a cost which plaintiff was *required* or *mandated* to incur? 783

In support of the statutory construction it urges, plaintiff points to the Board of Control's decision in March 1981 that 1275 claims were for reimbursement of state-mandated costs. Plaintiff correctly notes that such a finding by a state agency is accorded great weight unless shown to be clearly erroneous. (*Noroian v. Department of Administration, supra,* 11 Cal. App.3d at p. 655, 89 Cal.Rptr. 889.)

Defendants counter that the Legislature declared its intent that 1275 claims not be considered state-mandated by rejecting the line item of the budget providing funds for payment of 1275 claims and by directing that the Board of Control not approve or submit to the Legislature any more 1275 claims. (Ch. 1090, Stats.1981.) Defendants rely on *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 977, 185 Cal. Rptr. 49, to support their position that, where a statute is unclear, a later expression of the Legislature bearing upon the intent of the prior statute may be properly

1. Code of Civil Procedure section 1263.510 provides:

"(a) The owner of a business conducted on the property taken, or on the remainder if such property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:

"(1) The loss is caused by the taking of the property or the injury to the remainder.

"(2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.

"(3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.

"(4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

"(b) Within the meaning of this article, 'goodwill' consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage."

2. Until enactment of chapter 1275, Statutes of 1975, goodwill was not compensable in eminent domain proceedings. (See 5 Witkin, Summary of Cal.Law (8th ed. 1974) Constitutional Law, § 586, p. 3882.)

considered in determining the effect and meaning of the prior statute.

More significantly, defendants argue that the Legislature made clear the discretionary nature of acquisition of property by eminent domain by passage of Code of Civil Procedure section 1230.030. Section 1230.030 was included within chapter 1275, Statutes of 1975, the same legislation that changed the law of eminent domain to require compensation for business goodwill. Section 1230.030 provides:

"Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property."

[4] We agree that the Legislature intended for payment of goodwill to be discretionary. The above authorities reveal that whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.

This construction is confirmed by subsequent legislative actions, including the enactment of Senate Bill No. 90 (Russell), 1784 1979–1980 Regular Session. Among other things, that bill (Sen. Bill No. 90) added Revenue and Taxation Code section 2207, subdivision (h):

" 'Costs mandated by the state' means any increased costs which a local agency is required to incur as the result of the following:

"...

"(h) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which adds new requirements to an existing optional program or service and thereby increases the cost of such program or service if the local agencies have no reasonable alternatives other than to continue the optional program."

Senate Bill No. 90 became effective on July 1, 1981, after plaintiff incurred the cost of business goodwill for which it seeks reimbursement. Subdivision (h) appears to have been included in the bill to provide for reimbursement of increased costs in an optional program such as eminent domain when the local agency has no reasonable alternative to eminent domain. The legislative history of Senate Bill No. 90 supports the conclusion that subdivision (h) was added to Revenue and Taxation Code section 2207 to extend state liability rather than to clarify existing law. The Report of the Assembly Revenue and Taxation Committee (June 9, 1980) includes a statement:

"*SB 90* further defines 'mandated costs' in Sections 4 and 5 to include the following:

"...

"e. Where a statute or executive order adds *new requirements to an existing optional program*, which increases costs if the local agency has no reasonable alternative than to continue that optional program." (Rep., p. 1, emphasis in original.)

Additionally, the Ways and Means Committee's Staff Analysis (Aug. 4, 1980) notes that Senate Bill No. 90:

"Expands the definition of *local* reimbursable costs mandated and paid by the state to include:

"...

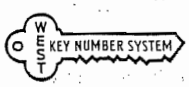
"e. Statutes or executive orders adding *new requirements to an existing optional program*, which increases costs if the local agency has no reasonable alternative than to continue that optional program." (P. 2, emphasis in original.)

Both reports quoted above characterize 1785 Senate Bill No. 90 as expanding the definition of local reimbursable costs. The Legislative Analyst's Report of July 30, 1980, on Senate Bill No. 90 similarly includes a

statement that the bill expands the definition of state-mandated costs. Such characterizations of the purpose of Senate Bill No. 90 are consistent only with the conclusion that, until that bill was enacted, increased costs incurred in an optional program such as eminent domain were not state-mandated. Thus the cost of business goodwill for which plaintiff was required by chapter 1275, Statutes of 1975, to pay in April 1980, was not a state-mandated cost. It follows that the trial court properly denied the petition for a writ of mandamus to compel payment of that cost. Our conclusion on this pivotal issue makes it unnecessary to consider plaintiff's contentions that article XIIIB of the California Constitution requires the State to provide a subvention of funds to reimburse state-mandated costs, that there are appropriated funds available to pay plaintiff's claim, and that a peremptory writ of mandate is the appropriate remedy in this case.

The judgment is affirmed.

FRANSON, Acting P.J., and ZENOVICH, J., concur.



153 Cal.App.3d 796

796 **The PEOPLE, Plaintiff and Respondent,**

v.

Eugene Newton GRIFFITH, Defendant and Appellant.

Cr.6742./F1863.

Court of Appeal, Fifth District.

March 27, 1984.

Defendant was convicted before the Superior Court, Kern County, Walter Osborn, Jr., J., of robbery, and he was placed on probation. Following revocation of his probation and imposition of an upper term of imprisonment, defendant appealed. The Court of Appeal, Andreen, J., held that: (1) although defendant was fully protected by his Fifth Amendment privilege from disclosing burglary he committed three days prior to original sentencing hearing, he had no right to deceive court by stating through his counsel that he was a changed personality who had "finally gotten back together"; (2) rule prohibiting trial court from relying upon conduct subsequent to granting of probation in imposing term of imprisonment was not violated where trial court, in selecting upper term of imprisonment following probation revocation, considered a crime which was committed after charged offense but which was unknown to sentencing court at time defendant was admitted to probation; and (3) trial court did not abuse its discretion in selecting upper term.

Affirmed.

1. Criminal Law ⇐982.9(1)

Probation is an act of clemency which may be withdrawn if the privilege is abused; such an abuse occurs when a defendant practices deception upon the court at the time probation is granted.

2. Criminal Law ⇐986.3

Although defendant was fully protected by his Fifth Amendment privilege from disclosing at sentencing hearing a burglary which he committed three days prior to hearing, he had no right to deceive court by stating at hearing through his counsel that he was a changed personality who had "finally gotten back together." U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐982.9(7)

Rule providing that when trial court determines, following revocation of probation, that a defendant should be committed to prison, length of sentence shall be based on circumstances existing at time probation was granted, and that subsequent events may not be considered in selecting base term, was not violated where court, when selecting prison term for defendant who violated probation, considered a crime which was committed after charged offense but which was unknown to sentenc-

The only decisional authority the majority cite is a New York trial court decision, *People ex rel. Lewis v. Safeco Ins. Co.* (1978) 98 Misc.2d 856, 414 N.Y.S.2d 823, but that decision in fact supports this dissent. In the New York case, the Superintendent of Insurance had prohibited two insurers from surrendering their licenses because they were obliged by statute to renew no-fault insurance policies. The court held that the superintendent could not require the insurer to renew policies and remain in business indefinitely. Since New York had no statute governing when and how companies could withdraw, the court sought to fashion a remedy itself. It concluded that the superintendent could require the insurers to service existing policies and "to renew certain other policies for a short period so that during such periods those presently insured may be able to obtain follow-up coverage[.]" (414 N.Y.S.2d at p. 830.) At the expiration of that period the insurers would be permitted to surrender their licenses. The decision thus supports the majority opinion's position on the broader issue which we need not decide—that once an insurer has withdrawn it is not statutorily required to renew policies. On the issue before us, however, *its holding that an insurer may be required to renew policies after it has applied to withdraw* is inconsistent with the position of the majority opinion, and consistent with the views of the Insurance Commissioner and this dissent.

My conclusion is simple: Travelers remains an admitted insurer until the commissioner permits it to withdraw and cancels its certificate. As an admitted insurer, it must obey all laws regulating such insurers. Nothing in section 1861.03, subdivision (c), makes that provision an exception to this rule. Thus, whether or not Travelers could refuse to renew once it has [16] actually withdrawn from California, it had no right to do so upon the filing of an application to withdraw. The commissioner properly found that Travelers' nonrenewal notices did not comply with California law.

This conclusion is the only one consistent with the spirit, as well as the letter, of Proposition 103. That initiative was not enacted to make it easy for insurers to terminate coverage, but to make insurance more available to Californians and to protect them against loss of coverage.

I would deny the petition for a peremptory writ of mandate.

MOSK, J., concurs.

785 P.2d 522

50 Cal.3d 51

[51] **CITY OF SACRAMENTO et al., Plaintiffs and Appellants,**

v.

The STATE of California et al., Defendants and Respondents.

No. S006188.

Supreme Court of California, In Bank.

Jan. 29, 1990.

City brought class action seeking subvention from state of costs incurred in providing unemployment compensation coverage for its employees. The Superior Court, Sacramento County, Darrel W. Lewis, J., granted summary judgment for State, and city appealed. The Court of Appeal, 247 Cal.Rptr. 109, reversed and remanded. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court, Eagleson, J., held that state was not required to subvent costs incurred by local governments under statute mandating extension of unemployment compensation coverage to local government employer.

Reversed.

Kaufman, J., concurred and dissented and filed opinion.

1. Administrative Law and Procedure ⇐229

States ⇐111

County and municipal employers, claiming that their unemployment compensation costs were subject to state subvention, were not required to comply with administrative "tax refund" procedures prior to bringing suit; employers were statutorily authorized to bring suit to declare unenforceable State's unfunded mandate to provide unemployment compensation coverage to their employees. West's Ann.Cal.Gov. Code § 17612(b); West's Ann.Cal.Rev. & T.Code § 2255(c) (Repealed).

2. Judgment ⇐650, 668(1), 678(1), 713(1)

Generally, collateral estoppel bars party to prior action, or one in privity with him, from relitigating issues finally decided against him in earlier action; but when issue is question of law rather than of fact, prior determination is not conclusive either if injustice would result or if public interest requires that relitigation not be foreclosed.

3. States ⇐111

Under public-interest exception, State was not collaterally estopped by prior adverse decision from contesting its continuing obligation to fund unemployment compensation costs of local governmental employers.

4. States ⇐111

Judgment requiring State to reimburse county and municipal employers for costs of unemployment compensation coverage extended to employees over particular period was not res judicata barring relitigation of question of State's subvention obligations in general under unemployment compensation statute.

5. States ⇐111

Statute extending mandatory unemployment insurance coverage to local government employees imposed no "unique" obligation on local governments, nor required them to provide new or increased governmental services to public, and thus State was not required to subvent costs incurred by local governments in providing such coverage. West's Ann.Cal. Const. Art. 13B, § 6; St.1978, c. 2, § 1 et seq.

6. Municipal Corporations ⇐864(1), 957(3)

Statute extending mandatory unemployment insurance coverage to local government employees imposed "federally mandated" costs on local governments, in that statute was adopted by state under federal coercion tantamount to compulsion, and thus local governments were not limited by constitutional and statutory tax and spending ceilings; subject to overriding limitations on tax rates, local governments could levy and spend as necessary to meet expenses of their unemployment compensation coverage obligations. St.1978, c. 2, § 1 et seq.; West's Ann.Cal. Const. Art. 13A, § 1 et seq.; Art. 13B, § 9(b); West's Ann.Cal.Rev. & T.Code § 2271 (Repealed).

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[156] James P. Jackson, City Atty., Sacramento, and William P. Carnazzo, Deputy City Atty., for plaintiffs and appellants.

John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Asst. Atty. Gen., Paul H. Dobson, Richard M. Frank, Floyd D. Shimomura and Carol Hunter, Deputy Attys. Gen., for defendants and respondents.

De Witt W. Clinton, County Counsel, Amanda F. Susskind, Sr. Deputy County Counsel, Kitt Berman, Ross & Scott and William D. Ross as amici curiae on behalf of defendants and respondents.

[157] EAGLESON, Justice.

In response to changes in federal law, chapter 2 of the Statutes of 1978 (hereafter chapter 2/78) extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. Here we consider whether, in chapter 2/78, the state "mandate[d] a new program or higher level of service" on the local agencies, and must therefore reimburse local compliance costs under article XIII B of the California Constitution and related statutes.

We conclude that the state is *not* required to reimburse the chapter 2/78 expenses of local governments. The obli-

gations imposed by chapter 2/78 fail to meet the "program" and "service" standards for mandatory subvention we recently set forth in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202 (hereafter *County of Los Angeles*). Chapter 2/78 imposes no "unique" obligation on local governments, nor does it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, must therefore be reversed.

However, our holding does not leave local agencies powerless to counter the fiscal pressures created by chapter 2/78. Though provisions of the Revenue and Taxation Code limit local property tax levies, and article XIII B itself places spending limits on both state and local governments, "costs mandated by the federal government" are expressly excluded from these ceilings. Chapter 2/78 imposes such "federally mandated" costs, because it was adopted by the state under federal coercion tantamount to compulsion. Hence, subject to overriding limitations on taxation rates (see, e.g., Cal. Const., art. XIII A), both state and local governments may levy and spend for their chapter 2/78 coverage obligations without reduction of the fiscal limits applicable to other needs and services.

I. FACTS.

In 1972, and again in 1973, the Legislature enacted comprehensive schemes for local property tax relief. Though frequently amended thereafter, these statutes retained three principal features. First, they placed a limit on the local property tax rate. Second, they required the *state* to reimburse local governments for their costs resulting from state laws "which mandate ... new program[s] or ... increased level[s] of service" at the local level. Finally, they allowed local governments to exceed their property taxation limits to fund certain other nondiscretionary expenses, including "costs mandated by the federal government." (Stats.1972, ch. 1406, § 14.7, pp. 2961–2967; Stats.1973, ch. 358, § 3, pp. 783–790; Rev. & Tax.Code, §§ 2206, 2260 et seq., 2271; former §§ 2164.3, 2165, 2167, 2169, 2207, 2231; Gov.Code, § 17500 et seq.)

Since adoption of the Social Security Act in 1935, federal law has provided powerful incentives to enactment of unemployment insurance protection by the individual states. In current form, the Federal Unemployment Tax Act (hereafter FUTA) (26 U.S.C. § 3301 et seq.) assesses an annual tax upon the gross wages paid by covered private employers nationwide. The tax rate, which has varied over the years, stands at 6.2 percent for calendar year 1990. (26 U.S.C. §§ 3301(1), 3306.) However, employers in a state with a federally "certified" unemployment insurance program may credit their contributions to the state system against up to 90 percent of the federal tax (currently computed at 6 percent for this purpose). (*Id.*, §§ 3302–3304.) A "certified" state program also qualifies for federal administrative funds. (42 U.S.C. §§ 501–503.)

California enacted its unemployment insurance system "on the eve of the adoption of the Social Security Act" in 1935 (*Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 587–588, 57 S.Ct. 883, 891, 81 L.Ed. 1279; see Stats.1935, ch. 352, § 1 et seq., p. 1226 et seq.) and has sought to maintain federal compliance ever since. Every other state has also adopted an unemployment insurance plan in response to the federal stimulus.

In 1976, Congress enacted Public Law number 94–566 (hereafter Public Law 94–566). Insofar as pertinent here, Public Law 94–566 amended FUTA to require for the first time that a "certified" state plan include coverage of the employees of public agencies. (Pub.L. No. 94–566 (Oct. 20, 1976) § 115(a), 90 Stat. 2667, 2670; 26 U.S.C. §§ 3304(a)(6)(A), 3309(a); see 26 U.S.C. § 3306(c)(7).) States which did not alter their unemployment compensation laws accordingly faced loss of the federal tax credit and administrative subsidy.

The Legislature thereafter adopted chapter 2/78 to conform California's system to Public Law 94–566. Among other things, chapter 2/78 effectively requires the state

and all local governments, beginning January 1, 1978, to participate in the state unemployment insurance system on behalf of their employees. (Stats.1978, ch. 2, §§ 12, 24, 31, 36.5, 58–61, pp. 12–14, 16, 18, 24–27; Unemp.Ins.Code, §§ 135, subd. (a), 605, 634.5, 802–804.)

In November 1979, the voters adopted Proposition 4, adding article XIII B to the state Constitution. Article XIII B—the so-called "Gann limit"—restricts the amounts state and local governments may [59] appropriate and spend each year from the "proceeds of taxes." (§§ 1, 3, 8, subds. (a)–(c).)[1] In language similar to that of earlier statutes, article XIII B also requires state reimbursement of resulting local costs whenever, after January 1, 1975, "the Legislature or any state agency mandates a new program or higher level of service on any local government,...." (§ 6.) Such mandatory state subventions are excluded from the local agency's spending limit, but included within the state's. (§ 8, subds. (a), (b).) Finally, article XIII B excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates of the courts *or the federal government* which, *without discretion*, require an expenditure for additional services or which *unavoidably* make the providing of existing services more costly." (§ 9, subd. (b) [hereafter section 9(b)], italics added.)

The City of Sacramento (City) and the County of Los Angeles (County) filed claims with the State Board of Control (Board) (see Rev. & Tax.Code, former § 2250 et seq.; see now Gov.Code, § 17550 et seq.) seeking state subvention of the costs imposed on them by chapter 2/78 during 1978 and portions of 1979. The Board denied the claims, ruling that chapter 2/78 was an enactment required by federal law and thus was not a reimbursable state mandate. On mandamus (Code Civ.Proc., § 1094.5; Rev. & Tax.Code, former § 2253.5, see now Gov.Code, § 17559), the Sacramento Superior Court overruled the Board and found the costs reimbursable. The court ordered the Board to determine the amounts of the City's and the County's individual claims, and also to adopt "parameters and guidelines" to be applied in determining "these ... and other claims" arising under chapter 2/78. (Rev. & Tax.Code, former § 2253.2; see now Gov.Code, §§ 17555, 17557.)[2]

In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 203 Cal. Rptr. 258 (hereafter *Sacramento I*), the Court of Appeal affirmed. Among other things, the court concluded (pp. 194–199, 203 Cal.Rptr. 258) that chapter 2/78 [60] imposed *state*-mandated costs reimbursable under section 6 of article XIII B, since the potential loss of federal funds and tax credits did not render Public Law 94–566 so coercive as to constitute a "[*mandate*] ... of the *federal* government" under section 9(b). (Italics added.) We denied hearing.

On remand, the Board determined the amounts due on the claims originally submitted by the City and the County. As required by the judgment, the Board also adopted "parameters and guidelines" for reimbursement of chapter 2/78 costs to all affected local agencies. However, during the 1984 session of the Legislature, no bills were introduced for reimbursement of pre–1984 costs, and bills to fund costs in and after 1984 failed passage.

1. Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to *adopt and levy taxes*. Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Moreover, to the extent "federally mandated" costs are exempt from prior *statutory* limits on local *taxation* (see ante, at p. 141), article XIII A eliminates the exemption insofar as it would allow levies in excess of the constitutional ceiling.

All further section references are to article XIII B of the California Constitution, unless otherwise indicated.

2. The claims for reimbursement were originally premised entirely on Revenue and Taxation Code section 2201 et seq. While the City's and the County's mandamus petitions were pending in superior court, article XIII B was adopted. The City and the County amended their petitions to include article XIII B as an additional basis for relief, and the case proceeded accordingly.

From and after the decision in *Sacramento I*, the City paid "under protest" its quarterly billings from the Employment Development Department (EDD) for unemployment compensation. Each payment included a claim for refund of unemployment taxes pursuant to Unemployment Insurance Code section 1176 et seq. EDD responded to the refund claims by referring the City to its statutory subvention remedies.

Accordingly, in July 1985, the City began returning its quarterly billings unpaid. It thereupon commenced the instant class action in Sacramento Superior Court on behalf of all local governments in the state. Named as defendants were the State of California, the Governor, EDD, the state Controller and Treasurer, and the Legislature. The complaint sought (1) injunctive and declaratory relief barring enforcement of chapter 2/78 in the absence of state subvention; (2) a writ of mandate directing that past, current, and future subvention funds be appropriated and disbursed, and/or that EDD pay local agencies' past, current, and future unemployment-insurance contributions from its own budget; and (3) damages for past failures to reimburse.

Shortly after this suit was filed, the Legislature appropriated some chapter 2/78 funds for fiscal year 1984–1985 (Stats.1985, ch. 1217, §§ 12, 17, subd. (b), pp. 4148, 4150), and it subsequently authorized limited funds in the 1986 Budget Act (Stats. 1986, ch. 186, § 2.00, p. 1006). On defendants' demurrer, the trial court later dismissed plaintiffs' claims for reimbursement for these post–1984 periods.[3] Thereafter, the trial court certified the suit as a class action and granted plaintiffs' motion for summary adjudication of issues based on *Sacramento I*.

[6] While the case remained pending at the trial level, we decided *County of Los Angeles*. There we held that article XIII B, and earlier subvention statutes, require state reimbursement *only* when the state compels local governments to provide new or upgraded "programs that carry out the governmental function of providing *services to the public*, or ..., to implement a state policy, impose[s] *unique* requirements on local governments [that] do not apply generally to all residents and entities in the state." (43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202, italics added.)

Defendants in this case thereupon moved for summary judgment, urging that extension of unemployment insurance coverage to public employees satisfied neither reimbursement standard set forth in *County of Los Angeles*. The trial court agreed and awarded summary judgment.

The Court of Appeal reversed on two independent grounds. First, the court ruled that defendants were collaterally estopped by *Sacramento I* to relitigate the reimbursability of chapter 2/78 costs. Second, the court found that chapter 2/78 imposed "unique requirements" on local governments, within the meaning of *County of Los Angeles*, since the legislation was aimed solely at local agencies and subjected them to obligations from which they were previously exempt.

II. JURISDICTION; PLAINTIFFS' EXHAUSTION OF REMEDIES.

[1] After we granted review, we asked the parties and amici curiae[4] to brief whether the current suit is jurisdictionally barred by any failure of plaintiffs to exhaust their remedies (see *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291–295, 109 P.2d 942), or for any other reason. If so, the summary judgment for defendants against all plaintiffs was proper notwithstanding the merits of the subvention claim. In that event, the judgment of

3. The trial court also sustained the Legislature's demurrer without leave to amend and dismissed the Legislature as a party defendant. The Court of Appeal affirmed the dismissal in a separate proceeding. (See *City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 231 Cal.Rptr. 686.)

4. Amicus curiae briefs were filed on behalf of plaintiffs by (1) the League of California Cities, the Association of California Water Agencies, and the Fire District Association of California, and (2) the County of Los Angeles and the County Supervisors Association of California.

the Court of Appeal must be reversed without consideration of the substantive issues raised by the appeal.

However, we find no failure to exhaust which would bar us from reaching the merits. Defendants concede plaintiffs exhausted all administrative remedies provided by the statutes governing subvention of state-mandated costs. The concession appears correct, at least as to the City and the County. These two agencies filed timely claims for reimbursement of expenses incurred to comply with chapter 2/78. When the Board initially denied the claims, the City and the County pursued judicial remedies culminating in [62] *Sacramento I.* By direction of the judgment in *Sacramento I,* the Board ultimately upheld the City's and County's 1979 claims, determined their amount, and adopted "parameters and guidelines" for statewide reimbursement that were later included in the Board's government-claims report to the Legislature. (Rev. & Tax.Code, former §§ 2253.2, 2255, subd. (a).)

These procedures exhausted the City's and the County's administrative and judicial avenues, short of this suit, to obtain redress on the claims adjudicated in *Sacramento I.* Insofar as the Legislature thereafter declined to appropriate the necessary funds for disbursement by the Controller, the City and the County were authorized to bring an enforcement action. (*Id.,* former § 2255, subd. (c); Gov.Code, § 17612, subd. (b); *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 72, 222 Cal.Rptr. 750; see *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 548–549, 234 Cal.Rptr. 795.) [5]

Defendants urge, however, that plaintiffs essentially are seeking resolution of a "tax" question—the validity *vel non* of their unemployment tax contributions—but have failed to satisfy the special procedures applicable to such cases. Defendants insist that because article XIII, section 32, of the California Constitution broadly precludes any suit to enjoin or impede collection of a tax (e.g., *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 838–841, 258 Cal.Rptr. 161, 771 P.2d 1247; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213, 242 Cal.Rptr. 334, 745 P.2d 1360; *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 279–284, 165 Cal.Rptr. 122, 611 P.2d 463), plaintiffs' claims for declaratory and injunctive relief are barred.

The only remedy constitutionally open to plaintiffs, defendants assert, is to pay their unemployment "taxes" and then seek a "refund" under the "exclusive" procedures set forth in the Unemployment Insurance Code. (Unemp.Ins.Code, §§ 1176 et seq., 1241, subd. (a).) Insofar as plaintiffs' complaint *does* seek reimbursement for past contributions, defendants suggest, plaintiffs have not correctly pursued the Unemployment Insurance Code procedures.

We question, but do not decide, whether a *public entity's* contributions to the state unemployment insurance system can ever constitute a "tax" subject [63] to article XIII, section 32. Even if so, defendants' claim lacks merit under the circumstances presented here.

"The policy behind [article XIII,] section 32 is to allow revenue collection to continue during [tax] litigation so that essential public services dependent on the funds are not unnecessarily disrupted. [Citation.]...." (*Pacific Gas & Electric Co.,* supra, 27 Cal.3d at p. 283, 165 Cal.Rptr. 122, 611 P.2d 463.) The administrative "refund" procedures established by the unemployment insurance law are designed to ensure initial examination of unemployment tax disputes by the agency with specific expertise in that area.

However, plaintiffs attempt no challenge, direct or indirect, to the validity or application of the unemployment insurance

5. In 1986, the Legislature repealed sections 2250–2255 of the Revenue and Taxation Code. (Stats.1986, ch. 879, §§ 37–48, p. 3047.) The Board's functions have been transferred to the Commission on State Mandates (Commission), but the procedures for administrative and judicial determination of subvention disputes remain functionally similar. (Gov.Code, §§ 17500 et seq., 17600 et seq.)

law as such, or to the propriety of any "tax" assessed thereunder. Nor have plaintiffs bypassed the agency or procedures established to decide such disputes.

Rather, plaintiffs claim that *all* their costs of affording unemployment compensation to their employees are subject to a statutory and constitutional *subvention* which the state refuses to make. It is incidental that these costs happen to include what might be characterized as a "tax." As the subvention statutes require, plaintiffs City and County have pursued all available remedies before the agency (formerly the Board, now the Commission) created to decide *subvention* issues; that agency has upheld their submitted claims in full, but the necessary appropriations have been withheld.

Under these circumstances, the Legislature has concluded that a local entity should *not* be forced to continue incurring the unfunded costs subject to "refund." Rather, the entity is expressly authorized to bring suit to declare such an unfunded mandate *unenforceable*. (Rev. & Tax. Code, former § 2255, subd. (c); Gov.Code, § 17612, subd. (b).) [6]

The importance of such a remedy stems from the fundamental legislative prerogative to control appropriations. Under the separation of powers doctrine, the Legislature cannot be compelled to appropriate or authorize the disbursement of specific funds. (*Mandel v. Myers* (1981) 29 Cal.3d 531, 540, 174 Cal.Rptr. 841, 629 P.2d 935.) Since the Legislature will have demonstrated its refusal to fund a particular mandate by the time a mandamus action is filed, the literal "tax refund" process urged by defendants may often be meaningless.

Insofar as plaintiffs also seek reimbursement for past expenses, similar considerations dictate that the governing statutes are those created to resolve subvention problems rather than garden-variety disputes over the unemployment insurance tax.[7] We find nothing in the language, history, or purpose of article XIII, section 32, or of the unemployment insurance law, which bars the instant complaint. We therefore have jurisdiction to decide whether chapter 2/78 constitutes a reimbursable mandate.

III. COLLATERAL ESTOPPEL; RES JUDICATA.

However, *plaintiffs* claim that because *Sacramento I* "finally" decided whether chapter 2/78 constitutes a reimbursable state mandate, the *state* and its agents are collaterally estopped from relitigating the issue here. The Court of Appeal agreed that the doctrine of collateral estoppel applies. Under the circumstances, we are not persuaded.

[2] Generally, collateral estoppel bars the party to a prior action, or one in privity with him, from relitigating issues finally decided against him in the earlier action. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 874, 151 Cal.Rptr. 285, 587 P.2d 1098.) "... But when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]...." (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902, 160 Cal.Rptr. 124, 603 P.2d 41.)

[3] Even if the formal prerequisites for collateral estoppel are present here, the public-interest exception governs. Whether chapter 2/78 costs are reimbursable un-

6. Indeed, when the City filed protective claims for "refund" with EDD in the wake of *Sacramento I*, that agency consistently disclaimed authority to decide the subvention issue presented and "suggest[ed]" that the City pursue its remedies before the Commission.

7. As we note above, courts are powerless to compel appropriations per se. However, that fact does not render a prayer for reimbursement of *past* costs wholly meaningless. California courts have previously recognized judicial power to fashion other appropriate reimbursement remedies. (See, e.g., *Carmel Valley Fire Protection Dist.*, supra, 190 Cal.App.3d at pp. 550–552, 234 Cal.Rptr. 795; also cf. *Mandel*, supra, 29 Cal.3d at pp. 535–537, 539–552, 174 Cal.Rptr. 841, 629 P.2d 935.) Such power is especially important where subvention is constitutionally compelled.

der article XIII B and parallel statutes constitutes a pure question of law. The *state* was the losing party in *Sacramento I*, and also the only entity legally affected by that decision. Thus, strict application of collateral estoppel would foreclose any reexamination of the holding of that case. The state would remain bound, and no other person would have occasion to challenge the precedent.

Yet the consequences of any error transcend those which would apply to mere private parties. If the result of *Sacramento I* is wrong but unimpeachable, taxpayers statewide will suffer unjustly the consequences of the state's continuing obligation to fund the chapter 2/78 costs of local agencies. On the other hand, if the state fails to appropriate the funds to meet this 165 obligation, and chapter 2/78 therefore cannot be enforced (Rev. & Tax.Code, former § 2255, subd. (c); Gov.Code, § 17612, subd. (b)), the resulting failure to comply with federal law could cost California employers millions.[8] Under these circumstances, neither stare decisis nor collateral estoppel can permanently foreclose our ability to examine the reimbursability of chapter 2/78 costs.[9]

[4] As below, plaintiffs also argue that reconsideration of *Sacramento I* is precluded by res judicata. They suggest that the prior litigation resolved not only the *legal issues* presented by this appeal, but all *claims* among the current parties as well.

Of course, res judicata and the rule of final judgments bar us from disturbing individual claims or causes of action, on behalf of specific agencies, which have been finally adjudicated and are no longer subject to review. (Code Civ.Proc., § 1908 et seq.; *Slater*, supra, 15 Cal.3d at p. 796, 126 Cal.Rptr. 225, 543 P.2d 593; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810, 122 P.2d 892.) However, the issues presented in the current action are not limited to the validity of any such finally adjudicated individual claims. Rather, they encompass the question of defendants' subvention obligations *in general* under chapter 2/78. We therefore conclude that defendants may contend in this lawsuit that chapter 2/78 is not a reimbursable state mandate.[10] We turn to the merits of that issue.

166 IV. "NEW PROGRAM" OR "INCREASED SERVICE"?

[5] As below, defendants urge that by extending unemployment insurance coverage to local government employees, the Legislature did not mandate a "new program" or an "increased" or "higher level of service" on local governments. Thus,

8. For these reasons, this case is distinguishable from *Slater v. Blackwood* (1975) 15 Cal.3d 791, 126 Cal.Rptr. 225, 543 P.2d 593, cited by the Court of Appeal. *Slater*, a suit between private parties, held only that the "injustice" exception to the rule of collateral estoppel cannot be based *solely* on an intervening change in the law. (P. 796, 126 Cal.Rptr. 225, 543 P.2d 593.) Here, as we note, overriding public-interest issues are involved.

9. By the same token, the state has not ignored available remedies or otherwise "waived" its right to argue the issues presented by this appeal. The state immediately raised the applicability of *County of Los Angeles* to this suit once our decision therein became final.

Plaintiffs claim the instant trial court had no power to grant summary judgment for defendants on authority of *County of Los Angeles*. Plaintiffs assert that because defendants failed to seek timely mandamus review of the prior, contrary order granting summary adjudication of issues in *plaintiffs'* favor, the issues decided by the earlier order must be "deemed established." (See Code Civ.Proc., § 437c, subd. (f).) We disagree. Failure to challenge a summary adjudication order by the *discretionary* avenue of writ review cannot foreclose a party from asserting *subsequent* changes in law which render such a pretrial order incorrect.

10. Plaintiffs imply that because the original claims by the City and the County were filed decided as statutory "test claims" (Rev. & Tax. Code, former §§ 2218, 2253.2; see now Gov. Code, §§ 17555, 17557), the "cause of action" adjudicated therein encompasses *all* claims by *all* local agencies for *all* years. However, the obvious purpose of the statutory "test claim" procedure is to resolve the *legal issue whether particular state legislation creates a reimbursable mandate*, not to adjudicate every individual claim for reimbursement which may thereafter accrue. The "test claim" result has *precedential* effect for all subsequent claims, but res judicata effect only for the individual claims which were actually adjudicated.

they assert, the local costs of providing such coverage are not subject to subvention under article XIII B, section 6, or parallel statutes. (Rev. & Tax.Code, former §§ 2207, 2231, subd. (a); Gov.Code, §§ 17514, 17561, subd. (a).) The trial court granted summary judgment for defendants on this basis. Contrary to the conclusions reached by the Court of Appeal, the trial court's ruling was correct.

Our analysis is controlled by our decision in *County of Los Angeles*. There we determined that a general increase in workers' compensation benefits did not, when applied to local governments, constitute a reimbursable state mandate under article XIII B.

In so holding, we focused on the particular language of article XIII B, section 6, which requires state subvention of a local government's costs of any "new program" or "increased level of service" imposed upon it by the state. We dismissed the notion that, by employing the quoted phrases, the voters intended *all* local costs resulting from compliance with state law to be subject to mandatory reimbursement. Rather, we explained, "[t]he concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public...." (43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.)

Under these circumstances, we reasoned, the electorate must have intended the undefined terms "new program" and "increased level of service" to carry their "commonly understood meanings ...—programs that carry out the governmental function of providing *services to the public*, or laws which, to implement a state policy, impose *unique requirements* on local governments and do not apply generally to all residents and entities in the state." (Ibid., italics added.)

Local governments' costs of complying with a general statewide increase in the level of workers' compensation benefits do not qualify under these standards, we concluded. As we noted, "... [w]orkers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to [67] their employees ..., they are indistinguishable in this respect from private employers...." (Id., at p. 58, 233 Cal.Rptr. 38, 729 P.2d 202.) [11]

Similar considerations apply here. By requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased "service to the public" at the local level. Nor has it imposed a state policy "unique[ly]" on local governments. Most private employers in the state already were required to provide unemployment protection to their employees. Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agen-

11. While our discussion centered on the meaning of section 6 of article XIII B, it relied heavily on the legislative history of parallel provisions of the 1972 and 1973 property tax relief statutes. When article XIII B was adopted in November 1979, the Revenue and Taxation Code already required state subvention of local "[c]osts mandated by the state," defined as "any increased costs which a local agency is required to incur as a result of ... [¶] [a]ny law enacted after January 1, 1973, which mandates a *new program* or an *increased level of service* of an existing program." (Rev. & Tax.Code, former §§ 2207 [italics added], 2231, subd. (a).) However, a further statutory definition of "increased level of service" to include any state mandate "which makes necessary expanded or additional costs to a county, city and county, city, or special district" had been repealed in 1975. (*County of Los Angeles*, 43 Cal.3d at p. 55, 233 Cal.Rptr. 38, 729 P.2d 202; see Rev. & Tax.Code, former § 2231, subd. (e), repealed by Stats.1975, ch. 486, § 6, p. 999.) We found the repealer significant to the limited meaning of the statutory term "increased level of service" as later incorporated in article XIII B. (43 Cal.3d at pp. 55–56, 233 Cal.Rptr. 38, 729 P.2d 202.) Our implicit conclusion, which we now make explicit, was that the statutory and constitutional concepts of reimbursable state-mandated costs are identical.

cies "indistinguishable in this respect from private employers."

Plaintiffs nonetheless suggest there are several bases for reaching a different result here than in *County of Los Angeles.* None of the asserted distinctions has merit.

Plaintiffs first note the proponents' declaration in the voters' pamphlet that the purpose of article XIII B, section 6, was to prevent the state from "forcing" unfunded programs on local agencies. Plaintiffs invoke this pamphlet language for the proposition that any new cost "forced" on local governments by state law is subject to subvention.

The claim is directly contrary to our holding in *County of Los Angeles.* As we explained, "[i]n ... context, the [pamphlet] phrase 'to force *programs* on local governments' confirms that the intent underlying section 6 [of article XIII B] was to require reimbursement to local agencies for the costs involved in carrying out *functions peculiar to government,* not for expenses incurred by local agencies as an *incidental impact* of laws that apply generally to all state residents and entities.... [¶] The language of section 6 is far too vague to support an inference that ... each time the Legislature [68] passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs...." (43 Cal.3d at pp. 56–57, 233 Cal.Rptr. 38, 729 P.2d 202, italics added.) [12]

Plaintiffs next urge the Court of Appeal's premise—that chapter 2/78 did impose a "unique" requirement on local agencies within the meaning of *County of Los Angeles,* since it applied only to them, and compelled costs to which they were not previously subject. Plaintiffs cite our recent decision in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318. There we held, inter alia, that by requiring each local school district to contribute part of the expense of educating its handicapped students in state-run schools—a cost previously absorbed entirely by the state—the Legislature created a "*new* program" subject to subvention under article XIII B, section 6. As we observed, "although the schools for the handicapped have been operated by the state for many years, the program was *new insofar as [the local districts] are concerned....*" (P. 835, 244 Cal.Rptr. 677, 750 P.2d 318, italics added.)

Lucia Mar is inapposite here. The education of handicapped students was clearly a traditional governmental "service to the public," and it qualified as a "program" on that basis. This function had long been performed by the state, and the only issue was whether the belated shifting of the program's costs to local governments made it "new" for subvention purposes. A negative answer to that question would have undermined a central purpose of article XIII B, section 6—to prevent the state's transfer of the *cost of government* from *itself* to the local level.

Here, the issue is whether costs *unrelated* to the provision of public services are *nonetheless* reimbursable costs of government, because they are imposed on local governments "unique[ly]," and not merely as an incident of compliance with general laws. State and local governments, and nonprofit corporations, had previously enjoyed a special *exemption* from requirements imposed on most other employers in the state and nation. Chapter 2/78 merely eliminated the exemption and made these previously exempted entities subject to the general rule. By doing so, it may have imposed a requirement "new" to local agencies, but that requirement was not "unique."

12. Indeed, our reasoning here was expressly foreshadowed in *County of Los Angeles.* There we observed: "The Court of Appeal reached a different conclusion in [*Sacramento I*], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as ... whether the expense was a 'state mandated cost,' rather than as whether the provision of an employee benefit was a 'program or service' within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved." (43 Cal.3d at p. 58, fn. 10, 233 Cal.Rptr. 38, 729 P.2d 202.)

[69]The distinction proposed by plaintiffs would have an anomalous result. The state could avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors *at the same time*. However, if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay. This was not the intent of our recent decision.

Next, plaintiffs complain that the new costs imposed on local governments by chapter 2/78 are too great to be deemed "incidental" within the meaning of *County of Los Angeles*. However, our decision did not use the word "incidental" to mean merely "insignificant in amount." Rather, we declared that the state need not reimburse local governments for expenses *incidentally imposed* upon them by laws of general application. In *County of Los Angeles*, we assumed that the expenses imposed *in common* on the private and public sectors by such a general law—as by the across-the-board increase in workers' compensation benefits there at issue—might be substantial. Notwithstanding this possibility, we found the voters did not intend to require a state subsidy of the public sector in such cases. (43 Cal.3d at pp. 56–58, 233 Cal.Rptr. 38, 729 P.2d 202.)

Finally, plaintiffs and their amici curiae urge us to overrule *County of Los Angeles*. They insist that our "program" and "unique requirement" limitations conflict with the language and purpose of article XIII B. First, they note that *nonreimbursable* state-mandated costs are expressly listed in subdivisions (a) through (c) of article XIII B, section 6.[13] Under the maxim *inclusio unius est exclusio alterius*, they reason, further exceptions may not be implied. Second, they assert, our limiting construction allows the state to "force" many costly but unfunded requirements on local governments, which the latter must absorb without relief from their own article XIII B spending limits. This, they aver, cannot have been the voters' intent.

These arguments misapprehend both the language of article XIII B, section 6, and our *County of Los Angeles* holding. Our reasoning in that case is not inconsistent with subdivisions (a) through (c) of section 6. Those paragraphs simply exclude certain state-imposed costs *even if they would otherwise be reimbursable under the "new program" or "increased service"* [70]*standards*. Subdivisions (a) through (c) do not purport to define what constitutes a "new program" or "increased level of service."

Moreover, the "program" and "service" standards developed in *County of Los Angeles* create no undue risk that the state will impose expensive unfunded obligations against local agencies' article XIII B spending limits. On the contrary, our standards require reimbursement whenever the state freely chooses to impose on local agencies *any* peculiarly "governmental" cost which they were not previously required to absorb.

On the other hand, as we explained in *County of Los Angeles*, extension of the subvention requirements to costs "incidentally" imposed on local governments would require the Legislature to assess the fiscal effect on local agencies of each law of general application. Moreover, it would subject much general legislation to the supermajority vote required to pass a companion local-government revenue bill. Each such necessary appropriation would, in turn, cut into the *state's* article XIII B spending limit. (§ 8, subd. (a).) We concluded that nothing in the language, history, or apparent purpose of article XIII B suggested such far-reaching limitations on

13. Article XIII B, section 6, provides that the state shall provide a subvention of funds to reimburse a local agency for costs incurred by the agency "[w]henever the [state] mandates [on the agency] a new program or higher level of service ..., except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

legitimate state power. (43 Cal.3d at pp. 56–58, 233 Cal.Rptr. 38, 729 P.2d 202.)

We remain persuaded by this reasoning.[14] We decline to overrule *County of Los Angeles.* Under the teaching of that case, we hold that chapter 2/78 imposes no local costs which must be reimbursed pursuant to article XIII B, section 6, and parallel statutes.

V. "FEDERAL" MANDATE?

[6] This case proceeded through the Court of Appeal solely on the issue whether chapter 2/78 constitutes a reimbursable "state mandate," as defined in *County of Los Angeles.* After we granted review, and in the public interest, we also decided to reexamine a related holding contained in *Sacramento I*—that chapter 2/78 does not qualify as a "federal" mandate.

Proper application of the "federal mandate" concept has important implications beyond subvention. A "cost mandated by the federal government" is exempt from a local government's statutory taxation limit. (Rev. & Tax.Code, § 2271.) Moreover, an appropriation required to comply with a [7] federal mandate is excluded from the constitutional spending limit of any affected entity, state or local (Cal. Const., art. XIII B, § 9, subd. (b)). Accordingly, we requested supplemental briefs on this question.[15]

After due consideration, we reject *Sacramento I*'s premise. We conclude that chapter 2/78 does impose "costs mandated by the federal government," as described in article XIII B and parallel statutes.[16]

Article XIII B, section 9(b), defines federally mandated appropriations as those "required for purposes of complying with mandates of ... the federal government which, *without discretion,* require an expenditure for additional services or which *unavoidably make the providing of existing services more costly.*" (Italics added.)

As in *Sacramento I,* plaintiffs argue that the words "without discretion" and "unavoidably" require clear *legal* compulsion not present in Public Law 94–566. Defendants respond, as before, that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.[17] In *Sacramento I,* the Court of Appeal adopted plaintiffs' narrow view. On reflection, we disagree.

Though section 9(b) seems plain on its face, we find a latent ambiguity in context. At the time article XIII B was adopted, United States Supreme Court decisions construing the Tenth Amendment *severely*

14. Nor do we agree that subvention depends on whether the "benefit" of a state-imposed local requirement falls principally at the state or local level. Attempts to apply such a "benefit" test to the myriad of individual cases could easily produce debates bordering on the metaphysical. Nothing in the language or history of article XIII B, or prior subvention statutes, suggests an intent to force such debates upon the Legislature each time it considers legislation affecting local governments.

15. For the reasons expressed in part III, *ante,* our consideration of this issue is not foreclosed by principles of collateral estoppel.

16. In *Sacramento I,* both the parties and the Court of Appeal assumed that if a cost was "federally mandated," it was therefore *not* a "state mandated" cost subject to subvention. In other words, it was assumed, an expense could not be both "state mandated" and "federally mandated," even if imposed by the state under federal compulsion. It was in this context that *Sacramento I* addressed the "federal mandate" issue. (See also *Carmel Valley Fire Protection Dist.,* supra, 190 Cal.App.3d at p. 543, 234 Cal.Rptr. 795.) We here express no view on the question whether "federal" and "state" mandates are mutually exclusive for purposes of state subvention, but leave that issue for another day. We decide only that, insofar as an expense is "federally mandated," as described in the state Constitution and statutes, it is exempt from the pertinent taxation and spending limits.

17. Ironically, the local agencies here argue *against* a "federal mandate," with the state in opposition to that view. An anti-"federal mandate" position seems directly contrary to the local agencies' interests, since its acceptance would mean the agencies are not eligible for exemptions from their pertinent taxing and spending limits. However, all parties appear still bound by the premise of *Sacramento I* that if a cost is "federally mandated," it is ineligible for state subvention. As noted above (see fn. 16, ante, at p. 150 of 266 Cal.Rptr., at p. 533 of 785 P.2d), we do not decide that issue here.

limited federal power to dictate policy or programs to the sovereign states or their subdivisions.[18] Indeed, by its early ruling that federal unemployment-insurance [72]laws did not violate state sovereignty insofar as they merely employed a "carrot and stick" to induce state compliance (*Steward Machine Co. v. Davis*, supra, 301 U.S. 548, 585–593, 57 S.Ct. 883, 890–894), the high court helped set the stage for two generations of pervasive federal regulation by this indirect means.[19]

Just three years before article XIII B was adopted, the court struck down, on Tenth Amendment grounds, Congress' effort to extend the minimum-wage and maximum-hour requirements of the Fair Labor Standards Act directly to local government employees. (*National League of Cities v. Usery* (1976) 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245.) Overruling earlier authority (see *Maryland v. Wirtz* (1968) 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020), the court held in *Usery*, supra, that constitutional principles of federalism prohibit Congress from using its otherwise "plenary" commerce power against the "States as States," so as to interfere with the essential "attributes of [state government] sovereignty." (426 U.S. at pp. 840–855, 96 S.Ct. at pp. 2468–2476.) Accordingly, said the court, Congress could not "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. . . ." (*Id.*, at p. 855, 96 S.Ct. at p. 2476.)

Usery dealt with federal efforts to regulate sovereign units of government as employers. However, the court's rationale obviously applied with equal or greater force to direct federal regulation of state and local governments *as governments*. Under *Usery's* reasoning, it seems manifest that Congress' direct power to require or prohibit substantive governmental policies or programs by state or local agencies was greatly curtailed. Such power would interfere impermissibly with "integral governmental functions" and essential "attributes of [state] sovereignty." [20]

[73]*After* article XIII B's adoption, both the result and the reasoning of *Usery* were overruled in *Garcia v. San Antonio Metro. Transit Auth.* (1985) 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016. In *Garcia*, a five-justice majority concluded that the political structure of the federal system, rather than rigid categories of inviolable state "sovereignty," constitutes state and local governments' primary protection against Congress' overreaching efforts to regulate them. (At pp. 547–555, 105 S.Ct. at pp. 1015–1020.)

However, this later development does not alter two crucial facts extant when article XIII B was enacted. First, the power of the federal government to impose its direct

18. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

19. The traditional categorical-aid provisions of the Social Security Act (e.g., 42 U.S.C. §§ 301 et seq. [old-age assistance], 601 et seq. [aid to needy families with dependent children], 1201 et seq. [aid to the blind], 1351 et seq. [aid to the permanently and totally disabled]), and statutes concerned with occupational safety and health (e.g., 29 U.S.C. § 651 et seq.), highways and mass transit (e.g., 23 U.S.C. § 101 et seq.), education (e.g., 20 U.S.C. § 241a et seq.), and air and water pollution (e.g., 33 U.S.C. § 1251 et seq., 1311 et seq.; 42 U.S.C. § 7401 et seq.) are but a few examples of federal laws imposing greater or lesser degrees of inducement to state and local compliance with federal policies and programs.

20. *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 later implicitly confirmed this premise. There, Virginia mine operators challenged a federal surface-mining regulatory scheme on grounds it displaced state authority and sovereignty. The federal law imposed minimum federal standards, to be enforced by federal or state officials at the state's choice, and allowed states to take over regulation by imposing equal or higher standards of their own. (30 U.S.C. §§ 1201 et seq., 1251–1254.) The court upheld the program, noting it regulated private persons, not the "States as States." Moreover, said the court, since states were not ordered to adopt their own surface-mining standards, "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. [Citations.] ...." (452 U.S. at pp. 286–288, 101 S.Ct. at pp. 2365–2366.)

regulatory will on state and local agencies was *then* sharply in doubt. Second, in conformity with this principle, the vast bulk of cost-producing federal influence on government at the state and local levels was by inducement or incentive rather than direct compulsion.[21] That remains so to this day.

Thus, if article XIII B's reference to "federal mandates" were limited to strict legal compulsion by the federal government, it would have been largely superfluous.[22] It is well settled that "constitutional . . . enactments must receive a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people. [Citations.]. . . ." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245, 149 Cal.Rptr. 239, 583 P.2d 1281.) While "[a] constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words[,] [citation][, t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers. [Citations.]" (Ibid.)

As the drafters and adopters of article XIII B must have understood, certain regulatory standards imposed by the federal government [74] under "cooperative federalism" schemes are coercive on the states and localities in every practical sense. The instant facts amply illustrate the point. Joint federal-state operation of a system of unemployment compensation has been a fundamental aspect of our political fabric since the Great Depression. California had afforded federally "certified" unemployment insurance protection to its workers for over 40 years by the time Public Law 94–566, chapter 2/78, and article XIII B were adopted. Every other state also operated such a system. If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty—full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.

Plaintiffs and their amici curiae suggest California could have chosen to terminate its own unemployment insurance system, thus leaving the state's employers faced only with the federal tax. However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends.

Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[23]

21. The United States Constitution includes specific limitations on the subject-matter jurisdiction of state and local governments (art. I, § 10), imposes certain direct obligations and restrictions on the "States as States" (e.g., art. I, § 2, cls. 1, 4; art. I, § 3, cls. 1, 2; art. II, § 1, cl. 2; art. IV, §§ 1, 2, cls. 1, 2; amends. XIV, XV), and grants Congress power to prevent denial of certain constitutional rights by the states (amends. XIII, XIV, XV). Obviously, however, these provisions account for only a minute portion of the costs incurred by state and local governments as a result of federal programs and regulations.

22. For this reason, federal cases cited by plaintiffs and their amici curiae for the proposition that Public Law 94–566 is not "coercive" (e.g., *County of Los Angeles, Cal. v. Marshall* (D.C.Cir. 1980) 631 F.2d 767; *State, etc. v. Marshall* (1st Cir.1980) 616 F.2d 240) are inapposite. Those decisions applied *Tenth Amendment* principles to determine whether Public Law 94–566 was constitutionally valid. Had Public Law 94–566 been struck down on this ground, it would *not* have resulted in local costs to which the "federal mandate" provisions of article XIII B might extend. Thus, applying the Tenth Amendment cases to determine whether a cost is "federally mandated" for purposes of article XIII B presents a problem in circular reasoning.

23. The dissent cites two older cases for the premise that in antidebt and antispending measures, the exception recognized for "mandatory" costs and expenditures has traditionally been limited to obligations imposed by law. Neither cited decision is dispositive or persuasive here. *County of Los Angeles v. Byram* (1951) 36 Cal.2d 694, 227 P.2d 4, and the cases therein

[175]Unlike the *Sacramento I* court, we deem significant the Legislature's persistent agreement with our construction. In 1980, after the adoption of article XIII B, it amended the statutory definition of "costs mandated by the federal government" to provide that these include "costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in *substantial monetary penalties* or *loss of funds* to *public or private persons* in the state...." (Rev. & Tax.Code, § 2206, italics added; Stats.1980, ch. 1256, § 3, p. 4247.)

In *Sacramento I,* the Court of Appeal declined to apply this statutory amendment "retroactively" to article XIII B. (156 Cal.App.3d at pp. 197–198, 203 Cal.Rptr. 258.) The Legislature immediately responded. In 1984 statutes enacted for the express purpose of "implement[ing]" article XIII B (see Gov.Code, § 17500), the Legislature reiterated its 1980 definition. (Id., § 17513; Stats.1984, ch. 1459, § 1, p. 5114.) [24]

Plaintiffs contend that these statutory pronouncements deserve little interpretive weight since, among other things, they are "internally inconsistent." Plaintiffs stress the proviso in Revenue and Taxation Code, section 2206, and in Government Code, section 17513, that the phrase "'[c]osts mandated by the federal government' does *not* include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the *option* of the state, local agency, or school district." (Italics added.)

We see no fatal inconsistencies. The first clause of the proviso merely confirms, as article XIII B itself specifies, that program funds voluntarily provided by another unit of government may not be excluded from the [176]spending limits of recipient local agencies. (Compare art. XIII B, §§ 8, subd. (b), 9 subd. (b).) The second clause isolates a concern which we share—that state or local governments might otherwise claim "federally mandated costs" even where participation in a federal program, or compliance with federal "standards," is a matter of true choice. (Cf., e.g., *Carmel*

cited, concern the constitutional provision (Cal. Const., former art. XI, § 18, see now art. XVI, § 18 (hereafter section 18)) which prohibits local governments, absent voter approval, from incurring debts or liabilities which exceed in any year the income or revenue provided for such year. Section 18 is *absolute on its face* and, unlike article XIII B, it contains *no express exception* for mandatory expenses. Though sometimes founded on contorted linguistic analyses (see, e.g., *City of Long Beach v. Lisenby* (1919) 180 Cal. 52, 56, 179 P. 198), the *implied* exceptions to section 18, as recognized in *Byram* and other cases, arise from a rule of necessity and despite the absolute constitutional language. Such implied exceptions must, of course, be narrowly confined.

On the other hand, *County of Los Angeles v. Payne* (1937) 8 Cal.2d 563, 66 P.2d 658, also cited by the dissent, construed former Political Code section 3714, which limited a local government's annual expenditures to its previously adopted budget. Section 3714 *did* contain an express exception for "mandatory expenses *required by law.*" (Italics added.) *Payne's* adherence to the explicit terms of the statutory exception is hardly remarkable.

In contrast with the measure considered in *Byram,* article XIII B and the Revenue and Taxation Code *do* expressly exempt "federally mandated" expenses from the pertinent taxation and appropriations limits. Unlike the measure construed in *Payne,* neither article XIII B nor the Revenue and Taxation Code expressly limit their exemptions to obligations "required by law." Article XIII B uses the broader terms "unavoidably" and "without discretion," suggesting recognition by the drafters and voters that forces beyond strict legal compulsion may produce expenses that are realistically involuntary. The Revenue and Taxation Code explicitly includes coercive federal "carrot and stick" requirements within the federally "mandated" costs exempt from statutory property tax limits. (Rev. & Tax.Code, § 2206.)

24. Plaintiffs suggest that by reenacting this language in the wake of *Sacramento I,* the Legislature "acquiesced" in the Court of Appeal's narrow definition of "costs mandated by the federal government." We are not persuaded. *Sacramento I* did not *construe* the statutory language; it simply found a postdated statute *irrelevant* to the proper interpretation of article XIII B. By later readopting its expanded definition in statutes designed to "implement" article XIII B, the Legislature expressed its disagreement with *Sacramento I,* not its acquiescence. Contrary to the implications of *Sacramento I,* legislative efforts to resolve ambiguities in constitutional language are entitled to serious judicial consideration. (See authorities cited *ante.*)

Valley Fire Protection Dist., supra, 190 Cal.App.3d at pp. 542–544, 234 Cal.Rptr. 795.) [25]

Given the variety of cooperative federal-state-local programs, we here attempt no final test for "mandatory" versus "optional" compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9, subd. (b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.

For reasons expressed above, we are satisfied under these standards that chapter 2/78 did implement a federal "mandate" within the meaning of article XIII B and prior statutes restricting local taxation. Hence, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by chapter 2/78 may tax and spend as necessary to meet the expenses required to comply with that legislation. To the extent *Sacramento I* is inconsistent with our analysis, that decision is disapproved.

VI. CONCLUSION.

We have concluded that chapter 2/78 is a "federal mandate" which exempts affected state and local agencies from pertinent limits on their power to tax, appropriate, and spend. However, local governments' expenses[77] of complying with chapter 2/78 are not subject to compulsory state subvention, because chapter 2/78 imposed no new or increased "program or service," and no "unique" requirement, on local agencies. The contrary judgment of the Court of Appeal is reversed.

LUCAS, C.J., and MOSK, BROUSSARD, PANELLI and KENNARD, JJ., concur.

KAUFMAN, Justice, concurring and dissenting.

I concur in the judgment. Given this court's decision in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, I am compelled to agree that the obligation imposed on local governments by the 1978 state unemployment insurance legislation is not a "new program or higher level of service" within the meaning of article XIII B, section 6, of the California Constitution, and that for this reason the state is not constitutionally obligated to provide a subvention of funds to reimburse the unemployment insurance costs of local governments. I respectfully dissent, however, from the additional conclusion, stated in part V of the majority opinion, that these unemployment insurance costs are "mandates of ... the federal government" and therefore exempt from the state and local government appropriation limits of article XIII B and from property taxation limits imposed by statute. In reaching this additional conclusion the majority decides an issue not raised by the parties and completely outside the scope of this action. As so often happens when a court reaches beyond the confines of the case before it to render a gratuitous

25. In the *Carmel Valley* case, the state claimed, among other things, that local costs of purchasing protective clothing and equipment for firefighters, as required by regulations under the California Occupational Safety and Health Act, constituted a nonreimbursable "federal mandate" because the California standards merely "implemented" federal law. However, the evidence was contrary; a letter from the federal Occupational Safety and Health Administration disclaimed federal jurisdiction over California's political subdivisions and stated that state and federal standard were independent. (190 Cal.App.3d at pp. 543–544, 234 Cal.Rptr. 795.) Examination of the pertinent statutory scheme reinforces the view that compliance with federal standards in this area is "optional" with the state. Other than loss of limited federal administrative funds (29 U.S.C. § 672(g)), the only sanction for California's decision not to maintain a federally approved occupational safety and health system is that federal standards, administered by federal personnel, will then prevail within the state. (Id., § 667(b)–(h).)

advisory opinion, the majority decides the issue incorrectly.

All too frequently in recent years (see, e.g., *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 345, fn. 1, 256 Cal.Rptr. 543, 769 P.2d 399) this court, in its misguided zeal to provide enlightenment, has reached out to decide an issue not tendered by the parties. The majority's failure to exercise proper judicial restraint in the instant case is another example of this trend and one I find particularly disturbing since it violates a fundamental and venerable tenet of judicial practice—i.e., "A court will not decide a constitutional question unless such construction is absolutely necessary." (*Estate of Johnson* (1903) 139 Cal. 532, 534, 73 P. 424; accord, *People v. Williams* (1976) 16 Cal.3d 663, 667, 128 Cal.Rptr. 888, 547 P.2d 1000; *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65, 195 P.2d 1.) The federal mandate issue which the majority here decides, because it turns on the proper construction of article XIII B, section 9, of our state Constitution, is a constitutional issue. Using this case to resolve that issue is, to my mind, indefensible.

To see just how far the majority has wandered from the issues essential to the proper resolution of this case, one need only point out that this action [178] was not brought to settle a dispute about taxation or appropriation limits, nor has this court been informed that any such dispute exists. Rather, this action was brought to enforce the holding in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 203 Cal.Rptr. 258 (*Sacramento I*), that the state is constitutionally obligated to reimburse the unemployment insurance costs of local governments. The governmental entities litigating this proceeding have not sought a judicial determination of the 1978 unemployment insurance legislation's effect on their statutory or constitutional taxing or spending limits, nor have they raised any issue regarding whether unemployment insurance costs are federally mandated for any purpose. The federal mandate issue was first injected into the case by this court when we requested additional briefing on the questions whether the unemployment insurance costs of local governments are federally mandated under article XIII B, section 9, of the state Constitution and, if so, whether this conclusion necessarily exempts the state from any obligation it might otherwise have to reimburse local governments for these costs.

The majority's federal mandate discussion does not even provide an alternative ground for the holding denying reimbursement of local governments' unemployment insurance costs, for the majority purports to decide whether unemployment insurance costs are federally mandated without deciding whether resolution of this issue has any bearing on entitlement to reimbursement (see maj. opn., ante, p. 150, fn. 16 of 266 Cal.Rptr., at p. 533, fn. 16 of 785 P.2d). The majority's only justification for deciding whether unemployment insurance costs are federally mandated is that the issue has "important implications" inasmuch as federally mandated costs are "exempt from a local government's statutory taxation limit (Rev. & Tax.Code, § 2271)" and "from the constitutional spending limit of any affected entity, state or local (Cal. Const., art. XIII B, § 9, subd. (b))." (Maj. opn., ante, pp. 150–151 of 266 Cal.Rptr., at pp. 533–534 of 785 P.2d.) But the present case is an inappropriate vehicle for deciding these weighty issues since neither the state nor the local entities have any reason to contest the other's exemptions from spending or taxation limits. In other words, the parties now before us are not adverse on these issues and so have not defined and argued opposing points of view with the vigor and thoroughness essential to proper judicial resolution of complex legal questions, particularly those of constitutional magnitude. Those who might have argued in favor of including unemployment insurance costs in the taxing and spending limits—for example, the proponents of the initiative measure by which article XIII B was enacted—are not represented in this proceeding.

Were the issue properly presented in this case, I would conclude that the unemployment insurance costs are not federally mandated. The text of a constitution "should be construed in accordance with

the natural and ordinary meaning of its words." (*Amador Valley Joint Union High Sch. Dist. v.* [179] *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245, 149 Cal.Rptr. 239, 583 P.2d 1281.) The language at issue here excludes from the definition of "appropriations subject to limitation" those appropriations "required for purposes of complying with *mandates* of the courts or the federal government which, *without discretion, require* an expenditure for additional services or which *unavoidably* make the providing of existing services more costly." (Cal. Const., art. XIII B, § 9, subd. (b), italics added.)

The meaning of this language is clear; to look beyond the text for some other meaning is both unnecessary and improper under accepted rules of constitutional interpretation. (See *State Board of Education v. Levit* (1959) 52 Cal.2d 441, 462, 343 P.2d 8; *People v. Knowles* (1950) 35 Cal.2d 175, 182–183, 217 P.2d 1.) A "mandate" is "an order, command [or] charge." (*Xth Olympiad Com. v. American Olym. Assn.* (1935) 2 Cal.2d 600, 604, 42 P.2d 1023; see also, *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908, 136 Cal.Rptr. 251, 559 P.2d 606 ["mandatory duty" is "an obligatory duty which a governmental entity is required to perform"]; *Bridgman v. American Book Co.* (1958) 12 Misc.2d 63, 66, 173 N.Y.S.2d 502, 506 ["mandate" is "a command, order or direction . . . which a person is bound to obey"].) The mandates to which the constitutional provision at issue refers are those "of the courts or the federal government." The coercive force of court mandates is, of course, the force of law. That "mandates of . . . the federal government" are similarly limited to those obligations imposed by force of federal law is shown not only by the term "mandate" itself but also by the terms "without discretion" and "unavoidably," which plainly exclude any form of inducement using political or economic pressure rather than legal compulsion.

Laws limiting governmental appropriations and indebtedness have traditionally exempted two categories of expenditures: those required to meet emergencies and those required to satisfy duties or mandates imposed by law. (See, e.g., *County of Los Angeles v. Byram* (1951) 36 Cal.2d 694, 698–700, 227 P.2d 4; *County of Los Angeles v. Payne* (1937) 8 Cal.2d 563, 569–575, 66 P.2d 658; *State v. City Council of City of Helena* (1939) 108 Mont. 347, 90 P.2d 514, 516; *Raynor v. King County* (1940) 2 Wash.2d 199, 97 P.2d 696, 707.) The latter category has been interpreted as including only those obligations compelled by force of law, as opposed to economic or political necessity or expedience. (See *County of Los Angeles v. Byram*, supra, 36 Cal.2d at pp. 698–700, 227 P.2d 4; *County of Los Angeles v. Payne*, supra, 8 Cal.2d at pp. 573–574, 66 P.2d 658.) Article XIII B of the California Constitution follows the pattern of other similar laws; it provides exemptions for emergency appropriations in section 3, subdivision (c), and for legal duties or "mandates" in section 9, subdivision (b). I see no basis for concluding that the term "mandate," which in the context of government debt and appropriation limitations has traditionally [180] meant a duty imposed by force of law, has suddenly acquired a novel and more expansive meaning in section 9. On the contrary, the drafters of section 9 appear to have taken pains to avoid any such interpretation.

As stated in *Sacramento I*, "The concept of federal mandates . . . is defined in section 9 of article XIII B. Subdivision (b) of that section excludes from a governmental entity's appropriation limit '[a]ppropriations required for purposes of complying with mandates of . . . the federal government which, *without discretion, require* an expenditure' by the governmental entity. (Italics added.) As contemplated by article XIII B, section 9, a federal mandate is one pursuant to which the federal government imposes a cost upon a governmental entity, and the entity has *no discretion* to refuse the cost. Chapter 2 [the 1978 unemployment insurance legislation] was not a federal mandate within this constitutional definition, as the State had the discretion to participate or not in the federal unemployment insurance system." (*Sacramento I*, supra, 156 Cal.App.3d 182, 197, 203 Cal.Rptr. 258, italics in original.) Giv-

ing the constitutional language its usual and ordinary meaning, I agree with the Court of Appeal that federal law "mandates" an expenditure only if the expenditure is legally compelled, and not if the federal law merely provides economic or political inducements, no matter how powerful or coercive. Since it undisputed that the state was under no legal compulsion to enact the 1978 unemployment insurance legislation, the burdens of that legislation are not "mandates of ... the federal government."

In support of its contrary conclusion, the majority reasons as follows: (1) when article XIII B of the California Constitution was drafted and enacted, the Tenth Amendment to the United States Constitution had been construed to prohibit Congress from imposing costs on state and local governments; (2) as a result, virtually all federal laws imposing costs on state and local governments did so through "carrot and stick" incentive programs rather than by direct legal compulsion; and (3) the exemption for "mandates of ... the federal government" must be construed to encompass at least some of these incentive programs because otherwise it would be almost entirely superfluous. I find each of these points highly questionable, if not demonstratively unsound.

First, the Tenth Amendment has never been interpreted as entirely prohibiting the federal government from imposing costs on state and local government. Rather, *National League of Cities v. Usery* (1976) 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 defined an exception to the broad sweep of Congress's commerce clause authority. Under this exception, "traditional governmental functions" of state and local governments were protected from direct and intrusive federal regulation. (426 U.S. at p. 852, 96 S.Ct. at p. 2474.) As explained in *Garcia v. San Antonio Metro. Transit* [81] *Auth.* (1985) 469 U.S. 528, 538–547, 105 S.Ct. 1005, 1010–1016, 83 L.Ed.2d 1016, the result was an inconsistent patchwork of decisions upholding or striking laws depending on whether the regulated activities were perceived by the court as being traditionally associated with state or local government or constituting "attributes of state sovereignty." Thus, a significant number of laws imposing costs on state and local governments survived Tenth Amendment scrutiny even before the decision in *Garcia v. San Antonio Metro. Transit Auth.*, supra. (See, e.g., *EEOC v. Wyoming* (1983) 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 [holding state and local government employee retirement policies subject to federal age discrimination regulations]; see generally, Skover, *"Phoenix Rising" and Federalism Analysis* (1986) 13 Hastings Const.L.Q. 271, 286–288.) More importantly, however, I see no reason to assume that the drafters of article XIII B intended that the federal mandate exemption would have broad application, encompassing a large number of federal programs. Rather, construing the exemption narrowly seems entirely consistent with the probable intent of those who drafted the provision.

The test proposed by the majority for identifying those incentive programs which qualify as "mandates of ... the federal government" will require an extensive factual inquiry into the practical consequenees of noncompliance with the federal law. It will be burdensome to apply and its outcome difficult to predict. Besides being wholly unnecessary to resolution of this case, and violating the probable intent of the voters who enacted article XIII B of the California Constitution,[1] the majority's discussion of the federal mandate issue is certain to generate more difficulties than it resolves.

1. Those voters no doubt will be upset to learn that their tax dollars will be dissipated in litigation to determine such metaphysical questions as whether a decision to participate in a federal program was "truly voluntary."

Finally, I also, again like Justice Reynoso, would withhold any decision on the question whether the Horse Racing Board has the statutory authority to provide compensatory relief to a person who has been injured though an intentional violation of one of the Board's regulations, by, for example, conditioning the reinstatement of a wrongdoer's license on his payment of wrongfully obtained gains to the victim. Because plaintiff never sought such relief from the Board, the question of the Board's power to afford that remedy is not presented here.

729 P.2d 743
43 Cal.3d 148

[148] **Leonard COLE et al., Plaintiffs and Appellants,**

v.

FAIR OAKS FIRE PROTECTION DISTRICT et al., Defendants and Respondents.

S.F. 24919.

Supreme Court of California, In Bank.

Jan. 2, 1987.

Rehearing Denied Feb. 11, 1987.

Employee brought civil action against employer and fellow employee for intentional infliction of emotional distress which caused him total, permanent, mental and physical disability. The Superior Court, Sacramento County, Fred W. Marler, J., sustained defendants' demurrer, and plaintiff appealed. The Court of Appeal affirmed in part and reversed in part. The Supreme Court granted review, superseding opinion of the Court of Appeal. The Supreme Court, Broussard, J., held that: (1) an employee could not maintain a civil issue in courts for intentional infliction of emotional distress against his employer and fellow employee when conduct complained of had caused total permanent mental and physical disability compensable under workers' compensation law, and (2) employee's wife's claims for loss of consortium and intentional infliction of emotional distress were also barred.

Affirmed.

Grodin, J., concurred in judgment.

Panelli, J., filed concurring opinion.

Bird, C.J., filed dissenting opinion.

1. Workers' Compensation ⇐2093, 2168

An employee could not maintain a civil action in courts for intentional infliction of emotional distress against his employer and fellow employee when conduct complained of had caused total, permanent, mental and physical disability compensable under workers' compensation law.

2. Workers' Compensation ⇐2084

Since an awareness of danger to a employee by employer is not basis for liability for damages, reckless disregard of probability of injury should not warrant exemption from workers' compensation exclusive remedy provisions. West's Ann. Cal.Labor Code §§ 3600, 3601.

3. Workers' Compensation ⇐2093

An employer's supervisory conduct is inherently "intentional."

See publication Words and Phrases for other judicial constructions and definitions.

4. Workers' Compensation ⇐2084

When misconduct attributed to employer is actions which are normal part of employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, employee suffering emotional distress causing disability may not avoid workers' compensation exclusive remedy provisions by characterizing employer's decisions which resulted in disability as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance. West's Ann.Cal.Labor Code §§ 3600, 3601.

5. Workers' Compensation ⇐2084

Civil action for injury sustained and arising out of course of employment, for which essence of wrong is personal physical injury or death, is barred by workers' compensation exclusive remedy provisions regardless of name of action or technical form if usual conditions of coverage are satisfied. West's Ann.Cal.Labor Code §§ 3600, 3601.

6. Workers' Compensation ⇐2162

Dual-capacity doctrine did not furnish basis to avoid exclusive remedy provisions of Labor Code on employee's claim for damages for injuries allegedly stemming from employer's intentional infliction of emotional distress.

7. Workers' Compensation ⇐2144

Wife's claims for intentional infliction of emotional distress and loss of consortium were barred where husband's claims were barred by workers' compensation exclusive remedy provisions. West's Ann. Cal.Labor Code §§ 3600, 3601.

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BROUSSARD, Justice.

The main issue presented is whether an employee may maintain a civil action in the courts for intentional infliction of emotional distress against his employer and fellow employee when the conduct complained of has caused total, permanent, mental and physical disability compensable under workers' compensation law. We conclude that when the employee's claim is based on conduct normally occurring in the workplace, it is within the exclusive jurisdiction of the Workers' Compensation Appeals Board.

The trial court sustained the demurrer of defendants, Fair Oaks Fire Protection District and its assistant fire chief, without leave to amend on the ground that plaintiffs' claims came within the exclusive jurisdiction of the Workers' Compensation Appeals Board. The Court of Appeal affirmed as to eight of the ten causes of action alleged but reversed with directions to permit amendment of the complaint as to causes of action for defamation and for false light invasion of privacy. We granted plaintiffs' petition for review. There is no challenge to the Court of Appeal's holding that the causes of action for defamation and privacy are not barred by the exclusive remedy provisions of the Labor Code. Plaintiffs challenge the Court of Appeal determination that their other claims are within the exclusive jurisdiction of the board.

The allegations of the complaint may be summarized as follows: [1]

[152] Leonard Cole enlisted as a volunteer firefighter in 1964 with the district, and in the next year he was appointed a full-time firefighter. In 1970 he was appointed engineer, and in 1977 he was promoted to captain. In March 1981 he was elected union representative and continued to serve in that capacity until April 1982.

In October 1981, he was diagnosed as having high blood pressure. His physician recommended rest and recreation. In February 1982 he was examined and again found to have elevated blood pressure. He was placed on medication. The elevated blood pressure was due to unreasonable stress and pressure by the assistant chief. As union representative Cole negotiated questions of contractual interpretation with management, and the assistant chief, al-

1. A general demurrer admits the proof of all material factual allegations in the complaint, and we are not concerned with the question of plaintiffs' ability to prove these allegations. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496, 86 Cal.Rptr. 88, 468 P.2d 216.)

though formerly the union representative, deliberately harassed him in the negotiations.

On one occasion the assistant chief demanded that Cole report to a meeting for performance evaluation and possible disciplinary action and refused to excuse him to attend a funeral.

Although Cole had repeatedly received superior performance ratings, the assistant chief devised a novel personnel evaluation procedure for Cole for the purpose of punishing him for his union activities. Cole was informed by various members of the fire department that the assistant chief and members of the management intended to take punitive action against him because of his union activities.

On May 11, Cole was placed on sick leave because of his hypertension. A doctor employed by the assistant chief reported that the level of hypertension disabled Cole from performing heavy duty and that he should be restricted to light duty until his blood pressure was better controlled.

Thereafter, the assistant chief notified him by mail that he was to present himself at a disciplinary hearing on June 3, 1982. The letter falsely asserted dishonesty as one of the grounds for the hearing. It stated that Cole had stated falsely that he was on workers' compensation and that he had been told by a county safety official not to report to work.[2] The assistant chief conducted the hearing before a panel of battalion chiefs. The hearing was a "kangaroo" proceeding.

Thereafter, on June 28, 1982, Cole was demoted to engineer, and was publicly stripped of his captain's badge. The assistant chief assigned him to [1153]perform "humiliating and menial duties," and he was ordered to return to duty from sick leave and assigned to work as a dispatcher, an entry level position.

On October 18, 1982, the Board of Directors of the Fair Oaks Fire Protection District reversed Cole's demotion and reinstated him as a captain at a reduced salary and placed him on probationary status. The assistant chief continued his harassment and sometime between July and September 1982, the assistant chief filed an application with the state to force Cole to retire involuntarily.

Cole's blood pressure was elevated by the continuous harassment, and on November 8, 1982, he suffered a severe and totally disabling cerebral vascular accident. He cannot move, care for himself, or communicate other than by blinking.

I. THE STATUTES

The pertinent code sections were amended by the Legislature in 1982. The pre–1982 statutes are applicable to the instant case because Cole suffered his stroke prior to the effective date of the 1982 legislation. "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393, 182 P.2d 159.) If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive "because the legal effects of past events would be changed, and the statute will be construed only to operate in futuro unless the legislative intent to the contrary clearly appears." (*Id.*, at p. 394, 182 P.2d 159; *DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 173, 18 Cal. Rptr. 369, 367 P.2d 865.) In the absence of a showing that the Legislature intended the 1982 amendments to be applied retroactively, two Courts of Appeal have concluded that the substantive changes of the 1982 legislation do not apply retroactively. (*Perry v. Heavenly Valley* (1985) 163 Cal. App.3d 495, 500–505, 209 Cal.Rptr. 771; *Horney v. Guy F. Atkinson Co.* (1983) 140 Cal.App.3d 923, 930, fn. 4, 190 Cal.Rptr. 18.) So far as appear there is no legislative history to the contrary. While it may be

2. Defendants have furnished the court with documents showing that Cole applied for workers' compensation benefits on June 14, and subsequently received an award of medical benefits.

true, as defendants argue, that the Legislature constitutionally could have made the 1982 amendment retroactively effective, it is unnecessary to reach that issue since under established canons of interpretation it must be presumed that the Legislature did not intend retroactive application.

[154]When Cole was injured, Labor Code section 3600 [3] provided in pertinent part: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person ... shall without regard to negligence, exist against an employer for any injury arising out of and in the course of employment...."[4]

Section 3601 provided that where the "conditions of compensation exist," the right to recover compensation is "the exclusive remedy" for injury or death of an employee against the employer or coemployee acting within the scope of employment except that an employee shall "in addition to the right of compensation against the employer, have a right to bring an action at law for damages against such other employee," when the injury is proximately caused by the willful and unprovoked "physical" act of aggression of such other employee.[5]

[155]Prior to the 1982 amendments, section 4553 provided for an increase in the amount of compensation by one-half up to $10,000, where the employee was injured by the serious and willful misconduct of the employer, the employer's managing representative, or general superintendent.[6] The employer may not insure against an award under section 4553 although an insurer may provide insurance for the cost of defending against any "suit" for serious and willful misconduct of the employer or his agent. (Ins.Code, § 11661; *Mercer-*

3. Unless otherwise indicated, all statutory references are to the Labor Code.

4. Section 3600 provided: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

"(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

"(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

"(c) Where the injury is proximately caused by the employment, either with or without negligence...."

Section 3706 provided for actions for damages if the employer failed to pay compensation.

5. Section 3601 provided: "(a) Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in Section 3706, the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment, except that an employee, or his dependents in the event of his death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against such other employee, as if this division did not apply, in the following cases:

"(1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of such other employee.

"(2) When the injury or death is proximately caused by the intoxication of such other employee....

"(b) An act which will not sustain an independent action for damages against such other employee under paragraphs (1) [or] (2) ... of subdivision (a) of this section may nevertheless be the basis of a finding of serious and willful misconduct under Section 4553 or 4553.1, if (1) such other employee is established to be one through whom the employer may be charged under Section 4553; (2) such act of such other employee shall be established to have been the proximate cause of the injury or death; and (3) such act is established to have been of a nature, kind, and degree sufficient to support a finding of serious and willful misconduct under Section 4553 or 4553.1.

"(c) In no event, either by legal action or by agreement whether entered into by such other employee or on his behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by such other employee under [paragraphs] (1) [or] (2) ... of subdivision (a) of this section.

"(d) No employee shall be held liable, directly or indirectly, to his employer, for injury or death of a coemployee except where the injured employee or his dependents obtain a recovery under subdivision (a) of this section."

6. In 1982, the $10,000 limitation was removed.

Fraser Co. v. Industrial Acc. Com. (1953) 40 Cal.2d 102, 108, 251 P.2d 955.)

II. CASES INVOLVING EMPLOYER'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A number of Court of Appeal cases have addressed the question whether the exclusive remedy provisions of the compensation act prior to the 1982 amendment preclude an action for intentional infliction of emotional distress.[7]

Renteria v. County of Orange (1978) 82 Cal.App.3d 833, 838 et seq., 147 Cal.Rptr. 447, held that an employee could maintain an action for intentional infliction against the employer where there was no physical injury[156] or disability. The court pointed out that, unless an action at law were permitted in cases where there was no physical injury or disability, the employee would be left without any remedy whatsoever for the intentional tortious conduct. (82 Cal.App.3d at p. 839, 147 Cal.Rptr. 447.) The court also reasoned that, like defamation, the action for intentional infliction of emotional distress is part of a class of civil wrongs outside the contemplation of the workers' compensation system and that the need to deter intentional wrongdoing was not met by the penalty provisions of section 4553 providing for a 50 percent surcharge because "50 percent of nothing is still nothing." (82 Cal.App.3d at p. 841, 147 Cal.Rptr. 447.) The court stated that if the essence of the tort is nonphysical and injuries are of a nonphysical sort with physical harm being at most a makeweight the action should not be barred. (82 Cal.App.3d at p. 842, 147 Cal.Rptr. 447.) A number of cases have followed *Renteria* in recognizing that an employee may maintain an action against the employer for intentional infliction of emotional distress. (E.g., *Young v. Libby-Owens Ford Co.* (1985) 168 Cal.App.3d 1037, 214 Cal.Rptr. 400; *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 229–230, 191 Cal.Rptr. 696; *McGee v. McNally* (1981) 119 Cal.App.3d 891, 895, 174 Cal.Rptr. 253; *Lagies v. Copley* (1980) 110 Cal.App.3d 958, 970 et seq., 168 Cal.Rptr. 368.)

However, the language of *Renteria* and the last cited group of cases recognize that the basis of liability in part is that the employee had no substantial remedy under the workers' compensation law and that an employer should not be permitted to engage in intentional tortious conduct with neither compensation nor damages to deter him. Three cases have refused to extend *Renteria* to cases where there was substantial physical injury and disability and have held that when the employee alleges physical injury and disability compensable

7. The elements of a cause of action for intentional infliction of emotional distress were stated in *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 160 Cal.Rptr. 141, 603 P.2d 58. A prima facie case requires (1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress. There is liability for conduct "'exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and does cause, mental distress. (See Prosser, Law of Torts (4th ed. 1971) p. 54.) Ordinarily mere insulting language, without more, does not constitute outrageous conduct. The Restatement view is that liability "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.... There is no occasion for the law to intervene ... where some one's feelings are hurt." (Rest.2d Torts, § 46, com. d.) Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress. (Prosser, Law of Torts, *supra*, at pp. 57–58; Rest.2d Torts, § 46, coms. e, f.; *Fletcher v. Western National Life Ins. Co.* [1970], *supra* [10 Cal.App.3d 376], at p. 397 [89 Cal.Rptr. 78] (insurance agent's threatened and actual refusals to pay; threatening communication in bad faith to settle nonexistent dispute); *Alcorn v. Anbro Engineering Inc., supra* [2 Cal.3d], at p. 496 [86 Cal.Rptr. 88, 468 P.2d 216] (supervisor shouting insulting epithets; terminating employment; humiliating plaintiff); *Golden v. Dungan* [1971], *supra* [20 Cal.App.3d 295], at p. 305 [97 Cal.Rptr. 577] (process server knowingly and maliciously banging on door at midnight).)'" (25 Cal.3d at pp. 946–947, 160 Cal. Rptr. 141, 603 P.2d 58.)

under that law or recovers under it, workers' compensation is the exclusive remedy of the employee. (*Hollywood Refrigeration Sales Co. v. Superior Court* (1985) 164 Cal.App.3d 754, 757 et seq., 210 Cal.Rptr. 619; *Gates v. Trans Video Corp.* (1979) 93 Cal.App.3d 196, 204–206, 155 Cal.Rptr. 486; *Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 535–536, 151 Cal.Rptr. 828.)

We recognize that the distinction drawn by the foregoing cases presents an anomaly. Intentional infliction of emotional distress which results in physical injury and disability is ordinarily more reprehensible than intentional infliction of emotional distress which does not result in disability, but civil action is allowed only in the latter situation.

[1] Nevertheless, *Renteria* and the cases following it do not offer support for plaintiffs' position. Obviously, the cases permitting maintenance of an action for intentional infliction of emotional distress are factually distinguishable because they do not involve substantial physical injury or disability. |157 Because the reasoning of the cases in permitting the action is largely based on the absence of any other deterrent to intentional tortious conduct, their application where other deterrents exist, such as compensation and the additional recovery under section 4553, would be to permit the tail to wag the dog. An implied exception to a statute should not be applied where the reason for the exception is not applicable.

On the other hand, the *Hollywood Refrigeration*, *Ankeny* and *Gates* cases, which denied a damage action because physical injury and disability were present, are not decisive in favor of defendant. They were primarily concerned with applying the rules and reasoning of *Renteria*, and did not extensively consider the possibility of other bases for permitting an action for intentional infliction of emotional distress.[8] We proceed to consider alternative bases for an exception to the exclusive remedy provisions of the Labor Code.[9]

III. EMPLOYER'S INTENTIONAL MISCONDUCT

In *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 473 et seq. 165 Cal.Rptr. 858, 612 P.2d 948, we held that an employee could state a cause of action against the employer where the employer fraudulently concealed from him, from his doctors and from the state that he was suffering from a work-related disease thereby preventing treatment and inducing him to continue working under hazardous conditions.

We considered at length the employer's liability for intentional misconduct and the exclusive remedy provisions of the Labor Code. "First we consider cases in which the intentional acts of the employer have been held not to justify an action at law. Compensation was determined to be the exclusive remedy for injuries suffered in a case in which the employer concealed the dangers inherent in the material the employees were required to handle (*Wright v. FMC Corp.* (1978) 81 Cal.App.3d 777, 779 [146 Cal.Rptr. 740]) or made false representations in that regard (*Buttner v. American Bell Tel. Co.* (1940) 41 Cal.App.2d 581, 584 [107 P.2d 439]). The same conclusion was reached on the basis of allegations that the employer was guilty of malicious misconduct in allowing an employee to use |158 a machine without proper instruction. (*Law v. Dartt* (1952) 109 Cal.App.2d 508, 509 [240 P.2d 1013].)

"The reason for the foregoing rule seems obvious. It is not uncommon for an employer to 'put his mind' to the existence of

8. Actions for intentional infliction of emotional distress against an employer were upheld in *Agarwal v. Johnson, supra*, 25 Cal.3d 932, 160 Cal.Rptr. 141, 603 P.2d 58, and *Alcorn v. Anbro Engineering, Inc., supra*, 2 Cal.3d 493, 86 Cal.Rptr. 88, 468 P.2d 216, but neither case considered the exclusive remedy provisions of the Labor Code.

9. We consider only common law causes of action. We do not decide whether the exclusive remedy provisions of the Labor Code bar causes of action created by statute.

a danger to an employee and nevertheless fail to take corrective action. (See, e.g., *Rogers Materials Co. v. Ind. Acc. Com.*, *supra*, 63 Cal.2d 717, 723 [48 Cal.Rptr. 129, 408 P.2d 737].) In many of these cases, the employer does not warn the employee of the risk. Such conduct may be characterized as intentional or even deceitful. Yet if an action at law were allowed as a remedy, many cases cognizable under workers' compensation would also be prosecuted outside that system. The focus of the inquiry in a case involving work-related injury would often be not whether the injury arose out of and in the course of employment, but the state of knowledge of the employer and the employee regarding the dangerous condition which caused the injury. Such a result would undermine the underlying premise upon which the workers' compensation system is based. That system balances the advantage to the employer of immunity from liability at law against the detriment of relatively swift and certain compensation payments. Conversely, while the employee receives expeditious compensation, he surrenders his right to a potentially larger recovery in a common law action for the negligence or willful misconduct of his employer. This balance would be significantly disturbed if we were to hold, as plaintiff urges, that any misconduct of an employer which may be characterized as intentional warrants an action at law for damages. It seems clear that section 4553 is the sole remedy for additional compensation against an employer whose employee is injured in the first instance as the result of a deliberate failure to assure that the physical environment of the work place is safe.

"Thus, if the complaint alleged only that plaintiff contracted the disease because defendant knew and concealed from him that his health was endangered by asbestos in the work environment, failed to supply adequate protective devices to avoid disease, and violated governmental regulations relating to dust levels at the plant, plaintiff's only remedy would be to prosecute his claim under the workers' compensation law.

"But where the employer is charged with intentional misconduct which goes beyond his failure to assure that the tools or substances used by the employee or the physical environment of a workplace are safe, some cases have held that the employer may be subject to common law liability." (27 Cal.3d at pp. 473–475, 165 Cal.Rptr. 858, 612 P.2d 948.)

The court pointed out that cases had permitted action for damages by the employee for an assault by the employer, for fraudulent misrepresentations [159] made as part of a conspiracy with a third party which concealed that the industrial injury was caused by the third party against whom the employee had recourse, and for assault, battery and intentional infliction of emotional distress based on an insurer's deceitful investigation. Those cases relied upon the factors that the employer's and insurer's misconduct had a questionable relationship to the employment and was not considered a risk of the employment. The court concluded that the cases reflect "a trend toward allowing an action at law for injuries suffered in the employment if the employer acts deliberately *for the purpose of injuring the employee* or if the harm resulting from the intentional misconduct consists of aggravation of an initial work-related injury." (27 Cal.3d at p. 476, 165 Cal.Rptr. 858, 612 P.2d 948, italics added.) We followed *Johns-Manville* in the recent decision in *Foster v. Xerox Corp.* (1985) 40 Cal.3d 306, 310–312, 219 Cal.Rptr. 485, 707 P.2d 858, where we held that the action for fraudulent concealment did not require affirmative misrepresentations so long as it was shown that the employer knew of the industrial injury and that work aggravated it and concealed that knowledge from the employee.

[2] Plaintiffs urge that the reasoning of *Johns-Manville* permits maintenance of an action for intentional infliction of emotional distress whether or not physical injury resulted where the tortious conduct has aggravated a compensable injury. Plaintiffs' contention appears too broad. As noted

above (see fn. 7), the intent element for such a cause of action may consist of an intention to cause emotional distress or reckless disregard of the probability of causing emotional distress. To permit liability where the employer did not specifically intend to cause distress but his misconduct reflected a reckless disregard of the probability of injury would to be contrary to *Johns-Manville*. As there pointed out: "It is not uncommon for an employer to 'put his mind' to the existence of a danger to an employee and nevertheless fail to take corrective action.... The focus of the inquiry in a case involving work-related injury would often be not whether the injury arose out of and in the course of employment, but the state of knowledge of the employer and the employee regarding the dangerous condition which caused the injury. Such a result would undermine the underlying premise upon which the workers' compensation system is based." (27 Cal.3d at p. 474, 165 Cal.Rptr. 858, 612 P.2d 948.) Since awareness of the danger by the employer is not a basis for liability for damages, it follows that reckless disregard of the probability of injury should not warrant exemption from the exclusive remedy provisions of the Labor Code. In addition, recovery based on aggravation where there was no intent to injure might encourage employers to seek excuses to terminate rather than attempt to continue employment of injured persons.

[3] Nevertheless, the question remains whether the exclusive remedy provisions exclude liability in a limited class of cases of intentional infliction of emotional distress causing disability, namely, where the employer acts with the purpose of causing emotional distress. Permitting such an action would throw open the doors to numerous claims already compensable under the compensation law. An employer's supervisory conduct is inherently "intentional." In order to properly manage its business, every employer must on occasion review, criticize, demote, transfer and discipline employees. Employers are necessarily aware that their employees will feel distressed by adverse personnel decisions, while employees may consider any such adverse action to be improper and outrageous. Indeed, it would be unusual for an employee *not* to suffer emotional distress as a result of an unfavorable decision by his employer. (Cf. *Magnuson v. Burlington Northern, Inc.* (9th Cir.1978) 576 F.2d 1367, 1369 ["[e]very employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged"].)

[4, 5] We have concluded that, when the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harrassment, or intended to cause emotional disturbance resulting in disability. The basis of compensation and the exclusive remedy provisions is an injury sustained and arising out of the course of employment (former Lab. Code, §§ 3600, 3601), and when the essence of the wrong is personal physical injury or death, the action is barred by the exclusiveness clause no matter what its name or technical form if the usual conditions of coverage are satisfied. (See Larson, *Nonphysical Torts and Workmen's Compensation* (1975) 12 Cal. Western L.Rev. 1, 11–13.)

If characterization of conduct normally occurring in the workplace as unfair or outrageous were sufficient to avoid the exclusive remedy provisions of the Labor Code, the exception would permit the employee to allege a cause of action in every case where he suffered mental disability merely by alleging an ulterior purpose of causing injury. Such an exception would be contrary to the compensation bargain and unfair to the employer.

In addition, when the employer successfully defends the claim of unfairness in

criticisms, reassignments, denial of promotions, or other frictions, he must pay disability benefits while the employee sues and may not recover such payments because disabilities caused by stresses in the workplace are compensable whether or not the employer was at fault. The employer also may have to pay the costs of a successful defense. Liability for intentionally inflicting injury is not insurable, and if liability can only be established due [161] to such intentional misconduct, an insurer need not furnish a defense. (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275–276, fn. 15.) Finally, there is a substantial deterrent to employer intentional misconduct since the employer must not only pay compensation but also the additional recovery under section 4553 which may not be insured.

The cases that have permitted recovery in tort for intentional misconduct causing disability have involved conduct of an employer having a "questionable" relationship to the employment, an injury which did not occur while the employee was performing service incidental to the employment and which would not be viewed as a risk of the employment, or conduct where the employer or insurer stepped out of their proper roles. (*Johns-Manville Products Corp. v. Superior Court, supra,* 27 Cal.3d 465, 477–478, 165 Cal.Rptr. 858, 612 P.2d 948; *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 630, 102 Cal.Rptr. 815, 498 P.2d 1063; *Magliulo v. Superior Court* (1975) 47 Cal.App.3d 760, 779, 121 Cal.Rptr. 621; *Ramey v. General Petroleum Corp.* (1959) 173 Cal.App.2d 386, 402, 343 P.2d 787.) Such circumstances are not alleged in the complaint before us.

To the contrary, the allegations in the instant case as to the *conduct* of the employer and the assistant chief reflect matters which can be expected to occur with substantial frequency in the working environment. Some harrassment by superiors when there is a clash of personality or values is not uncommon. Disciplinary hearings and demotions and friction in negotiations as to grievances are also an inherent part of the employment setting as are decisions to seek disability retirement and demands to appear at meetings which interfere with personal arrangements.

IV. THE DUAL CAPACITY DOCTRINE

Prior to 1982, when the employer engaged in a relationship with the employee which was distinct from that of employer and employee and invoked a different set of obligations than the employer's duties to its employee, the employee could recover damages for breach of the latter obligations under the dual capacity doctrine. (*Bell v. Industrial Vangas, Inc.* (1981) 30 Cal.3d 268, 272 et seq., 179 Cal.Rptr. 30, 637 P.2d 266; *D'Angona v. County of Los Angeles* (1980) 27 Cal.3d 661, 664 et seq., 166 Cal.Rptr. 177, 613 P.2d 238; *Unruh v. Truck Insurance Exchange, supra,* 7 Cal.3d 616, 629–631, 102 Cal.Rptr. 815, 498 P.2d 1063; *Duprey v. Shane* (1952) 39 Cal.2d 781, 789–795, 249 P.2d 8.) In *Duprey,* the defendant doctor undertook to treat his employee's industrial injury, and it was held that he was liable for malpractice in the treatment under the dual capacity doctrine. In *D'Angona* it was held that under the dual capacity doctrine an employee of a hospital could maintain [162] an action for negligence against the hospital for negligent treatment of an industrial injury. In both cases, it was reasoned that the treatment was not part of the usual employer-employee relationship but that in undertaking to treat the employees the defendants were in the same relationship as they would be in treating members of the public. In *Bell,* the defendant manufacturer was held liable for its defectively manufactured product used by the employee, the court pointing out that other users could recover for such injuries. In *Unruh,* the employer's insurer was held liable for deceitful conduct in investigating the workers' compensation action.

In all of these cases, the conduct which gave rise to the dual capacity doctrine was an act not ordinarily part of the employment. In the instant case, as we have seen, all of the acts alleged are acts which

normally occur within the course and scope of employment.[10]

[6] We conclude that the dual capacity doctrine does not furnish a basis in this case to avoid the exclusive remedy provisions of the Labor Code.

V. ADDITIONAL CAUSES OF ACTION

[7] As to the additional causes of action, plaintiff Shirley Cole challenges the Court of Appeal ruling on her causes of action for intentional infliction of emotional distress and loss of consortium. We conclude that since her husband's claims are barred by the exclusive remedy provisions of the Labor Code, her claims are also barred.

Section 3600 provided that liability for compensation is "in lieu of any other liability whatsoever to any person," and section 3601 provided that compensation was "the exclusive remedy for injury or death of an employee against the employer or against any other employee." (See fns. 3, 4.) Under these provisions the Courts of Appeal have held that claims for loss of consortium are excluded where the spouse's injury giving rise to the loss is compensable under the compensation act. (*Santiago v. Employee Benefits Services* (1985) 168 Cal.App.3d 898, 906, 214 Cal.Rptr. 679; *Casaccia v. Green Valley Disposal Co.* (1976) 62 Cal.App.3d 610, 612, 133 Cal.Rptr. 295; *Williams v. State Compensation Ins. Fund* (1975) 50 Cal.App.3d 116, 123, 123 Cal.Rptr. 812; *Gillespie v. Northridge Hosp. Foundation* (1971) 20 Cal.App.3d 867, 871, 98 Cal.Rptr. 134.) Although the cause of action for loss of consortium is not merely derivative or collateral to the spouse's cause of action (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 1168 115 Cal.Rptr. 765, 525 P.2d 669), it is based on the physical injury or disability of the spouse, and is precluded by the broad language of the Labor Code sections. (*Casaccia v. Green Valley Disposal Co.*, *supra*, 62 Cal.App.3d 610, 612–613, 133 Cal.Rptr. 295; *Williams v. State Compensation Ins. Fund, supra*, 50 Cal.App.3d 116, 123, 123 Cal.Rptr. 812.)

In *Williams v. Schwartz* (1976) 61 Cal.App.3d 628, 631 et seq., 131 Cal.Rptr. 200, the court, relying on consortium cases, held that action for infliction of emotional distress for negligence of the spouse's employer in injuring the spouse was precluded by the broad language of the exclusive remedy provisions limiting the employer's liability. Where the employee's action for physical or mental injury is barred by the exclusive remedy provisions, there is no sound basis for distinguishing between negligent and intentional misconduct which causes emotional distress to the employee's spouse when the distress is due to the employee's injury.

The judgment of the Court of Appeal is affirmed.

MOSK, REYNOSO and LUCAS, JJ., concur.

GRODIN, J., concurs in the judgment.

PANELLI, Justice, concurring.

I concur.

The narrow question presented is whether an employee's court action is barred by Labor Code section 3600 et seq. (workers' compensation), as they read prior to 1982, where his injury is otherwise compensable under those statutes. Here the specific tort alleged by the employee-plaintiff is intentional infliction of emotional distress. However, the facts underlying the action stem from, and arise out of, the course of an employer-employee relationship; that is, the employer's conduct cannot be analyzed outside of the employment context. This allegedly tortious conduct resulted in physical injury, for which the employee-plaintiff can recover under Labor Code sections 3600 et seq.

10. Plaintiffs have not relied upon the union allegations as furnishing a basis for invoking the dual capacity doctrine. This would seem to be a tactical decision perhaps based on available evidence. Thus, the issue is not presented.

Under these circumstances, to allow the employee-plaintiff to bring an independent court action would be to allow him to circumvent the carefully crafted legislative framework for employment related injuries. Therefore, the action is preempted. Moreover, the spouse-plaintiff's action is barred because her injury stems from an injury to her husband that is compensable under Labor Code section 3600 et seq.

Based on the foregoing understanding of the majority's opinion, I concur.

1164BIRD, Chief Justice, dissenting.

I respectfully dissent. Today, this court holds that an employer, who purposefully injures an employee and subjects him to a campaign of harassment and humiliation so extreme that it " 'exceed[s] all bounds usually tolerated by a decent society' " (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946, 160 Cal.Rptr. 141, 603 P.2d 58, quoting *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 297, 131 Cal.Rptr. 547), is shielded from tort liability by the workers' compensation exclusivity provisions.[1] The majority's rationale for limiting an employee's remedy to workers' compensation is that the employer's outrageous behavior here constitutes "actions which are a normal part of the employment relationship...." (See maj. opn., *ante*, at p. 315 of 233 Cal.Rptr., at p. 750 of 729 P.2d.)[2]

I respectfully disagree. Cole alleges that the defendants "conspired to humiliate, harass and intimidate" him. Such a sustained and deliberate psychological assault designed to injure an employee is not a normal risk or condition of employment and is not "conduct normally occurring in the workplace." (See maj. opn., *ante*, at p. 309 of 233 Cal.Rptr., at p. 744 of 729 P.2d.)

Calling such behavior normal tacitly condones it. I cannot join in that view. Since workers' compensation does not compensate an employee for pain and suffering (1 Larson, Workmen's Compensation Law (1986) § 2.40, p. 11) and does not allow for punitive damages (*Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 478, 165 Cal.Rptr. 858, 612 P.2d 948) it does not sufficiently deter employers from engaging in such egregious conduct. Accordingly, I would hold that an employee's action at law for intentional infliction of emotional distress, which alleges that the employer acted "deliberately for the purpose of injuring[165] the employee" (*Johns-Manville, supra*, at p. 476, 165 Cal. Rptr. 858, 612 P.2d 948), is impliedly exempted from the exclusive-remedy provisions of the Workers' Compensation Act and is not barred.[3]

1. For the text of former Labor Code sections 3600 and 3601, which govern this case, see majority opinion at page 311, footnotes 4 and 5 of 233 Cal.Rptr., at page 746, footnotes 4 and 5 of 729 P.2d.

2. The majority hold that conduct normally occurring in the workplace, which causes an injury compensable under the Workers' Compensation Act, may not serve as the basis for an action at law for intentional infliction of emotional distress. (Maj. opn. at p. 315 of 233 Cal.Rptr., at p. 750 of 729 P.2d.) The majority apparently would not reach the question as to whether conduct that meets one but not the other of these standards is similarly barred by the act's exclusive remedy provisions.

The majority confuse the issue by noting that "when the essence of the wrong is personal physical injury or death, the action is barred by the exclusiveness clause no matter what its name or technical form...." (Maj. opn. at p. 315 of 233 Cal.Rptr., at p. 750 of 729 P.2d.) Determining whether the "essence" of the injury is physical or nonphysical is of limited value in construing the exclusive remedy provisions of the Workers' Compensation Act. California, unlike some states, provides workers' compensation benefits for both disabling-psychological and -physical injuries. (See *Traub v. Board of Retirement* (1983) 34 Cal.3d 793, 799, 195 Cal. Rptr. 681, 670 P.2d 335; *Georgia-Pacific Corp. v. Workers' Comp. Appeals Bd.* (1983) 144 Cal. App.3d 72, 75, 192 Cal.Rptr. 643; *Albertson's Inc. v. Workers' Comp. Appeals Bd.* (1982) 131 Cal. App.3d 308, 310, 182 Cal.Rptr. 304; *Baker v. Workmen's Comp. Appeals Bd.* (1971) 18 Cal. App.3d 852, 861, 96 Cal.Rptr. 279; Annot. (1980) 97 A.L.R.3d 161, 167, 174–176.)

3. This rule is similar to rules in other states where an employee is free to sue his employer when the employer acts deliberately to injure the employee. (See e.g., *Johnson v. Kerr-McGee Oil Industries, Inc.* (App.1981) 129 Ariz. 393, 397–398, 631 P.2d 548, 552–553; *Serna v. Statewide Contractors, Inc.* (1967) 6 Ariz.App. 12, 15, 429 P.2d 504, 507; *Griffin v. George's, Inc.*

The workers' compensation system represents an equitable compromise between the interests of employees and employers. "[I]t affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts." (2A Larson, Workmen's Compensation Law, *supra*, § 65.11, pp. 12–1 to 12–6, fns. omitted.) As the majority note, however, the exclusivity provisions of the Workers' Compensation Act do not always prevail when the employer's misconduct is intentional. (See maj. opn., *ante*, at p. 316 of 233 Cal.Rptr., at p. 751 of 729 P.2d.)

In *Johns-Manville*, this court recognized that where the employee's injuries result from an unsafe workplace, the employee is generally limited to his or her workers' compensation remedy. (*Johns-Manville, supra*, 27 Cal.3d at pp. 473–474, 165 Cal.Rptr. 858, 612 P.2d 948.) This is true even if the employer's failure to ensure a safe workplace is deliberate and "intentional or even deceitful." (*Id.*, at p. 474, 165 Cal.Rptr. 858, 612 P.2d 948.) However, this court has held that "where the employer is charged with intentional misconduct which goes beyond his failure to assure that the tools or substances used by the employee or the physical environment of a workplace are safe, some cases have held that the employer may be subject to common law liability." (*Id.*, at p. 475, 165 Cal.Rptr. 858, 612 P.2d 948.)

For example, our courts have permitted an action for damages where: 1) the employer physically assaulted an employee (*Magliulo v. Superior Court* (1975) 47 Cal.App.3d 760, 121 Cal.Rptr. 621); 2) the employer conspired with a third party to conceal the latter's liability for the injury (*Ramey v. General Petroleum Corp.* (1959) 173 Cal.App.2d 386, 400–403, 343 P.2d 787); and 3) the employer's workers' compensation insurer conducted a deceitful investigation of a claim (*Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 102 Cal.Rptr. 815, 498 P.2d 1063).

[1166]In these cases, the courts characterized the employer's intentional misconduct as outside the scope of the normal risks or conditions of employment. (See *Magliulo, supra*, 47 Cal.App.3d at p. 779, 121 Cal.Rptr. 621; *Ramey, supra*, 173 Cal.App.2d at pp. 402–403, 343 P.2d 787; *Unruh, supra*, 7 Cal.3d at p. 630, 102 Cal.Rptr. 815, 498 P.2d 1063; maj. opn., *ante*, at p. 314 of 233 Cal.Rptr., at p. 749 of 729 P.2d.) In *Johns-Manville*, this court concluded that our caselaw reflects "a trend toward allowing an action at law for injuries suffered in the employment if *the employer acts deliberately for the purpose of injuring the employee* or if the harm resulting from the intentional misconduct consists of aggravation of an initial work-related injury." (*Johns-Manville, supra*, 27 Cal.3d at p. 476, 165 Cal.Rptr. 858, 612 P.2d 948, emphasis added.)

Here, the employer's misconduct is analogous to incidents in which an employer physically assaults an employee. In *Magliulo*, the Court of Appeal held that an employee's action against an employer for physical assault is an implied exception to the exclusive-remedy provisions of the Workers' Compensation Act. (See *Magliulo, supra*, 47 Cal.App.3d at pp. 777–778, 779, 121 Cal.Rptr. 621.) The court in *Magliulo* noted that such activity has a "questionable relationship to the general conditions of employment." (47 Cal.App.3d at p. 779, 121 Cal.Rptr. 621.)

Magliulo was explained in *Johns-Manville*. "[A]lthough an employee might be willing to surrender his right to an action

(1979) 267 Ark. 91, 96, 589 S.W.2d 24, 27; *Great Western Sugar Co. v. District Ct.* (1980) 188 Mont. 1, 6, 610 P.2d 717, 720; *Bakker v. Baza'r, Inc.* (1976) 275 Ore. 245, 253–254, 551 P.2d 1269, 1274; *Houston v. Bechtel Assoc. Professional Corp.* (D.D.C.1981) 522 F.Supp. 1094, 1096; see also Ariz.Rev.Stat.Ann. § 23–1022 (1986 Supp.); Ky.Rev.Stat.Ann. § 342.610(4) (Baldwin 1986); Md.Ann.Code art. 101, § 44 (1957); Ore.Rev.Stat. § 656.156(2) (1985); Wash.Rev.Code Ann. § 51.24.020 (1987 Supp.); W.Va.Code Ann. § 23–4–2 (Michie 1985)).

at common law for the ordinary type of work-related injuries, it is not equally clear that when he accepts employment he contemplates his employer might assault him or if an assault occurs he must be satisfied with the additional compensation provided by section 4553." (27 Cal.3d at p. 477, 165 Cal.Rptr. 858, 612 P.2d 948; *Magliulo, supra*, 47 Cal.App.3d at p. 778, 121 Cal.Rptr. 621.)

It is similarly inconceivable that an employee would contemplate that his employer would deliberately subject him to a campaign of extreme and outrageous psychological assault for the purpose of injuring him and that, if such an assault occurred, he would have to be satisfied with the limited compensation provided by the Workers' Compensation Act. Such an intentional course of harassment and humiliation, like a physical assault, is not a normal risk or condition of employment and the Legislature could not have intended to bar actions at law for such egregious assaults.

This conclusion is supported by an examination of the goal of the workers' compensation system. Workers' compensation is not designed to make injured workers whole, "but to keep them from becoming burdens on the community." (Note, *Intentional Torts Under Workers' Compensation Statutes: A Blessing or a Burden?* (1983) 12 Hofstra L.Rev. 181, 185 (hereafter *Intentional Torts*).) Therefore, "[t]he only injuries compensated under Workers' Compensation are those which produce disability and, thereby, affect earning power. Damages for pain and suffering are not available...." (*Ibid.*)

Under the workers' compensation system, the "employee relinquishes the right to recover a potentially greater award for damages" and "the employer assumes liability without fault...." (*Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 223, 191 Cal.Rptr. 696.) The employee receives "swift and certain compensation for injury" and the employer "is relieved of the prospect of a large civil verdict." (*Ibid.*)

While this bargain appears fair where the employer's conduct is negligent or even reckless, it is difficult to justify shielding the employer from "the full brunt of liability" where, as here, the employer has acted intentionally and with the purpose of injuring the employee. (Comment, *Johns-Manville Products Corp. v. Superior Court: The Not-So-Exclusive Remedy Rule* (1981) 33 Hastings L.J. 263, 270 (hereafter *The Not-So-Exclusive Remedy Rule*); Tomita, *The Exclusive Remedy of Workers' Compensation for Intentional Torts of the Employer: Johns-Manville Products v. Superior Court* (1982) 18 Cal. Western L.Rev. 27, 45 (hereafter *Tomita*).)

Since the workers' compensation system shields the employer from full liability, it does not provide a deterrent sufficient to prevent employers from engaging in such egregious behavior. A workers' compensation award will normally be much smaller than a tort damages award (see *Intentional Torts, supra*, 12 Hofstra L.Rev. at pp. 185–186) and, at any rate, the workers' compensation award will be paid by the employer's insurance carrier. Moreover, punitive damages are not available under the Workers' Compensation Act; they are "afforded only in an action at law." (*Johns-Manville, supra*, 27 Cal.3d at p. 478, 165 Cal.Rptr. 858, 612 P.2d 948.)

Although section 4553 of the Labor Code provides that "[t]he amount of compensation otherwise recoverable shall be increased one-half" when the employer's misconduct is "serious and willful," this "is additional compensation and does not represent exemplary damages" (*Johns-Manville, supra*, 27 Cal.3d at p. 478, fn. 12, 165 Cal.Rptr. 858, 612 P.2d 948).[4] In sum, "the

4. The majority argue that section 4553 creates a "substantial deterrent" to intentional employer misconduct because an employer cannot insure against such liability. (Maj. opn., *ante*, at pp. 315–316 of 233 Cal.Rptr., at pp. 750–751 of 729 P.2d.) However, given the "low benefits" payable under the workers' compensation system (see *The Not-So-Exclusive Remedy Rule, supra*, 33 Hastings L.J. at p. 266, and fn. 20), an out-of-pocket payment of one-half of such an amount

deterrent effect of large damage awards, one of the basic objectives of tort law and of any loss-distribution system, is not realized when workers' compensation is the exclusive remedy for an intentional tort." (*The Not-So-Exclusive Remedy Rule, supra,* 33 Hastings L.J. at p. 270.)

[168]Despite the policy considerations weighing in favor of allowing an action at law where, as here, the employer acts with the purpose of causing emotional distress, the majority argue that the Legislature could not have intended such a result because "[p]ermitting such [ ] action[s] would throw open the doors to numerous claims already compensable under the compensation law." (Maj. opn., *ante,* at p. 315 of 233 Cal.Rptr., at p. 750 of 729 P.2d.)

The majority contend that "[a]n employer's supervisory conduct is inherently 'intentional' " and employees may consider such conduct, at times, to be "improper and outrageous." Moreover, "demotions, promotions, criticisms of work practices, and frictions in negotiations as to grievances" are a standard part of the workplace. (Maj. opn., *ante,* at p. 315 of 233 Cal.Rptr., at p. 750 of 729 P.2d.) However, Cole does *not* allege merely a series of "adverse personnel decisions...." (See *ibid.*) He states that his employer singled him out and subjected him to an extreme and outrageous campaign of humiliation and harassment for the purpose of causing him emotional distress.

Contrary to the majority's characterization, Cole has not alleged merely "[s]ome harassment by superiors...." (Maj. opn., *ante,* at p. 316 of 233 Cal.Rptr., at p. 751 of 729 P.2d.) Instead, he contends that the defendants conspired to humiliate him and, with knowledge of his hypertension, subjected him to unconscionable and unreasonable psychological pressure. Cole alleges, inter alia, that he was made to answer trumped-up charges of misconduct, was wrongly demoted, and was subjected to repeated public humiliation. He further alleges that these acts were engaged in for the purpose of causing him injury.

I cannot accept the majority's conclusion that such conduct "can be expected to occur with substantial frequency in the working environment." (Maj. opn., *ante,* at p. 316 of 233 Cal.Rptr., at p. 751 of 729 P.2d.) Therefore, allowing an action at law in circumstances such as these poses no real threat to the workers' compensation system.

The majority contend that if this court were to exempt claims such as these from the workers' compensation exclusivity provisions, employees could always get into court by alleging outrageous conduct and an ulterior purpose to injure. However, under the rule that I would propose, an employee, in order to file an action at law, would have to allege: 1) intentional infliction of emotional distress, i.e., conduct that is so outrageous that it " 'exceeds all bounds usually tolerated by a decent society' " (*Agarwal v. Johnson, supra,* 25 Cal.3d at p. 946, 160 Cal.Rptr. 141, 603 P.2d 58, quoting *Newby v. Alto Riviera Apartments, supra,* 60 Cal.App.3d at p. 297, 131 Cal.Rptr. 547); and 2) that the employer acted [169]"deliberately for the purpose of injuring the employee" (*Johns-Manville, supra,* 27 Cal.3d at p. 476, 165 Cal.Rptr. 858, 612 P.2d 948).[5]

will not necessarily suffice to deter employer misconduct.

5. The second requirement would limit the number of cases that could evade the exclusive remedy provisions of the Workers' Compensation Act. For example, an intentional infliction of emotional distress action based on "reckless disregard of the probability of causing emotional distress" (*Agarwal v. Johnson, supra,* 25 Cal.3d at p. 946, 160 Cal.Rptr. 141, 603 P.2d 58, quoting *Newby v. Alto Riviera Apartments, supra,* 60 Cal.App.3d at p. 297, 131 Cal.Rptr. 547) does not involve purposeful conduct. (See *Tomita, supra,* 18 Cal.Western L.Rev. at p. 45.) Moreover, not all intentionally tortious acts are done with the purpose of causing injury. (Prosser & Keeton, Torts (5th ed. 1984) § 8, pp. 34, 35 ["intent is broader than a desire or purpose to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does"].)

The majority apparently assume that the plaintiffs and their attorneys would allege such serious misconduct even when the charges could not be proved. However, plaintiffs cannot recover in an action at law unless they prove their claims of intentional and purposeful wrongdoing. If they cannot do so, plaintiffs or their attorneys must bear the substantial cost of prosecuting the tort action. I do not share the majority's belief that recognition of this implied exception to the workers' compensation exclusivity provisions would "be contrary to the compensation bargain and wrfair to the employer." (Maj. opn., *ante*, at p. 315 of 233 Cal.Rptr., at p. 750 of 729 P.2d.) [6]

Finally, the majority distinguish the situation presented here from the facts alleged in other California cases that have permitted recovery in tort for intentional misconduct by the employer. Those cases, they argue, "have involved conduct of an employer having a 'questionable' relationship to the employment, an injury which did not occur while the employee was performing service incidental to the employment and which would not be viewed as a risk of the employment, or conduct where the employer or insurer stepped out of their proper roles." (Maj. opn., *ante*, at p. 316 of 233 Cal.Rptr., at p. 751 of 729 P.2d.) [1,7,10]However, the psychological assault described in Cole's complaint, like the physical assault in *Magliulo*, bears a "questionable relationship to general conditions of employment." (*Magliulo v. Superior Court, supra*, 47 Cal.3d at p. 779, 121 Cal.Rptr. 621.) Also, the employer certainly stepped out of their proper role by conspiring to injure Cole. (See *Unruh v. Truck Insurance Exchange, supra*, 7 Cal.3d at p. 630, 102 Cal.Rptr. 815, 498 P.2d 1063 [employer stepped out of proper role when it intentionally embarked on a deceitful course of conduct that injured the employee].) Like the fraud perpetrated in *Ramey v. General Petroleum Corp., supra*, 173 Cal.App.2d 386, 343 P.2d 787, the Legislature never intended that the conduct alleged here was a normal risk of employment (*Id.*, at pp. 402–403, 343 P.2d 787.)

Since Cole has alleged that his employer singled him out and subjected him to an extreme and outrageous campaign of harassment for the purpose of causing him injury, his cause of action for intentional infliction of emotional distress is not barred by the exclusivity provisions of the Workers' Compensation Act.[7]

6. The majority argue that actions such as Cole's should be barred because the employer "must pay disability benefits while the employee sues and may not recover such payments because disabilities caused by stresses in the workplace are compensable whether or not the employer was at fault." (Maj. opn., *ante*, at p. 316 of 233 Cal.Rptr., at p. 751 of 729 P.2d.) This argument is unpersuasive. The obligation to pay workers' compensation benefits is statutory and obviously applies even where an action at law is not filed. Allowing the employee to sue would be unfair to the employer only if the successful plaintiff were allowed to retain workers' compensation benefits received for the same injuries. Such double recovery would not occur, however, because the employer is entitled to a setoff against any damages already awarded the employee for work-related injuries. (See *Johns-Manville, supra*, 27 Cal.3d at pp. 478–479, 165 Cal.Rptr. 858, 612 P.2d 948.)

Furthermore, the majority contend that allowing an action at law in these circumstances is unfair because "[t]he employer ... may have to pay the costs of a successful defense." (Maj. opn., *ante*, at p. 316 of 233 Cal.Rptr., at p. 751 of 729 P.2d.) However, assuming that "[l]iability for intentionally inflicting injury is not insurable," (maj. opn., *ante*, at p. 316 of 233 Cal.Rptr., at p. 751 of 729 P.2d), employers may still contract with their insurers to cover the cost of defending an action alleging such misconduct. (See *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 277, 278, 54 Cal.Rptr. 104, 419 P.2d 168; *The Not-So-Exclusive Remedy Rule, supra*, 33 Hastings L.J. at p. 267, fn. 27; see also maj. opn., *ante*, at p. 312 of 233 Cal.Rptr., at p. 747 of 729 P.2d.)

7. Since Cole's claims should not be barred by the Workers' Compensation Act, I would find that his wife's claims were properly before the trial court.

729 P.2d 202
43 Cal.3d 46

[1][6]COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants,

v.

The STATE of California et al., Defendants and Respondents.

CITY OF SONOMA et al., Plaintiffs and Appellants,

v.

The STATE of California et al., Defendants and Respondents.

L.A. No. 32106.

Supreme Court of California,
In Bank.

Jan. 2, 1987.

Rehearing Denied Feb. 26, 1987.

After State mandated increases in certain workers' compensation benefits, cities and counties, as self-insured employers, brought action against State for reimbursement of required increases. The Superior Court, Los Angeles County, Leon Savitch and John L. Cole, JJ., denied relief, and cities and counties appealed. The Court of Appeal, Eagleson, J., 215 Cal.Rptr. 139, affirmed in part, reversed in part, and remanded. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court, Grodin, J., held that constitutional provision, requiring State to reimburse local governments for increased costs whenever legislature mandated new program or higher level of service, was not applicable to increases in workers' compensation benefits, where public and private employers were equally affected.

Court of Appeal reversed.

Mosk, J., concurred and filed opinion.

States ⇐123

Constitutional provision requiring State to reimburse local governments for costs of new programs or higher levels of service mandated by legislature was not applicable to costs incurred by local governments in complying with legislatively mandated increases in workers' compensation benefits where increases were applicable to both public and private employers; disapproving *City of Sacramento v. State of California*, 156 Cal.App.3d 182, 203 Cal. Rptr. 258 (3 Dist.). West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Labor Code §§ 4453, 4453.1, 4460, 4553, 4702.

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James K. Hahn, City Atty. (Los Angeles), Thomas C. Bonventura and Richard Dawson, Asst. City Attys., and Patricia V. Tubert, Deputy City Atty., as amici curiae on behalf of plaintiffs and appellants.

John K. Van de Kamp, Atty. Gen., N. Eugene Hill, Asst. Atty. Gen., Henry G. Ullerich and Martin H. Milas, Deputy Attys. Gen., for defendants and respondents.

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GRODIN, Justice.

We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain workers' compensation benefit payments is subject to the command of article XIIIB of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated in-

creases in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIIIB, an initiative constitutional provision, and legislative implementing statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. We conclude that when the voters adopted article XIIIB, section 6, their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or [50]increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by section 6.

We recognize also the potential conflict between article XIIIB and the grant of plenary power over workers' compensation bestowed upon the Legislature by section 4 of article XIV, but in accord with established rules of construction our construction of article XIIIB, section 6, harmonizes these constitutional provisions.

I

On November 6, 1979, the voters approved an initiative measure which added article XIIIB to the California Constitution. That article imposed spending limits on the state and local governments and provided in section 6 (hereafter section 6): "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." No definition of the phrase "higher level of service" was included in article XIIIB, and the ballot materials did not explain its meaning.[1]

The genesis of this action was the enactment in 1980 and 1982, after article XIIIB had been adopted, of laws increasing the amounts which employers,[51] including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly Bill No. 2750 (Stats.1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of Labor Code sections 4453, 4453.1 and 4460 increased the maximum weekly wage upon which temporary and permanent disability indemnity is computed from $231 per week to $262.50 per week. The amendment of section 4702 of the Labor Code increased certain death benefits from $55,000 to $75,000. No ap-

1. The analysis by the Legislative Analyst advised that the state would be required to "reimburse local governments for the cost of complying with 'state mandates.' 'State mandates' are requirements imposed on local governments by legislation or executive orders." Elsewhere the analysis repeats: "[T]he initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates...."

The one ballot argument which made reference to section 6, referred only to the "new program" provision, stating, "Additionally, this measure [¶] (1) will not allow the state government to force programs on local governments without the state paying for them."

propriation for increased state-mandated costs was made in this legislation.[2]

Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in providing an increased level of service mandated by the state pursuant to Revenue and Taxation Code section 2207.[3] They also sought a declaration that because the State of California and the board were obliged by article XIIIB to reimburse them, they were not obligated to pay the increased benefits until the state provided reimbursement.

The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost of living raises were not expressly [52] excepted from the requirement of state reimbursement in section 6 the intent of article XIIIB to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost of living changes, they did not, in the view of the trial court, create an "increased level of service" in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922, p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from $73.50 to $168, and the maximum from $262.50 to $336. For permanent partial disability the weekly wage was raised from a minimum of $45 to $105, and from a maximum of $105 to $210, in each case for injuries occurring on or after January 1, 1984. (Lab.Code, § 4453.) A $10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed (Lab. Code, § 4553), and the maximum death benefit was raised from $75,000 to $85,000 for deaths in 1983, and to $95,000 for deaths on or after January 1, 1984. (Lab.Code, § 4702.)

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[n]otwithstanding section 6 of Article XIIIB of the California Constitution and section 2231 ... of the Revenue and Taxation

2. The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either Revenue and Taxation Code section 2231, or article XIIIB; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation.

Legislative history confirms only that the final version of Assembly Bill 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of $510 on which to base benefits, an unspecified appropriation was included.

3. The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.

Code." (Stats.1982, ch. 922, § 17, p. 3372.) [4]

Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in Revenue and Taxation Code section 2207, subdivision (a).

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation Code [153] or section 6. The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact of changes in the burden of proof in some workers' compensation proceedings (Lab.Code § 3202.5); a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine (Lab.Code §§ 3601–3602); and changes in death and disability benefits and in liability in serious and wilful misconduct cases. (Lab.Code, § 4551.)

The court also held: "[T]he changes made by chapter 922, Statutes of 1982 may be excluded from state mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego appeal from this latter portion of the judgment only.

II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of section 6, or are an "increased level of service" [5] described in subdivision (a) of Revenue and Taxation Code section 2207. The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of section 6 is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The Court of Appeal addressed the problem as one of defining "increased level of service."

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in section 2231, subdivision, (e) of the Revenue and Taxation Code should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased level of service." The court concluded that the repeal of section 2231 in 1975 (Stats. 1975, ch. 486, § 7, pp. 999–1000) and the failure of the Legislature by statute or the electorate in article XIIIB to readopt the [154] definition must be treated as reflecting an intent to change the law. (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470, 128 Cal.Rptr. 1, 546 P.2d 289.) [6] On that basis the court

4. The same section "recognized," however, that a local agency "may pursue any remedies to obtain reimbursement available to it" under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.

5. The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.

6. The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750

concluded that increased costs were no longer tantamount to an increased level of service.

The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of living. The judgment in the second, or "Sonoma" case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter "remanded" to the board for more adequate findings, with directions.[7]

III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 was adopted. That provision used the same "increased level of service" phraseology but it also failed to include a definition of "increased level of service," providing only: 'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law ... which mandates a new program or an increased level of service of an existing program." (Rev. & Tax. Code, 2207.) As noted, however, the definition of that term which had been [55] included in Revenue and Taxation Code section 2164.3 as part of the Property Tax Relief Act of 1972 (Stats.1972, ch. 1406, § 14.7, p. 2961), had been repealed in 1975 when Revenue and Taxation Code section 2231, which had replaced section 2164.3 in 1973, was repealed and a new section 2231 enacted. (Stats.1975, ch. 486, §§ 6 & 7, p. 999.)[8] Prior to repeal, Revenue and Taxation Code section 2164.3, and later section 2231, after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that " 'Increased level of service' means any requirement mandated by state law or executive regulation ... which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats.1972, ch. 1406, § 14.7, p. 2963.)

(see fn. 2, *ante*). While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either section 6, adopted by the electorate in the prior year, or of Revenue and Taxation Code section 2207, subdivision (a) enacted in 1975. (Cf. *California Employment Stabilization Com. v. Payne* (1947) 31 Cal.2d 210, 213–214, 187 P.2d 702.) There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting section 6.

The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., Stats.1973, chs. 1021 and 1023.)

7. We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and reconsider the claim after making the additional findings. (See Code Civ.Proc. § 1094.5, subd. (f).)

8. Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs, (see, e.g., Stats.1973, ch. 1021, § 4, p. 2026; ch. 1022, § 2, p. 2027; Stats 1976, ch. 1017, § 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to Revenue and Taxation Code sections 2218–2218.54 had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of Revenue and Taxation Code section 2231, subdivision (a) that "[t]he state shall reimburse each local agency for all 'costs mandated by the state,' as defined in Section 2207" and the additional command of subdivision (b) that any statute imposing such costs "provide an appropriation therefor." (*County of Orange v. Flournoy* (1974) 42 Cal.App.3d 908, 913, 117 Cal.Rptr. 224.)

Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in enacting section 2207, explained that the provision was "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. "[I]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*Lake Forest Community Assn. v. County of Orange* (1978) 86 Cal.App.3d 394, 402, 150 Cal.Rptr. 286; see also *Eu v. Chacon*, supra, 16 Cal.3d 465, 470, 128 Cal.Rptr. 1, 546 P.2d 289.) Here, the revision was not minor: a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of section 2207. If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post–1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been aware, [56] we may not conclude that an intent existed to incorporate the repealed definition into section 6.

In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIIIB in 1979. To determine this intent, we must look to the language of the provision itself. (*ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 866, 210 Cal.Rptr. 226, 693 P.2d 811.) In section 6, the electorate commands that the state reimburse local agencies for the cost of any "new program or higher level of service." Because workers' compensation is not a new program, the parties have focussed on whether providing higher benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither section 6 nor the current statutory reimbursement scheme.

Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIIIB. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term—programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of section 6 in article XIIIB was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIIIB explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them." (Ballot Pamp., Proposed Amend. to Cal. Const. with argu-

ments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Ital. added.) In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not [157] for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to "force" programs on localities.

The language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word "program" was being used in such a unique fashion. (Cf. *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7, 128 Cal.Rptr. 673, 547 P.2d 449; *Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 105, 132 Cal.Rptr. 835.) Nothing in the history of article XIIIB that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this construction or the additional indirect, but substantial impact it would have on the legislative process.

Were section 6 construed to require state subvention for the incidental cost to local governments of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, § 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by article XIIIB. (Rev & Tax. Code, § 2255, subd. (c).) Revenue bills must be passed by two-thirds vote of each house of the Legislature. (art. IV, § 12, subd. (d).) Thus, were we to construe section 6 as applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote.[9] Certainly no such intent is reflected in the language or history of article XIIIB or section 6.

We conclude therefore that section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation [158] benefits that employees of private individuals or organizations receive.[10] Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See

9. Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228, 149 Cal. Rptr. 239, 583 P.2d 1281.)

10. The Court of Appeal reached a different conclusion in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 203 Cal.Rptr. 258, with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as whether the expense was a "state mandated cost," rather than as whether the provision of an employee benefit was a "program or service" within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

Lab.Code, § 3201 et seq.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.

IV

Our construction of section 6 is further supported by the fact that it comports with controlling principles of construction which "require that in the absence of irreconcilable conflict among their various parts, [constitutional provisions] must be harmonized and construed to give effect to all parts. (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 813–814 [114 Cal.Rptr. 577, 523 P.2d 617]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596 [96 Cal.Rptr. 601, 487 P.2d 1241]; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645 [335 P.2d 672].)" (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 676, 194 Cal.Rptr. 781, 669 P.2d 17.)

Our concern over potential conflict arises because article XIV, section 4,[11] gives the Legislature "plenary power, unlimited by any provision of this Constitution" over workers' compensation. Although seemingly unrelated to Workers' compensation, section 6, as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is intend-

11. Section 4: "The Legislature is hereby *expressly vested with plenary power, unlimited by any provision of this Constitution,* to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed." (Emphasis added.)

ed to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature. The potential conflict between section 6 and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent.

The County of Los Angeles, while recognizing the impact of section 6 on the Legislature's power over workers' compensation, argues that the "plenary power" granted by article XIV, section 4, is power over the substance of workers' compensation legislation, and that this power would be unaffected by article XIIIB if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural [60] limitations on the Legislature, such as the "single subject rule" (art. IV, § 9), as to which article XIV, section 4, has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If section 6 were applicable, therefore, article XIIIB would restrict the power of the Legislature over workers' compensation.

The City of Sonoma concedes that so construed article XIIIB *would* restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of article XIV, section 4, or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of section 6 permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision such as section 6 to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with and reflects the principle applied by this court in *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 178 Cal. Rptr. 801, 636 P.2d 1139. There, by coincidence, article XIV, section 4, was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, article XIV, section 4, would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, § 3.) The court was thus called upon to determine whether the adoption of article XIV, section 4, granting the Legislature plenary power over Workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because article XIV, section 4, did not give the Legislature the authority to enact the statute. Article XIV section 4, did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. "It is well established that the adoption of article XIV, section 4 'effected a repeal pro tanto' of any state constitutional provisions which conflicted with that [61] amendment. (*Subsequent Etc. Fund. v. Ind. Acc. Com.* (1952) 39 Cal.2d 83, 88 [244 P.2d 889]; *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 695 [151 P. 398].) A pro tanto repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization

of the objectives of the new article. (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691–692 [97 Cal.Rptr. 1, 488 P.2d 161]; cf. *City and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 103, 15–17 [148 Cal.Rptr. 626, 583 P.2d 151].) Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of article XIV, section 4 are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power—the disciplining of attorneys—that otherwise rests exclusively with this court?" (*Hustedt v. Workers' Comp. Appeals Bd.*, supra, 30 Cal.3d 329, 343, 178 Cal.Rptr. 801, 636 P.2d 1139.) We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from achieving the objectives of article XIV, section 4, and no pro tanto repeal need be found.

A similar analysis leads to the conclusion here that no pro tanto repeal of article XIV, section 4, was intended or made necessary here by the adoption of section 6. The goals of article XIIIB, of which section 6 is a part, were to protect residents from excessive taxation and government spending. (*Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 109–10, 211 Cal.Rptr. 133, 695 P.2d 220.) Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIIIA in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage—costs which all employers must bear—neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.

Therefore, since the objectives of article XIIIB and section 6 can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, section 6 did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer must fund the cost or increases in [62] benefits paid to employees of local agencies, or that statute affecting those benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that section 6 has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal—whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

V

It follows from our conclusions above, that in each of these cases the plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Appeal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

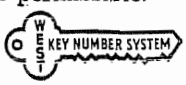
BIRD, C.J., and BROUSSARD, REYNOSO, LUCAS and PANELLI, JJ., concur.

MOSK, Justice, concurring.

I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither article XIII B, section 6, of the Constitution nor Revenue and Taxation Code sections 2207 and 2231 require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of section 2231, subdivision (a), that the state reimburse local government for "all costs mandated by the state."

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but merely to provide a cost-of-living$_{63}$ adjustment. I agree with the Court of Appeal that this was permissible.



729 P.2d 239

The PEOPLE, Plaintiff and Respondent,

v.

Melvin Meffery WADE, Defendant and Appellant.

Crim. 22654.

Supreme Court of California, In Bank.

Jan. 2, 1987.

Rehearing Granted March 26, 1987.

Defendant was convicted in the Superior Court, San Bernardino County, Ben T. Kayashima, J., of first-degree murder and sentenced to death. On automatic appeal, the Supreme Court held that: (1) defendant was not denied effective assistance of counsel; (2) evidence of defendant's prior acts of child abuse was admissible; (3) torture-murder special circumstance instruction was sufficient; and (4) "no sympathy" instruction at penalty phase of murder prosecution required reversal of death penalty where defendant introduced mitigating character and background evidence.

Judgment of guilt and finding of torture-murder special circumstance affirmed; finding of "heinous, atrocious or cruel" murder special circumstance and penalty of death reversed.

Mosk, J., concurred and dissented and filed opinion.

Lucas, concurred and dissented and filed opinion in which Panelli, J., joined.

Bird, C.J., dissented and filed opinion in which Broussard and Reynoso, JJ., joined.

Reynoso, J., dissented and filed opinion in which Bird, C.J., joined.

1. Criminal Law ⇐641.13(2)

Murder defendant was not denied effective assistance of counsel where counsel's choice, in closing argument, to acknowledge defendant's guilt, concede heinous nature of offense, and concentrate on convincing jury of legitimacy of defendant's mental defenses, was tactical decision taken in light of overwhelming evidence of defendant's guilt. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐369.2(4), 675

Evidence that defendant, who was accused of beating child to death, had previously abused other children was admissible where such evidence was relevant to defendant's claim of multiple personalities, and was not cumulative, though there was also expert testimony on issue of defendant's alleged multiple personalities. West's Ann.Cal.Evid.Code § 352.

[L. A. No. 26576. In Bank. July 17, 1962.]

DEWEY FRANKLIN, Individually and as an Officer, etc., of the Hod Carriers and Laborers Union Local No. 1184, Plaintiff and Appellant, v. CITY OF RIVERSIDE, Defendant and Respondent.

[1] Municipal Corporations—Legislative Control: Public Works—Contracts—Wages.—It is not required that the general prevailing wage in the community be paid by a contractor for public work to persons performing maintenance work on high voltage electrical transmission line right-of-way easements owned or controlled by a freeholders' charter city. Even conceding that such work is a matter of state concern rather than a municipal affair, maintenance work is excluded under the terms of Lab. Code, § 1771, from the general requirement of § 1773 that not less than the prevailing rate of per diem wages be paid for work of a similar character in the locality in which the public work is performed.

APPEAL from a judgment of the Superior Court of Riverside County. John G. Gabbert, Judge. Affirmed.

Action for injunctive and declaratory relief with respect to validity of a contract for the performance of public work. Judgment for defendant affirmed.

Lewis Garrett, Lionel Richman and Herbert M. Ansell for Plaintiff and Appellant.

Leland J. Thompson, City Attorney, and Justin M. McCarthy, Assistant City Attorney, for Defendant and Respondent.

McCOMB, J.—Plaintiff is an officer, representative and member of the Hod Carriers and Laborers Union Local No. 1184 and a resident and taxpayer of the City of Riverside (hereinafter referred to as "defendant"). Defendant is a municipal corporation existing and operating under a valid freeholders' charter pursuant to article XI, section 8, of the California Constitution.

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[1] See Cal.Jur.2d, Municipal Corporations, § 168; Am.Jur., Municipal Corporations, § 98.

McK. Dig. Reference: [1] Municipal Corporations, § 86; Public Works, § 5.

Plaintiff filed an action for an injunction and declaratory relief, seeking a determination that a contract entered into between defendant and John Roseberry for the performance of a public work was invalid. A judgment was entered in favor of defendant, holding the contract to be valid and enforceable, and plaintiff appeals.

The work to be performed under the contract consisted of the trimming of trees and clearing of brush on high voltage electrical transmission line right-of-way easements owned or controlled by defendant and operated and maintained by its public utilities department.

Through the transmission lines the public utilities department distributes to the residents of defendant city electrical energy originating at various hydroelectric or steam generating plants operated by Southern California Edison Company both within and without the State of California, none of which plants are in defendant city.

The payment by defendant to Mr. Roseberry for the performance of the contract was to be made solely from funds of the public utilities department of defendant, which funds are derived from the revenue of said public utilities department.

Plaintiff contends that the work to be performed under the contract, *being an essential part of the maintenance of high tension lines delivering power from outside the state,* was a matter of state concern and that therefore under section 1773 of the Labor Code* it was necessary that the contract require Mr. Roseberry to pay his employees the general prevailing wage in the community. It was stipulated that the contract included no such requirement.

Defendant, on the other hand, relying on *Pasadena* v. *Charleville,* 215 Cal. 384 [10 P.2d 745], contends that the work to be performed was a municipal affair and that consequently the general law is inapplicable.

[1] This is the sole question necessary for us to determine: *Is it required that the general prevailing wage in the*

*Section 1773 of the Labor Code provides, in part: "The body awarding any contract for public work, or otherwise undertaking any public work, shall ascertain the general prevailing rate of per diem wages in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract, and shall specify in the call for bids for the contract, and in the contract itself, what the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality is for each craft, classification or type of workman needed to execute the contract. . . ."

community be paid to persons performing maintenance work on high voltage electrical transmission line right-of-way easements owned or controlled by a freeholders' charter city?

No. Even conceding the correctness of plaintiff's contention that the work is a matter of state concern (cf. *Pacific Tel. & Tel. Co.* v. *City & County of San Francisco,* 51 Cal.2d 766, 767 [1a] et seq. [336 P.2d 514]), there is nevertheless no requirement that the general prevailing wage in the community be paid for the type of work here involved.

The work in the present case clearly constitutes maintenance work. It is therefore excluded under the terms of section 1771 of the Labor Code, which provides: "Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workmen employed on public works *exclusive of maintenance work.*" (Italics added.)

The judgment is affirmed.

Gibson, C. J., Traynor, J., Schauer, J., Peters J., and White, J., concurred.

Appellant's petition for a rehearing was denied August 15, 1962.

204 F.3d 941
140 Lab.Cas. P 58,862, 5 Wage & Hour Cas.2d (BNA) 1573, 00 Cal. Daily Op. Serv. 1370,
2000 Daily Journal D.A.R. 1921, 2000 Daily Journal D.A.R. 2349
(Cite as: 204 F.3d 941)

United States Court of Appeals,
Ninth Circuit.

G & G FIRE SPRINKLERS, INC., Plaintiff-Appellee,
v.
Victoria L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; Lloyd W. Aubry, Jr., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; Daniel Dellarocca, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; Roger Miller, an individual in his official capacity as Deputy Labor Commissioner of the State of California; Rosa Frazier, an individual in her capacity as Deputy Labor Commissioner of the State of California, Defendants-Appellants.
G & G Fire Sprinklers, Inc., Plaintiff-Appellee,
v.
Victoria L. Bradshaw, an individual in her official capacity as Labor Commissioner of the State of California; Lloyd W. Aubry, Jr., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; Daniel Dellarocca, an individual in his official capacity as Deputy Labor Commissioner of the State of California; Roger Miller, an individual in his official capacity as Deputy Labor Commissioner of the State of California; Rosa Frazier, an individual in her official capacity as Deputy Labor Commissioner of the State of California; Division of Labor Standards Enforcement, an agency of the State of California; Department of Industrial Relations, an agency of the State of California, Defendants-Appellants.

Nos. 95-56639, 96-55194.

Argued and Submitted Sept. 14, 1999.
On Remand from the United States Supreme Court April 19, 1999.
Filed Feb. 23, 2000.

Public works subcontractor brought action against State of California's Labor Commissioner and others challenging constitutionality of California statutes authorizing state, without notice or hearing, to withhold money and impose penalties for subcontractor's failure to comply with prevailing wage requirements. The United States District Court for the Central District of California, Manuel L. Real, Chief District Judge, entered summary judgment for subcontractor. Labor Commissioner and others appealed. The Court of Appeals, 156 F.3d 893, affirmed in part and reversed and remanded in part. The Supreme Court granted certiorari, vacated judgment, and remanded for further consideration. The Court of Appeals reinstated its prior opinion and held that: (1) subcontractor did not have right under due process clause to payment of funds withheld pending outcome of hearing; (2) State violated subcontractor's due process rights when if failed to afford subcontractor a hearing prior to withholding funds; and (3) withholding of funds constituted state action.

Affirmed in part; reversed and remanded in part.

Kozinski, Circuit Judge, dissented and filed opinion.

West Headnotes

[1] Constitutional Law ⚿254(2)
92k254(2)

"State action" within the meaning of the due process clause requires some deprivation of a constitutional right, and the party charged with the deprivation must be fairly said to be a state actor. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law ⚿275(3)
92k275(3)

[2] Labor Relations ⚿1421
232Ak1421

Public works subcontractor did not have right under due process clause to payment of funds withheld by State of California from public works contractor pending outcome of hearing to determine whether funds should be disbursed directly to subcontractor's employees as result of subcontractor's failure to comply with prevailing wage requirements. U.S.C.A.

Const.Amend. 14; West's Ann.Cal.Labor Code § 1727.

[3] Constitutional Law ⚷275(3)
92k275(3)

[3] Labor Relations ⚷1437
232Ak1437

State of California violated public works subcontractor's due process rights when if failed to afford it a hearing prior to withholding funds from public works contractor pending outcome of hearing to determine whether funds should be disbursed directly to subcontractor's employees as result of subcontractor's failure to comply with prevailing wage requirements. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code § 1727.

[4] Constitutional Law ⚷277(1)
92k277(1)

The definition of a "property interest" protected by the due process clause often includes a temporal component. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law ⚷254(4)
92k254(4)

Withholding of funds from public works contractor, pending outcome of hearing to determine whether funds should be disbursed directly to subcontractor's employees as result of subcontractor's failure to comply with prevailing wage requirements, was compelled by State of California, and thus constituted "state action" for purposes of subcontractor's due process claim, inasmuch as withholding was specifically directed by State officials in environment where withholding party had no discretion. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code § 1727.

***942** Before: REINHARDT, KOZINSKI and HAWKINS, Circuit Judges.

Order; Dissent by Judge KOZINSKI.

ORDER

In *G & G Fire Sprinklers, Inc. v. Bradshaw,* 156 F.3d 893 (9th Cir.1998), we held that California Labor Code provisions authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements violated the Due Process Clause of the Fourteenth Amendment. *See id.* at 904. The Supreme Court granted certiorari, vacated our judgment, and remanded "for further consideration in light of *American Manufacturers Mutual Insurance Company v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999)." *Bradshaw v. G & G Fire Sprinklers, Inc.,* --- U.S. ----, 119 S.Ct. 1450, 143 L.Ed.2d 538 (1999). Having determined that *Sullivan* is fully consistent with our analysis, we reinstate the judgment and opinion.

DISCUSSION

Sullivan involved the Pennsylvania Workers' Compensation Act, under which an employer or its insurer must pay for all "reasonable" and "necessary" medical treatment for work-related injuries. *See* 119 S.Ct. at 982. Under the Pennsylvania scheme, an insurance company could withhold payment for medical treatment if it disputed the reasonableness or necessity of that treatment. *See* Pa. Stat. Ann. ***943** § 531(5) ("All payments to providers for treatment ... shall be made within thirty (30) days of receipt of such bills and records unless the employer or insurer disputes the reasonableness or necessity of the treatment."). The *Sullivan* plaintiffs claimed that the failure to pay their contested benefit claims within thirty days, before a process was provided to resolve the dispute about the "reasonableness" of their treatment, amounted to a deprivation of due process.

Sullivan dealt with two questions: (1) whether the insurance company's decision to withhold payment for disputed medical treatment was fairly attributable to the State so as to subject insurers to the constraints of the Fourteenth Amendment, 119 S.Ct. at 984; and (2) whether the Due Process Clause requires workers' compensation insurers to immediately pay disputed medical bills prior to a determination that the medical treatment was reasonable and necessary. *Id.* at 985.

[1] The first question concerns whether there is state action, since the Fourteenth Amendment does not reach private acts or actors. *Sullivan* repeats a familiar calculus to determine the presence of state action: there must be some deprivation of a constitutional right and the party charged with the deprivation must be fairly said to be a state actor. *Id.* at 986. The second question turns on whether the claimant has a property interest in the matter complained of.

The Supreme Court found that the *Sullivan* plaintiffs did not possess a property interest in the *immediate,* unconditional payment for all medical treatment under the Pennsylvania statute. Nevertheless, the Court stated that the plaintiffs did have an interest in payment

of "reasonable" medical costs, *see Sullivan,* 119 S.Ct. at 990, and went out of its way to make clear that its holding did not upset previous Supreme Court precedent supporting the conclusion that the plaintiffs had a property interest in their *claims* for payment. *See id.* at n. 13 ("Respondents do not contend that they have a property interest in their claims for payment, as distinct from the payments themselves, such that the State, the arguments goes, could not finally reject their claims without affording them appropriate procedural protections.") (citing *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430-31, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)). Justice Ginsburg, who provided the fifth vote necessary to make the due process discussion in *Sullivan* an opinion of the Court, further clarified this distinction in her concurrence:

> I join Part III of the Court's opinion on the understanding that the Court rejects specifically, and only, respondent's demands for constant payment of each medical bill, within 30 days of receipt, *pending determination of the necessity or reasonableness of the medical treatment.* I do not doubt, however, that due process requires fair procedures for the adjudication of respondents' claims for workers' compensation benefits, including medical care.

Sullivan, 119 S.Ct. at 991 (emphasis added) (citation omitted).

[2][3][4][5] Our opinion adopts the approach explicitly preserved by the *Sullivan* majority and unequivocally adopted in Justice Ginsburg's concurrence. We specifically held that G & G did not have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded to determine whether G & G complied with the California prevailing wage laws. *See G & G Fire Sprinklers,* 156 F.3d at 903-04. To the contrary, we explicitly authorized the withholding of payments pending the hearing. *See id.* G & G's due process rights were violated, we held, not because it was denied immediate payment, but because the California statutory scheme afforded no hearing at all when state officials directed that payments ***944** be withheld. [FN1] *See id.* at 904. Nor can there be any doubt whether the action at issue here was compelled by the State. The withholding in *Sullivan* was carried out by a private insurer exercising its discretion in a way permitted by State law. The withholding here was specifically directed by State officials in an environment where the withholding party has no discretion at all. Moreover, in their complaint the plaintiffs directly attack the notices of withholding issued by the state agency, alleging that they were issued "arbitrarily and unreasonably."

> FN1. It is true that our opinion addressed the withholding of payments pending the outcome of the hearing to determine contractor compliance in its discussion of the "process due" to a protected property interest, and not in its discussion of the nature of the property interest protected. In contrast, the above discussion in *Sullivan* is situated in the Supreme Court's discussion of the existence or nonexistence of a protected property interest. But this does not reduce the relevance of *Sullivan* 's reasoning. As the Court recognized in the seminal due process case *Mathews v. Eldridge,* the definition of a protected property interest often includes a temporal component. *See* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (identifying the property interest at stake as the beneficiary's interest in continuing to receive benefits for approximately one year). For this reason, issues of timing can arise at either the property-determination or the process-determination stage.

Because our holding is not contrary to the Court's ruling in *Sullivan,* and because our opinion's reasoning fits comfortably within the analytic framework set forth in *Sullivan,* we REINSTATE the judgment and the opinion reported at 156 F.3d 893 (9th Cir.1998).

KOZINSKI, Circuit Judge, dissenting:

I dissented from the original opinion in this case because I do not believe that relations among contracting parties are governed by the Due Process Clause merely because one of the parties happens to be a state. *See G & G Fire Sprinklers, Inc. v. Bradshaw,* 156 F.3d 893, 908 (1998) (Kozinski, J., dissenting). I continue to adhere to that view. But the Supreme Court has now directed us to reconsider our opinion in light of *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). *See Bradshaw v. G & G Fire Sprinklers, Inc.,* --- U.S. ----, 119 S.Ct. 1450, 143 L.Ed.2d 538 (1999). In response, the majority reinstates its original opinion without amendment, claiming that its reasoning "fits comfortably within the analytic framework set forth in *Sullivan.*" Reinstatement Order at 1970. I must dissent once again, because *Sullivan* fits the majority's rationale about as comfortably as Cinderella's slipper on the wicked step-sister's foot.

Sullivan teaches that, to state a claim for relief under section 1983, G & G must identify both an alleged

constitutional deprivation and a state actor who is responsible for it. *See Sullivan,* 119 S.Ct. at 985 (rejecting the argument that "we need not concern ourselves with 'the identity of the defendant' "). In deciding whether G & G has succeeded in this, *Sullivan* explains that we must begin "by identifying 'the specific conduct of which the plaintiff complains.' " *Id.* at 985 (quoting *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)). Here the only deprivation alleged by G & G was effected by the prime contractor, who withheld funds which G & G claims under a contract. [FN1] There's no state action.

> FN1. *See G & G,* 156 F.3d at 901 n. 4 ("Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.")

The majority waves a magic wand by asserting that "[t]he withholding here was specifically directed by state officials in an environment where the withholding party has no discretion at all." Reinstatement Order at 1970. This would be true had the prime contractor been ordered, under penalty of law, to withhold funds from G & G. It was not. The only entity "specifically directed" to withhold funds was the awarding body, which withheld funds only from ***945** the prime contractor, not from G & G. While the challenged provision *authorized*-even *encouraged*-the prime to withhold an equivalent amount from G & G, the prime was free to pay G & G the full amount specified by the contract. *Sullivan* clearly holds that mere authorization and encouragement do not render a private entity's decisions "fairly attributable" to the state. 119 S.Ct. at 986. Under *Sullivan,* then, the prime contractor who chose to deprive G & G of its alleged property was not a state actor.

This presents the same problem for G & G as it did for the plaintiffs in *Sullivan.* The Court's description of the *Sullivan* plaintiffs' attempt to get around this problem is equally apt here: "Perhaps hoping to avoid the traditional application of our state-action cases, respondents attempt to characterize their claim as a 'facial' or 'direct' challenge to the [provisions in question.]" *Id.* at 985. In like manner, G & G's claim comes to us in the garb of a "direct constitutional challenge to the state's regulatory power as embodied in these statutes...." *G & G,* 156 F.3d at 902. The reinstated opinion assumes that, so long as standing requirements are satisfied, G & G may bring such a challenge. It then goes on to find a "causal link between G & G's injury and the state's action" sufficient to support standing. *Id.* at 900.

The problem is that standing deals only with whether the plaintiff "is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen,* 392 U.S. 83, 100, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). If the state's conduct does not violate the Constitution, there can be no question of standing-standing to challenge *what?* The violation alleged here is an unconstitutional deprivation of property. *Sullivan* tells us that the deprivation at issue cannot be attributed to the state. Therefore, the state cannot have violated G & G's right to due process. G & G is left with two alternatives: suing a depriver who is not a state actor, or suing a state actor who has committed no deprivation. The panel's opinion lets G & G get away with the latter, by substituting the normal causation prong of standing analysis for the more intimate causal relationship required by the state action doctrine. [FN2] Were it permissible to thus turn a pumpkin into a carriage, the Court should have allowed the *Sullivan* plaintiffs to bring their "facial challenge," on the theory that, while the private insurers in that case were not state actors, the state bureau's authorization of their withholding created a "causal link" sufficient to support standing. [FN3]

> FN2. *Compare G & G,* 156 F.3d at 899-900 (causation requirement for standing satisfied where choices of third party have been made " 'in such a manner as to produce causation and permit redressability' ") (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)), *with Sullivan,* 119 S.Ct. at 986 (no state action unless the state has " 'exercised coercive power' " or provided such significant encouragement that " 'the choice must in law be deemed to be that of the State' ") (quoting *Blum,* 457 U.S. at 1004, 102 S.Ct. 2777).

> FN3. Like G & G, the *Sullivan* plaintiffs had also named as defendants the state officials who administered the challenged act. *See Sullivan,* 119 S.Ct. at 984. Yet after holding that the private insurers regulated by the act were not state actors, the Court held that this alone would be sufficient to reverse the Third Circuit's holding that the act violated due process. *See id.* at 989. The Court nevertheless went on to address the merits of the claim, because it thought the question an important one. *See id.*

In addition to ignoring *Sullivan* 's state action holding,

the majority fails to apply the other teaching of the case-that before finding a deprivation, we must carefully identify the nature of the property interest at stake. *See Sullivan,* 119 S.Ct. at 989-90 (holding that a statutory entitlement to payment for "reasonable" and "necessary" medical treatment cannot give rise to a property interest until the payments in question have been proven to be reasonable and necessary). The opinion reinstated today asserts that G & G has a protectable ***946** property interest "in being paid in full for the construction work it has completed." *G & G,* 156 F.3d at 901. This cannot be so, for just as the *Sullivan* plaintiffs had no property interest in receiving payment for medical treatments that had not been shown to be "reasonable" and "necessary," G & G can have no property interest in being paid for work that has not been shown to satisfy the contractual condition that it be completed in accordance with prevailing wage requirements. Nevertheless, though the majority now attempts to recharacterize its position, *see* Reinstatement Order at 1969, its opinion remains unambiguous in holding that G & G has *already suffered* a deprivation for which the state is required to provide a post-deprivation hearing. *See G & G,* 156 F.3d at 903-04.

Even if the reinstated opinion actually rested on the rationale now attributed to it, we would still have a case of premature remediation. The majority's current position is that its holding is in line with previous Supreme Court precedent protecting plaintiffs' "property interest in their *claims* for payment." Reinstatement Order at 1968. If the property interest at stake here is G & G's *claim* for payment, however, when and how was G & G deprived of it? This is not a case like *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), where the plaintiff had filed a timely claim that was dismissed because of a procedural default committed by the state. *See id.* at 426-27, 102 S.Ct. 1148. G & G has yet to attempt to file a claim in state court. How can the state have deprived G & G of a legal claim it has never asked the state to enforce? [FN4]

> FN4. *Cf. Sullivan,* 119 S.Ct. at 988 (noting that the legal obligation to pay on a contract arises only after one has "initiated a claim and reduced it to a judgment").

The reinstated opinion forces the state to create an entirely new administrative machinery if it wishes to withhold funds in accordance with the terms of its contract. *See G & G,* 156 F.3d at 905-06. The majority appears to believe this is justified by Justice Ginsburg's concurring statement in *Sullivan* that " 'due process requires fair procedures for the adjudication [of claims.]' " Reinstatement Order at 1969 (quoting *Sullivan,* 119 S.Ct. at 991 (Ginsburg, J., concurring)). No doubt it does. But this is not a case like *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), where the Court, having identified a previously unrecognized property interest in welfare benefits, was obliged to create a new procedural regime to protect it. This is a claim for payment on a contract. There is a well-established "fair procedure" for dealing with such claims: an action for breach of contract in state court. It seems unlikely that Justice Ginsburg would regard such a time-honored procedure as inadequate to satisfy the demands of due process. The majority has not explained why working on a government contract heightens one's interest in receiving prompt payment so as to require procedural safeguards not available to other parties that have a disputed claim under a contract.

It is true that the law does not on its face guarantee that a subcontractor will attain an assignment enabling it to sue the awarding body. But G & G has not tried to obtain such an assignment from the prime contractor, nor has it given the state courts a chance to decide whether a subcontractor who has been denied such assignment nevertheless has an equitable right to sue under state law. Until these questions have been resolved against G & G, it simply cannot be said that the state has " 'finally reject[ed] their claims without affording them appropriate procedural protections.' " Reinstatement Order at 1968 (quoting *Sullivan,* 119 S.Ct. at 990 n. 13).

To sum up, the reinstated opinion papers over a state action deficiency with standing analysis, identifies a property interest the Court has told us can't yet exist, and holds that due process entitles G & G ***947** to the creation of a new procedure bypassing the one all other unpaid contractors are required to use. A fairy godmother could do no more. Once again, I must respectfully dissent.

204 F.3d 941, 140 Lab.Cas. P 58,862, 5 Wage & Hour Cas.2d (BNA) 1573, 00 Cal. Daily Op. Serv. 1370, 2000 Daily Journal D.A.R. 1921, 2000 Daily Journal D.A.R. 2349

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3543.5, subdivision (c) or section 3545, subdivision (b)(3) and that PERB did not abuse its discretion in finding that the parity agreement here did not violate these statutes, we nevertheless recognize that under different circumstances an employer might violate the EERA by entering into a parity agreement.

The decision of the Court of Appeal is reversed.

LUCAS, C.J., and MOSK, BROUSSARD, ARGUELLES, EAGLESON and KAUFMAN, JJ., concur.

750 P.2d 318

44 Cal.3d 830

[1830] **LUCIA MAR UNIFIED SCHOOL DISTRICT et al., Plaintiffs and Appellants,**

v.

Bill HONIG, as Superintendent, etc. et al., Defendants and Respondents.

No. S000064.

Supreme Court of California.

March 14, 1988.

Rehearing Denied April 27, 1988.

School districts filed petition for writ of mandate, declaratory relief, and restitution, seeking declaration that statute requiring local school districts to pay 10% of excess annual cost of educating any pupil, who attends state-operated school for pupils not educable at local schools and whose parent or guardian lives within district, violated State Constitution. The Superior Court, San Luis Obispo County, Walter Charamza, J., denied the petition. School districts appealed. The Court of Appeal, 233 Cal.Rptr. 531, affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court, Mosk, J., held that: (1) the statute did require school districts to support a "new program," for purposes of a state constitutional article providing that whenever legislature or any state agency mandates new program or higher level of service by any local government, state should provide subvention of funds to reimburse local government for costs of program or increased level of service; (2) issue of whether school districts were "mandated" by the statute to make contributions called for therein for purposes of state constitutional article would be remanded to Commission on State Mandates for determination; and (3) State Superintendent of Public Instruction and State Department of Education did not act in excess of their authority by deducting amount of contributions required of school districts by the statute from funds appropriated for support of the districts' schools.

Reversed and remanded.

1. Schools ⇐19(1)

Statute requiring local school districts to pay 10% of excess annual cost of educating any pupil who attends state-operated school for pupils not educable at local schools and whose parent or guardian lives within district creates "new program," for purposes of constitutional article providing that whenever legislature or any state agency mandates new program or higher level of service by any local government, state should provide subvention of funds to reimburse local government for costs of program or increased level of service, although impact of statute was to require districts to contribute funds to operate state schools for handicapped rather than to themselves administer program; the statute shifted partial financial responsibility for support of students in state operated schools from state to local districts. West's Ann.Cal.Educ.Code § 59300; West's Ann.Cal. Const. Art. 13B, § 6.

See publication Words and Phrases for other judicial constructions and definitions.

2. Schools ⇐19(1)

Issue of whether local school districts are "mandated" to make contributions called for by statute requiring local school districts to pay 10% of excess annual cost of educating any pupil, who attends state-operated school for pupils not educable at local schools and whose parent or guardian lives within district, would be remanded to Commission on State Mandates, for purposes of determining whether statute imposes on local districts state-mandated new program or level of service for which state must provide reimbursement under state constitutional article; it was argued local districts were not compelled to contribute to education of handicapped children at state schools because they possessed other options to educate such students. West's Ann.Cal.Educ.Code § 59300; West's Ann. Cal.Gov.Code § 17500 et seq.; West's Ann. Cal. Const. Art. 13B, § 6.

3. Schools ⇐19(1)

State Superintendent of Public Instruction and State Department of Education did not act in excess of their authority by deducting amount of contributions required of local school districts from funds appropriated to local districts for support of districts' schools to satisfy districts' obligations under statute requiring local school districts to pay 10% of excess annual cost of educating any pupil, who attends state-operated school for pupils not educable at local schools and whose parent or guardian lives within district; the statute did not specify method by which contributions of districts to state schools should be paid, so method of collection was left to reasonable discretion of Department, and method of collection chosen by Department was not unreasonable, in view of fact that no test claim had been filed when districts failed to pay invoices. West's Ann.Cal.Educ.Code § 59300.

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[882] Peter C. Carton, Bakersfield, for plaintiffs and appellants.

Henry Ullerich, Office of the Atty. Gen., Los Angeles, Joanne Lowe, State Dept. of Educ., Sacramento, for defendants and respondents.

MOSK, Justice.

Section 59300 of the Education Code requires a school district to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped. We must determine if that section imposes on a district a state-mandated "new program or higher level of service" for which the state must provide reimbursement under section 6 of article XIIIB of the California Constitution.[1] The constitutional provision, adopted by initiative in 1979, declares, with exceptions not relevant here, that "[w]henever the Legislature ... mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service...."

The resolution of the question before us turns on whether the contributions made by a district pursuant to section 59300 are used to fund "a new program or higher level of service" and if so, whether the statute "mandates" that a district make the contribution set forth therein. We conclude that the contribution required by section 59300 is utilized to fund a "new program" as defined in the constitutional provision, but that it is not clear from the record whether districts are "mandated" to pay these costs. The matter will therefore be remanded to the Commission on State Mandates to make that determination.

The State Department of Education (department) operates schools for severely handicapped students, including schools for the deaf (§ 59000 et seq.), the blind (§ 59100 et seq.), and the neurologically handicapped (§ 59200 et seq.). Although prior to 1979, school districts were required by statute to contribute to the education of pupils from the districts at the state [883] schools (former §§ 59021, 59121, 59221),

1. Hereafter all statutory references are to the Education Code unless otherwise noted, and all references to articles are to the California Constitution.

these provisions were repealed in that year and on July 12, 1979, the state assumed the responsibility for full funding. (Stats. 1979, ch. 237, § 3, p. 493.) This responsibility existed when article XIIIB became effective on July 1, 1980 (art. XIIIB, § 10), and continued until section 59300 became effective on June 28, 1981. (Stats. 1981, ch. 102, § 17, p. 703.)

Section 59300 represents an attempt by the state to compel school districts to share in these costs. The section provides, "Notwithstanding any provision of this part to the contrary, the district of residence of the parent or guardian of any pupil attending a state-operated school pursuant to this part, excluding day pupils, shall pay the school of attendance for each pupil an amount equal to 10 percent of the excess annual cost of education of pupils attending a state-operated school pursuant to this part." [2]

Starting in 1981, the department attempted to collect the contributions called for in the section by sending invoices to the school district superintendents. When the invoices were not paid, their amount was deducted from the appropriations made by the state to the districts for the support of the schools.

The Government Code sets forth a procedure to determine whether a statute imposes state-mandated costs on a school district or other local agency under article XIIIB. (Gov. Code, § 17500 et seq.). The district must file a test claim with the Commission on State Mandates (commission) which, after a hearing, decides whether the statute mandates a "new program or increased level of service." (Id., §§ 17521, 17551, 17556.) If a claim is found to be reimbursable, the commission must determine the amount to be reimbursed. (Id., § 17557.) The code specifies the procedure to be followed by a local agency to obtain reimbursement if the commission has determined that reimbursement is due. (Id., § 17558 et seq.) If the Legislature refuses to appropriate money to satisfy a mandate found to be reimbursable by the commission, a claimant may bring an action for declaratory relief to enjoin enforcement of the mandate. (Id., § 17612, subd. (b).) [3] In the event the commission finds against the local agency, it may bring a proceeding in administrative mandate under section 1094.5 of the Code of Civil Procedure to challenge the commission's determination. (Gov. § 1834 17559.) The procedure provided in the code is the exclusive means by which a local agency may claim reimbursement for mandated costs. (Id., § 17552.)

In 1984 plaintiff Lucia Mar Unified School District and other school districts (plaintiffs) filed a test claim before the commission,[4] asserting that section 59300 requires them to make payments for a "new program or increased level of service," and that they are entitled to reimbursement pursuant to section 6 of article XIIIB. The commission denied the claim, finding no reimbursable mandate because, although section 59300 increased plaintiffs' costs for educating students at state-operated schools, it did not impose on the districts a new program or higher level of service.

Plaintiffs then filed a petition for writ of mandate, declaratory relief, and restitution against the commission, the State Superintendent of Public Instruction (superintendent), and the department. They sought a declaration that section 59300 violates section 6 of article XIIIB, and prayed for orders to compel the commission to reverse its determination, and the superintendent and the department to reimburse them for the amounts withheld under the authority

2. "Excess annual cost" means the total cost of educating a pupil in a state operated school less a school district's annual base revenue limit, multiplied by the estimated average daily attendance of the state operated school.

3. In *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 549, 234 Cal.Rptr. 795, the court observed that this remedy would afford relief only prospectively, and not as to funds previously paid out by a local agency to satisfy a state mandate.

4. The claim was originally filed with the State Board of Control, which preceded the commission; when the commission was created in 1984, the claim was transferred to it for determination.

of section 59300. The trial court affirmed the commission's decision. It, too, held that section 59300 does not mandate a new program or higher level of service, finding that the section only calls for an "adjustment of costs." [5]

The court held, further, that it had no jurisdiction to issue orders to the superintendent to refund the sums withheld from plaintiffs because the commission's decisions may only be challenged by a proceeding in administrative mandate under section 1094.5 of the Code of Civil Procedure. (Gov. Code, §§ 17552, 17559.) Plaintiffs appealed. The Court of Appeal affirmed the judgment, 198 Cal.App.3d 299, 233 Cal. Rptr. 531, reasoning that a shift in the funding of an existing program is not a new program or a higher level of service. It declined to rule whether restitution from the superintendent was an appropriate remedy.

[1] The commission argues before this court, as it did below, that section 59300 does not mandate a new program or a higher level of service. The superintendent and the department express no opinion as to the merits of plaintiffs' assertions, but argue that if we should find a reimbursable mandate, plaintiffs' remedy is to seek an appropriation from the Legislature rather than reimbursement from the department.

[1835] We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state. In keeping with this principle, we recently held in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, that legislation requiring local governments and other employers to increase certain workers' compensation benefits did not invoke the subvention requirement because the state mandate did not provide for a "program." We reasoned that the additional expense to the local agency mandated by the legislation arose as an incidental impact of a law which applied generally to all state residents and entities, and this type of expense was not what the voters had in mind when they adopted section 6 of article XIIIB. (See also *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484, 235 Cal.Rptr. 101.)

We defined a "program" as used in article XIIIB as one that carries out the "governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*County of Los Angeles*, supra, 43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.) Unquestionably the contributions called for in section 59300 are used to fund a "program" within this definition, for the education of handicapped children is clearly a governmental function providing a service to the public, and the section imposes requirements on school districts not imposed on all the state's residents. Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since at the time section 59300 became effective they were not required to contribute to the education of students from their districts at such schools.

The fact that the impact of the section is to require plaintiffs to contribute funds to operate the state schools for the handicapped rather than to themselves administer the program does not detract from our conclusion that it calls for the establishment of a new program within the meaning of the constitutional provision. To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section

5. The court found that this "adjustment" was "precipitated" by the Special Education Program, enacted in 1980 (Stats.1980, ch. 797, § 9, p. 2411 et seq.), discussed in a later part of this opinion, which afforded local governments certain options to educate the handicapped.

6 of article XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, which severely limited the taxing power of local governments. Section 6 was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services |836 in view of these restrictions on the taxing and spending power of the local entities. (See *County of Los Angeles*, supra, 43 Cal.3d at p. 61, 233 Cal.Rptr. 38, 729 P.2d 202.) [6]

The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not "new." Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, or to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, seems equally violative of the fundamental purpose underlying section 6 of that article.[7] We conclude, therefore, that because section 59300 shifts partial financial responsibility for the support of students in the state operated schools from the state to school districts—an obligation the school districts did not have at the time article XIIIB was adopted—it calls for plaintiffs to support a "new program" within the meaning of section 6.[8]

[2] The question remains whether school districts are "mandated" by section 59300 to make the contributions called for therein. The commission claims that plaintiffs are not compelled to contribute to the education of handicapped children at the state schools because they possess other options to educate such students. In 1980, the Legislature passed a law codified in the Education Code, which requires local education agencies to assess the needs |837 of handicapped pupils residing in their districts, and to formulate an appropriate plan to educate them. (§ 56000 et seq.)

The commission asserts that a local agency has the option under section 56361 to provide a local program for handicapped children, to send them to private schools, or to refer them to the state operated schools. At the hearing before the commission, the Department of Finance recommended that the commission find that section 59300 does not impose a state mandate because plaintiffs were not required to send students from their districts to the state schools but had the additional options described in sec-

6. The Revenue and Taxation Code also contains provisions requiring reimbursement of local agencies for state-mandated costs. (Rev. & Tax Code, § 2201 et seq.) These provisions were enacted before the adoption of article XIIIB (Stats. 1973, ch. 358, § 3, p. 780), but the principle of reimbursement was enshrined in the Constitution in 1979 with the adoption of section 6 of article XIIIB to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources.

7. There is a statement in *County of Los Angeles*, supra, that a concern prompting the adoption of section 6 in article XIIIB "was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.) We do not read the phrase "administered by local agencies" to mean that the electorate intended that only locally administered programs require state reimbursement. The underlying premise of the sentence is that reimbursement is required if the state transfers fiscal responsibility to a local agency for a program the state deems desirable.

8. An opinion of the Attorney General, relied on by the commission, is inapposite. It suggests that a law increasing the number of judges in a municipal court district does not constitute a higher level of service under section 6 of article XIIIB because the district has a constitutional obligation to provide for an adequate number of judges. ((1980) 63 Ops.Cal.Atty.Gen. 700, 702.) In the present case, the issue is whether section 59300 involves a new program rather than a higher level of service, and it is clear that at the time the section was enacted, plaintiffs did not have an obligation to contribute to the support of the students from their districts at the state schools for the severely handicapped.

tion 56361. The commission staff recommended against adoption of this position on the ground that the plaintiffs "had no other reasonable alternative than to utilize the services of the state operated schools, as they are the least expensive alternative in educating handicapped children." [9]

The commission did not and was not required to decide whether section 59300 constitutes a state mandate since it concluded that plaintiffs were not entitled to reimbursement in any event because the section does not provide for a new program or increased level of service. The issue is for the commission to determine, as it is charged by section 17551 of the Government Code with the duty to decide in the first instance whether a local agency is entitled to reimbursement under section 6 of article XIIIB.

In view of our conclusion that the question whether section 59300 amounts to a state mandate must be remanded to the commission, we do not decide whether, as the superintendent and the department argue, plaintiffs' sole remedy, in the event a reimbursible mandate is ultimately found, is to seek relief under the procedure set forth in section 17500 et seq. of the Government Code.

[3] The final question is whether the superintendent and the department acted in excess of their authority in deducting the amount of the contributions required of plaintiffs by section 59300 from the funds appropriated by the state to them for the support of the districts' schools. Plaintiffs cite no authority for the proposition that such conduct was improper. Section 59300 does not specify the method by which the contributions of the school districts to the state schools shall be paid. We agree with the Court of Appeal that in these circumstances the method of collection is left to the reasonable discretion of the department, and in view of the fact no test claim had been filed when the school districts failed to pay the invoices, the [838] method of collection the Department chose was not unreasonable. (See, e.g., *Carmel Valley Fire Protection District v. State of California*, supra, 190 Cal.App.3d 521, 550, 234 Cal.Rptr. 795.)

The judgment of the Court of Appeal is reversed, and the court is directed to remand the matter to the commission for further proceedings consistent with this opinion.

LUCAS, C.J., and BROUSSARD, PANELLI, ARGUELLES, EAGLESON and KAUFMAN, JJ., concur.

9. According to the Department of Finance, in 1979–1980, the average cost to educate a student in a local program was $5,527, for private school the cost was $9,527, and for the least expensive state school $15,556. The local agency is required to pay 30 percent of the cost for students placed in private schools.

750 P.2d 324

44 Cal.3d 839

[839] **RUSS BUILDING PARTNERSHIP, Plaintiff and Appellant,**

v.

CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.

PACIFIC GATEWAY ASSOCIATES JOINT VENTURE, Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.

CROCKER NATIONAL BANK et al., Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.

S000156.

Supreme Court of California.

March 17, 1988.

Developers of new office space within city limits sued for declaratory judgment

121 S.Ct. 1446
149 L.Ed.2d 391, 143 Lab.Cas. P 59,189, 6 Wage & Hour Cas.2d (BNA) 1537, 1 Cal. Daily Op. Serv. 3004, 2001 Daily Journal D.A.R. 3701, 14 Fla. L. Weekly Fed. S 167
(Cite as: 532 U.S. 189, 121 S.Ct. 1446)

Supreme Court of the United States

Arthur S. LUJAN, Labor Commissioner of California, et al., Petitioners,
v.
G & G FIRE SPRINKLERS, INC.

No. 00-152.

Argued Feb. 26, 2001.
Decided April 17, 2001.
Rehearing Denied June 11, 2001.
See 533 U.S. 912, 121 S.Ct. 2264.

Public works subcontractor brought action against State of California's Labor Commissioner and others challenging constitutionality under Due Process Clause of California statutes authorizing state, without notice or hearing, to withhold money and impose penalties for subcontractor's failure to comply with prevailing wage requirements of Labor Code. The United States District Court for the Central District of California, Manuel L. Real, Chief District Judge, entered summary judgment for subcontractor. The Ninth Circuit Court of Appeals, 156 F.3d 893, affirmed in part and reversed and remanded in part, on basis that statutory scheme did not provide a hearing before or after payments were withheld. The Supreme Court granted certiorari, vacated judgment, and remanded for further consideration. On remand, the Court of Appeals, 204 F.3d 941, reinstated its prior opinion. Labor Commissioner again petitioned for certiorari. The Supreme Court, Chief Justice Rehnquist, held that: (1) Labor Code provisions did not deprive subcontractor of property without due process if California makes ordinary judicial process available to subcontractor to resolve its contractual dispute, and (2) California law, by allowing contractor to assign to subcontractor statutory right of suit to recover withheld payments, and by appearing to permit common-law breach of contract suit, provided adequate means by which subcontractor might pursue claim.

Reversed.

West Headnotes

[1] Constitutional Law 277(1)
92k277(1) Most Cited Cases

[1] Constitutional Law 278(1)
92k278(1) Most Cited Cases

Where a state law is challenged on due process grounds, inquiry is whether State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 275(3)
92k275(3) Most Cited Cases

[2] Labor Relations 1268
232Ak1268 Most Cited Cases

Statutory scheme authorizing State to withhold payments to contractor based on subcontractor's failure to comply with prevailing wage requirements in public works contract did not deprive subcontractor of procedural due process, if California made ordinary judicial process available to subcontractor for resolving contractual dispute. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

[3] Constitutional Law 275(3)
92k275(3) Most Cited Cases

[3] Labor Relations 1268
232Ak1268 Most Cited Cases

California Labor Code, by allowing public works contractor to assign to subcontractor right to bring claim to recover payments withheld based on subcontractor's violation of prevailing wage requirements, satisfies procedural due process, by providing a means by which subcontractor may bring claim for breach of contract to recover wages and penalties withheld. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

[4] Constitutional Law 275(3)
92k275(3) Most Cited Cases

[4] Labor Relations 1268
232Ak1268 Most Cited Cases

Under Labor Code sections that authorize

withholding of payments and penalties based on violation of prevailing wage requirements for public works contract, suit under Labor Code to recoup withheld amounts is adequate to satisfy due process, even though awarding body retains wages and penalties while suit is pending. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

[5] Labor Relations ⚿1268
232Ak1268 Most Cited Cases

Provision of California Labor Code making suit on public works contract against awarding body "exclusive remedy" of contractor or his assignees to recover wages and penalties withheld from contract payments for subcontractor's violation of prevailing wage requirements is not exclusive remedy for subcontractor who does not receive assignment. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

[6] Constitutional Law ⚿48(1)
92k48(1) Most Cited Cases

Party challenging statutory withholding scheme bears the burden of demonstrating its unconstitutionality.

[7] Constitutional Law ⚿275(3)
92k275(3) Most Cited Cases

[7] Labor Relations ⚿1268
232Ak1268 Most Cited Cases

Provisions of California Labor Code authorizing State to withhold payments to contractor based on subcontractor's failure to comply with prevailing wages requirements in public works contract, and allowing contractor in turn to withhold monies from subcontractor's payments, did not violate due process rights of subcontractor, given availability of assignment of contractor's right to suit against State to resolve contractual dispute and apparent availability of standard breach of contract suit against contractor. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

**1447 *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The California Labor Code (Code) authorizes the State to order withholding of payments due a contractor on a public works project if a subcontractor on the project fails to comply with certain Code requirements; permits the contractor, in turn, to withhold similar sums from the subcontractor; and permits the contractor, or his assignee, to sue the awarding body for alleged breach of the contract in not making payment to recover the wages or penalties withheld. After petitioner State Division of Labor Standards Enforcement (DLSE) determined that respondent G & G Fire Sprinklers, Inc. (G & G), as a subcontractor on three public works projects, had violated the Code, it issued notices directing the awarding bodies on those projects to withhold from the contractors an amount equal to the wages and penalties forfeited due to G & G's violations. The awarding bodies withheld payment from the contractors, who in turn withheld G & G's payment. G & G filed a 42 U.S.C. § 1983 suit against DLSE and other state petitioners in the District Court, claiming that the issuance of the notices without a hearing deprived it of property without due process in violation of the Fourteenth Amendment. The court granted G & G summary judgment, declared the relevant Code sections unconstitutional, and enjoined the State from enforcing the provisions against G & G. The Ninth Circuit affirmed. This Court granted certiorari, vacated that judgment, and remanded for reconsideration in light of its decision in *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130, that the respondents there had no property interest in payment for disputed medical treatment pending review of the treatment's reasonableness and necessity, as authorized by state law. On remand, the Ninth Circuit reinstated its prior judgment and opinion, explaining that G & G's rights were violated not because it was deprived of immediate payment, but because the state statutory scheme afforded no hearing at all.

**1448 *Held:* Because state law affords G & G

sufficient opportunity to pursue its claim for payment under its contracts in state court, the statutory scheme does not deprive it of due process. In each of this Court's ***190** cases relied upon by the Ninth Circuit, the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation. See, *e.g., United States v. James Daniel Good Real Property,* 510 U.S. 43, 62, 114 S.Ct. 492, 126 L.Ed.2d 490. Unlike those claimants, G & G has not been deprived of any present entitlement. It has been deprived of payment that it contends it is owed under a contract, based on the State's determination that it failed to comply with the contract's terms. That property interest can be fully protected by an ordinary breach-of-contract suit. If California makes ordinary judicial process available to G & G for resolving its contractual dispute, that process is due process. Here, the Code, by allowing a contractor to assign the right of suit, provides a means by which a subcontractor may bring a breach-of-contract suit to recover withheld payments. That damages may not be awarded until the suit's conclusion does not deprive G & G of its claim. Even if G & G could not obtain assignment, it appears that a breach-of- contract suit against the contractor remains available under state common law, although final determination of the question rests in the hands of the California courts. Pp. 1450-1452.

204 F.3d 941, reversed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Thomas S. Kerrigan, Van Nuys, CA, for petitioners.

Jeffrey A. Lamken, Washington, DC, for United States as amicus curiae, by special leave of the Court.

Stephen A. Seideman, Los Angeles, CA, for respondent.

For U.S. Supreme Court Briefs See:

2001 WL 43586 (Resp.Brief)

2001 WL 137346 (Reply.Brief)

2000 WL 1792987 (Pet.Brief)

2000 WL 1803647 (Amicus.Brief)

2000 WL 1922620 (Amicus.Brief)

For Transcript of Oral Argument See:

2001 WL 209816 (U.S.Oral.Arg.)

***191** Chief Justice REHNQUIST delivered the opinion of the Court.

The California Labor Code (Code or Labor Code) authorizes the State to order withholding of payments due a contractor on a public works project if a subcontractor on the project fails to comply with certain Code requirements. The Code permits the contractor, in turn, to withhold similar sums from the subcontractor. The Court of Appeals for the Ninth Circuit held that the relevant Code provisions violate the Due Process Clause of the Fourteenth Amendment because the statutory scheme does not afford the subcontractor a hearing before or after such action is taken. We granted certiorari, 531 U.S. 924, 121 S.Ct. 297, 148 L.Ed.2d 239 (2000), and we reverse.

Petitioners are the California Division of Labor Standards Enforcement (DLSE), the California Department of Industrial Relations, and several state officials in their official capacities. Respondent G & G Fire Sprinklers, Inc. (G & G), is a fire-protection company that installs fire sprinkler systems. G & G served as a subcontractor on several California public works projects. "Public works" include construction work done under contract and paid for in whole or part by public funds. Cal. Lab.Code Ann. § 1720 (West Supp.2001). The department, board, authority, officer, or agent awarding a contract for public work is called the "awarding body." § 1722 (West 1989). The California Labor Code requires that contractors and subcontractors on such projects pay their workers a prevailing wage that is determined by the State. §§ 1771, 1772, 1773 (West 1989 and Supp.2001). At the time relevant here, if workers were not paid the prevailing wage, the contractor was required ****1449** to pay each worker the

difference between the prevailing wage and the wages paid, in addition to forfeiting a penalty to the State. § 1775 ***192** (West Supp.2001). [FN1] The awarding body was required to include a clause in the contract so stipulating. *Ibid.*

FN1. The Code also imposes restrictions on recordkeeping and working hours, and at the time relevant here, the contractor was similarly penalized if the contractor or subcontractor failed to comply with them. Cal. Lab.Code Ann. §§ 1776(a), (b), (g) (West Supp.2001), 1813 (West 1989). The awarding body was required to include a clause in the contract so stipulating. §§ 1776(h), 1813.
Sections 1775, 1776, and 1813 were subsequently amended to provide that both contractors and subcontractors may be penalized for failure to comply with the Labor Code. §§ 1775(a), 1776(g), 1813 (West Supp.2001). Amendments to § 1775 also state that either the contractor or the subcontractor may pay workers the difference between the prevailing wage and wages paid. § 1775(a).

The Labor Code provides that "[b]efore making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter." § 1727. If money is withheld from a contractor because of a subcontractor's failure to comply with the Code's provisions, "[i]t shall be lawful for [the] contractor to withhold from [the] subcontractor under him sufficient sums to cover any penalties withheld." § 1729 (West 1989). [FN2]

FN2. Amendments to the Labor Code effective July 1, 2001, impose additional requirements on contractors. See § 1727(b) (West Supp.2001) (contractor shall withhold money from subcontractor at request of Labor Commissioner in certain circumstances); § 1775(b)(3) (contractor shall take corrective action to halt subcontractor's failure to pay prevailing wages if aware of the failure or be subject to penalties).

The Labor Code permits the contractor, or his assignee, to bring suit against the awarding body "on the contract for alleged breach thereof in not making ... payment" to recover the wages or penalties withheld. §§ 1731, 1732 (West Supp.2001) . The suit must be brought within 90 days of completion of the contract and acceptance of the job. § 1730. Such a suit "is the exclusive remedy of the contractor ***193** or his or her assignees." § 1732. The awarding body retains the wages and penalties "pending the outcome of the suit." § 1731. [FN3]

FN3. Sections 1730-1733 of the Code have been repealed, effective July 1, 2001. Section 1742 has replaced them. It provides that "[a]n affected contractor or subcontractor may obtain review of a civil wage and penalty assessment [under the Code] by transmitting a written request to the office of the Labor Commissioner." § 1742(a). The contractor or subcontractor is then entitled to a hearing before the Director of Industrial Relations, who shall appoint an impartial hearing officer. Within 45 days of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. A contractor or subcontractor may obtain review of the director's decision by filing a petition for a writ of the mandate in state superior court. §§ 1742(b), (c). These provisions are not yet in effect and these procedures were not available to respondent at the time of the withholding of payments at issue here.

In 1995, DLSE determined that G & G, as a subcontractor on three public works projects, had violated the Labor Code by failing to pay the prevailing wage and failing to keep and/or furnish payroll records upon request. DLSE issued notices to the awarding bodies on those projects, directing them to withhold from the contractors an amount

equal to the wages and penalties forfeited due to G & G's violations. The awarding bodies withheld payment from the contractors, who in turn withheld payment from G & G. The total withheld, according to respondent, exceeded $135,000. App. 68.

G & G sued petitioners in the District Court for the Central District of California. G & G sought declaratory and injunctive relief pursuant to Rev. Stat. § 1979, 42 U.S.C. § 1983, claiming that the issuance of withholding notices without a hearing ****1450** constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment. The District Court granted respondent's motion for summary judgment, declared §§ 1727, 1730-1733, 1775, 1776(g), and 1813 of the Labor Code unconstitutional, and enjoined the State from enforcing these provisions ***194** against respondent. App. to Pet. for Cert. A85-A87. Petitioners appealed.

A divided panel of the Court of Appeals for the Ninth Circuit affirmed. *G & G Fire Sprinklers, Inc. v. Bradshaw,* 156 F.3d 893, 898 (1998) *(Bradshaw I).* The court concluded that G & G "has a property interest in being paid in full for the construction work it has completed," *id.,* at 901, and found that G & G was deprived of that interest "as a result of the state's action," *id.,* at 903. It decided that because subcontractors were "afforded neither a pre- nor post-deprivation hearing when payments [were] withheld," the statutory scheme violated the Due Process Clause of the Fourteenth Amendment. *Id.,* at 904.

Following *Bradshaw I,* we decided *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999), where respondents also alleged a deprivation of property without due process of law, in violation of the Fourteenth Amendment. *Sullivan* involved a challenge to a private insurer's decision to withhold payment for disputed medical treatment pending review of its reasonableness and necessity, as authorized by state law. We held that the insurer's action was not "fairly attributable to the State," and that respondents therefore failed to satisfy a critical element of their § 1983 claim. *Id.,* at 58, 119 S.Ct. 977. We also decided that because state law entitled respondents to reasonable and necessary medical treatment, respondents had no property interest in payment for medical treatment not yet deemed to meet those criteria. *Id.,* at 61, 119 S.Ct. 977. We granted certiorari in *Bradshaw I,* vacated the judgment of the Court of Appeals, and remanded for reconsideration in light of *Sullivan. Bradshaw v. G & G Fire Sprinklers, Inc.,* 526 U.S. 1061, 119 S.Ct. 1450, 143 L.Ed.2d 538 (1999).

On remand, the Court of Appeals reinstated its prior judgment and opinion, again by a divided vote. The court held that the withholding of payments was state action because it was "specifically directed by State officials ... [and] the withholding party has no discretion." ***195***G & G Fire Sprinklers, Inc. v. Bradshaw,* 204 F.3d 941, 944 (C.A.9 2000). In its view, its prior opinion was consistent with *Sullivan* because it "specifically held that G & G did not have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded," and "explicitly authorized the withholding of payments pending the hearing." 204 F.3d, at 943. The court explained that G & G's rights were violated not because it was deprived of immediate payment, but "because the California statutory scheme afforded no hearing at all when state officials directed that payments be withheld." *Id.,* at 943-944.

[1] Where a state law such as this is challenged on due process grounds, we inquire whether the State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process. *Sullivan, supra,* at 59, 119 S.Ct. 977. We assume, without deciding, that the withholding of money due respondent under its contracts occurred under color of state law, and that, as the Court of Appeals concluded, respondent has a property interest of the kind we considered in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), in its claim for payment under its contracts. 204 F.3d, at 943-944. Because we believe that California law affords respondent sufficient opportunity to pursue that claim in state court, we conclude that the California statutory scheme does not deprive G & G of its claim for payment without due process of law. See *Logan, supra,* at 433, 102 S.Ct. 1148 ("[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged").

1451 The Court of Appeals relied upon several of our cases dealing with claims of deprivation of a property interest without due process to hold that G & G was entitled to a reasonably prompt hearing when payments were withheld. *Bradshaw I, supra,* at 903-904 (citing *United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993); *FDIC v. Mallen,* 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988); ***196 *Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 1979)). In *Good,* we held that the Government must afford the owner of a house subject to forfeiture as property used to commit or to facilitate commission of a federal drug offense notice and a hearing before seizing the property. 510 U.S., at 62, 114 S.Ct. 492. In *Barchi,* we held that a racetrack trainer suspended for 15 days on suspicion of horse drugging was entitled to a prompt postdeprivation administrative or judicial hearing. 443 U.S., at 63-64, 99 S.Ct. 2642. And in *Mallen,* we held thatthe president of a Federal Deposit Insurance Corporation (FDIC) insured bank suspended from office by the FDIC was accorded due process by a notice and hearing procedure which would render a decision within 90 days of the suspension. 486 U.S., at 241-243, 108 S.Ct. 1780. See also *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (holding that due process requires notice and a hearing before wages may be garnished).

[2] In each of these cases, the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation. Unlike those claimants, respondent has not been denied any present entitlement. G & G has been deprived of payment that it contends it is owed under a contract, based on the State's determination that G & G failed to comply with the contract's terms. G & G has only a claim that it did comply with those terms and therefore that it is entitled to be paid in full. Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, see *supra,* at 1450, it is an interest, unlike the interests discussed above, that can be fully protected by an ordinary breach-of-contract suit.

In *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961) (citations omitted), we said:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. " '[D]ue process," unlike some legal rules, is not a technical conception with a fixed **197** content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions ....' "

We hold that if California makes ordinary judicial process available to respondent for resolving its contractual dispute, that process is due process.

[3] The California Labor Code provides that "the contractor or his or her assignee" may sue the awarding body "on the contract for alleged breach thereof" for "the recovery of wages or penalties." §§ 1731, 1732 (West Supp.2001). There is no basis here to conclude that the contractor would refuse to assign the right of suit to its subcontractor. In fact, respondent stated at oral argument that it has sued awarding bodies in state superior court pursuant to § § 1731-1733 of the Labor Code to recover payments withheld on previous projects where it served as a subcontractor. See Tr. of Oral Arg. 27, 40-41, 49-50. Presumably, respondent brought suit as an assignee of the contractors on those projects, as the Code requires. § 1732 (West Supp.2001). Thus, the Labor Code, by allowing assignment, provides a means by which a subcontractor may bring a claim for breach of contract to recover wages and penalties withheld.

[4] Respondent complains that a suit under the Labor Code is inadequate because the awarding body retains the wages and penalties "pending the outcome of the **1452 suit," § 1731, which may last several years. Tr. of Oral Arg. 51. A lawsuit of that duration, while undoubtedly something of a hardship, cannot be said to deprive respondent of its claim for payment under the contract. Lawsuits are not known for expeditiously resolving claims, and the standard practice in breach-of-contract suits is to award damages, if appropriate, only at the conclusion of the case.

[5] Even if respondent could not obtain assignment of the right to sue the awarding body under the contract, it appears that a suit for breach of contract against the contractor remains available under

California common law. See 1 ***198** B. Witkin, Summary of California Law §§ 791, 797 (9th ed.1987) (defining breach as the "unjustified or unexcused ... failure to perform a contract" and describing the remedies available under state law). To be sure, § 1732 of the Labor Code provides that suit on the contract against the awarding body is the "exclusive remedy of the contractor or his or her assignees" with respect to recovery of withheld wages and penalties. § 1732 (West Supp.2001). But the remedy is exclusive only with respect to the contractor and his assignees, and thus by its terms not the exclusive remedy for a subcontractor who does not receive assignment. See, *e.g., J & K Painting Co., Inc. v. Bradshaw,* 45 Cal.App.4th 1394, 1402, 53 Cal.Rptr.2d 496, 501 (1996) (allowing subcontractor to challenge Labor Commissioner's action by petition for a writ of the mandate).

[6][7] In *J & K Painting,* the California Court of Appeal rejected the argument that § 1732 requires a subcontractor to obtain an assignment and that failure to do so is "fatal to any other attempt to secure relief." *Id.,* at 1401, n. 7, 53 Cal.Rptr.2d, at 501, n. 7. The Labor Code does not expressly impose such a requirement, and that court declined to infer an intent to "create remedial exclusivity" in this context. *Ibid.* It thus appears that subcontractors like respondent may pursue their claims for payment by bringing a standard breach-of-contract suit against the contractor under California law. Our view is necessarily tentative, since the final determination of the question rests in the hands of the California courts, but respondent has not convinced us that this avenue of relief is closed to it. See *id.,* at 1401, and n. 4, 53 Cal.Rptr.2d, at 500, and n. 4 (noting that the contractor might assert a variety of defenses to the subcontractor's suit for breach of contract without evaluating their soundness). As the party challenging the statutory withholding scheme, respondent bears the burden of demonstrating its unconstitutionality. Cf. *INS v. Chadha,* 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (statutes presumed constitutional). We ***199** therefore conclude that the relevant provisions of the California Labor Code do not deprive respondent of property without due process of law. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

121 S.Ct. 1446, 532 U.S. 189, 149 L.Ed.2d 391, 143 Lab.Cas. P 59,189, 6 Wage & Hour Cas.2d (BNA) 1537, 1 Cal. Daily Op. Serv. 3004, 2001 Daily Journal D.A.R. 3701, 14 Fla. L. Weekly Fed. S 167

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active service, these provisions are invalid as violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

" 'Where a statute is defective because of underinclusion ... there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.' " (*Califano v. Westcott* (1979) 443 U.S. 76, 89, 99 S.Ct. 2655, 2663, 61 L.Ed.2d 382 quoting conc. opn. of Harlan, J., in *Welsh v. United States* (1970) 398 U.S. 333, 361, 90 S.Ct. 1792, 1807, 26 L.Ed.2d 308.) Being guided by the intent of the Legislature to aid veterans, and the agreement of the parties that extension of benefits is the appropriate remedy, we direct that the second remedial alternative be embraced.

We affirm the judgment of the Court of Appeal and remand to the Court of Appeal with directions to remand the cause to the superior court for further proceedings not inconsistent with this opinion.

LUCAS, C.J., and PANELLI, KENNARD, ARABIAN, BAXTER and GEORGE, JJ., concur.

824 P.2d 643

1 Cal.4th 976

[976] **LUSARDI CONSTRUCTION COMPANY, Plaintiff and Respondent,**

v.

Lloyd W. AUBRY, Jr., as Labor Commissioner, etc., et al., Defendants and Appellants.

No. S011121.

Supreme Court of California, In Bank.

Feb. 24, 1992.

Contractor filed action for declaratory and injunctive relief against the enforcement of prevailing wage laws on a hospital construction project. The Superior Court, San Diego County, No. 579903, Vincent P. DiFiglia, J., entered summary judgment for contractor and enjoined Division of Labor Standards Enforcement from attempting to enforce prevailing wage law provisions as to hospital project. The Court of Appeal, 259 Cal.Rptr. 250, affirmed. The Supreme Court granted review, 265 Cal.Rptr. 111, superseding the opinion of the Court of Appeal, and, in an opinion by Kennard, J., held that: (1) statutory obligation to pay prevailing wage law on public works project had an independent statutory basis; (2) Director of Department of Industrial Relations was statutorily authorized to make administrative determination that contract for the construction of a public improvement was one for public works within meaning of prevailing wage law; (3) doctrine of equitable estoppel did not prevent Director from proceeding against contractor absent privity or identity of interest between Director and local hospital district involved in project; but (4) equitable considerations precluded imposition of statutory penalties against public work contractor for failing to pay prevailing wage where contractor acted in good faith.

Judgment of Court of Appeal reversed.

Panelli, J., filed concurring and dissenting opinion, in which Baxter, J., joined.

Arabian and Baxter, JJ., each filed concurring and dissenting opinions.

1. Labor Relations ⇐1268

Overall purpose of the prevailing wage law for construction projects financed in whole or in part by public funds is to protect and benefit employees on public works projects. West's Ann.Cal.Labor Code §§ 1720–1861.

2. Labor Relations ⇐1268

The obligation of a contractor on a public works project to pay the prevailing wage flows from the statutory duty to pay

the prevailing wage imposed on the contractor independent of any contractual requirement. West's Ann.Cal.Labor Code §§ 1773.2, 1775, 1776(g), 1777, 1777.5.

3. Statutes ⇐184

The object a statute seeks to achieve is of primary importance in statutory interpretation.

4. Labor Relations ⇐1268

The prevailing wage law applied to public works construction projects, regardless of whether the contractor and public entity included in the contract language which required compliance with the prevailing wage law. West's Ann.Cal.Labor Code §§ 1773.2, 1775, 1776(g), 1777, 1777.5.

5. Labor Relations ⇐1268

Director of the Department of Industrial Relations has the authority to determine that a construction project is a "public work" within the meaning of the Labor Code and thus subject to the statutory requirement that prevailing wages be paid. West's Ann.Cal.Labor Code §§ 50.5, 51, 54, 55, 59.

See publication Words and Phrases for other judicial constructions and definitions.

6. Administrative Law and Procedure ⇐388

Labor Relations ⇐513

Director of the Department of Industrial Relations has plenary authority to promulgate rules to enforce the Labor Code. West's Ann.Cal.Labor Code §§ 50.5, 51, 54, 55, 59.

7. Administrative Law and Procedure ⇐442

Constitutional Law ⇐275(3)

Labor Relations ⇐598

Determination by Director of Department of Industrial Relations that a project was a public work was not an "adjudication" resulting in a deprivation requiring procedural due process; director was authorized only to bring charges in court against contractor for failing to pay prevailing wage, but the court had sole power to determine whether contractor was liable for any underpayment and to make binding order that payments be made. West's Ann.Cal.Labor Code § 1775.

See publication Words and Phrases for other judicial constructions and definitions.

8. Constitutional Law ⇐251.6

A person against whom criminal or civil charges may be filed has no procedural due process right to notice and a hearing until and unless an executive branch actually files formal civil or criminal charges. U.S.C.A. Const.Amends. 5, 14.

9. Administrative Law and Procedure ⇐453, 470

Constitutional Law ⇐275(3)

Labor Relations ⇐1268

Determination by Director of Department of Industrial Relations that hospital construction project was a public work to which prevailing wage law applied, did not implicate any procedural due process rights of contractor, who had no right to notice and hearing unless and until the director officially brought court action to recover amounts due under prevailing wage law. West's Ann.Cal.Labor Code § 1775; U.S.C.A. Const.Amends. 5, 14.

10. Constitutional Law ⇐275(3)

Labor Relations ⇐1268

Contractor failed to show that any application of prevailing wage laws against it requiring payment of higher wages to its employees on hospital construction project or subjecting it to penalties for failing to comply with prevailing wage laws amounted to "retroactive enforcement" in violation of state and federal due process guarantees, as contractor's obligation to pay prevailing wages on public work was statutory in nature. West's Ann.Cal.Labor Code § 1775; U.S.C.A. Const.Amends. 5, 14.

11. Estoppel ⇐62.2(2)

Equitable estoppel could not be used to bar the Director of the Department of Industrial Relations from determining that a hospital construction project was a public work, as there was no privity or identity of interest between the local public hospital district, which had represented project not to be a public work, and the Director of the Department of Industrial Relations.

2. Estoppel ⇐52.15

In order for equitable estoppel to apply, the party to be estopped must have been aware of the facts, that party must either intend that its act or omission be acted upon or must so act that the party asserting estoppel has a right to believe it was intended, the party asserting estoppel must be unaware of the true facts, and the party asserting estoppel must rely on the other party's conduct to its detriment.

13. Estoppel ⇐62.1

Even when all elements of equitable estoppel are present, estoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of public.

4. Administrative Law and Procedure ⇐496

The acts of one public agency will bind another public agency only when there is privity or an identity of interests between the agencies.

15. Labor Relations ⇐1541

Equitable considerations precluded imposition of statutory penalties against a public works contractor for failing to pay prevailing wage where the contractor acted in good faith in entering into contract on the basis of public hospital district's representations, assertedly on the advice of its attorneys, that the project was not subject to the prevailing wage law; thus contractor's exposure to liability was limited to the amount of underpayments. West's Ann.Cal.Labor Code §§ 1720(a), 1773.2, 1775.

16. Forfeitures ⇐9
Penalties ⇐11

When a party incurs a loss in the nature of a forfeiture or penalty, but makes full compensation to the injured party, he or she may be relieved from forfeiture or penalty except when there has been a grossly negligent, willful or fraudulent breach of duty. West's Ann.Cal.Civ.Code § 3275.

17. Constitutional Law ⇐69

Court would not issue advisory opinion on constitutionality of prevailing wage law penalty provision. West's Ann.Cal.Labor Code § 1776(f).

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[981]H. Thomas Cadell Jr., Dept. of Indus. Relations, Chief Counsel, D.I.R., San Francisco, for defendants and appellants.

John W. Prager Jr., Santa Ana, for plaintiff and respondent.

KENNARD, Justice.

The prevailing wage law governs wages and other conditions of employment on public works, which include "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds...." (Lab.Code, § 1720, subd. (a); all further unlabeled statutory references are to the Labor Code.) "Public works" contracts awarded to private contractors must include stipulations requiring the contractors and subcontractors to pay their employees no less than the applicable prevailing wage rates, as determined by the Director of the Department of Industrial Relations (the Director). (§§ 1773.2, 1775.)

This case involves an $18 million expansion of a public hospital. To keep the construction costs as low as possible, the public entity entered into a written agreement with a third party corporation, which appointed the public [982]entity as its agent for all purposes on the construction project. The public entity, purportedly acting as agent for the third party corporation, then hired a private contractor to construct the project, without entering into the statutorily required stipulations that the contractor pay its employees the prevailing wage rates.

The Director sought to require the contractor to pay its employees prevailing wages; the contractor then brought this action challenging enforcement of the law against it. The trial court granted injunctive and declaratory relief, and the Court of Appeal affirmed, concluding on constitutional and equitable grounds that the Director could not enforce the prevailing wage law against the contractor.

This case involves the following issues:

First, does the prevailing wage law apply only when the contractor agrees to comply with it as part of the contract, or does the obligation to pay prevailing wages have an independent statutory basis?

Second, is the Director statutorily authorized to make the administrative determination that a contract for the construction of a public improvement is one for a public work? If so, does the making of such a determination constitute an adjudication, so that procedural due process protections are required?

Third, does the doctrine of equitable estoppel preclude any determination that in this case the contractor is bound by the prevailing wage law?

Fourth, is a civil penalty sought to be imposed on the contractor by the state invalid?

We hold that the statutory obligation to pay the prevailing wage does not depend on the contractor's assent, that the Director may validly and constitutionally determine that a given project is for a public work, and that the doctrine of equitable estoppel does not prevent the Director from proceeding against the contractor. We emphasize, however, that the contractor may be entitled to indemnity from the public entity if it reasonably relied on the public entity's representations that the project was not subject to the prevailing wage law, and that when, as here, a contractor does rely in good faith on such representations, equity prohibits the imposition of statutory penalties against the contractor for failing to pay the prevailing wage.

We conclude that the judgment of the Court of Appeal should be reversed.

1983 FACTS

The parties stipulated to these facts: Tri–City Hospital District (the District) is a public hospital district and an independent political subdivision of the State of California. In 1983, the District wanted to expand its hospital facilities. On June 28, 1983, the District entered into a written agreement with Imperial Municipal Services Group, Inc. (Imperial), a private corporation, for the construction of new facilities at Tri–City Hospital (the Expansion Project). The contract with Imperial specified that the sole role of Imperial was that of the seller of the property, and that the District was appointed as Imperial's "agent and attorney-in-fact for all purposes respecting construction of the Expansion Project, including, without limitation, the engagement of contractors ... and the management and supervision of the construction of the Expansion Project." The contract further provided that "Purchaser [the District], as agent, shall cause contractors under such contracts to ... pay prevailing wages in accordance with the California Labor Code...."

Although Lusardi Construction Company (Lusardi) had served as a contractor on many public works, it made a business decision not to perform any public works contracts after 1980. During its negotiations with the District, Lusardi told the District that it did not enter into contracts for the construction of public works. The District represented to Lusardi that: (1) the Expansion Project was a private work and not a public work under the prevailing wage law, and therefore the payment of prevailing wages and keeping of payroll records was not required; (2) the District had received legal opinions determining that the Expansion Project was not a public work; and (3) Lusardi should compute its construction costs on the basis that the project was not a public work. Lusardi relied on the District's representations in calculating its construction costs.

With the District purportedly acting as Imperial's "agent," Imperial and Lusardi then entered into a contract for the construction of the Expansion Project. Lusardi agreed to construct a "four-phase," 108,000–square-foot addition to Tri–City Hospital at a maximum cost of $18,350,000. The contract between Imperial and Lusardi did not refer to prevailing wages.

In July 1983, Lusardi began work on the project. Lusardi and its subcontractors did not pay the prevailing wage, and did not comply with prevailing wage law require-

ments governing the hiring of apprentices and the maintenance of certified payroll records. After two and one-half years, Lusardi had completed significant portions of the project.

In January 1986, the Director informed the District in writing of his tentative determination that the Expansion Project was a public work. In 1984 May, the Division of Labor Standards Enforcement (the DLSE), a part of the Department of Industrial Relations (the Department), requested Lusardi to submit payroll records, and warned that failure to comply would subject Lusardi to statutory penalties. In August, the Department's Director notified Lusardi and the District that he had made a final determination that the Expansion Project was a public work. In September, the Division of Apprenticeship Standards (the DAS), another arm of the Department, requested evidence of compliance with the statutory apprenticeship requirements from Lusardi.

When Lusardi did not submit the certified payroll records, the DLSE sent a "penalty assessment letter" to the District in November 1986, with a copy to Lusardi. The DLSE purported to assess a statutory penalty of $25 per day per employee, calculated on the basis of a minimum of 200 employees, retroactive to August 1986. Although the construction contract provided that Lusardi was paid by Imperial and not by the District, the DLSE directed the District to withhold future payments due Lusardi, and to increase the amount withheld by $5,000 a day for each day of noncompliance beyond November 13, 1986.

The DAS wrote to Lusardi on November 13, 1986, that if it did not receive satisfactory proof of compliance with the statutory apprenticeship requirements within five days of the letter's receipt, it would initiate "proceedings for determination of willful noncompliance ... pursuant to Labor Code section 1777.7...." The DLSE and the DAS warned Lusardi that it could be subject to back-wage payments, civil penalties, public work debarment, and civil and administrative litigation.

In November 1986, Lusardi filed this lawsuit and ceased all work on the Expansion Project. Lusardi's complaint sought declaratory and injunctive relief, alleging that the prevailing wage provisions of the Labor Code could not lawfully be applied to it consistent with due process.[1]

The trial court issued a temporary restraining order and a preliminary injunction restraining defendants from enforcing or attempting to enforce the prevailing wage law against Lusardi. It subsequently granted Lusardi's motion for summary judgment. Based on the stipulated facts, the trial court ruled that the prevailing wage law could not be applied to Lusardi because of 1985 the absence of the requisite contractual provisions and because Lusardi's due process rights had been violated.

The trial court determined that under the prevailing wage law the responsibility for ensuring that the prevailing wage provisions were in a public work contract was on the agency awarding the contract. Because the contract contained no provisions requiring the prevailing wage to be paid, the trial court ruled that Lusardi had acted reasonably as a matter of law in concluding that the prevailing wage law did not apply to it. The trial court also concluded that the Department's application of the public works standards to Lusardi violated Lusardi's right to reasonable notice and an opportunity to respond.

The Court of Appeal affirmed, holding that the Director's determination that the project was a public work without giving Lusardi notice and an opportunity to be heard violated procedural due process, and that the Director was barred under the doctrine of equitable estoppel from proceeding against Lusardi.

1. The DLSE filed a cross-complaint against the District alleging that the District had engaged in an unlawful scheme to circumvent the prevailing wage law in an effort to reduce its construction costs. The trial court sustained the District's demurrer without leave to amend, and dismissed the cross-complaint. The Court of Appeal affirmed, and we granted review. *Aubry v. Tri-City Hospital Dist.* (1989) 234 Cal.App.3d 510, 265 Cal.Rptr. 451, review granted March 15, 1990 (S011123), is now pending in this court.

DISCUSSION

1. *Overview of the Prevailing Wage Law*

The Legislature has declared that it is the public policy of California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a).) The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law. (§§ 1720–1861.)

[1] The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects. (*O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458, 127 Cal.Rptr. 799.) Subject to an exception not relevant here, under section 1720, subdivision (a), "public works" include "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds...." Section 1771 provides that not less than the general prevailing rate of wages must be paid to all workers employed on public works projects costing more than $1,000. Section 1770 requires the Director to make the prevailing wage rate determination, based on a method defined in section 1773.

[986] Section 1773 requires the public entity "awarding any contract for public work, or otherwise undertaking any public work," to obtain from the Director the general prevailing rate for each craft, classification or type of worker needed to execute the contract. The public entity must specify those rates in its call for bids, in bid specifications, and in the contract or, alternatively, must specify in those documents that the prevailing wage rates are on file in its principal office. (§ 1773.2.)

A contractor for a public works project that fails to pay the prevailing rate to its workers is liable for the deficiency and is subject to a statutory penalty. (§ 1775.) Deficiencies and penalties are to be withheld by the awarding body from sums due under the contract. (§ 1727.) If the money due a contractor from an awarding body is insufficient to pay all of the imposed penalties and deficiencies, or if the public works contract does not provide for payments by the awarding body to the contractor, the DLSE is authorized to bring an action to recover the deficiencies due and penalties assessed. (§ 1775.) [2]

2. *Statutory Obligation by Contractor on Public Work to Pay Prevailing Wages*

[2] The threshold issue here is whether the obligation of a contractor on a public works project to pay the prevailing wage is based exclusively on contractual provisions, or whether such an obligation flows from a statutory duty to pay the prevailing wage imposed on the contractor independent of

2. Each contractor and subcontractor must maintain complete and accurate records showing the names, occupations, addresses and Social Security numbers of all workers employed on public works projects, and detailing the actual hours worked and wages paid. (§ 1776, subd. (a).) The awarding body must insert stipulations in the construction contract requiring compliance with the recordkeeping provisions. (§ 1776, subd. (g).) Certified copies of these records must be made available for inspection or furnished upon request to representatives of the awarding body or the Department. (§ 1776, subd. (b).) Failure to do so within 10 days after receipt of the request subjects the contractor or subcontractor to forfeiture of $25 "for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated." (§ 1776, subd. (f).) Additionally, noncompliance may lead to prosecution on a misdemeanor charge. (§ 1777.)

This statutory scheme also governs the employment of apprentices. Section 1777.5 requires the employment of apprentices on public works projects under the terms of a statutory formula, and mandates that the awarding body insert stipulations in the construction contract requiring compliance with the apprenticeship provisions of the prevailing wage law. Section 1777.7 specifies sanctions for failure to comply with the apprenticeship requirements, including debarment from public works contracting and monetary penalties.

Any public agent who wilfully fails to comply with any provision of the prevailing wage law is guilty of a misdemeanor. (§ 1777.)

any contractual requirement. The Court of Appeal implicitly assumed, without deciding, that the contractor's duty to pay prevailing wages arose from statute.

[987]As noted above, sections 1773.2, 1775, 1776, subdivision (g), and 1777.5 generally require the contracting public entity, either through specifications in the notice for bids or by stipulations in any resulting contract, to notify the contractor of the applicability of the prevailing wage law and the possibility of penalties and forfeitures in the event of noncompliance. Lusardi contends that these statutes reflect a legislative intent that the prevailing wage laws are enforceable only when a provision requiring their observance is contained in the contract between the public agency and the contractor. We disagree.

Lusardi's proposed interpretation violates section 1771, which provides that "[e]xcept for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages ... *shall be paid* to all workers employed on public works." (Italics added.) By its express language, this statutory requirement is not limited to those workers whose employers have contractually agreed to pay the prevailing wage; it applies to "*all* workers employed on public works." (Italics added.)

[3] Moreover, Lusardi's proposed interpretation would defeat the legislative objective. The object that a statute seeks to achieve is of primary importance in statutory interpretation. (*People v. Jeffers* (1987) 43 Cal.3d 984, 997, 239 Cal.Rptr. 886, 741 P.2d 1127; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 669, 150 Cal.Rptr. 250, 586 P.2d 564.) The overall purpose of the prevailing wage law, as noted earlier, is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 123, 270 Cal.Rptr. 75; *O.G. Sansone Co. v. Department of Transportation, supra*, 55 Cal.App.3d at pp. 458–460, 127 Cal.Rptr. 799.) These objectives would be defeated if we were to accept Lusardi's interpretation.

[4] As the facts of this case show, both the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law. To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects [988]that would otherwise be deemed public works. To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view.

Lusardi argues that the legislative history of the prevailing wage law supports its position that the law applies only when the contractor agrees to it in writing. Yet there is nothing in the legislative history that establishes an intent by the Legislature that contractors on public works projects who failed to execute such agreements are not bound by the prevailing wage laws.[3] The awarding body and con-

3. At least one feature in the legislative history of the statutory scheme strongly favors the conclusion that the Legislature intended the contractor's obligation to pay prevailing wages to be both statutory and contractual. Section 1781, before its repeal in 1957 (Stats.1957, ch. 396, § 1, p. 1240), read: "The penalties and remedies provided for in sections 1775 and 1777 shall be the exclusive penalties and remedies against any contractor or subcontractor for any violation of sections 1770 to 1777 *or* of the provisions inserted in any call for bids, specifications or contracts pursuant thereto." (Italics added.)

tractor are required to take steps to assure that the prevailing wage law is observed. It does not follow, however, that the law is intended to be optional with the contracting parties.

For these reasons, Lusardi's argument that the prevailing wage law applies only when the contractor assents to it in writing should be rejected.

3. *Director's Authority to Determine Coverage*

[5] The Court of Appeal assumed for the purpose of analysis that the Director could make the determination that a project was a public work. Lusardi contends that the Director has no statutory authority to determine that a construction project is a "public work" within the meaning of the Labor Code, and thus subject to the statutory requirement that "prevailing wages" be paid. We disagree.

The Director is the chief officer of the Department. (§ 51.) The stated function of the Department is to "foster, promote and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment." (§ 50.5.) The Director's statutory authority is broad: "The director shall perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities, and carry out and effect all purposes vested by law in the department, [989] except as otherwise expressly provided by this code." (§ 54.) The Director possesses explicit authority to make rules. Section 55 provides in pertinent part: "[T]he director may, in accordance with the provisions of [the Administrative Procedure Act], make such rules and regulations as are necessary to carry out the provisions of this chapter and to effectuate its purposes." [4]

[6] These statutes establish a legislative intent to give the Director plenary authority to promulgate rules to enforce the Labor Code. Although no statute expressly gives the Director the authority to make regulations governing coverage, such authority is implied. " '[T]he authority of an administrative board or officer, ... to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted.' " (*California Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 303, 140 P.2d 657.) Thus, this court has previously upheld labor regulations under the same general statutory scheme "for which there is no express statutory or constitutional authority." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 330, 19 Cal.Rptr. 492, 369 P.2d 20.)

Under these standards, the Director's interpretation of the statutes as authorizing the making of regulations governing coverage of the prevailing wage laws is well within the broad scope of his authority. Exercising that authority, the Director has made regulations governing coverage of the prevailing wage law.[5] Under the regu-

The Legislature's use of the disjunctive "or" in this provision indicates that it viewed contractors and subcontractors as liable *either* for violation of their statutory obligation to pay prevailing wages, *or* for violation of their contractual stipulations to do so. The repeal of the statute does not change this, but merely clarifies that the Legislature no longer intends the statutory remedies to be exclusive. (See Comment, *Employee Rights: Enforcement of the Public Works Prevailing Wage Obligation* (1981) 14 Loyola L.A.L.Rev. 311, 328, fn. 110.)

4. Section 59, part of the same chapter as sections 54 and 55, provides: "The department through its appropriate officers shall administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the department."

5. At the time of the coverage determination in this case, California Administrative Code, title 8, section 16207.5 provided in relevant part: "The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues." (This regulation has since been recodified at California Code of Regulations, title 8, section 16100.) California Administrative Code, title 8, section 16207.7 specified: "Any issue as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party shall be referred to the Director, except that if it involves an issue raised after a contract is let, DLSE shall exercise discretion in the

lations, issues of coverage of the prevailing wage law are determined by the Director or the DLSE as the Director's designee. Lusardi does not contend that the regulations themselves are invalid. For the reasons discussed earlier, we hold that the Director's interpretation of his statutory authority is reasonable, and that the Director has the power to determine that a construction project is a "public work."

[990] 4. *Due Process Implications of Director's Coverage Determinations*

Lusardi contends that the Director's determination in August 1986 that the Expansion Project was a public work without affording Lusardi notice and an opportunity to be heard violated its right to procedural due process under the state and federal Constitutions. This argument mirrors the reasoning of the Court of Appeal, which held that because the administrative finding that a project was a public work was of great importance to the contractor, procedural due process attached. We disagree.

The Court of Appeal correctly observed that procedural due process "does not require any particular form of notice or type of hearing." Thereafter, the Court of Appeal focused exclusively on the importance of the interests involved. The court stated that whether the project was a public work was "a matter of great importance to the contractor." The court found it significant that the Director had promulgated regulations allowing for hearings to determine prevailing wage rates; this was, in the court's view, another "important determination" to be made in connection with the prevailing wage law, though not directly relevant to this case. The court observed that it could "conceive of no adjudication under the prevailing wage law more important to a contractor than the foundational adjudication of the very nature of the job—whether it is 'public' or 'private' works." The court then concluded that Lusardi's due process rights had been violated by this adjudication.

[7] The Court of Appeal erred in assuming that the Director's determination that the project was a public work is an "adjudication" resulting in a deprivation requiring procedural due process.

Careful review of the statutory scheme, however, makes clear that the Director has no power to adjudicate whether a project is a public work, or to independently deprive a contractor such as Lusardi of any property interest. Instead, when the contract does not provide for a money payment from the awarding body to the contractor, the Director is authorized under the statute only to bring charges in court against a contractor for failing to pay the prevailing wage. The court has the sole power to determine whether the contractor is liable for any underpayment, and to make a binding order that the payments be made. The Director's role in this process is purely prosecutorial.

The statute governing this case is section 1775. It provides, in pertinent part: "[I]n all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall [991] notify the [DLSE] of the violation and the [DLSE], if necessary with the assistance of the awarding body, *may maintain an action in any court of competent jurisdiction* to recover the penalties and the amounts due provided in this section." (Italics added.)

Here, the contract did not provide for a money payment from the District to Lusardi. Accordingly, the Director, through the DLSE, was authorized to bring an action in court for recovery of the underpayment. Contrary to the Court of Appeal's assumption, the Director was not authorized to, and did not, "adjudicate" anything. The Director's role in deciding that the prevailing wage law had been violated was no more "adjudicatory" than a district attor-

enforcement of the law.... DLSE shall refer ... any issue as to coverage which is not routine to the Director's office as soon as possible to coordinate with Departmental policy." (This regulation appears now in somewhat different language in California Code of Regulations, title 8, section 16301.)

ney's decision that a criminal statute has been violated.

It is true that after the Director made his determination that the project was a public work, he caused the DLSE to direct the District to withhold purported future payments to Lusardi. This did not result in a deprivation of property. Because "the contract does not provide for a money payment by the awarding body to the contractor" (§ 1775), this purported direction to withhold payments was meaningless.[6] The DLSE ordered the District to perform an impossible act.

The Director did not order Lusardi to begin paying the prevailing wage, nor did the Director have any power to do so. The DAS did warn Lusardi that if it did not comply with the statutory apprenticeship requirements, the DAS would initiate "proceedings for determination of willful noncompliance ... pursuant to ... section 1777.7...." The DAS has not, however, initiated such proceedings.

Thus, what the Director and his designees did in this case was to notify the District and Lusardi that, in the view of the authorities, the project was a public work and the prevailing wage law applied. There is no statute requiring the Director to so notify an awarding body or contractor; apparently the Director did so in the hope that voluntary compliance could avoid the necessity to bring an action under section 1775. But before the Director could bring a court action to recover the amounts due under section 1775, Lusardi sued the Director, claiming its due process rights were violated.

[8, 9] 1992There is apparently no case that is precisely on point. But there is a substantial body of case law that is wholly supportive of the conclusion that a party in Lusardi's situation has no procedural due process rights to notice or a hearing until an executive branch official files formal civil or criminal charges against it.

Thus, in *SEC v. Jerry T. O'Brien, Inc.* (1984) 467 U.S. 735, 742, 104 S.Ct. 2720, 2725, 81 L.Ed.2d 615, the high court stated that "because an administrative investigation adjudicates no legal rights," the due process clause of the federal Constitution is "not implicated...." In the context of administrative process that, unlike the main procedure at issue here, does include an administrative hearing, the courts have consistently held that "due process do[es] not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." (*Opp Cotton Mills v. Administrator* (1941) 312 U.S. 126, 152–153, 61 S.Ct. 524, 536, 85 L.Ed. 624; see *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 303, 101 S.Ct. 2352, 2374, 69 L.Ed.2d 1.)

In the more closely related context of official action that, like a criminal prosecution and the procedure under section 1775, contemplates not an administrative hearing but a court trial after an executive official has filed charges, the courts have also refused to hold that procedural due process requires notice and a hearing prior to the filing of charges.

A representative analysis is found in *Baltimore Gas & Elec. Co. v. Heintz* (4th Cir.1985) 760 F.2d 1408, 1419, cert. den. 474 U.S. 847, 106 S.Ct. 141, 88 L.Ed.2d 116: "The mere determination to enforce the statute or regulation in some cases and not to enforce [it] in others, without more, may entitle one to an explanation from the agency designed to facilitate judicial review of the decision, but such an action does not constitute a deprivation of due process.

6. In this case the District, though it did not directly award the contract to Lusardi, is the awarding body within the meaning of the statutory scheme. As explained earlier, the District entered into a contract under which Imperial, a private corporation, would build the Expansion Project and sell the completed Expansion Project to the District; the contract provided that the District was appointed as Imperial's "agent ... for all purposes ... including, the engagement of contractors ... and the management and supervision of the Expansion Project." As Imperial's "agent," the District negotiated with Lusardi for the award of the construction contract. Under section 1722, "awarding body" means "department, board, authority, officer or *agent* awarding a contract for public work." (Italics added.)

That standard has 'generated an almost unbroken line of cases upholding prosecutors' powers to decide who and how to charge.' [Citations.]" (Accord, e.g., *United States v. Patterson* (9th Cir.1972) 465 F.2d 360, 361, cert. den. 409 U.S. 1038, 93 S.Ct. 516, 34 L.Ed.2d 487 ["It is sufficient if a hearing is had prior to the final order which deprives the person of his liberty."].)

Thus, the case law establishes that a person against whom criminal or civil charges may be filed has no procedural due process right to notice and a hearing until and unless an executive branch official actually files formal civil or criminal charges.

A contrary conclusion would result in serious mischief. For example, a place of prostitution that learned that the district attorney planned to file a |993civil "red light" action against it to abate a nuisance could demand that, before charges were filed, a hearing be held on the prosecutor's decision to file. (But see Pen.Code, § 11225 et seq.) Or the Attorney General, having decided to seek an injunction under the unfair competition statute to halt a campaign of false advertising targeting senior citizens, would be required to subject the decision to proceed to a hearing. (But see Bus. & Prof.Code, § 17200 et seq.) Or the Division of Medical Quality of the Medical Board of California, having determined as a result of an investigation that charges should be brought against a physician for unprofessional conduct, would be required to provide the physician, under Lusardi's theory, with notice and an opportunity to be heard before an accusation could be brought. (But see Gov.Code, § 11500 et seq.; Bus. & Prof.Code, § 2220 et seq.) The examples could easily be multiplied.

The Director's decision that a project is a public work may lead to further action that triggers due process rights. Should the DLSE seek to recover underpayments of the prevailing wage from Lusardi in a court action under section 1775, Lusardi will be entitled to fully litigate the issue of its liability in the trial court. But at the time the Director's preliminary determination is made, no process is due.

5. *Coverage Determinations and Judicial Powers*

Lusardi argues that the Director's determination that a contract is a public work impermissibly intrudes on judicial powers under the standards set forth in *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 261 Cal.Rptr. 318, 777 P.2d 91. We do not agree.

In *McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d 348, 261 Cal.Rptr. 318, 777 P.2d 91, this court held that administrative agencies that are legislatively authorized to hold hearings and order relief may constitutionally do so when the exercise of such power is reasonably necessary to effectuate the agency's legitimate regulatory purposes, and "the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." (*Id.,* at p. 372, 261 Cal.Rptr. 318, 777 P.2d 91, italics omitted.)

Here, the Director's determination that a project is a public work does not violate the principles set forth in *McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d 348, 261 Cal.Rptr. 318, 777 P.2d 91. The Director's determination cannot be accurately characterized as "judicial," because it does not encompass the conduct of a hearing or a binding order for any type of relief.

6. *Lusardi Has Not Demonstrated Impermissible "Retroactive Enforcement" of the Prevailing Wage Law*

[10] Lusardi argues that *any* application of the prevailing wage laws against it requiring the payment of higher wages to its employees on the |994Expansion Project, or subjecting it to penalties for failing to comply with the prevailing wage laws, violates state and federal due process guarantees and amounts to impermissible "retroactive enforcement." Lusardi's theory, which the Court of Appeal found unnecessary to address, is that because the contract contained no provision requiring it to pay the prevailing wage, it had no notice of such a requirement. In support of this

theory Lusardi relies on *Lambert v. California* (1957) 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228.

Lusardi's retroactive enforcement argument is premised on its contention that the obligation to pay prevailing wages arises solely from the contract. As shown above, however, this is incorrect; the obligation of a contractor to pay prevailing wages on a public work is statutory in nature.

In *Lambert v. California, supra,* 355 U.S. 225, 78 S.Ct. 240, the United States Supreme Court held that an ordinance making it a criminal offense for a person convicted of a felony to fail to register with a city if the person remained for more than five days in the city was unconstitutional as applied to a person who had no actual knowledge of the ordinance, when no showing was made of the probability of such knowledge. *Lambert* solely concerns the state of mind requisite to an individual's criminal liability. (*Texaco, Inc. v. Short* (1982) 454 U.S. 516, 537 fn. 33, 102 S.Ct. 781, 796 fn. 33, 70 L.Ed.2d 738; see *United States v. Freed* (1971) 401 U.S. 601, 608–609, 91 S.Ct. 1112, 1117–1118, 28 L.Ed.2d 356.) Thus, it has no application here.

7. *Equitable Issues*

[11] The Court of Appeal was persuaded that the doctrine of equitable estoppel bars the Director from determining that the Expansion Project was a public work. Lusardi renews that contention here, arguing that it relied on the District's representations that the project was not subject to the prevailing wage law, and that to now allow the Director to enforce the prevailing wage law against it would violate equitable principles. Not so.

[12, 13] Generally, four elements must be present for the doctrine of equitable estoppel to apply. First, the party to be estopped must have been aware of the facts. Second, that party must either intend that its act or omission be acted upon, or must so act that the party asserting estoppel has a right to believe it was intended. Third, the party asserting estoppel must be unaware of the true facts. Fourth, the party asserting estoppel must rely on the other party's conduct, to its detriment. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 398–399, 261 Cal.Rptr. 310, 777 P.2d 83.) Even when these elements are present, estoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of the 1995 public. (*Ibid.;* accord, e.g., *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488, 91 Cal.Rptr. 23, 476 P.2d 423.)

Lusardi's attempt to invoke the doctrine against the Director must fail because the elements of equitable estoppel are entirely lacking against the Director. Lusardi does not and cannot claim that it justifiably relied on acts or omissions of the Director. Rather, Lusardi argues that the actions of the District led to Lusardi's reliance, and that the acts of the District should be attributed to the Director.

[14] The acts of one public agency will bind another public agency only when there is privity, or an identity of interests between the agencies. (*City and County of San Francisco v. Grant Co.* (1986) 181 Cal.App.3d 1085, 1092, 227 Cal.Rptr. 154; *California Tahoe Regional Planning Agency v. Day & Night Electric, Inc.* (1985) 163 Cal.App.3d 898, 904–905, 210 Cal.Rptr. 48; see *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 397–399, 29 Cal.Rptr. 657, 380 P.2d 97.)

In this case, there is no privity or identity of interest between the District and the Director. Instead, there is a direct and palpable conflict. As its actions clearly evidence, the District had an interest in obtaining the lowest possible cost for construction of the hospital expansion project. The interest of the Director is in enforcing the prevailing wage laws. Contractors that do not pay the prevailing wage to their workers enjoy a competitive advantage over contractors that do, and may be preferred by local government agencies for public works projects, because the construction dollar will purchase more when a contractor paying less than the prevailing wage is selected. The facts of this case

illustrate this conflict of interest: the District seeks to avoid the prevailing wage law, while the Director seeks to enforce it.

Lusardi argues that *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 237 Cal.Rptr. 546 (hereafter *Waters*) supports a finding that the Director is estopped from determining that the project is subject to the prevailing wage law. We disagree.

In *Waters, supra*, 192 Cal.App.3d 635, 237 Cal.Rptr. 546, a city published a notice for bids on a construction project stating that, under section 1773, prevailing wages were to be paid by the contractor, but failing to set forth the prevailing wage rates or to include a statement that the rates were on file with the city, as required by section 1773.2. The contractor consulted with a city architect, who mistakenly indicated that the prevailing rates for carpentry were considerably lower than the applicable rate established by the Director. Based on |996 this incorrect information, the contractor concluded that the rates paid by his carpentry subcontractor were greater than the prevailing wage. Thereafter, the DLSE determined that the carpenters had been underpaid; it levied a penalty for the underpayment, and ordered the city to withhold the amount of the underpayment plus the penalty from payments due the contractor. The contractor sued the DLSE. On appeal from a judgment in favor of the contractor, the appellate court held that although the contractor was liable for the underpayment, the DLSE was estopped by the actions of the city from collecting the penalty. (192 Cal.App.3d at pp. 639–642, 237 Cal.Rptr. 546.)

The *Waters* court declined to apply estoppel to preclude enforcement of the prevailing wage law against the contractor, and held that the contractor was liable for the difference between the amount paid and the prevailing wage rate. (*Waters, supra*, 192 Cal.App.3d at p. 639, 237 Cal. Rptr. 546.) Thus, *Waters* does not support an application of the doctrine of estoppel to preclude a determination that a project is a public work. Moreover, the *Waters* court never considered the question whether the city and the DLSE shared the requisite privity or identity of interests.

[15] *Waters* does, however, contain an insight of considerable value to this case. The *Waters* court concluded that there was no "strong rule of policy" that would require the imposition of a penalty on the contractor, who had reasonably and in good faith attempted to comply with the requirements of the prevailing wage law. (*Waters, supra*, 192 Cal.App.3d at pp. 641–642, 237 Cal.Rptr. 546.) We agree that in a proper case equitable considerations may preclude the imposition of statutory penalties against a public work contractor for failing to pay the prevailing wage. This is such a case. Here, Lusardi acted in good faith in entering into the contract on the basis of the District's representations, assertedly on the advice of its attorneys, that the project was not subject to the prevailing wage law. Under the circumstances of this case it would be inequitable for Lusardi to be held liable for penalties for failure to pay the prevailing wage. Lusardi's exposure to liability must be limited to the amount of underpayment.

[16] This conclusion comports with this state's policy, reflected in Civil Code section 3275, that when a party incurs a loss in the nature of a forfeiture or penalty, but makes full compensation to the injured party, he or she may be relieved from the forfeiture or penalty except when there has been a grossly negligent, willful or fraudulent breach of a duty. California courts have applied this principle when necessary to accomplish substantial justice. (See *Valley View Home of Beaumont, Inc. v. Department of Health Services* (1983) 146 Cal.App.3d 161, 168, 194 Cal.Rptr. 56.) Similarly, courts refuse to impose civil penalties against a party who acted with a good |997 faith and reasonable belief in the legality of his or her actions. (*Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, 263, 220 Cal. Rptr. 2; *No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8, 30, 123 Cal.Rptr. 589.) In this case substantial justice would not be achieved by a resolution that left Lusardi liable for statutory penal-

ties under section 1775 for failing to pay the prevailing wage when it acted in good faith and on the express representations of a governmental entity. Based on these equitable principles, Lusardi should also not be liable for penalties under either section 1777.7 (relating to failure to comply with the apprenticeship provisions of the prevailing wage law) or section 1813 (involving noncompliance with overtime provisions of the prevailing wage law) based on violations allegedly occurring before Lusardi ceased work on the project in this case.

We also note in connection with the equitable issues raised in this case that although the contract between Imperial and the District specified that the prevailing wage was to be paid, the stipulation of the parties makes clear that the District expressly represented to Lusardi that the construction project was not a public work and therefore the prevailing wage law did not apply, and that Lusardi relied in good faith on these representations. These facts strongly suggest that Lusardi has remedies against the District, Imperial, and perhaps others for indemnification of any sums it may be required to pay as a result of application of the prevailing wage law. (See generally, *Rozay's Transfer v. Local Freight Drivers L.* (9th Cir.1988) 850 F.2d 1321; *Southwest Administrators, Inc. v. Rozay's Transfer* (9th Cir.1986) 791 F.2d 769.) Moreover, if the District made material misrepresentations to Lusardi, as the stipulated facts suggest, Lusardi may be entitled to recover for all other consequential damages it suffered as a result of such wrongful conduct, in addition to indemnification for amounts due under the prevailing wage law. (Civ.Code, § 3333.)

8. *Section 1776 Penalties*

[17] Lusardi separately challenges numerous specific provisions of the prevailing wage law relating to penalties. The Court of Appeal did not reach Lusardi's specific challenges.

As described above, in May 1986 the DLSE directed Lusardi to submit certified payroll records and warned that failure to do so would subject Lusardi to statutory penalties. Lusardi did not comply with the request. In November 1986, the DLSE sent a "penalty assessment letter" to the District, with a copy to Lusardi. The letter purported to assess a statutory penalty of $25 per day per employee, under section 1776, subdivision (f), calculated on the basis that there were a minimum of 200 employees, and made retroactive to August 30, 1986. The DLSE directed the District to withhold $380,000 from future progress payments due Lusardi, and to increase the amount withheld by $5,000 per day for each day of noncompliance beyond November 13, 1986.

Lusardi contends that the penalties imposed against it violate procedural due process guarantees because they constitute a deprivation of its property without a hearing. Lusardi also argues that section 1776, subdivision (f), violates the prohibition of unreasonable searches and seizures under the Fourth Amendment to the United States Constitution. We do not reach the merits of these arguments because, as we shall explain, the DLSE's letter purporting to impose the penalty was ineffective.

Under subdivision (f) of section 1776, a contractor has 10 days in which to comply with a request to submit certified payroll records. If the contractor fails to do so, the statute provides: "[T]he contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon request of the [DAS] or the [DLSE], these penalties shall be withheld from progress payments then due."

In this case, there was no contract between Lusardi and the District. The only contract to which Lusardi was a party was the construction contract between it and Imperial. The District itself had no funds to withhold from Lusardi; thus, the DLSE's letter directing the District to withhold funds had no legal force.

Because the DLSE has taken no effective steps to impose a penalty on Lusardi under section 1776, subdivision (f), Lusardi is in

the same position as if the DLSE had never asserted the applicability of that subdivision. In this context, a ruling on the constitutionality of section 1776, subdivision (f), would be purely advisory. We have no assurance that Lusardi would refuse to comply with a renewed request for records. Nor is there any reason to believe that the DLSE would necessarily seek penalties before affording Lusardi an opportunity to contest the matter in court. We decline to reach the questions regarding the constitutionality of section 1776 in this hypothetical context. (See *Hodel v. Virginia Surface Min. & Reclam. Assn., supra*, 452 U.S. 264, 304, 101 S.Ct. 2352, 2374, 69 L.Ed.2d 1; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 173–174, 188 Cal.Rptr. 104, 655 P.2d 306.)

[999] 9. *Additional Issues*

Lusardi argues that sections 1727 through 1733 are unconstitutional because they authorize the seizure of property without a hearing, and that sections 1775, 1777.7 and 1813 are unconstitutional because they provide for excessive penalties that are imposed without a hearing. As we have explained earlier, Lusardi is not liable for penalties under the latter three sections based on any violation allegedly occurring before it ceased work on the Expansion Project. Accordingly, we do not address Lusardi's contentions regarding these sections.

Sections 1727 through 1733 generally govern the circumstances under which awarding bodies may withhold sums from contractors, and provide for recovery of withheld sums. As noted above, here there was no contract between the contractor and the awarding body, and no sums were or could have been withheld from Lusardi by the District. The Director has not sought to apply any of these statutes against Lusardi. Under the circumstances, sections 1727 through 1733 are inapplicable. We decline to address the merits of legal questions not posed by the facts of this case.

DISPOSITION

The judgment of the Court of Appeal is reversed.

LUCAS, C.J., and MOSK and GEORGE, JJ., concur.

PANELLI, Justice, concurring and dissenting.

I dissent from the majority's holding that the obligation of a contractor on a public works project to pay the prevailing wages arises from a statutory duty independent of any contractual agreement or notice to the contractor. (Maj. opn., *ante*, at pp. 842–844 of 4 Cal.Rptr.2d, at pp. 648–650 of 824 P.2d.) The majority bases its conclusion on the language of one of the public works law's provisions that the prevailing wage "'shall be paid to all workers employed on public works.'" (*Id.* at p. 843 of 4 Cal.Rptr.2d, at p. 649 of 824 P.2d, quoting Lab.Code, § 1771.[1]) The majority also asserts that requiring contractors to comply with the public works laws only when their contracts require it would defeat the legislative objective of ensuring that workers on public works be paid the prevailing wages. (Maj. opn., *ante*, at p. 843 of 4 Cal.Rptr.2d, at p. 649 of 824 P.2d.) I disagree with the majority's interpretation of the prevailing wage laws. In my view, the statutory scheme as a whole does not disclose a legislative intent to hold contractors liable for paying the prevailing wages when the contract does not require those wages to be paid; rather, it reflects a view that the Legislature intended contractors to be aware of their obligations under the prevailing [1000] wage laws before entering into a contract for public works. As a consequence, the result that the majority in this case reaches is patently unfair and, in my view, unconstitutional as a violation of due process; there is no evidence that the Legislature intended such a result.

In interpreting the prevailing wage laws, we must look at the statutory scheme as a whole in order to harmonize the various elements. (*Mattice Investments, Inc. v. Division of Labor Standards Enforce-*

1. All further statutory references are to the Labor Code unless otherwise noted.

ment (1987) 190 Cal.App.3d 918, 923, 235 Cal.Rptr. 502; *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489, 134 Cal. Rptr. 630, 556 P.2d 1081.) While it is true, as the majority states, that section 1771 provides that the prevailing wage "shall be paid to all workers employed on public works," it is also evident that the statutory scheme establishes detailed procedures designed to ensure that contractors are aware of their responsibilities under the public works laws before entering into a public works contract. (See §§ 1773.2, 1775, 1776, subd. (g), 1777.5.) In particular, the public body awarding the contract is required either to specify the prevailing wage in the call for bids, the bid specifications, and the contract itself, or to include a statement in those documents that copies of the prevailing rate of wages are on file and available for inspection. (§ 1773.2.) In addition, the awarding public body is required to have the contract include a stipulation that the contractor will comply with the forfeiture and penalty provisions if any workers employed by the contractor or any subcontractor are underpaid. (§ 1775.)

These provisions for precontract notice indicate that the Legislature intended contractors to be fully aware of their responsibility to pay the prevailing wages and of the consequences of failure to pay those wages before entering into a contract for the construction of public works. The Legislature also intended contractors to agree to those obligations in the contract. The statutory scheme can most reasonably be read to allow the prevailing wage laws to be enforced against the contractor only when the contract specifies that the project is a public work. The *stipulated* facts in this case indicate that Lusardi Construction Company's (Lusardi's) contract did not state that the prevailing wage laws were applicable; in fact, Lusardi's representative made clear that the company would not enter the contract if it was for a public works project. I do not believe that the Legislature intended contractors to be held liable for the prevailing wages under these factual circumstances.

This interpretation is consistent with that of the Courts of Appeal that have considered the question of when a contractor can be required to pay prevailing wages on a public works project. As will be discussed, those courts have held without exception, that the contractor could be held liable because, *in* [1001] *each case, the contractor had agreed in the contract to be subject to the prevailing wage laws.*

In *Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 270 Cal.Rptr. 75, the Court of Appeal held that a contractor could be required to pay the prevailing wage to workers who fell into a job classification for which the public entity awarding the contract had not specified the prevailing wage. The court reasoned that this deficiency did not relieve the contractor of its obligation to pay all its workers prevailing wages, because *the contractor had expressly agreed in the contract to pay prevailing wages.* (221 Cal.App.3d at pp. 125–126 & fn. 21, 270 Cal.Rptr. 75.)

Two cases in which payments were withheld from contractors after the contractors failed to ensure that prevailing wages were paid also conclude that the duty to pay prevailing wages arises from the contract. In *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799 the court held that contractor could be required to pay penalties and the difference between actual wages and the prevailing wage rate when a subcontractor failed to pay the prevailing wages. The court reasoned that the public works provisions of the Labor Code did not place an involuntary burden on the contractor, since "[the contractors'] execution of the contract with knowledge of the penalties to be imposed if they or their subcontractors failed to pay the prevailing wages required under the contract was voluntary, and constituted consent to the [prevailing wage provisions.] [Citation.]" (55 Cal. App.3d at p. 455, 127 Cal.Rptr. 799.) Therefore the court held that "[w]hen the contractor submits his bid *based on the prevailing wage determination* and freely enters into a contract for the public work involved, *in which contract he stipulates*

to be subject to the penalty provisions of the prevailing wage law, he cannot be heard to say that he was denied due process of law with respect to the enforcement of the penalty provisions." (*Ibid.*, emphasis added.)

The court in *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal. App.3d 635, 237 Cal.Rptr. 546 (*Waters*), applied a similar analysis. There, the contracting public entity withheld payments from a contractor to cover penalties and extra wages when a subcontractor failed to pay the prevailing rate. The city contracting for the project had not specified what the prevailing rates were, nor that those rates were on file in the city's office. However, the contract between the city and Waters, the contractor, did provide that the prevailing wage rates were to be paid to the workers. The court held that Waters could be required to pay the difference between the prevailing rates and the wages actually paid, *because "[t]he contract documents ... did alert Waters, as he so testified, that the wages must not be less* [1002] *than the prevailing general rate."* (192 Cal.App.3d at p. 640, 237 Cal.Rptr. 546, emphasis added.) [2] The court stated, "[w]hen a contractor freely enters into an agreement for a public work in which he stipulates to pay the prevailing wage rate ..., he will be required to comply with the terms of his contract." (*Id.* at p. 639, 237 Cal.Rptr. 546.)

Thus, the courts that have considered the applicability of the requirement to pay prevailing wages in circumstances in which the public entity did not fully comply with its obligations agree that *"the duty to pay the prevailing wage [is] triggered once the contractor so agree[s] in the contract."* (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc., supra,* 221 Cal.App.3d at p. 126, fn. 21, 270 Cal.Rptr. 75, emphasis added.) Under this analysis, a contractor is not liable for paying prevailing wages or for any penalties for underpayment unless he was on notice of the requirements at the time that he entered into the contract for the public work and agreed to pay the prevailing wages in the contract. I believe that this conclusion is correct.

Under the majority's interpretation, a contractor may be held liable for extra wages although he had no notice that the prevailing wage requirements would be applicable and, like Lusardi, he would not have entered into the contract if he had had that notice. In that case, if a contractor enters into a contract in a good faith belief that it is for a private work, *as the stipulated facts state that Lusardi did,* and the project is later determined to be a public work, the contractor would effectively have been forced against his will into accepting a public works contract. To say that the contractor will only be liable for the extra wages and not for any penalties does not mitigate the fundamental unfairness of this outcome. I see no reason to conclude that the Legislature intended such an unfair result. (See *County of Madera v. Gendron* (1963) 59 Cal.2d 798, 803, 31 Cal.Rptr. 302, 382 P.2d 342 [court reluctant to construe statute in a way that would cause "harsh and unjust result" in the absence of "clear indication" of legislative intent]; see also *Johnson v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 235, 242, 207 Cal.Rptr. 857, 689 P.2d 1127.)

The majority attempts to soften the harshness of its holding by saying that Lusardi may be entitled to indemnity from the Tri-City Hospital District (the District). In my view, the fundamental unfairness remains. The majority's conclusion would place on Lusardi the primary responsibility for paying the excess wages, as well as the additional burden of showing that it was entitled to indemnity. This is a considerable burden to place on a contractor that, as the stipulated facts state, relied in good faith on the District's assurances that the expansion project was a private work.

[1003] I am also troubled by the due process implications of the majority's conclusion

2. It also held that, under the doctrine of equitable estoppel, Waters could not be required to pay the statutory penalties because he had made a reasonable attempt to find out what the prevailing wages were. (*Waters, supra,* 192 Cal. App.3d at pp. 640–641, 237 Cal.Rptr. 546.)

imposing liability on Lusardi. In this case, the Director, after the contract was entered into, made a determination that the project was a public work and directed the District to withhold payments due Lusardi. The majority concludes that this action did not result in a deprivation of property without due process of law, since there was no money due from the District to Lusardi, but rather, all money due Lusardi was owed by Imperial. Accordingly, under the majority's view, the Director would have had to institute a court action, giving Lusardi notice and an opportunity to be heard before any deprivation of its property occurred. (Maj. opn., *ante*, at pp. 845–847 of 4 Cal.Rptr.2d, at pp. 651–653 of 824 P.2d; see § 1775.)

This reasoning, in my view, is unsound. The contract between the District and Imperial stated that "[Imperial] hereby appoints and constitutes [the District] as its agent and attorney-in-fact for all purposes respecting construction of the [Expansion Project], including, without limitation, the engagement of contractors .... and the management and supervision of the construction of the [Expansion Project].... [The District], as agent, shall ... supervise and provide for, or cause to be supervised and provided for, as agent for [Imperial], the complete acquisition and construction of the [Expansion Project]." Thus, the District had complete responsibility for managing the construction of the project. Moreover, the majority concludes that as the agent of Imperial, the District is the "awarding body."

If the District is the "awarding body," it elevates form over substance to say that there was no money owing from the District to the contractor. If the District did owe money to Lusardi, then the Director would not have ordered an "impossible act" when he ordered the District to withhold funds from Lusardi. (See maj. opn., *ante*, at p. 846 of 4 Cal.Rptr.2d, at p. 652 of 824 P.2d.) This withholding of funds would clearly violate Lusardi's due process rights, since the contractor would have been deprived of its property without notice or an opportunity to be heard. (See *O.G. Sansone Co. v. Department of Transportation*, *supra*, 55 Cal.App.3d at p. 455, 127 Cal.Rptr. 799.)

The majority has expressed concern that if contractors cannot be bound by the public works laws in the absence of agreement in the contract, the policy of ensuring that workers are paid the prevailing wage will be defeated. However, I do not see any state policy that can only be served by holding contractors liable in these circumstances. The Legislature has seen fit to place on the contracting *public entities* the obligation to require public works contractors to pay the prevailing wages. "By the express terms of the statutes, the Legislature has imposed upon the awarding body ... the responsibility for providing advance notice to the contractor that wages must 1004be paid in accordance with the general prevailing rate.... [Citation.]" (*Waters*, *supra*, 192 Cal.App.3d at p. 640, 237 Cal.Rptr. 546.) The statutory objective of guaranteeing that workers on public works are paid prevailing wages can be served by requiring public entities to carry out their obligations under the public works law.

Enforcing the public works laws against awarding bodies only and not against the contractors in these circumstances would be both reasonable and fair. The public works law imposes a duty *on the public agency* to put bidders on notice of the potential liability that a successful bidder will incur. Nowhere does the public works law suggest that bidders not notified of the implications of a successful bid will nonetheless be subject to an obligation imposed upon them after the fact, resulting from the failure of a public agency to follow the dictates of the law. Nor would it be unreasonable to place upon the public agency itself the financial burden of its failure to comply with the public works law. By not adhering to its obligation under the law, the public agency is, presumptively, the beneficiary of a less costly project; had the public agency advised bidders of their obligations under the public works law to pay prevailing wages the project would have been more costly to the public agency. Hence it would not be unfair to require the

public agency to bear any obligation to pay the extra wages.

The majority has also raised the possibility that, if contractors are not held liable in these circumstances, public entities and contractors might collude to evade the prevailing wage laws. However, the statutory scheme provides criminal sanctions that will serve to discourage collusion. Section 1777 makes it a misdemeanor for any officer, agent, or representative of the state or any political subdivision to wilfully violate any provision of the prevailing wage law statutory scheme. I presume that collusion with a contractor to evade the laws would fall under this section.

Therefore, I dissent from the majority's conclusion that contractors' obligation to pay the prevailing wages arises purely from the statutory scheme. In my view, Lusardi cannot be required to pay the difference between the prevailing wages and the wages actually paid because it did not have notice that the prevailing wage laws applied before entering into the contract to construct the expansion project and did not agree in the contract to pay those wages. Like the majority, I also conclude that Lusardi cannot be required to pay the statutory penalties.

BAXTER, J., concurs.

ARABIAN, Justice, concurring and dissenting.

Although I agree that the obligation to pay prevailing wage derives from statute as well as contract [1005] and that the Director of the Department of Industrial Relations (the Director) retains the inherent and necessary authority ultimately to determine a project's public work status, I cannot support the majority's refusal to accord Lusardi Construction Company (Lusardi) a modicum of fairness under this scenario. In my view, the circumstances "clearly establish that a grave injustice would be done if an equitable estoppel were not applied." (*Cal. Cigarette Concessions v. City of L.A.* (1960) 53 Cal.2d 865, 869, 3 Cal.Rptr. 675, 350 P.2d 715.) I would, therefore, affirm the judgment of the Court of Appeal.

The stipulated facts establish that the contract between Lusardi and Imperial Municipal Services Group, Inc. (Imperial) did not contain any reference to the status of the expansion project as a public work or to any obligation to pay prevailing wages; that Lusardi inquired as to the nature of the project, expressly declining to enter into a public works contract; that in response the Tri-City Hospital District (the District) gave assurances, based on representations of its legal counsel, that the construction was private and no prevailing wage or payroll record obligations obtained; that Lusardi premised its agreement with Imperial upon those assurances and representations; and that in so doing Lusardi acted in good faith. Lusardi did all a business could do.

A simple recitation of these facts should thus suffice to confirm the right to invoke equitable estoppel: Lusardi acted to its detriment in justifiable reliance upon the inaccurate representations of a governmental agency charged with implementation and enforcement of the law. Nevertheless, the majority demur based upon an asserted lack of privity between the Director and the District and the potential nullification of "a strong rule of policy adopted for the benefit of the public." (Maj. opn., *ante*, p. 848 of 4 Cal.Rptr.2d, p. 654 of 824 P.2d.)

To reach its conclusion, the majority analysis hews to the "elements" of equitable estoppel. (See *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489, 91 Cal.Rptr. 23, 476 P.2d 423.) Dispensing equitable relief, however, depends upon a measure of flexibility as well as fairness and must accommodate compelling circumstances that may not precisely conform to "the rigid rules of law." (*Bechtel v. Wier* (1907) 152 Cal. 443, 446, 93 P. 75.) "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention." (*Times-Mirror Co. v. Superior Court* (1935) 3 Cal.2d 309, 331, 44 P.2d 547; *Bisno v. Sax* (1959) 175 Cal. App.2d 714, 729, 346 P.2d 814 [" 'no inflexible rule has been permitted to circumscribe the power of equity to do justice' "]; cf. *Farina v. Bevilacqua* (1961) 192 Cal.

App.2d 681, 685, 13 Cal.Rptr. 791 [inability to restore precise status quo not invariable bar to rescission]; *Nadell & Co. v. Grasso* [1006](1959) 175 Cal.App.2d 420, 431, 346 P.2d 505 ["peculiar, and perhaps unique, facts" justified enforcement of restrictive covenant as to services; equitable servitudes not limited to chattels].)

Moreover, I am unpersuaded under the facts that equity should not charge the Director with the consequences of the District's conduct. As head of the Department of Industrial Relations, the Director assumes primary responsibility for determining, monitoring, and enforcing prevailing wage laws on public works. (See generally Lab.Code, § 1770 et seq.) The awarding body has interrelated notification and implementation obligations pursuant to which it works in conjunction with the Director to ensure compliance. (See, e.g., Lab.Code, §§ 1773.2, 1773.3, 1773.4, 1775, 1776; cf. *City and County of San Francisco v. Grant Co.* (1986) 181 Cal.App.3d 1085, 1092, 227 Cal.Rptr. 154 [city not acting as arm or agent of state in failing to enforce building code regulations since city had initial and independent enforcement responsibility within its territory].) The statutory scheme thus contemplates a confluence of governmental interests and duties sufficient in my estimation to establish privity. (See *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 397–399, 29 Cal.Rptr. 657, 380 P.2d 97, and cases cited at fn. 10.) In finding to the contrary, the majority rely on the fact that the District in actuality assumed a position antagonistic to the Director. Lusardi, however, had no reason to anticipate such an eventuality, whereas the Director could well have taken measures to forestall the possibility. (See Lab.Code, § 1773.5 [Director may "establish rules and regulations for the purpose of carrying out this chapter, including, ... the responsibilities and duties of awarding bodies"].) Lusardi should not bear the burden of the Director's default in failing to maintain adequate administrative controls over awarding bodies that share responsibility for implementing and enforcing prevailing wage laws.[1]

Furthermore, the Director retains the inherent authority to characterize a given project as a public work thereby invoking the obligation to pay [1007]prevailing wages. (Maj. opn., *ante*, pp. 844–845 of 4 Cal.Rptr. 2d, pp. 650–651 of 824 P.2d.) Accordingly, at any and all times the Director could have intervened, notified Lusardi that the project constituted a public work, and mandated wage and reporting compliance. Cynically, I note such intervention did not occur until Lusardi had substantially completed the project in reliance upon contractual provisions and express representations by a governmental agency to the contrary. "[N]egligence or silence in the face of a duty to speak may suffice [to invoke estoppel]. [Citation.]" (*City and County of San Francisco v. Grant Co., supra*, 181 Cal.App.3d at p. 1091, 227 Cal.Rptr. 154; see also *Dettamanti v. Lompoc Union School Dist.* (1956) 143 Cal.App.2d 715, 721, 300 P.2d 78; cf. *People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 195–196, 119 Cal.Rptr. 266 [comparing estoppel and laches]; 11 Witkin, Summary of Cal.Law (9th ed. 1990) Equity, § 14, pp. 690–692 [defense of laches].) While the District's misfeasance may have instigated this predicament, the Director's nonfeasance perpetuated it to Lusardi's detriment.

As to the majority's policy argument, I cannot agree that the Legislature enacted the prevailing wage laws "for the benefit of the public." (See *County of San Diego*

1. Whether based on equity or otherwise, this court does not lack precedent for holding one governmental agency accountable for the actions of another. (See, e.g., *People v. Sims* (1982) 32 Cal.3d 468, 481–482, 186 Cal.Rptr. 77, 651 P.2d 321 [criminal charges of welfare fraud dismissed on collateral estoppel after evidence found insufficient in administrative hearing; "The People cannot now take advantage of the fact that the County avoided its litigation responsibilities and chose not to present evidence at the prior proceeding."]; *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827–829, 48 Cal.Rptr. 366, 409 P.2d 206 [under Pen.Code, § 654, misdemeanor conviction will generally bar felony prosecution based on same act or course of conduct even when crimes are prosecuted by different public law offices]; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 351–352, 272 Cal.Rptr. 767, 795 P.2d 1223 [for reasons of public policy collateral estoppel does not preclude criminal prosecution after People fail to establish violation of probation based on same underlying conduct].)

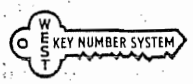
v. Cal. Water etc. Co. (1947) 30 Cal.2d 817, 826–828, 186 P.2d 124.) Whatever incidental salutary effect the general public may derive, in the words of the majority, "[t]he overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (Maj. opn., *ante*, p. 842 of 4 Cal.Rptr.2d, p. 648 of 824 P.2d; see Lab.Code, § 90.5, subd. (a); *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458, 127 Cal.Rptr. 799; cf. 11 Witkin, Summary of Cal.Law, *supra*, Equity, § 183, at pp. 864–866, and cases cited therein ["no estoppel where it would defeat operation of a policy protecting the public"].) As between the two, the District, not Lusardi, had the primary statutory obligation to safeguard the interests of employees with respect to minimum labor standards. (See Lab.Code, § 1720 et seq.) Indemnification notwithstanding, I see no public policy fostered by requiring a nondefaulting party to assume that responsibility.[2] (*Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 641–642, 237 Cal.Rptr. 546.)

As the Court of Appeal below summarized, "We have here a fact situation which shouts estoppel." If no equitable mechanism exists by which Lusardi can extricate itself from the very litigation it attempted in good faith to avoid, then rectitude and fair dealing have ceased to function within our judicial framework. Regrettably, the chancellor's conscience has fallen victim to the very rigidity of the rule of law it should seek to ameliorate. (See 1008*Bechtel v. Wier, supra*, 152 Cal. 443, 446, 93 P. 75; *City of Los Angeles v. Cohn* (1894) 101 Cal. 373, 376–378, 35 P. 1002.)

BAXTER, Justice, concurring and dissenting.

I agree with the majority that Lusardi Construction Company (Lusardi) cannot be held liable for statutory penalties. I respectfully dissent, however, from the remainder of the judgment and the majority's reasoning. I have concurred in Justice Panelli's explanation of why Lusardi should not be required to pay the difference between the prevailing wages and the wages that Lusardi contracted to pay. (Conc. and dis. opn. of Panelli, J., at pp. 851–855 of 4 Cal.Rptr.2d, at pp. 657–661 of 824 P.2d, *ante*.) I write separately only to state that I also agree with Justice Arabian's conclusion that the majority opinion results in a miscarriage of justice. (Conc. and dis. opn. of Arabian, J., at pp. 855–857 of 4 Cal.Rptr. 2d, at pp. 661–663 of 824 P.2d, *ante*.) As he explains and as the Court of Appeal observed, this case cries out for application of equitable estoppel.

In an apparent attempt to render its harsh result more palatable, the majority suggests that Lusardi "has remedies against the District, Imperial, and perhaps others for indemnification...." (Maj. opn., at p. 850 of 4 Cal.Rptr.2d, at p. 656 of 824 P.2d, *ante*.) This result not only delays justice to Lusardi, it unnecessarily consumes court resources.



824 P.2d 663

1 Cal.4th 1105

Robert CONNOLLY, et al., Plaintiffs and Respondents,

v.

COUNTY OF ORANGE, et al., Defendants and Appellants.

No. S016686.

Supreme Court of California, In Bank.

Feb. 27, 1992.

As Modified March 26, 1992.*

Board of regents of state university, university housing authority, and professor

2. In no respect do the facts imply a case of unjust enrichment or an unfair profit by Lusardi at the expense of employees who may otherwise have been entitled to a higher wage. Lusardi and the District premised their negotiations and the final terms of the contract on the absence of any prevailing wage obligations.

* Editor's Note: The final star pagination of the modified State Report opinion was not available for the bound volume.

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, Plaintiff and Respondent,

v.

G & G FIRE SPRINKLERS, INC., Defendant and Appellant.

No. C035386.

Court of Appeal, Third District.

Oct. 1, 2002.

Certified for Partial Publication.

Union brought action against fire suppression sprinkler subcontractor for the construction of new wing of county hospital, alleging subcontractor's failure to pay prevailing wage rate and benefits. The Superior Court, San Joaquin County, No. 294737, William J. Murray, Jr., J., awarded the union $230,630.60 for deficiency wages, unpaid benefits, waiting time penalty wages, interest, attorney fees, and costs. Subcontractor appealed. The Court of Appeal, Blease, Acting P.J., held that: (1) a worker on a public works project has a private statutory cause of action against a contractor to recover unpaid prevailing wages and waiting time wages, and (2) an award of waiting time penalty wages was warranted.

Affirmed.

1. **Appeal and Error** ⇐173(9)

Fire suppression sprinkler subcontractor for the construction of new wing of county hospital waived appellate review of its claim that union's action against subcontractor, alleging subcontractor's failure to pay prevailing wage rate, was barred by the res judicata effect of the final judgment in the Department of Labor Standards Enforcement's (DLSE) action against general contractor, where subcontractor failed to raise the res judicata defense in the trial court.

2. **Judgment** ⇐540

The doctrine of "res judicata" or "claim preclusion" gives preclusive effect to former judgments on the merits and bars relitigation of the same cause of action in a subsequent suit between the same parties or parties in privity with them.

See publication Words and Phrases for other judicial constructions and definitions.

3. **Judgment** ⇐540

The res judicata doctrine promotes judicial economy by limiting multiple litigation.

4. **Judgment** ⇐948(1), 951(.5)

The defense of res judicata must be pleaded and proven.

5. **Judgment** ⇐678(2)

"Privity," for purposes of res judicata, involves a person so identified in interest with another that he represents the same legal right.

See publication Words and Phrases for other judicial constructions and definitions.

6. **Appeal and Error** ⇐842(8)

Because an assignment is a written instrument, in the absence of parol evidence, the appellate court reviews the assignment independently, looking to the language of the assignment.

7. **Public Contracts** ⇐46

A payment bond is the practical substitute for a mechanic's lien in the public works context, when a stop notice is inadequate because insufficient funds remain to be paid by the awarding body.

8. **Public Contracts** ⇐25

Workers have no mechanic's lien rights regarding the performance of public work. West's Ann.Cal.Civ.Code § 3109.

9. Labor Relations ⇐1491

When seeking recovery for deficiency wages for breach of a public works contract, the plaintiff must plead a common law cause of action for breach of contract and must allege the public works contract, by its terms, requires the payment of prevailing wages.

10. Labor Relations ⇐1471

Assignment from workers to union, of "any and all statutory and private bond rights" with respect to recovery of prevailing wage rate and benefits from subcontractor for public works project, did not assign the workers' personal or contractual rights.

11. Labor Relations ⇐1492.1

In a suit to recover deficiency wages by a union as an assignee of an aggrieved worker who is a third party beneficiary of the public works contract, the union has the burden of proof and must establish the factual elements of its standing as a third party beneficiary.

12. Labor Relations ⇐1494

Department of Labor Standards Enforcement (DLSE) need not obtain an assignment from an aggrieved worker before bringing suit against the contractor on behalf of the worker for recovery of deficiency wages. West's Ann.Cal.Labor Code § 96.7.

13. Labor Relations ⇐1101.1

Central purpose of the prevailing wage law is to protect and benefit employees on public works projects. West's Ann.Cal.Labor Code § 1720 et seq.

14. Labor Relations ⇐1268

Provision of Prevailing Wage Law, authorizing Department of Labor Standards Enforcement (DLSE) to maintain civil action to recover deficiency wages and penalties from a contractor on a public works project who fails to pay the prevailing rate to his workers, does not specify exclusive remedies; DLSE also may file suit on behalf of workers against awarding body on third party beneficiary theory, and against surety on payment bond. West's Ann.Cal.Labor Code § 1775.

15. Labor Relations ⇐1471

A worker on a public works project may maintain a private suit against the contractor to recover deficiency wages as a third party beneficiary of the public contract if the contract provides for the payment of prevailing wages.

16. Labor Relations ⇐1471

A worker on a public works project has a private statutory cause of action against a contractor to recover unpaid prevailing wages. West's Ann.Cal.Labor Code §§ 1194, 1774.

17. Labor Relations ⇐1268

California's prevailing wage law is a minimum wage law which guarantees a minimum cash wage for employees hired to work on public works contracts. West's Ann.Cal.Labor Code § 1720 et seq.

18. Labor Relations ⇐1101.1, 1268

Prevailing wage law serves the important public policy goals of protecting employees on public works projects, competing union contractors, and the public. West's Ann.Cal.Labor Code § 1720 et seq.

19. Labor Relations ⇐1471

Workers on public works projects have a private statutory right to sue their employer for waiting time wages. West's Ann.Cal.Labor Code § 203.

20. Master and Servant ⇐79

"Wages," within meaning of statute requiring prompt payment of wages when a worker who does not have a written contract for a definite period quits his employment, includes health benefits and

other fringe benefits. West's Ann.Cal.Labor Code §§ 200, 202.

See publication Words and Phrases for other judicial constructions and definitions.

21. Master and Servant ⇐79

"Willful," within meaning of statute authorizing waiting time penalties if an employer willfully fails to promptly pay wages when a worker who does not have a written contract for a definite period quits his employment, means the employer intentionally failed or refused to perform an act which was required to be done; it does not mean that the employer's refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud workers of wages which the employer knows to be due. West's Ann.Cal.Labor Code §§ 202, 203.

See publication Words and Phrases for other judicial constructions and definitions.

22. Master and Servant ⇐79

Fire suppression sprinkler subcontractor for construction of new wing of county hospital was liable to fire sprinkler fitters for waiting time penalties, relating to subcontractor's failure to promptly pay prevailing wage upon fitters' termination of employment, though subcontractor had paid fitters more than prevailing wage for pipe tradesmen; fitters had been entitled to prevailing wage for sprinkler fitter classification, rather than the lower wage for a pipe tradesman. West's Ann.Cal.Labor Code §§ 202, 203.

23. Appeal and Error ⇐1010.1(6), 1011.1(5)

The power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

24. Appeal and Error ⇐1012.1(2)

The appellate court will not reweigh the evidence.

25. Appeal and Error ⇐931(1)

A reviewing court begins with the presumption that the record contains evidence to sustain every finding of fact.

26. Labor Relations ⇐1268
Master and Servant ⇐79

Failure of fire suppression sprinkler subcontractor for construction of new wing of county hospital to promptly pay prevailing wage upon fire sprinkler fitters' termination of employment was "willful," within meaning of statute authorizing waiting time penalties if an employer willfully fails to promptly pay wages when a worker who does not have a written contract for a definite period quits his employment; subcontractor's erroneous classification of the fitters in the lower-wage category of pipe tradesmen was not a good faith legal mistake, because it was clear the fitters belonged in the higher-paying sprinkler fitter classification. West's Ann.Cal.Labor Code §§ 202, 203.

27. Master and Servant ⇐79

An employer's good faith mistaken belief regarding whether wages are owed may negate a finding of willfulness, for purposes of statute authorizing waiting time penalties if an employer willfully fails to promptly pay wages when a worker who does not have a written contract for a definite period quits his employment. West's Ann.Cal.Labor Code §§ 202, 203.

Horvitz & Levy, David M. Axelrad, Sandra J. Smith, Encino, Stephanie Rae Williams, Jon B. Eisenberg, Oakland; Robert G. Klein, for Defendant and Appellant.

Roger Frommer & Associates and Roger Frommer, Los Angeles, for Plaintiff and Respondent.

Robert N. Villalovos, Sacramento, and Michelle Yu, Los Angeles, for Division of

Labor Standards Enforcement as Amicus Curiae on behalf of Plaintiff and Respondent.

BLEASE, Acting P.J.

This case is the result of a dispute arising from the construction of a new wing of the San Joaquin General Hospital, in which the subcontractor, G & G Fire Sprinklers, Inc. (G & G), failed to pay its workers the prevailing wage rate for their labor classification.

Road Fitters Sprinklers Local Union No. 669 (the Union), acting on the assignment of the statutory rights of four workers, sued G & G to recover their unpaid, prevailing wages under Labor Code section 1774 [1] and for waiting time penalty wages under section 203.

G & G appeals from the judgment in favor of the Union, raising several contentions. It claims this matter is pre-empted by the National Labor Relations Act and that the National Labor Relations Board has exclusive jurisdiction over this case, the Union has no standing to sue because its standing is limited to recovery of the workers' statutory rights and the workers have no private statutory right to recover unpaid prevailing wages, G & G's reasonable good faith choice of job classification defeats the Union's claim, the trial court's erroneous rulings on the burden of proof and the admission of evidence require a new trial, and G & G is not liable for waiting time penalty wages.

In the published portion of the opinion we conclude the Union, as assignee of the workers' statutory rights, has standing to assert G & G's statutory duty to pay prevailing wages under section 1774, because a prevailing wage is a minimum wage, and therefore the workers may assert their express rights to recover their unpaid prevailing wages under the minimum wage provisions of section 1194.[2]

We find no error and affirm the judgment and award of damages.

FACTUAL AND PROCEDURAL BACKGROUND [3]

On September 28, 1993, the County of San Joaquin awarded Perini Building Company, Inc. (Perini) a public works construction contract to build a new wing of the San Joaquin County General Hospital. On November 23, 1993, Perini selected G & G as the subcontractor to install the fire suppression sprinkler system for the hospital. Pursuant to a written subcontract, G & G agreed to perform this work for $398,000.

A fire suppression sprinkler system may be installed only by workers classified as fire sprinkler fitters, a skilled classification of the plumbers craft responsible for installing and maintaining several types of fire suppression systems.

In its call for bids and in the public works contract, San Joaquin County published the prevailing wages for the work classifications necessary to execute the contract. Included in the publication was the basic prevailing hourly wage rate for fire sprinkler fitters. Including benefits, the rate was $33.73 per hour in 1994 when the work was performed.

G & G hired a number of workers to install the fire suppression system it had

1. All further section references are to the Labor Code unless otherwise specified.

2. Under California Rules of Court, rules 976(b) and 976.1, the Reporter of Decisions is directed to publish the opinion except for Parts I, and III through V of the Discussion.

3. The Statement of Facts are taken primarily from the trial court's Statement of Intended Decision.

agreed to provide under its subcontract with Perini. Four of these workers were Thomas Browning, Dennis Marlowe, Kenneth Ahoff, and Stephen Ledford. They are fire sprinkler fitters by trade with years of experience in the trade and belong to the Union. G & G hired Browning as the foreman and paid him the basic rate for the classification of fire sprinkler fitter, but failed to provide him with the required benefits. G & G paid Marlowe, Ahoff, and Ledford as pipe tradesmen, a classification that carries a lower per diem prevailing wage rate than a fire sprinkler fitter. G & G also failed to provide these men with benefits.

Browning, Marlowe, Ahoff and Ledford filed complaints with the Department of Labor Standards Enforcement (DLSE) protesting their rate of pay and lack of benefits, triggering an investigation by DLSE. After an initial review of the matter, a DLSE investigator advised G & G it was using the wrong classification to pay its men and advised it to cease that practice. G & G did not heed the advice. DLSE subsequently filed a Notice to Withhold Payment against G & G in the amount of $93,867.08 for wages and penalties. DLSE determined the total amount of underpaid wages and penalties owed by G & G was $219,929.25.

G & G called only one witness, Mr. Itai Ben–Artzi, to testify concerning its claim it paid Browning, Marlowe, Ahoff, and Ledford their required benefits and that it had reasonably and in good faith relied on information provided by government officials in making its determination that Marlowe, Ahoff, and Ledford should be classified as pipe tradesmen and paid the prevailing wage for that classification.

Browning, Marlowe, Ahoff, and Ledford signed a document assigning the Union their "statutory" rights to collect underpaid wages and benefits.

The DLSE filed a complaint against Perini and its sureties to recover the underpaid wages and benefits for 17 workers, and penalties. The Union, as assignee of Browning, Marlowe, Ahoff, and Ledford, filed a complaint against the County of San Joaquin, Perini, G & G, and the sureties for their underpaid wages and waiting time penalty wages. Pursuant to a stipulation and order, the Union agreed to abate its action against the County, Perini, and the sureties, and these defendants were dismissed from the action without prejudice. The two matters were consolidated and tried before the court.

The trial court found in favor of DLSE [4] and the Union. The court awarded the Union $230,630.60 against G & G for deficiency wages, unpaid benefits, waiting time penalty wages, interest, attorneys' fees, and costs.[5] The amount awarded for deficiency wages, $93,633.41, was included in the total awards to both the Union and DLSE and was made joint and several. The award to the Union for waiting time wages, interest, attorneys' fees, and costs was made several.

G & G filed a timely notice of appeal from the judgment in favor of the Union.

DISCUSSION [6]

4. DLSE was awarded a total of $343,839.26 against Perini and $215,820 against the sureties.

5. The total award of $230, 630.60 is calculated as the sum of the following items of damages: deficiency wages: $93,633.41; interest: $41,257.19; waiting time wages (§ 203) $32,380.00; interest: $40,860; and, attorney's fees: $22,500.

6. At oral argument, G & G raised the defense of res judicata for the first time, citing to footnote 12 in *Mycogen Corporation v. Monsanto Co.* (2002) 28 Cal.4th 888, 123 Cal. Rptr.2d 432, 51 P.3d 297, arguing that the final judgment in DLSE's case against Perini

I.*

II.

Standing

[1–5] G & G contends the Union lacks standing to assert the workers' claims for unpaid prevailing wages and benefits. G & G claims the Union was assigned only the right to recover for the workers' statutory rights and the workers have no private, statutory rights to sue a subcontractor for unpaid prevailing wages and benefits.

The Union argues the employees transferred to the Union "any and all statutory rights" which include the power to collect the unpaid prevailing wages under section 1774, as well as under a third-party beneficiary theory. We agree with the Union although we differ in our analysis of the statutory basis for standing. We agree with G & G that the rights conveyed by the assignments are limited, for purposes of our discussion, to the workers' statutory rights, but conclude the workers have private statutory rights to recover unpaid prevailing wages under sections 1194 and 1774 and waiting time wages under section 203.

A. The Assignment

The assignments state as follows:

"The undersigned does hereby authorize the filing of Mechanics Liens or Stop Notices, on my behalf with respect to the job site at San Joaquin General Hospital, French Camp, whereon my Employer G & G FIRE SPRINKLER CO., INC. ("G & G") was engaged, and whereon the undersigned worked, for which work I failed to receive payment of state prevailing wages; and further transfers and assigns for purposes of collection, all of my rights and causes of action under the Mechanics Lien Law to Road Sprinkler Fitters Local Union, 669 ("Union"), and does further transfer and assign all interest in and to, any and all parties named therein (owners, awarding bodies, etc.) to said Union. *This Assignment includes any and all statutory and private bond rights.*" (Emphasis added, fn. omitted.)

The trial court found that while the assignment is "less than artfully drafted," it included the workers' statutory rights under section 1774 and any third-party bene-

and its sureties bars recovery by the Union against G & G under principles of res judicata.

This claim has no merit. The doctrine of res judicata, or "claim preclusion," gives preclusive effect to former judgments on the merits and bars relitigation of the same cause of action in a subsequent suit between the same parties or parties in privity with them. (*Mycogen, supra.*) The doctrine promotes judicial economy by limiting multiple litigation. (*Ibid.*; 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.) In *Mycogen*, the Supreme Court held that a final judgment in an action for declaratory relief and specific performance is a bar to a separate subsequent action for damages on the same underlying claim.

The defense of res judicata must be pleaded and proven. Failure to properly raise it in the trial court waives it. (7 Witkin, *supra*, Judgment, §§ 281, 291, pp. 821, 836–837.) G & G waived this claim by failing to raise it in the trial court. Moreover, among the many hurdles that G & G would have to overcome to successfully assert this defense would be to establish privity of interest between the DLSE and the Union.

" '[P]rivity involves a person so identified in interest with another that he represents the same legal right.' " (*Zaragosa v. Craven* (1949) 33 Cal.2d 315, 318, 202 P.2d 73; 7 Witkin, *supra*, Judgment, § 392, p. 961.) G & G must also establish identity of claim. (*Mycogen, supra.*) As we discuss ante, the legal claims and factual issues raised and litigated in the suit by DLSE against Perini and its sureties were significantly different from those claims and issues raised by the Union as the workers' assignee against G & G. (See fn. 13.)

* See footnote 2, *ante*.

ficiary theory based on the prevailing wage contract.

[6–8] Because the assignment is a written instrument, in the absence of parol evidence we review the assignment independently, looking to the language of the assignment. (*Parsons v. Bristol Dev. Co.* (1965) 62 Cal.2d 861, 865–866, 44 Cal.Rptr. 767, 402 P.2d 839; *Gifford v. City of Los Angeles* (2001) 88 Cal.App.4th 801, 806, 106 Cal.Rptr.2d 164.) By its own terms, the assignment is limited to the filing of Mechanics' Liens and Stop Notices, and for purposes of collection, "all ... causes of action under the Mechanics Lien Law", and "any and all *statutory* and private bond rights." (Emphasis added.) Because these rights are expressed in the conjunctive, we understand the causes of action under the "Mechanics Lien Law" to be separate from and not a limitation on "all statutory and private bond rights." For reasons we footnote, the workers have no mechanics lien rights regarding the performance of public work.[11]

[9] For these reasons no doubt, the Union bases its standing to sue G & G on the assignment of "statutory" rights under section 1774 and on a third party beneficiary theory.[12] As discussed more fully in part B, the right to recover prevailing wages under the statutory scheme is separate from the right to recover under the public works contract. At the risk of stating the obvious, the right to recover under the statute arises from the statutory scheme, (§§ 1771, 1774, 1775; see *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986–988, 4 Cal.Rptr.2d 837, 824 P.2d 643), while the right to recover on a contract theory arises from the common law right to sue for breach of the express terms of the contract as a third party beneficiary of the public works contract. (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 971, 9 Cal.Rptr.2d 92, 831 P.2d 317 (*Aubry*); *Tippett v. Terich* (1995) 37 Cal.App.4th 1517, 1532–1534, 44 Cal. Rptr.2d 862, overruled on other grounds in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 171, 96 Cal.Rptr.2d 518, 999 P.2d 706; *Department of Industrial Relations v. Fidelity Roof Co., supra,* 60 Cal.App.4th at pp. 425–426, 70 Cal.Rptr.2d 465 [a worker has a private common law right of action to recover unpaid wages against a contractor as a third party beneficiary of the public works contract].)[13]

[10] The limited language of the assignments purports to transfer only the

11. A mechanic's lien is a procedural device for obtaining payment of a debt owned by a property owner for the performance of labor or the furnishing of materials used in construction. (Civ.Code, §§ 3109–3154.) However, mechanic's liens are not applicable to the performance of a public work. (Civ.Code, § 3109; *Department of Industrial Relations v. Fidelity Roof Co.* (1997) 60 Cal.App.4th 411, 418, 70 Cal.Rptr.2d 465.) A payment bond is the practical substitute for a mechanic's lien in the public works context when a stop notice is inadequate because insufficient funds remain to be paid by the awarding body. (*Id.* at p. 423, 70 Cal.Rptr.2d 465.) A payment bond is required by statute and affords an additional or cumulative remedy. (*Ibid.*) The assignment therefore assigns to the Union, the right to sue the surety on the payment bond. Because the language regarding the Mechanics Lien Law is without legal effect, it adds nothing to the Union's argument.

12. At oral argument, G & G agreed that "private" modifies "bond rights," to the effect that the assignment is of statutory rights and private bond rights.

13. When seeking recovery for deficiency wages for breach of a public works contract, the plaintiff must plead a common law cause of action for breach of contract and must allege the public works contract, by its terms, requires the payment of prevailing wages. (*Aubry, supra,* 2 Cal.4th at p. 971, 9 Cal. Rptr.2d 92, 831 P.2d 317.) It has not done so.

right to recover unpaid wages under a statute, not under the contract. No personal or contractual rights are included within the assignment.

[11, 12] The Union argues that because the cases were consolidated by defendants and the issues and facts are identical for the consolidated plaintiffs, "it makes little difference under whose assignment the claimants are cloaked, for the Labor Commissioner may take wage claims without assignment." Aside from the inaccuracy of this claim,[14] we fail to see its relevancy in determining the scope of the assignment, which turns on its terms.

For these reasons, we conclude the assignment is limited to the workers' statutory rights to sue G & G for recovery of unpaid prevailing wages.

B. The Private Statutory Right to Recover Unpaid Prevailing Wages Against the Subcontractor

G & G contends that sections 1774 and 1775 do not create a private right of action to recover unpaid prevailing wages from a subcontractor. It argues the statutory scheme gives DLSE the exclusive statutory right to sue a contractor for unpaid prevailing wages and penalties, that section 1775 details the procedures for suits to recover such wages and penalties, and the statutory scheme makes no mention of suits by individuals.

As discussed above in sub-part A, Browning, Marlowe, Ahoff, and Ledford assigned the Union their statutory rights to recover unpaid wages. The assignee "stands in the shoes" of the assignor and his rights are no greater than those of the assignor. (Civ.Code, § 1459; Code Civ. Proc., § 368; Rest.2d, Contracts § 336; 4 Corbin § 892 et seq.) We therefore determine whether the workers have a private statutory right to recover unpaid wages from G & G.

The California Prevailing Wage Law is a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds. (§§ 1720–1861; see *Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at p. 985, 4 Cal.Rptr.2d 837, 824 P.2d 643 (*Lusardi*); *Independent Roofing*

14. The legal and factual issues in a suit by the assignee of a worker against the subcontractor are not identical to the legal and factual issues raised in a suit by the DLSE against a contractor. In a suit to recover deficiency wages by the Union as an assignee of an aggrieved worker who is a third party beneficiary of the public works contract, the Union has the burden of proof (Evid.Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"]; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205, 52 Cal.Rptr.2d 518), and must establish the factual elements of its standing as a third party beneficiary (*Tippett v. Terich, supra*, 37 Cal.App.4th at pp. 1531–1532, 44 Cal.Rptr.2d 862), the breach of the terms of the contract (*Ibid.*), and the assignment.

In a suit by the DLSE against a contractor under former section 1775, the only issue to be determined is the contractor's liability for the penalties and deficiency payments, and the contractor has the burden of proving that the penalties and amounts demanded in the action are not due. Additionally, the contractor's liability for penalties is subject to statutory defenses, including his willful failure to pay the correct rates of pay and his knowledge of his or her obligations under the statutory scheme. (§ 1775, Stats.1992, ch. 1342, § 9, pp. 6602–6603.)

Unlike the Union, the DLSE need not obtain an assignment from an aggrieved worker before bringing suit against the contractor on behalf of the worker for recovery of deficiency wages. (§ 96.7; *Department of Industrial Relations v. Fidelity Roof Co., supra*, 60 Cal.App.4th at pp. 426–427, 70 Cal.Rptr.2d 465.) In sum, the burden of proof and the legal and factual issues in suits brought by DLSE against a contractor and by the assignee of a worker against a subcontractor are significantly different.

Contractors v. Department of Industrial Relations (1994) 23 Cal.App.4th 345, 351, 28 Cal.Rptr.2d 550.)

Under the prevailing wage law, all workers employed on public works costing more than $1,000 must be paid not less than the general prevailing rate of per diem wages as determined by the Director of the Department of Industrial Relations for work of a similar character and not less than the general prevailing per diem wage for holiday and overtime work. (§§ 1770, 1771, 1772 & 1774; *Lusardi, supra,* 1 Cal.4th at p. 987, 4 Cal.Rptr.2d 837, 824 P.2d 643; *O.G. Sansone Co. v. Department of Transp.* (1976) 55 Cal.App.3d 434, 441, 127 Cal.Rptr. 799.) Per diem wages include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in the applicable collective bargaining agreement. (§ 1773.1, and former § 1773.8, repealed by Stats. 1999, ch. 1224, § 5.) The duty to pay the prevailing wage to employees on a public works project extends to both the prime contractor and all subcontractors. (§ 1774.)

[13] The central purpose of the prevailing wage law is to protect and benefit employees on public works projects. (*Lusardi, supra,* 1 Cal.4th at p. 985, 4 Cal.Rptr.2d 837, 824 P.2d 643; *O.G. Sansone Co. v. Department of Transportation, supra,* 55 Cal.App.3d at p. 458, 127 Cal.Rptr. 799.) It also includes several goals which serve "to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees." (*Lusardi, supra,* 1 Cal.4th at p. 987, 4 Cal.Rptr.2d 837, 824 P.2d 643.)

[14] Former section 1775 authorizes the Department of Labor Standards Enforcement to maintain a civil action to recover deficiency wages and penalties from a contractor on a public works project who fails to pay the prevailing rate to his workers. (§ 1775, as amended by Stats.1992, ch. 1342, § 9, pp. 6602–6603.) However, the remedies specified in section 1775 are not exclusive. (*Tippett v. Terich, supra,* 37 Cal.App.4th at pp. 1531–1532, 44 Cal.Rptr.2d 862.) The DLSE also may file suit on behalf of the workers against the awarding body on a third party beneficiary theory (*Aubry, supra,* 2 Cal.4th at p. 971, 9 Cal.Rptr.2d 92, 831 P.2d 317) and against a surety on the payment bond. (*Department of Industrial Relations v. Fidelity Roof Co., supra,* 60 Cal.App.4th at p. 425, 70 Cal.Rptr.2d 465.)

[15] Additionally, a worker on a public works project may maintain a private suit against the contractor to recover deficiency wages as a third party beneficiary of the public contract if the contract provides for the payment of prevailing wages. (*Tippett v. Terich, supra,* 37 Cal.App.4th at pp. 1531–1532, 44 Cal.Rptr.2d 862; *Department of Industrial Relations v. Fidelity Roof Co., supra,* 60 Cal.App.4th at pp. 425–426, 70 Cal.Rptr.2d 465; *Aubry, supra,* 2 Cal.4th at p. 971, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

[16] With this background in mind, we turn to the question whether a worker has a private *statutory* cause of action against a contractor to recover the prevailing wage. While the question has not been decided, it has been discussed. (*Aubry, supra,* 2 Cal.4th at p. 969, fn. 5, and at p. 972, 9 Cal.Rptr.2d 92, 831 P.2d 317, dis. opn. of Kennard, J.)

In *Aubry,* a contractor (*Lusardi*) brought suit for injunctive and declaratory relief against the DLSE seeking a determination the prevailing wage law did not

apply to a hospital facility constructed by the contractor for a third party who would sell it to the public hospital district on completion. After the trial court granted summary judgment for the contractor, the DLSE cross-complained against the public hospital district under tort claims provisions of Government Code section 815.6, seeking damages for violation of the prevailing wage law. The district's demurrer to that claim was sustained and the DLSE appealed.

The Supreme Court held that Government Code section 815.6 does not provide a cause of action against a public entity that fails to comply with its obligation under the prevailing wage law. The court reasoned that section 815.6 is part of the Tort Claims Act which does not protect the type of injury arising from the failure to pay prevailing wages, i.e., injuries that " 'would be actionable if inflicted by a private person.' " (*Id.* at p. 968, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

Justice Kennard, writing in dissent, was of the view the interest injured was one protected in an action between private persons. "The worker can proceed [under section 1194] against the contractor in an action to which no public entity need be a party—an 'action between private persons.' " (*Id.* at pp. 972, 976, 9 Cal.Rptr.2d 92, 831 P.2d 317.) Responding to the dissent, Justice Panelli writing for the majority, pointed out the Court had not yet decided this issue and dismissed the dissent's view on the grounds that "even if such an action is available, it does not bring the present action within the scope of the Tort Claims Act. Any action by a worker against a contractor for wages must necessarily be based on the worker's contractual relationship with the contractor.... Thus, a worker's action against an employer for unpaid statutorily required wages sounds in contract." (*Id.* at p. 969, fn. 5, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

This case tenders the issue not reached by the majority in *Aubry* and we therefore consider the applicability of the provisions of section 1194, which provides as follows:

"(a) Notwithstanding any agreement to work for a lesser wage, *any employee* receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee *is entitled to recover in a civil action* the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (Emphasis added.)

Section 1194 grants to an employee the statutory right to recover in a civil action for unpaid minimum wages and overtime compensation. (See *Ghory v. Al–Lahham* (1989) 209 Cal.App.3d 1487, 1492, 257 Cal. Rptr. 924 [overtime compensation].) In the context of overtime compensation, the court in *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430, 95 Cal.Rptr.2d 57, explained, "[a]n employee's right to wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to over-time compensation, on the other hand, is mandated by statute and is based on an important public policy.... 'The duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer. [Citations omitted.] California courts have long recognized [that] wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." ' [Citation.]" (Emphasis omitted.)

[17, 18] It is well established that California's prevailing wage law is a minimum wage law (*Metropolitan Water Dist. v. Whitsett* (1932) 215 Cal. 400, 417–418, 10

P.2d 751; *O.G. Sansone Co. v. Department of Transportation, supra*, 55 Cal.App.3d at p. 448, 127 Cal.Rptr. 799; see also *People v. Hwang* (1994) 25 Cal.App.4th 1168, 1181, 31 Cal.Rptr.2d 61), which guarantees a minimum cash wage for employees hired to work on public works contracts. (*Department of Industrial Relations v. Nielsen Construction Co.* (1996) 51 Cal.App.4th 1016, 1026, 59 Cal.Rptr.2d 785.) Like overtime compensation (*Earley v. Superior Court, supra*, 79 Cal.App.4th at p. 1430, 95 Cal.Rptr.2d 57), the prevailing wage law serves the important public policy goals of protecting employees on public works projects, competing union contractors and the public. (*Lusardi, supra*, 1 Cal.4th at pp. 985, 987, 4 Cal.Rptr.2d 837, 824 P.2d 643.) The duty to pay prevailing wages is mandated by statute and is enforceable independent of an express contractual agreement. (§§ 1771, 1774–1775; *Lusardi, supra*, 1 Cal.4th at pp. 986–987, 4 Cal.Rptr.2d 837, 824 P.2d 643.) Thus, while the obligation to pay prevailing wages arises from an employment relationship which gives rise to contractual obligations and claims (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22–23, 157 Cal.Rptr. 706, 598 P.2d 866), the duty to pay the prevailing wage is statutory. (§§ 1771, 1774.)

For these reasons we conclude that, because the prevailing wage law is a minimum wage law mandated by statute and serves important public policy goals, section 1194 provides an employee with a private statutory right to recover unpaid prevailing wages from an employer who fails to pay that minimum wage.

C. The Private Statutory Right to Recover Waiting Time Wages

The Union also sought and was awarded waiting time wages under section 203.[15] It compels the prompt payment of earned wages (*Triad Data Services, Inc. v. Jackson* (1984) 200 Cal.Rptr. 418, 153 Cal.App.3d Supp. 1, 9), and provides an employee who is discharged or quits with a statutory cause of action against his or her employer if the employer fails to pay earned wages immediately upon the employee's termination. (§ 203; *Division of Labor Law Enforcement v. El Camino Hospital Dist.* (1970) 87 Cal.Rptr. 476, 8 Cal.App.3d Supp. 30, 35.)

Thus, under section 203, if G & G owed the workers wages at the time their employment terminated and failed to pay them, it is liable to the employee for penalties which the employee has a statutory cause of action to recover.

[19] For these reasons we hold that workers on public works projects have a private statutory right to sue their employer for failure to pay the prevailing wage (§§ 1194, 1771, 1774) and for waiting time wages. (§ 203.) Because workers have private statutory remedies against their employer, the assignment of their "statutory rights" was sufficient to give the Union

15. The version of section 203 governing the instant proceedings, provides as follows:

"If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days. No employee who secretes or absents himself to avoid payment to him, or who refuses to receive the payment when fully tendered to him, including any penalty then accrued under this section, shall be entitled to any benefit under this section for the time during which he so avoids payment.

Suit may be filed for such penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." (Stats.1975, ch. 43, § 1, p. 75, emphasis added.)

standing to sue G & G for recovery of unpaid prevailing wages and waiting times wages.

III.–V.**

VI.

Section 203 Waiting Time Wages

G & G contends it is not liable for section 203 waiting time penalties because it paid all of the wages due, its failure to pay the prevailing wage for sprinkler fitters was not willful, and it acted in good faith after requesting guidance from the State. The Union contends section 203 penalty wages were properly imposed. We agree with the Union.

The trial court awarded the Union $32,380 in waiting time penalties under section 203. The purpose of section 203 is to "compel the prompt payment of earned wages...." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7, 177 Cal. Rptr. 803 (*Barnhill*); *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492, 80 Cal. Rptr.2d 175.) Former section 203 mandates the payment of penalties under the following circumstances: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days." (§ 203, amended by Stats.1975, ch. 43, p. 75, § 1.)

Section 202 provides that when an employee who does not have a written contract for a definite period quits his employment, his wages become "due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

[20] Wages are defined to include "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (§ 200, subd. (a).) "Wages" include health benefits (*People v. Alves* (1957) 320 P.2d 623, 155 Cal.App.2d Supp. 870, 872) and other fringe benefits. (*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 44, 100 Cal.Rptr. 791; *Suastez v. Plastic Dress–Up Co.* (1982) 31 Cal.3d 774, 780, 183 Cal.Rptr. 846, 647 P.2d 122.)

[21] Thus, section 203 requires the payment of an additional penalty if the employer willfully fails to comply with section 202. The term "willful" within the meaning of section 203, means the employer "intentionally failed or refused to perform an act which was required to be done." (*Barnhill, supra*, 125 Cal.App.3d at pp. 7–8, 177 Cal.Rptr. 803, emphasis omitted; *Ghory v. Al–Lahham* (1989) 209 Cal.App.3d 1487, 1492, 257 Cal.Rptr. 924.) It does not mean that the employer's refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud workers of wages which the employer knows to be due. (*Barnhill, supra*, 125 Cal.App.3d at p. 7, 177 Cal.Rptr. 803; *Davis v. Morris* (1940) 37 Cal.App.2d 269, 274, 99 P.2d 345.)

[22] The evidence was clear. G & G's workers were sprinkler fitters entitled to the prevailing wage for that classification. Because G & G failed to promptly pay these workers their due upon their termination of employment, G & G also owed them penalty wages under section 203.

** See footnote 2, *ante*.

G & G argues that because it paid its workers more than the prevailing wage as pipe tradesmen, and paid full benefits in cash, it could not be held liable for failure to pay wages or waiting time penalties under section 203. G & G also argues that it paid Browning the full wage and benefits for a fire sprinkler fitter and that a contrary conclusion is not supported by substantial evidence.

[23, 24] In considering G & G's contention, the crucial determination is whether there is substantial evidence in support of the trial court's findings of fact. " '[T]he power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362, orig. emphasis.) It will not reweigh the evidence. (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465, 46 Cal. Rptr.2d 427, 904 P.2d 834.)

The first of G & G's claims is premised on the factual claim it did not owe the workers the prevailing wage for sprinkler fitters. It ignores the trial court's contrary findings of fact that G & G had erroneously classified its workers as pipe tradesmen, that they should have been classified as fire sprinkler fitters and paid the prevailing wage for that classification. The second claim is also contrary to the trial court's finding that G & G failed to enroll Browning in any of its benefit plans.

[25] A reviewing court begins with the " 'presumption that the record contains evidence to sustain every finding of fact.' " (*Foreman & Clark Corp. v. Fallon, supra,* at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362.) To overcome the trial court's factual findings, G & G must " 'demonstrate that there is *no* substantial evidence to support the challenged findings.' . . . A recitation of only defendants' evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if . . .'some particular issue of fact is not sustained, [defendants] are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence.* Unless this is done the error is deemed to be waived.' " (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362, emphasis in original.) G & G sets forth only its own evidence, ignoring the trial court's findings and the evidence in support of those findings. It has therefore waived its substantial evidence claim.

[26] Second, G & G claims it did not act willfully in failing to pay the prevailing wage, arguing that "[m]ore than a simple mistake is required to impose the statutory penalties." G & G applies the wrong legal standard and again ignores the factual findings.

[27] An employer's good faith mistaken belief that wages are owed may negate a finding of willfulness. In *Barnhill, supra,* 125 Cal.App.3d 1, 177 Cal.Rptr. 803, the employee was owed wages upon her discharge but she owed the employer on a debt she incurred. The employer exercised its right of set-off against the employee's wages, bringing the amount due to the employee to zero. The court held the employer did not have a right of set-off and was therefore liable to the employee for wages due at the time of her discharge. Nevertheless, because the question of set-off was one of law and the law was not clear at the time of the employee's discharge, the employer's good faith belief he had a right of set-off negated a finding his nonpayment of wages was willful within the meaning of section 203. (*Id.* at pp. 8–9, 177 Cal.Rptr. 803.)

By contrast, in the instant case, the trial court found that "G & G's error in classification is clear. Marlowe, Ahoff, and Led-

ford should have been classified as Fire Sprinkler Fitters and paid the prevailing wage for that classification." The trial court also found that G & G did not act in good faith in determining the workers' classification and failing to pay the proper prevailing wage and benefits. Thus, unlike the employer in *Barnhill*, G & G did not make a reasonable good faith legal mistake in failing to pay its workers their full wages upon termination of their employment. Moreover, because G & G does not set forth all the material substantial evidence in support of these findings, its substantial evidence claim is waived. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362.)

Third, relying on *Lusardi, supra*, 1 Cal.4th at pages 996–997, 4 Cal.Rptr.2d 837, 824 P.2d 643, *Division of Labor Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 129, 270 Cal.Rptr. 75, and *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 639–642, 237 Cal.Rptr. 546, G & G contends that equity precludes imposition of waiting time penalties because it acted reasonably and in good faith after requesting guidance from the State.

G & G failed to raise this claim in the trial court and has waived it on appeal. (*Forman v. Chicago Title Co., supra*, 32 Cal.App.4th at pp. 1015–1016, 38 Cal.Rptr.2d 790.) Moreover, for the same reasons discussed above, because it is not supported by the trial court's findings and the substantial evidence in support of those findings, G & G has waived its claim. (*Foreman & Clark, Corp. v. Fallon, supra*, 3 Cal.3d at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362.) Accordingly, we hold that the trial court's imposition of waiting time wages was proper.

DISPOSITION

The judgment and award of damages is affirmed. Plaintiff is awarded its costs on appeal. (Cal. Rules of Court, rule 26(a).)

We concur: DAVIS, and RAYE, JJ.

Theodore KELLOGG et al., Plaintiffs and Appellants,

v.

Ronald GARCIA et al., Defendants and Respondents.

No. C037628.

Court of Appeal, Third District.

Oct. 2, 2002.

Landowners brought quiet title action against neighbors, asserting easement by necessity over their properties. The Superior Court, Calaveras County, No. CV23054, John E. Martin, J., entered judgment for neighbors. Landowners appealed. The Court of Appeal, Kolkey, J., held that: (1) federal government could be common grantor for purposes of easement; (2) evidence showed that government owned surrounding land; and (3) landowners showed strict necessity justifying easement.

Reversed and remanded with directions.

1. **Easements** ⇐18(1)

An easement by way of necessity arises when it is established that: (1) there is a strict necessity for the right-of-way, as when a claimant's property is landlocked, and (2) the dominant and servient tene-

121 Cal.App.3d 120

[120] WINZLER & KELLY [and four other cases],* Plaintiffs and Respondents,

v.

DEPARTMENT OF INDUSTRIAL RELATIONS, et al., Defendants and Appellants,

Western Association of Engineers, Operating Engineers Local Union No. 3, Intervenors and Respondents.

Civ. 50341.

Court of Appeal, First District, Division 4.

June 17, 1981.

As Modified June 29, 1981.

Actions were brought against the director of the Department of Industrial Relations for writ of mandate and related relief with respect to coverage and wage rate determinations for field surveyors. The actions were consolidated and transferred. The Superior Court, San Francisco County, Eugene F. Lynch, J., entered judgment that the challenged determinations were void and remanded the case. The Department appealed. The Court of Appeal, Caldecott, P.J., held that although the determination of the director of the Department of Industrial Relations that field surveying is performed by the type of worker intended to be covered by the prevailing wage law was a quasi-legislative action and amounted to a regulation, the coverage determination, as integral part of the wage determination process, was exempted from the prior hearing requirements of the APA and thus there was no requirement that the director grant a hearing prior to the determination of the type of work covered.

Reversed.

Labor Relations ⇐1437

Although the determination of the director of the Department of Industrial Relations that field surveying is performed by the type of worker intended to be covered by the prevailing wage law was a quasi-legislative action and amounted to a regulation, the coverage determination, as integral part of the wage determination process, was exempted from the prior hearing requirements of the APA and thus there was no requirement that the director grant a hearing prior to the determination of the type of work covered. West's Ann.Labor Code, §§ 1720, 1723; West's Ann.Gov.Code, §§ 11371, 11380, 11380(a)(1), 11421 (Repealed).

Christine C. Curtis, Peter H. Weiner, Department of Industrial Relations, San Francisco, for defendants and appellants.

Edgar B. Washburn, David C. Spielberg, Washburn, Kemp & Wagenseil, San Francisco, Larry P. Schapiro, Littler, Mendelson, Fastiff & Tichy, San Francisco, Littler, Mendelson, Fastiff & Tichy, Fresno, Archie G. Parker, Rowland & Parker, Sacramento, Leo H. Scheuring, Sacramento, for plaintiffs and respondents.

Steven M. Bernard, McKeehan, Bernard & Wood, Fremont, for intervenors and respondents Operating Engineers Local Union #3.

[123] CALDECOTT, Presiding Justice.

Defendants Department of Industrial Relations and Donald Vial, the director of the department (appellants) appeal from an adverse judgment rendered in an action brought for writ of mandate and related relief.

THE FACTS

The director of the Department of Industrial Relations (hereafter director or depart-

* Hogan-Schoch & Assoc., Inc., Sonoma County Sup.Ct. No. 92318; Hogan-Schoch & Assoc., Inc., Sonoma County Sup.Ct. No. 93338; McGlasson & Assoc., Kings County Sup.Ct. No. 28567; Siegfried & Assoc., San Joaquin County Sup.Ct. No. 139553.

ment) was asked by an employer group, representing local awarding bodies, whether surveyor classifications were covered under the prevailing wage laws. On May 26, 1977, the director issued a determination that field surveying is performed by the type or classification of worker (certified chief of party, chief of party, rodman/chairman and instrument man) intended to be covered by the Act. (Lab. Code § 1772.) The coverage determination of the director was made in a letter dated the same day, addressed to Paul L. Schoch of Hogan-Schoch & Associates, Inc. (Hogan-Schoch) and signed by Christine Curtis on behalf of the director. The trial court found that, although contained in a letter addressed to a specific firm, the coverage determination of May 26, 1977, had a statewide impact which necessarily applied to all public entities letting contracts for public works and all employers of field survey workers or public work contracts.

Hogan-Schoch protested both the coverage determination and the lack of a hearing and filed a petition for writ of mandate in the Sonoma County Superior Court. On July 13, 1977, at the request of Hogan-Schoch, the department held a hearing on the inclusion of surveyors in the prevailing wage law. This hearing, of course, could not affect the coverage determination of May 26, 1977, because it was held subsequent to its issuance. Nonetheless, on August 5, 1977, the director reaffirmed his initial coverage determination based upon the July 13, 1977 post-hearing.

On August 12, 1977, the director announced that as a consequence of his prior coverage determination he was making a sweeping "wage rate determination" for surveyors throughout northern California. This wage rate determination in fact involved two separate provisions: first, the director purported to establish an "appropriate labor market area" consisting of all 46 northern California counties; and second, he declared that the wage rate prevailing in that "market area" was the San Francisco Bay area wage scale of Operating Engineers Local Union No. 3's (Local 3) "master" collective bargaining agreements. The court below found that "the August 12, 1977 general determination was separate and distinct from the May 26, 1977 general determination."

Both the coverage determination and the wage rate determination were challenged in several lawsuits filed by petitioners Winzler & Kelly, Hogan-Schoch, Western Association of Engineers and Land Surveyors, McGlasson & Associates, Consulting Engineers Association of California, and Siegfried & Associates (hereafter respondents) in several courts around the state. On motion by the department these lawsuits were ordered coordinated as Judicial Council Coordination Proceeding No. 449 (entitled Surveyor Classification Cases).

The trial judge determined that the issuance of the two general determinations was a quasi-legislative action which should be reviewed under Code of Civil Procedure section 1085. He concluded that the director was required under the Administrative Procedure Act (APA) (Gov.Code § 11370 et seq.)[1] to hold administrative hearings *prior* to issuing any of the challenged determinations and that he had failed to do so. Accordingly, he held that the challenged determinations were void and remanded the entire matter to the department for further proceedings consistent with the APA and his order. Judgment was entered accordingly. The appeal at bench has been taken from the judgment.

THE ISSUE

The sole issue presented on appeal is whether the director was required to hold a hearing prior to issuing the determination that the field surveying work was covered by the California prevailing wage law (Lab. Code, § 1720 et seq.).

1. Unless otherwise indicated, all further references will be made to the Government Code. We also note that Government Code sections 11371–11445 were repealed by Stats. 1979, ch. 567, § 2, effective July 1, 1980, and substantially reenacted as Government Code sections 11342–11351. Since the former provisions were in effect all relevant times herein, we cite the former code sections in this opinion.

Before discussing and analyzing the principal issue at bench, as a threshold matter we note that, as the parties themselves concede, there is no constitutional requirement to hold a public hearing in quasi-legislative matters. The parties are also in agreement that prior hearing is not required under the statutes regulating the prevailing wage law
|125 either. Consequently, in order to determine the issue here raised (i. e., whether a prior hearing is required before a coverage determination under the California prevailing wage law) we are compelled to resort to the APA, which establishes minimum procedural requirements applicable to quasi-legislative and quasi-judicial actions by state agencies. In doing so we follow the established principles which hold that the different codes blend into each other and constitute a single statute for the purposes of statutory construction and that the legislative intent may be determined not only from an individual code but the whole body of law. (*Pesce v. Dept. of Alcoholic Bev. Control* (1958) 51 Cal.2d 310, 312, 333 P.2d 15; *American Friends Service Committee v. Procunier* (1973) 33 Cal.App.3d 252, 260, 109 Cal.Rptr. 22.) The rationale behind this rule is the assumption that the Legislature was aware of the existing, related laws and intended to maintain a consistent body of statutes. (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805, 249 P.2d 241; *Lambert v. Conrad* (1960) 185 Cal. App.2d 85, 93, 8 Cal.Rptr. 56.) It follows that in the instant case we must construe the prevailing wage law together with the APA in order to arrive at the determination of whether the Legislature intended that the department hold a public hearing prior to a coverage determination.

With these introductory observations, we now turn to the statutory scheme outlined in the APA. We start with Chapter 4.5 of the APA (§ 11371 et seq.), which applies to the quasi-legislative actions of state agencies. Section 11420 describes the coverage by providing that: "It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11421, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly."

"Regulation" is defined in section 11371, subdivision (b), which sets forth in pertinent part that: "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it. . . ."

|126 The exceptions referred to in section 11420 are described in section 11421, subdivision (a), which reads in part that: "The provisions of this article shall not apply to any regulation not required to be filed with the Secretary of State under this chapter, and only this section and Section 11422 of this article shall apply to any regulation prescribing an agency's organization or procedure or to an emergency regulation adopted pursuant to subdivision (b) of this section."

|127 The requirements for filing regulations and exceptions to those requirements are set out in section 11380. It spells out in relevant portion that: "Every state agency shall: (a) Transmit to the department for filing with the Secretary of State and with the Rules Committee of each house of the Legislature a certified copy of every regulation adopted by it except one which: (1) Establishes or fixes rates, prices or tariffs. . . . (3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the State."

Finally, sections 11423 through 11425 detail the applicable notice and hearing requirements. Section 11423 provides that notice must be given "[a]t least 30 days,

prior to the adoption, amendment or repeal of a regulation. . . ." Section 11424 outlines the required contents of the notice. Lastly, section 11425 sets forth the hearing requirements by providing in part that: "On the date and at the time and place designated in the notice the state agency shall afford any interested person or his duly authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present the same orally. The state agency shall consider all relevant matter presented to it before adopting, amending or repealing any regulation."

Thus the aforecited statutory provisions make it clear that the director's coverage determination would be subject to the APA if the following three conditions coexist: (1) the determination is a quasi-legislative action; (2) it amounts to a "regulation" within the meaning of section 11371, subdivision (b); and (3) it is not expressly exempted by either the APA or the prevailing wage law.

In addressing these subissues, first we point out that the parties agreed (and the trial court so found) that the coverage determination in dispute was a quasi-legislative function. We are likewise persuaded that the May 26, 1977 determination of the director constituted a regulation within the purview of the law. As spelled out before, [1127] in the definition of section 11371, subdivision (b), "regulation" includes orders or *standards of general application* which are adopted by state agencies in order to implement, interpret or make specific the law enforced by such agencies. Clearly, the coverage determination in dispute amounted to a standard of general application because it had a statewide impact and applied not only to the individual firm to which it was addressed but also to all public entities letting contracts for public works and to all employees who engaged the services of field surveying workers on public work projects. The eventuality that the director entitled his action as a "general determination" rather than a "regulation" is of no legal consequence. Whether the action of a state agency constitutes a regulation does not depend on the designation of the action, but rather on its effect and impact on the public. If the action is not only of local concern, but of statewide importance, it qualifies as a regulation despite the fact that it is called "resolutions," "guidelines," "rulings" and the like (*State Comp. Ins. Fund v. McConnell* (1956) 46 Cal.2d 330, 343, 294 P.2d 440; see also *Davies v. Contractors' State License Bd.* (1978) 79 Cal.App.3d 940, 145 Cal.Rptr. 284; *City of San Marcos v. California Highway Com.* (1976) 60 Cal. App.3d 383, 131 Cal.Rptr. 804).

Moreover, the second criterion of the statutory definition of "regulation" is also present in this case. As appears from the record, the coverage determination of the director was issued for the purpose of interpreting the terms "public works" and "workman" in Labor Code sections 1720 and 1723 and to apply those interpretations to the surveying profession. In sum, since the coverage determination had statewide significance and applicability and was issued to implement, interpret and make specific the prevailing wage law, it undoubtedly qualifies as a "regulation" within the meaning of section 11371 and is subject to the APA unless specifically exempted.

This leads us to the next important issue, i. e., whether the director's action was exempted from the APA's requirements. There are three possible places where such an exemption might be found: in the organic legislation establishing the department, in the prevailing wage law, or in the APA itself.

Section 11421 exempts regulations not required to be filed with the Secretary of State under section 11380. Section 11380, subdivision (a)(1) exempts regulations which inter alia "[e]stablishes or fixes rates, prices or tariffs." While the director's wage determination of August 12, 1977, is exempt under this latter section, there is no specific exemption in section 11380 or any- [1128] where for the director's *coverage* determination. The trial court concluded "The general determination of May 26, 1977 was a determination of the coverage of the pub-

lic works law and not an order fixing rates, prices or tariffs as provided in Government Code § 11380, subdivision (a)(1)," so was not exempt.

Appellant argues that the coverage determination should be exempted from the APA requirements because it is part of the rate setting process. Labor Code section 1773 provides the method to be used by the director in determining general prevailing rates. In this determination the director shall fix the rate for each craft, classification or type of work. Thus, the determination of the classification or type of work covered is an essential step in the wage determination process and a rate cannot be fixed without such a determination. As the wage determination process is exempted from the prior hearing requirements of the APA, coverage determination, as an integral part of that process, is also exempted. There is no requirement that the director grant a hearing prior to the determination of the type of work covered.

The judgment is reversed.

RATTIGAN and CHRISTIAN, JJ., concur.

120 Cal.App.3d 517

517 **Minoru SHIMOYAMA, Plaintiff and Appellant,**

v.

The BOARD OF EDUCATION OF the LOS ANGELES UNIFIED SCHOOL DISTRICT, et al., Defendants and Respondents.

Civ. 59994.

Court of Appeal, Second District, Division 4.

June 17, 1981.

Teacher appealed from judgment of the Superior Court, Los Angeles County, Elisabeth E. Zeigler, J., which denied to teacher declaration that he was entitled to be reinstated as head football coach, and an injunction against removing him from that position. The Court of Appeal, Foster, J., assigned, held that: (1) personal attacks by teacher upon principal contained in letter sent in response to principal's reprimand of teacher for deficiencies in performance of his duties, were not protected by the First Amendment so as to prevent principal from disciplining the teacher for such remarks; (2) trial judge could accept testimony of principal that he thought he would have still dismissed teacher from that position even if teacher had not sent letter to him containing remarks both protected and not protected by the First Amendment; therefore any connection between the letter and the principal's decision did not meet the requirement of legal causation; and (3) in view of fact that teacher never sought a hearing for an opportunity to clear his name, and that the only relief sought by teacher in his suit was reinstatement to the position of football coach, issue of whether dismissal of teacher violated his right to due process as a deprivation of a liberty interest without a hearing would not be considered on appeal.

Affirmed.

1. Schools ⇐141(4)

It is an established principle that a teacher may not be denied a position in retaliation for his exercise of a First Amendment right, even if the teacher has no contractual or statutory right of tenure. U.S.C.A.Const. Amend. 1.

2. Schools ⇐141(5)

In determining whether a teacher has been deprived of a position because of his exercise of a constitutional right, the teacher has the burden of proving that his conduct was constitutionally protected, and that it was a motivating factor in the decision of the employer not to renew his assignment; the employer may negate legal

Appendix 2 LABOR CODE

Labor Code (1975)

Labor Code (1999)

Labor Code (2002)

Labor Code

1975

STATE OF CALIFORNIA
Department of General Services
Documents and Publications Section
P.O. Box 20191, Sacramento 95820

1700.44. In cases of controversy arising under this chapter the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo. To stay any award for money, the party aggrieved shall execute a bond approved by the superior court in a sum not exceeding twice the amount of the judgment. In all other cases the bond shall be in a sum of not less than one thousand dollars ($1,000) and approved by the superior court.

The Labor Commissioner may certify without a hearing that there is no controversy within the meaning of this section if he has by investigation established that there is no dispute as to the amount of the fee due. Service of such certification shall be made upon all parties concerned by registered or certified mail with return receipt requested and such certification shall become conclusive 10 days after the date of mailing if no objection has been filed with the Labor Commissioner during that period.

(Amended by Stats. 1967, Ch. 1567.)

1700.45. Notwithstanding Section 1700.44 of the Labor Code, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

(a) If the provision is contained in a contract between an artists' manager and a person for whom such artists' manager under the contract undertakes to endeavor to secure employment,

(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to an artists' manager,

(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and

(d) If the contract provides that the Labor Commissioner or his authorized representative has the right to attend all arbitration hearings.

Except as otherwise provided in this section, any such arbitration shall be governed by the provisions of Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

If there is such an arbitration provision in such a contract, the contract need not provide that the artists' manager agrees to refer any controversy between the applicant and the artists' manager regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.

A provision in a contract providing for the decision by arbitration of any controversy arising under this chapter which does not meet the requirements of this section is not made valid by Section 1281 of the Code of Civil Procedure.

(Amended by Stats. 1961, Ch. 461.)

1700.46. Any person, or agent or officer thereof, who violates any provision of this chapter is guilty of a misdemeanor, punishable by a fine of not less than twenty-five dollars ($25) nor more than two hundred fifty dollars ($250) or imprisonment for a period of not more than 60 days, or both.

(Added by Stats. 1959, Ch. 888.)

PART 7. PUBLIC WORKS AND PUBLIC AGENCIES

CHAPTER 1. PUBLIC WORKS

Article 1. Scope and Operation

1720. As used in this chapter "public works" means:

(a) Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether such political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(Amended by Stats. 1973, Ch. 77.)

1720.2. For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but, upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(Added by Stats. 1974, Ch. 1027.)

1721. "Political subdivision" includes any county, city, district, township, public housing authority, or public agency of the State, and assessment or improvement districts.

(Amended by Stats. 1953, Ch. 1283.)

1722. "Awarding body" or "body awarding the contract" means department, board, authority, officer or agent awarding a contract for public work.

1723. "Workman" includes laborer, workman, or mechanic.

1724. "Locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

1725. "Alien" means any person who is not a born or fully naturalized citizen of the United States.

1726. The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract.

1727. Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained

or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body.
(Amended by Stats. 1945, Ch. 1431.)

1728. In cases of contracts with assessment or improvement districts where full payment is made in the form of a single warrant, or other evidence of full payment, after completion and acceptance of the work, the awarding body shall accept from the contractor in cash a sum equal to, and in lieu of, any amount required to be withheld, retained, or forfeited under the provisions of this section, and said awarding body shall then release the final warrant or payment in full.

1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

1730. Every awarding body that withholds any penalty or forfeiture from any contract payment, for failure of a contractor or subcontractor to comply with any provision of this chapter or any of the labor laws on public works, or with any provision of a contract based on such labor laws, shall at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, transfer all penalties and forfeitures, whether withheld from a progress payment or final payment, to the State Treasurer to become a part of the general fund.

1731. If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the penalties and forfeitures shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the State Treasurer only in the event of a final court judgment against the contractor or his assignee. Otherwise the penalties and forfeitures are subject to any final judgment which is obtained by the contractor or his assignee.

1732. The time for action by the contractor or his assignee for the recovery of penalties or forfeitures is limited to the 90-day period and such suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or his assignees with reference to such penalties or forfeitures.

1733. Suit may be brought by the contractor or his assignee without permission from the State or other authority and is limited to the recovery of the penalties or forfeitures without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in such case and the burden shall be on the plaintiff to establish his right to the penalties or forfeitures withheld. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body.

The Division of Labor Law Enforcement may, upon written request of any awarding body, assist in the defense of such action.
(Amended by Stats. 1957, Ch. 398.)

1734. Any court collecting any fines or penalties under the criminal provisions of this chapter or any of the labor laws pertaining to public works shall as soon as practicable after the receipt thereof deposit same with the county treasurer of the county in whi ich court is situated. Amounts so deposited shall b aid at least

once a month by warrant of the county auditor drawn upon requisition of the judge or clerk of said court, to the State Treasurer for deposit in the General Fund.
(Amended by Stats. 1953, Ch. 523.)

1735. No discrimination shall be made in the employment of persons upon public works because of the race, color, national origin or ancestry, or religion of such persons and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.
(Amended by Stats. 1965, Ch. 283.)

1740. Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements.
(Added by Stats. 1957, Ch. 1992.)

Article 2. Wages

1770. The body awarding the contract or authorizing the public work shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and its determination in the matter shall be final except as provided in Sections 1773.4 and 1773.6. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.
(Amended by Stats. 1953, Ch. 1706.)

1771. Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workmen employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.
(Amended by Stats. 1974, Ch. 1202.)

1772. Workmen employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

1773. The body awarding any contract for public work, or otherwise undertaking any public work, shall ascertain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the awarding body shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such tes as may have been determined for federal public works, within the loc id in the nearest labor arket area. Where such rates do not constitute the r.

actually prevailing in the locality, the awarding body shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the awarding body determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the awarding body may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the awarding body determines that another rate should be adopted.

(Amended by Stats. 1971, Ch. 785.)

1773.1. Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workmen needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids.

(Amended by Stats. 1969, Ch. 1502.)

1773.2. The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy of the prevailing rate of per diem wages on file at its principal office, in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year, and in such event, the awarding body shall cause a copy thereof to be posted at each jobsite.

(Amended by Stats. 1974, Ch. 876.)

Note: Stats. 1974, Ch. 876, also contains the following provisions:

SEC. 2. The amendment of this section made by the 1973–74 Regular Session of the Legislature does not constitute a change in, but is declaratory of, existing law.

1773.3. The awarding body of each city, county and city and county shall file, annually, with the Director of Industrial Relations its determination, pursuant to Section 1773 of this code, of general prevailing rates of per diem wages in the locality in which the public work is to be performed. If during any annual period the awarding body determines that there has been a change in any prevailing rate of per diem wages in such locality it shall notify the Director of Industrial Relations within 10 days thereof.

Where the body awarding or authorizing the public work is a state agency, except as provided in Section 1773.6, it shall file, annually, with the Director of Industrial Relations its determination of general prevailing rates of per diem wages for those localities in which public work is to be performed. If during any annual period the state agency determines that there has been a change in any prevailing rate of per diem wages in any locality it shall notify the Director of Industrial Relations within 10 days thereof.

(Added by Stats. 1959, Ch. 1787.)

1773.4. Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general prevailing rates of per diem wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

(Amended by Stats. 1969, Ch. 301.)

1773.5. The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out the prevailing wage provisions of this article.

(Added by Stats. 1953, Ch. 1706.)

1773.6. Where the body awarding the contract or authorizing the public work is the State Department of Public Works, the Department of General Services, or the State Department of Water Resources or any division thereof, it shall file, quarterly, its determination of general prevailing rates of per diem wages for those localities in which public work is to be performed, in the office of the Director of Industrial Relations, commencing not later than January 10, 1954. Such determination shall be final except as hereinafter provided. If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall immediately notify the awarding body of such change and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

(Amended by Stats. 1963, Ch. 1786.)

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1773.7. The provisions of Sections 1773.4 and 1773.5 shall not apply to the State Department of Public Works, the Department of General Services, or the State Department of Water Resources or any division thereof.
(Amended by Stats. 1963, Ch. 1786.)

1773.8. The body awarding any contract for public work shall include in the specifications for the contract a requirement requiring the payment of travel and subsistence payments to each workman needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed in accordance with this section.

To establish such travel and subsistence payments for contracts entered into with the state, each city, county and city and county, the representative of any craft, classification or type of workman needed to execute the contracts shall file with the Department of Industrial Relations fully executed copies of collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter shall establish such travel and subsistence payments whenever filed 30 days prior to the call for bids.
(Added by Stats. 1968, Ch. 880.)

1774. The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

1775. The contractor shall, as a penalty to the State or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each workmen paid less than the stipulated prevailing rates for such work or craft in which such workman is employed for any public work done under the contract by him or by any subcontractor under him. The difference between such stipulated prevailing wage rates and the amount paid to each workman for each calendar day or portion thereof for which each workman was paid less than the stipulated prevailing wage rate shall be paid to each workman by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that the provisions of this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813 of this chapter, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify, provided that in the case of a workman claiming the difference between the prevailing wage rate and the amount paid him the awarding body has first been given the notice mentioned in Section 1190.1 of the Code of Civil Procedure, the Division of Labor Law Enforcement of such violation and the Division of Labor Law Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided for herein. Such action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of such public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in such action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in such action are not due.

Out of any money withheld or recovered or both there shall first be paid the amount due each workman and if insufficient funds are withheld or recovered or both to pay each workman in full the money shall be prorated among all such workmen.
(Amended by Stats. 1963, Ch. 467.)

1776. Every contractor and subcontractor shall keep an accurate record showing the name, occupation, and the actual per diem wages paid to each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the body awarding the contract and to the Division of Labor Law Enforcement.
(Amended by Stats. 1949, Ch. 127.)

1777. Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or respresentative thereof, doing public work who neglects to comply with any provision of Section 1776 is guilty of a misdemeanor.

1777.5. Nothing in this chapter shall prevent the employment of properly indentured apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is indentured.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area of the site of the public work. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, shall, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall, employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each eight journeymen, the Division of Apprenticeship Standards shall grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to prime contracts involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts of subcontra not bidding for work t gh a general or prime contractor, involving less t two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Law Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

In the event a contractor willfully fails to comply with this section, such contractor shall be denied the right to bid on a public works contract for a period of six months from the date the determination is made.

The interpretation and enforcement of this section shall be in accordance with the rules and procedures prescribed by the Apprenticeship Council.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.

(Amended by Stats. 1974, Ch. 965.)

1777.6. It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as indentured apprentices on any public works,

solely on the ground of the race, religious creed, color, national origin, ancestry, or sex of such employee.

(Amended by Stats. 1971, Ch. 280.)

1778. Every person, who individually or as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes, receives, or conspires with another to take or receive, for his own use or the use of any other person any portion of the wages of any workman or working subcontractor, in connection with services rendered upon any public work is guilty of a felony.

1779. Any person or agent or officer thereof who charges, collects, or attempts to charge or collect, directly or indirectly, a fee or valuable consideration for registering any person for public work, or for giving information as to where such employment may be procured, or for placing, assisting in placing, or attempting to place, any person in public work, whether the person is to work directly for the State, or any political subdivision or for a contractor or subcontractor doing public work is guilty of a misdemeanor.

1780. Any person acting on behalf of the State or any political subdivision, or any contractor or subcontractor or agent or representative thereof, doing any public work who places any order for the employment of a workman on public work where the filling of the order for employment involves the charging of a fee, or the receiving of a valuable consideration from any applicant for employment is guilty of a misdemeanor.

Article 3. Working Hours

1810. Eight hours labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this State, or under the direction, or control, or by the authority of any officer of this State acting in his official capacity, or under the direction, or control or by the authority of any municipal corporation, or of any officer thereof. A stipulation to that effect shall be made a part of all contracts to which the State or any municipal corporation therein is a party.

1811. The time of service of any workman employed upon public work is limited and restricted to 8 hours during any one calendar day, and 40 hours during any one calendar week, except as hereinafter provided for under Section 1815.

(Amended by Stats. 1963, Ch. 964.)

1812. Every contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Law Enforcement.

(Amended by Stats. 1963, Ch. 964.)

1813. The contractor shall, as a penalty to the State or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall

report them to the officer of the State or political subdivision who is authorized to pay the contractor money due him under the contract.
(Amended by Stats. 1963, Ch. 964.)

1814. Any officer, agent, or representative of the State or any political subdivision who violates any provision of this article and any contractor or subcontractor or agent or representative thereof doing public work who neglects to comply with any provision of Section 1812 is guilty of a misdemeanor.
(Added by renumbering Section 1816 by Stats. 1961, Ch. 238.)

1815. Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.
(Amended by Stats. 1963, Ch. 964.)

Article 5. Securing Workmen's Compensation
(Article 5 added by Stats. 1965, Ch. 1000)

1860. The awarding body shall cause to be inserted in every public works contract a clause providing that, in accordance with the provisions of Section 3700 of the Labor Code, every contractor will be required to secure the payment of compensation to his employees.
(Added by Stats. 1965, Ch. 1000.)

1861. Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: "I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workmen's compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."
(Added by Stats. 1965, Ch. 1000.)

CHAPTER 2. PUBLIC AGENCIES

Article 1. Municipal Employees

1900. Every employee of a city whose hours of labor exceed 120 in a week is entitled to be off duty at least three hours during every 24 hours for the purpose of procuring meals. No deduction of salary shall be made by reason thereof.

1901. Any officer or agent of a city having supervision and control of employees covered by this article who violates any provision hereof is guilty of a misdemeanor.

CHAPTER 4. FIREFIGHTERS
(Chapter 4 added by Stats. 1959, Ch. 723)

1960. Neither the State nor any county, political subdivision, incorporated city, town, nor any other municipal corporation shall prohibit, deny or obstruct the right of firefighters to join any bona fide labor organization of their own choice.
(Added by Stats. 1959, Ch. 723.)

1961. As used in this chapter, the term "employees" means the employees of the fire departments and fire services of the State, counties, cities, cities and counties, districts, and other political subdivisions of the State.
(Added by Stats. 1959, Ch. 723.)

1962. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body, and to discuss the same with such governing body, through such an organization, but shall not have the right to strike, or to recognize a picket line of a labor organization while in the course of the performance of their official duties.
(Added by Stats. 1959, Ch. 723.)

1963. The enactment of this chapter shall not be construed as making the provisions of Section 923 of this code applicable to public employees.
(Added by Stats. 1959, Ch. 723.)

PART 8. UNEMPLOYMENT RELIEF

CHAPTER 1. EXTENSION OF PUBLIC WORKS

2010. As used in this chapter, "State agency" means any department, division, board, bureau, or commission of the State.

2011. The Department of Finance shall ascertain and secure from the several State agencies tentative plans for the extension of public works which are best adapted to supply increased opportunities for advantageous public labor during periods of temporary unemployment. Such plans shall include estimates of the amount, character, and duration of employment, the number of employees who could be profitably employed therein, together with rates of wages and other information which the Department of Finance deems necessary.

2012. The Division of Labor Statistics and Research shall keep constantly advised of industrial conditions throughout the State as affecting the employment of labor. Whenever the Governor represents or the division has reason to believe, that a period of extraordinary unemployment caused by industrial depression exists in the State, it shall immediately hold an inquiry into the facts relating thereto, and report to the Governor whether, in fact, such condition exists.
(Amended by Stats. 1945, Ch. 1431.)

2013. If the Division of Labor Statistics and Research reports to the Governor that a condition of extraordinary unemployment caused by industrial depression does exist within this State, the Department of Finance may apportion the available Emergency Fund among the several State agencies for the extension of the public works of the State under the charge or direction thereof, in the manner which the Department of Finance believes to be best adapted to advance the public interest by providing the maximum of public employment consistent with the most useful, permanent, and economic extension of public works.
(Amended by Stats. 1945, Ch. 1431.)

2014. The Department of Employment Development immediately upon the publication of a finding under this chapter that a period of extraordinary unemployment due to industrial depression exists throughout this State shall prepare approved lists of applicants for public employment, secure full information as to their industrial qualifications, and shall submit the same to the Department of Finance for transmission to the state agencies which avail themselves of the provisions of this chapter.
(Amended by Stats. 1973, Ch. 1207.)

3097. The Department of Industrial Relations, Division of Apprenticeship Standards, shall provide services to the Department of Human Resources Development, as requested by and contracted for, with that department. Such federal funds as are available to the Department of Industrial Relations, Division of Apprenticeship Standards, for the purpose of developing and maintaining apprenticeship and on-the-job training programs for eligible persons described in Section 10500 of the Unemployment Insurance Code, shall be directed to the support of the Department of Human Resources Development clients.

The Division of Apprenticeship Standards shall continue in the Department of Industrial Relations but shall exert maximum effort to persuade sponsors of its registered, nonfederally funded, voluntary apprenticeship and on-the-job training programs to accept to the maximum possible extent the eligible persons as described in Section 10500 of the Unemployment Insurance Code.

The Department of Human Resources Development may request, within the limitations of the funds available to it for this purpose, assignment of at least one Division of Apprenticeship Standards consultant to each area designated by the Director of the Department of Human Resources Development. Such apprenticeship consultant services, when funded and requested, shall be provided to the area offices of the Department of Human Resources Development.

(Added by Stats. 1968, Ch. 1460.)

3098. An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

(Amended by Stats. 1974, Ch. 1095.)

PARKER'S 1999 CALIFORNIA LABOR CODE

LEXIS LAW PUBLISHING

710.18. Enacted 1961. Repealed 1967 ch. 1505.

710.19-1710.25. Enacted 1961. Repealed 1970 ch. 399.

710.23a-1710.236. Enacted 1965. Repealed 1970 ch. 1399.

710.30-1710.53. Enacted 1961. Repealed 1970 ch. 1399.

PART 7

PUBLIC WORKS AND PUBLIC AGENCIES

Chapter 1

Public Works

Article 1

Scope and Operation

Article 1.5

Right of Action

Article 2

Wages

Article 3

Working Hours

Article 4

Employment of Aliens [Repealed]

Article 5

Securing Workers' Compensation

Article 1

Scope and Operation

§ 1720. Public Works—Defined

As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(1937 ch. 90, 1953 ch. 1706, 1972 ch. 717, 1973 ch. 77, 1989 ch. 278 urgency eff. Aug. 7, 1989)

Compliance: All contracts that are governed by Sections 1775, 1776, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720 of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects. (1997 ch 757)

§ 1720.2. Public Works—Under Private Contract

For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exist:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

(1974 ch. 1027, 1980 ch. 962)

§ 1720.3. Public Works—Refuse Hauling

For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California.

(1976 ch. 1084, 1983 chs. 142, 143)

§ 1720.4. Work Not Deemed "Public Works"

For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on [illegible] of, private nonprofit c[illegible]unity organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate local or state organization of duly authorized employee representatives of workers employed on public works.

(1989 ch. 1224)

§ 1721. Political Subdivision—Defined

"Political subdivision" includes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.

(1937 ch. 90, 1953 ch. 1283, 1985 ch. 239)

§ 1722. Awarding Body—Defined

"Awarding body" or "body awarding the contract" means department, board, authority, officer or agent awarding a contract for public work.

(1937 ch. 90)

§ 1722.1. Contractor, Subcontractor—Defined

For the purposes of this chapter, "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article and Article 2 (commencing with Section 1770).

(1978 ch. 1249, 1982 ch. 454)

§ 1723. Workman—Defined

"Workman" includes laborer, workman, or mechanic.

(1937 ch. 90)

§ 1724. Locality in Which Public Work Performed—Defined

"Locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

(1937 ch. 90)

§ 1725. Alien—Defined

"Alien" means any person who is not a born or fully naturalized citizen of the United States.

(1937 ch. 90)

§ 1726. Awards of Contracts—Cognizance of Violations

The body awarding the contract for public work shall take cognizance of violations of the [illegible]ons of this

chapter committed in the course of the execution of the contract.

(1937 ch. 90)

§ 1727. Withholding of Forfeited Sums

Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.

(1937 ch. 90, 1945 ch. 1431, 1992 ch. 1342)

§ 1728. Cash in Lieu of Forfeited Sum

In cases of contracts with assessment or improvement districts where full payment is made in the form of a single warrant, or other evidence of full payment, after completion and acceptance of the work, the awarding body shall accept from the contractor in cash a sum equal to, and in lieu of, any amount required to be withheld, retained, or forfeited under the provisions of this section, and said awarding body shall then release the final warrant or payment in full.

(1937 ch. 90)

§ 1729. Withholding of Penalties from Subcontractor

It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

(1937 ch. 90)

§ 1730. Transfer of Wages and Penalties to Labor Commissioner

Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job.

(1992 ch. 1342)

Former section 1730: Enacted 1937 and repealed 1992 ch. 1342.

§ 1731. Suit Against Awarding Body—Wages and Penalties Retained

If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the wages and penalties shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the Labor Commissioner for disbursement pursuant to Section 1775 if the contractor does not prevail in the action. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(1937 ch. 90, 1992 ch. 1342)

§ 1732. Recovery of Wages or Penalties—Time for Action

Notwithstanding any other provision of law, the time for action by the contractor or his or her assignee for the recovery of wages or penalties is limited to the 90-day period and suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or his or her assignees with reference to those wages or penalties.

(1937 ch. 90, 1992 ch. 1342)

§ 1733. Recovery of Wages and Penalties—Suit

Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

(1937 ch. 90, 1957 ch. 398, 1988 ch. 160, 1992 ch. 1342)

§ 1734. Fines, Penalties—Deposit

Any court collecting any fines or penalties under the criminal provisions of this chapter or any of the labor laws pertaining to public works shall as soon as practicable after the receipt thereof deposit same with the county treasurer of the county in which such court is situated. Amounts so deposited shall be paid at least once a month by warrant of the county auditor drawing upon requisition of the judge or clerk of said court, to the State Treasurer for deposit in the General Fund.

(1937 ch. 90, 1953 ch. 523)

§ 1735. Employment Discrimination—Prohibited

No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

(1939 ch. 643, 1965 ch. 283, 1976 ch. 1174, 1980 ch. 992, 1992 ch. 913)

§§ 1736-1739. Reserved.

§ 1740. Bids Subject to Modification

Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements.

(1957 ch. 1992)

§ 1741. Enacted 1963. Repealed 1971 ch. 438.

Article 1.5

Right of Action

§ 1750. Cause of Action by Second Lowest Bidder

(a)(1) The second lowest bidder, and any person, firm, association, trust, partnership, labor organization, corporation, or other legal entity which has, prior to the letting of the bids on the public works project in question, entered into a contract with the second lowest bidder, that suffers damage as a proximate result of a competitive bid for a public works project, as defined in subdivision (b), not being accepted due to the successful bidder's violation, as evidenced by the conviction of the successful bidder therefor, of any provision of Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code, may bring an action for damages in the appropriate state court against the violating person or legal entity.

(2) There shall be a rebuttable presumption that a successful bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of this code or of the Unemployment Insurance Code, or of both, was awarded the bid because that successful bidder was able to lower the bid due to this violation or these violations occurring on the contract for public work awarded by the public agency.

(b) For purposes of this article:

(1) "Public works project" means the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement, or renovation of a public building or structure.

(2) "Second lowest bidder" means the second lowest qualified bidder deemed responsive by the public agency awarding the contract for public work.

(3) The "second lowest bidder" and the "successful bidder" may include any person, firm, association, corporation, or other legal entity.

(c) In an action brought pursuant to this section, the court may award costs and reasonable attorney's fees, in an amount to be determined in the court's discretion, to the prevailing party.

(d) For purposes of an action brought pursuant to this section, employee status shall be determined pursuant to Division 4 (commencing with Section 3200) with respect to alleged violations of that division, pursuant to the Unemployment Insurance Code with respect to alleged violations of that code, and pursuant to Section 2750.5 with respect to alleged violations of either Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code.

(e) The right of action established pursuant to this article shall not be construed to diminish rights of action established pursuant to Section 19102 of, and Article 1.8 (commencing with Section 20104.70) of Chapter 1 of Part 3 of Division 2 of, the Public Contract Code.

(f) A second lowest bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of the Labor Code or of the Unemployment Insurance Code, or both, within one year prior to filing the bid for public work, and who has failed to take affirmative steps to correct that violation or those violations, is prohibited from taking any action authorized by this section.

(1991 ch. 906)

Article 2

Wages

§ 1770. Determination of Prevailing Per Diem Wage—Director

The Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.

(1937 ch. 90, 1953 ch. 1706, 1976 ch. 281)

§ 1771. Prevailing Per Diem Wage Required

Except for public works projects of one thousand dollars ($1,000) or less, not less that the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

(1937 ch. 90, 1953 ch. 1706, 1974 ch. 1202, 1976 ch. 361, 1981 ch. 449)

§ 1771.5. Projects Excluded from Prevailing Per Diem Wage Requirement upon Election of Labor Compliance Program

(a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

(1989 ch. 1224)

§ 1771.6. Deposit of Fines or Penalties into General Fund

Notwithstanding Sections 1730, 1731, and 1734, any political subdivision which enforces this chapter in accordance with Section 1771.5 shall, at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, deposit all penalties or forfeitures withheld from any contract payment in the general fund of the political subdivision. Any court collecting any fines or penalties under the criminal provisions of this chapter, or any of the labor laws pertaining to public works, when the fines and penalties resulted from enforcement actions by a political subdivision pursuant to Section 1771.5, shall deposit the fines or penalties in the general fund of the political subdivision.

(1989 ch. 1224)

§ 1771.7. Appeal of Enforcement Action

A contractor may appeal an enforcement action by a political subdivision pursuant to Section 1771.5 to the Director of Industrial Relations. Any ruling by the director shall be final and, notwithstanding Section 1732, any appeal shall waive the contractor's right to bring court action on the same issue.

(1989 ch. 1224)

§ 1772. Workers Employed Upon Public Work

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

(1937 ch. 90, 1992 ch. 1342)

§ 1773. Adoption of Prevailing Per Diem Wage

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

(1937 ch. 90, 1953 ch. 1706, 1968 ch. 699 oper. July 1, 1969, 1971 ch. 785, 1976 ch. 281)

§ 1773.1. Per Diem Wages—Inclusions

Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in Section 1773.8, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workman needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids.

(1959 ch. 2173, 1969 ch. 1502, 1976 ch. 281)

§ 1773.2. Call for Bids—Specification of Wage Rates

The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

(1971 ch. 785, 1974 ch. 876, 1977 ch. 423, 1992 ch. 1342)

§ 1773.3. Apprenticeship Standards Division—Public Works Awards

An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

(Formerly § 3098, 1972 ch. 1399, 1974 ch. 1095, renumbered § 1773.3, 1978 ch. 1249)

Former section 1773.3: Enacted 1959 and repealed 1976 ch. 281.

§ 1773.4. Petition to Review Wage Rate Determination

Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general prevailing rates of per diem wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

(1953 ch. 1706, 1968 ch. 699 oper. July 1, 1969, 1969 ch. 301)

§ 1773.5. Enforcement of Public Works Labor Laws

The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out

his chapter, including, but not limited to, the responibilities and duties of awarding bodies under this hapter.

(1953 ch. 1706, 1989 ch. 1224)

1773.6. Change in Prevailing Wage Rate

If during any quarterly period the Director of Industrial Relations shall determine that there has been a hange in any prevailing rate of per diem wages in any ocality he shall make such change available to the warding body and his determination shall be final. Such determination by the Director of Industrial Relaions shall not be effective as to any contract for which he notice to bidders has been published.

(1953 ch. 1706, 1957 ch. 1932, 1963 ch. 1786 rgency eff. Oct. 1. 1963, 1976 ch. 281)

1773.7. Applicability of Government Code

The provisions of Section 11250 of the Government Code shall not be applicable to Sections 1773, 1773.4, nd 1773.6.

(1976 ch. 281)

Former section 1773.7: Enacted 1953 and repealed 1976 ch. 281.

1773.8. Payment of Travel, Subsistence Payments

The body awarding any contract for public work shall nclude in the specifications for the contract a requirement requiring the payment of travel and subsistence payments to each workman needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed in accordance with this section.

To establish such travel and subsistence payments for contracts entered into with the state, each city, county and city and county, the representative of any craft, classification or type of workman needed to execute the contracts shall file with the Department of Industrial Relations fully executed copies of collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter shall establish such travel and subsistence payments whenever filed 30 days prior to the call for bids.

(1968 ch. 880)

1774. Specified Prevailing Wage—Must Be Paid

The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

(1937 ch. 90)

[Section 1775 effective until January 1, 2003: see also Section 1775 set out below]

1775. Payment Less Than Stipulated Rate—Penalty

(a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or the willful failure by the contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor or subcontractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. If the Division of Labor Standards Enforcement determines that employees of a subcontractor were not paid the general prevailing rate of per diem wages and if the body awarding the contract under which the employees performed work did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the contractor shall withhold an amount of moneys due the subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by the Division of Labor Standards Enforcement. The contractor shall pay any money retained from and owed to a subcontractor upon receipt of notification by the Division of Labor Standards Enforcement that the wage complaint has been resolved. If notice of the resolution of the wage complaint has not been received by the contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, whichever occurs later, the contractor shall pay all moneys retained from the subcontractor to the awarding body. The moneys shall be retained by the awarding body pending the final decision of an enforcement action, and be forwarded to the Labor Commissioner for disbursement pursuant to subdivision (d) if the subcontractor does not prevail in the action. Wages for workers who cannot be located after a diligent search by the Labor Commissioner shall be deposited in the Industrial Relations Unpaid Wage Fund pursuant to subdivision (c) of Section 96.7. Penalties shall be paid into the General Fund.

If the subcontractor prevails in the enforcement action, the awarding body shall release any funds retained pursuant to this subdivision to the contractor within 10 working days from the date of the final decision of the court.

(d) To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section or Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the division, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor and subcontractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor and subcontractor to establish that the penalties and amounts demanded in the action are not due. The contractor and subcontractor shall be jointly and severally liable in an enforcement action for any wages due. Following entry of a judgment for joint and several liability, the division shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim for wages against the contractor. From the amount collected from the subcontractor, the wage claim shall be satisfied prior to the amount being applied to penalties.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

(e) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

(1937 ch. 90, 1957 ch. 397, 1963 ch. 467, 1978 ch. 1249, 1989 ch. 1224, 1992 ch. 1342, 1997 ch. 757)

Compliance: All contracts that are governed by Sections 1775, 1776, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720 of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects. (1997 ch 757)

[Section 1775 operative January 1. 2003; see also Section 1775 set out above]

§ 1775. Payment Less Than Stipulated Rate—Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the

Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

This section shall become operative on January 1, 2003.

(1937 ch. 90, 1957 ch. 397, 1963 ch. 467, 1978 ch. 1249, 1989 ch. 1224, 1992 ch. 1342, 1997 ch. 757)

[Section 1776 effective until January 1, 2003; see also Section 1776 set out below]

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records,

including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

(1978 ch. 1249, 1983 ch. 681, 1992 ch. 1342, 1993 ch. 589, 1997 ch. 757)

Compliance: All contracts that are governed by Sections 1775, 1776, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720 of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects. (1997 ch. 757)

Former section 1776: Enacted 1937 and repealed 1978 ch. 1249.

[Section 1776 effective January 1, 2003; see also Section 1776 set out above]

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement, shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall become operative January 1, 2003.

(1978 ch. 1249, 1983 ch. 681, 1992 ch. 1342, 1993 ch. 589, 1997 ch. 757, 1998 ch. 485 oper. Jan. 1, 2003)

§ 1777. Violation—Misdemeanor

Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of Section 1776 is guilty of a misdemeanor.

(1937 ch. 90)

§ 1777.1. Violation of Chapter with Intent to Defraud—Ineligibility to Bid on Contract

(a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible for a period of not less than one year or more than three years to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(c) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

Not less than semiannually, the Labor Commissioner shall publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project pursuant to this chapter. The list shall contain the name of the contractor, the Contractor's State License Board license number of the contractor, and the effective period of debarment of the contractor.

(d) The Labor Commissioner shall adopt rules and regulations for the administration and enforcement of this section, the definition of terms, and appropriate penalties.

(1989 ch. 1224, 1998 ch. 443)

§ 1777.5. Apprentices—Employment upon Public Works

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee that includes an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There is an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to

the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman or, in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. The joint apprenticeship committee has the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but, where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

(1937 ch. 872, 1939 ch. 971, 1957 ch. 699, 1968 ch. 1411, 1969 ch. 1260 urgency eff. Aug. 31, 1969, 1972 chs. 1087, 1399, 1974 ch. 965, 1976 chs. 538, 1179, 1989 ch. 1224, 1997 ch. 17)

§ 1777.6. Employment Discrimination—Unlawful

It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as registered apprentices on any public works, on the ground of the race, religious creed, color, national origin, ancestry, sex, or age, except as provided in Section 3077, of such employee.

(1951 ch. 1192, 1965 ch. 283, 1971 ch. 280, 1976 ch. 1179 urgency eff. Sept. 22, 1976)

§ 1777.7. Noncompliance with Law Governing Apprenticeship

(a) In the event a contractor or subcontractor willfully fails to comply with Section 1777.5, the Director of Industrial Relations shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on, or to receive, any public works contract for a period of up to one year for the first violation and for a period of up to three years for the second and subsequent violations. Each period of debarment shall run from the date the determination of noncompliance by the Administrator

of Apprenticeship becomes an order of the California Apprenticeship Council.

(b) A contractor or subcontractor who violates Section 1777.5 shall forfeit as a civil penalty the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(c) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first time violation and with the concurrence of the joint apprenticeship committee, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(e) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

(1989 ch. 1224)

Former section 1777.7: Enacted 1976 and repealed 1989 ch. 1224.

§ 1777.8. Enacted 1990. Repealed 1991 ch. 640.

§ 1778. Illegal Taking of Wages—Felony

Every person, who individually or as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes, receives, or conspires with another to take or receive, for his own use or the use of any other person any portion of the wages of any workman or working subcontractor, in connection with services rendered upon any public work is guilty of a felony.

(1937 ch. 90)

§ 1779. Fees for Employment Registration, Information—Misdemeanor

Any person or agent or officer thereof who charges, collects, or attempts to charge or collect, directly or indirectly, a fee or valuable consideration for registering any person for public work, or for giving information as to where such employment may be procured, or for placing, assisting in placing, or attempting to place, any person in public work, whether the person is to work directly for the State, or any political subdivision or for a contractor or subcontractor doing public work is guilty of a misdemeanor.

(1937 ch. 90)

§ 1780. Fees for Filling Work Orders—Misdemeanor

Any person acting on behalf of the State or any political subdivision, or any contractor or subcontractor or agent or representative thereof, doing any public work who places any order for the employment of a workman on public work where the filling of the order for employment involves the charging of a fee, or the receiving of a valuable consideration from any applicant for employment is guilty of a misdemeanor.

(1937 ch. 90)

§ 1781. Enacted 1937. Repealed 1957 ch. 396.

Article 3

Working Hours

§ 1810. Legal Day's Work—Eight Hours

Eight hours labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this State, or under the direction, or control, or by the authority of any officer of this State acting in his official capacity, or under the direction, or control or by the authority of any municipal corporation, or of any officer thereof. A stipulation to that effect shall be made a part of all contracts to which the State or any municipal corporation therein is a party.

(1937 ch. 90)

§ 1811. Time of Service

The time of service of any workman employed upon public work is limited and restricted to 8 hours during any one calendar day, and 40 hours during any one calendar week, except as hereinafter provided for under Section 1815.

(1937 ch. 90, 1961 ch. 238, 1963 ch. 964)

§ 1812. Records of Working Hours—Maintenance

Every contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each worker employed by him or her in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Standards Enforcement.

(Formerly § 1814, 1937 ch. 90, 1945 ch. 1431, renumbered § 1812, 1961 ch. 238, 1963 ch. 964, 1988 ch. 160)

[Section 1813 effective until January 1, 2003; see also Section 1813 set out below]

§ 1813. Working Hours Violations—Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which the workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him or her under the contract.

This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

(Formerly § 1815, 1937 ch. 90, 1957 ch. 399, renumbered § 1813, 1961 ch. 238, 1963 ch. 964, 1997 ch. 757)

Compliance: All contracts that are governed by Sections 1775, 1776, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720 of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects. (1997 ch. 757)

Former section 1813: Enacted 1937 and repealed 1961 ch. 238.

[Section 1813 effective January 1, 2003; see also Section 1813 set out above]

§ 1813. Working Hours Violations—Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which the workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him or her under the contract.

This section shall become operative January 1, 2003.

(Formerly § 1815, 1937 ch. 90, 1957 ch. 399, renumbered § 1813, 1961 ch. 238, 1963 ch. 964, 1997 ch. 757, 1998 ch. 485 oper. Jan. 1, 2003)

§ 1814. Violation—Misdemeanor

Any officer, agent, or representative of the State or any political subdivision who violates any provision of this article and any contractor or subcontractor or agent or representative thereof doing public work who neglects to comply with any provision of Section 1812 is guilty of a misdemeanor.

(Formerly § 1816, 1937 ch. 90, renumbered § 1814, 1961 ch. 238)

§ 1815. Overtime—Compensation

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1 ½ times the basic rate of pay.

(Formerly § 1817, 1941 ch. 759, renumbered § 1815, 1961 ch. 238, 1963 ch. 964)

§ 1816. Renumbered § 1814 and amended 1961 ch. 238.

§ 1817. Renumbered § 1815 and amended 1961 ch. 238.

Article 4

Employment of Aliens

[Repealed]

§§ 1850-1854. Enacted 1937. Repealed 1970 ch. 652.

Article 5

Securing Workers' Compensation

§ 1860. Payment of Workers' Compensation—Required

The awarding body shall cause to be inserted in every public works contract a clause providing that, in accordance with the provisions of Section 3700 of the Labor Code, every contractor will be required to secure the payment of compensation to his employees.

(1965 ch. 1000)

§ 1861. Certificate of Awareness of Compensation Requirements

Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: "I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

(1965 ch. 1000, 1979 ch. 373)

Chapter 2

Public Agencies

Article 1

Municipal Employees

PARKER'S 2002 CALIFORNIA LABOR CODE

§ 1701.16. on by injured person

A person who is injured by any violation of this chapter or by the breach of a contract subject to this chapter may bring an action for recovery of damages or to restrain and enjoin a violation, or both. The amount awarded for damages for a violation of this chapter may be up to three times the damages actually incurred, but not less than the amount paid by the artist to the advance-fee talent service. When an advance-fee talent service refuses or is unwilling to pay damages awarded by a judgment that has become final, the judgment may be satisfied from the bond or deposit maintained by the Labor Commissioner. If the plaintiff prevails in an action under this chapter, the plaintiff shall be awarded reasonable attorney's fees and costs. If the court determines, by clear and convincing evidence, that the breach of contract or violation of this chapter was willful, the court, in its discretion, may award punitive damages in addition to any other amounts.

Added Stats 1999 ch 626 § 1 (AB 884).

§ 1701.17. Exclusivity of provisions

The provisions of this chapter are not exclusive and do not relieve any person subject to this chapter from the duty to comply with all other laws.

Added Stats 1999 ch 626 § 1 (AB 884).

§ 1701.18. Remedies

The remedies provided in this chapter are not exclusive and shall be in addition to any other remedies or procedures provided in any other law.

Added Stats 1999 ch 626 § 1 (AB 884).

§ 1701.19. Waivers

Any waiver by the artist of the provisions of this chapter is deemed contrary to public policy and void and unenforceable. Any attempt by an advance-fee talent service to have an artist waive his or her rights under this chapter is a violation of this chapter.

Added Stats 1999 ch 626 § 1 (AB 884).

§ 1701.20. Severability of provisions

If any provision of this chapter or the application thereof to any person or circumstances is held unconstitutional, the remainder of the chapter and the application of that provision to other persons and circumstances shall not be affected thereby.

Added Stats 1999 ch 626 § 1 (AB 884).

Chapter 5
Nurses Registries
[Repealed]

§§ 1710, 1710.1, 1710.2, 1710.3. [Sections repealed 1970.]
§ 1710.4. [Section repealed 1970.]
§§ 1710.5, 1710.6, 1710.7. [Sections repealed 1970.]
§§ 1710.10, 1710.11, 1710.12, 1710.13, 1710.14, 1710.15, 1710.16. [Sections repealed 1970.]
§ 1710.17. [Section repealed 1970.]
§ 1710.18. [Section repealed 1967.]
§§ 1710.19, 1710.20, 1710.21, 1710.22, 1710.23. [Sections repealed 1970.]
§§ 1710.23a, 1710.23b. [Sections repealed 1970.]
§§ 1710.24, 1710.25. [Sections repealed 1970.]
§§ 1710.30, 1710.31, 1710.32, 1710.33. [Sections repealed 1970.]
§§ 1710.34, 1710.35. [Sections repealed 1970.]
§§ 1710.36, 1710.37, 1710.38. [Sections repealed 1970.]
§§ 1710.39, 1710.40, 1710.41, 1710.42, 1710.43. [Sections repealed 1970.]
§§ 1710.45, 1710.46, 1710.47, 1710.48, 1710.49, 1710.50, 1710.51, 1710.52, 1710.53. [Sections repealed 1970.]

§§ 1710, 1710.1, 1710.2, 1710.3. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1970 ch 1399 § 2. See CC § 1812.524.

§ 1710.4. [Section repealed 1970.]

Added Stats 1961 ch 242 § 2. Amended Stats 1967 ch 1505 § 17. Repealed Stats 1970 ch 1399 § 2. See CC § 1812.524.

§§ 1710.5, 1710.6, 1710.7. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1970 ch 1399 § 2.

§§ 1710.10, 1710.11, 1710.12, 1710.13, 1710.14, 1710.15, 1710.16. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1970 ch 1399 § 2.

§ 1710.17. [Section repealed 1970.]

Added Stats 1961 ch 242 § 2. Amended Stats 1965 ch 185 § 1. Repealed Stats 1970 ch 1399 § 2.

§ 1710.18. [Section repealed 1967.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1967 ch 1505 § 14.

§§ 1710.19, 1710.20, 1710.21, 1710.22, 1710.23. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1970 ch 1399 § 2.

§§ 1710.23a, 1710.23b. [Sections repealed 1970.]

Added Stats 1965 ch 180 §§ 1, 2. Repealed Stats 1970 ch 1399 § 2.

§§ 1710.24, 1710.25. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1970 ch 1399 § 2.

§§ 1710.30, 1710.31, 1710.32, 1710.33. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1970 ch 1399 § 2. See CC § 1812.526.

§§ 1710.34, 1710.35. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Amended Stats 1967 ch 1505 §§ 15, 16. Repealed Stats 1970 ch 1399 § 2.

§§ 1710.36, 1710.37, 1710.38. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1970 ch 1399 § 2. See CC §§ 1812.528, 1812.529.

§§ 1710.39, 1710.40, 1710.41, 1710.42, 1710.43. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1970 ch 1399 § 2.

§§ 1710.45, 1710.46, 1710.47, 1710.48, 1710.49, 1710.50, 1710.51, 1710.52, 1710.53. [Sections repealed 1970.]

Added Stats 1961 ch 242 § 2. Repealed Stats 1970 ch 1399 § 2. See CC §§ 1812.531, 1812.532.

Part 7
Public Works and Public Agencies

Chapter 1
Public Works

Article 1

Scope and Operation

Article 1.5

Right of Action

Article 2

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Article 3

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Article 5

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Article 1

Scope and Operation

§ 1720. "Public works"

(a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(b) For purposes of this section, "paid for in whole or in part out of public funds" means the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations.

(c) Notwithstanding subdivision (b):

(1) Private residential projects built on private property are not subject to the requirements of this chapter if the projects are not built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

(2)(A) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(B) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

(3) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code does not constitute a project that is paid for in whole or in part out of public funds.

(4) "Paid for in whole or in part out of public funds" shall not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8369.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the Health and Safety Code, or Sections 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or an ordinance or regulation, other than an ordinance or regulation adopted pursuant to this section, applies this chapter to a project, the exclusions set forth in subdivision (d) shall not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code shall mean the Internal Revenue Code of 1986, as amended, and shall include the corresponding predecessor sections of the Internal Revenue Code of 1954, as amended.

Enacted 1937. Amended Stats 1953 ch 1706 § 1; Stats 1972 ch 717 § 1; Stats 1973 ch 77 § 19; Stats 1989 ch 278 § 1. Amended Stats 2000 ch 881 § 1 (SB 1999); Stats 2001 ch 938 § 2 (SB 975).

§ 1720.2. "Public works" as including construction work done under private contract

For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exist:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

Added Stats 1974 ch 1027 § 1. Amended Stats 1980 ch 962 § 1.

§ 1720.3. Public works as including hauling of refuse

For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state.

Added Stats 1976 ch 1084 § 1. Amended 1983 Stats ch 143 § 201 (ch 142 prevails), ch 142 § 101. Amended Stats 1999 ch 220 § 1 (AB 3021).

§ 1720.4. Work not included under "public works"

For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on behalf of, private nonprofit community organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate local or state organization of duly authorized employee representatives of workers employed on public works.

Added Stats 1989 ch 1224 § 1.

§ 1721. "Political subdivision"

"Political subdivision" includes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.

Enacted 1937. Amended Stats 1953 ch 1283 § 1; Stats 1985 ch 239 § 1.

§ 1722. "Awarding body" or "body awarding contract"

"Awarding body" or "body awarding the contract" means department, board, authority, officer or agent awarding a contract for public work.

Enacted 1937.

§ 1722.1. "Contractor" and "subcontractor"

For the purposes of this chapter, "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article and Article 2 (commencing with Section 1770).

Added Stats 1978 ch 1249 § 1. Amended Stats 1982 ch 454 § 132.

§ 1723. "Worker"

"Worker" includes laborer, worker, or mechanic.

Enacted 1937. Amended Stats 2000 ch 954 § 2 (AB 1646), operative July 1, 2001.

Note—Stats 2000 ch. 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

§ 1724. "Locality in which public work is performed"

"Locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

Enacted 1937.

§ 1725. "Alien"

"Alien" means any person who is not a born or fully naturalized citizen of the United States.

Enacted 1937.

§ 1726. Co[illegible]ce of violations by body awarding co[illegible]t

The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed.

Enacted 1937. Amended Stats 2000 ch 954 § 3 (AB 1646), operative July 1, 2001.

Note—Stats 2000 ch. 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

§ 1727. Withholding payment of amounts forfeited

(a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

Enacted 1937. Amended Stats 1945 ch 1431 § 50; Stats 1992 ch 1342 § 1 (SB 222); Stats 2000 ch 954 § 4 (AB 1646), operative July 1, 2001.

Note—Stats 2000 ch. 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

§ 1728. Acceptance of cash in lieu of amount withheld, retained or forfeited; Release

In cases of contracts with assessment or improvement districts where full payment is made in the form of a single warrant, or other evidence of full payment, after completion and acceptance of the work, the awarding body shall accept from the contractor in cash a sum equal to, and in lieu of, any amount required to be withheld, retained, or forfeited under the provisions of this section, and said awarding body shall then release the final warrant or payment in full.

Enacted 1937.

§ 1729. Withholding sums by contractor from subcontractor; Recovery of penalty from subcontractor

It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

Enacted 1937.

§ 1730. [Section repealed 2001.]

Added Stats 1992 ch 1342 § 3. Repealed Stats 2000 ch 954 § 5 (AB 1646), operative July 1, 2001. The repealed section related to disposition of penalties and forfeitures.

Former Sections:

Former § 1730, similar to the present section, was enacted in 1937 and repealed Stats 1992 ch 1342 § 2.

§ 1731. [Section repealed 2001.]

Enacted 1937. Amended Stats 1992 ch 1342 § 4 (SB 222). Repealed Stats 2000 ch 954 § 6 (AB 1646), operative July 1, 2001. The repealed section related to retention of wages and penalties pending suit against awarding body.

§ 1732. [Section repealed 2001.]

Enacted 1937. Amended Stats 1992 ch 1342 § 5 (SB 222). Repealed Stats 2000 ch 954 § 7 (AB 1646), operative July 1, 2001. The repealed section related to time for action by contractor and assignee to recover penalties.

§ 1733. [Section repealed 2001.]

Enacted 1937. Amended Stats 1957 ch 398 § 1; Stats 1988 ch 160 § 122. Amended Stats 1992 ch 1342 § 6 (SB 222). Repealed Stats 2000 ch 954 § 8 (AB 1646), operative July 1, 2001. The repealed section related to action by contractor or assignee to recover wages and penalties.

§ 1734. Fines or penalties; Transmission to State Treasurer

Any court collecting any fines or penalties under the criminal provisions of this chapter or any of the labor laws pertaining to public works shall as soon as practicable after the receipt thereof deposit same with the county treasurer of the county in which such court is situated. Amounts so deposited shall be paid at least once a month by warrant of the county auditor drawn upon requisition of the judge or clerk of said court, to the State Treasurer for deposit in the General Fund.

Enacted 1937. Amended Stats 1953 ch 523 § 5.

§ 1735. Prohibited employment discrimination

No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

Added Stats 1939 ch 643 § 1. Amended Stats 1965 ch 283 § 8; Stats 1976 ch 1174 § 1; Stats 1980 ch 992 § 10. Amended Stats 1992 ch 913 § 36 (AB 1077).

§ 1736. Confidentiality of employee reporting violation

During any investigation conducted under this part, the Division of Labor Standards Enforcement shall keep confidential the name of any employee who reports a violation of this chapter and any other information that may identify the employee.

Added Stats 1999 ch 302 § 1 (AB 1395).

§ 1740. Legislative body receiving federal aid; Provision for compliance of bids or contracts with revisions in federal minimum wage schedules

Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements.

Added Stats 1957 ch 1992 § 1.

§ 1741. Violation of chapter

If the Labor Commissioner or his or her designee determines after an investigation that there has been a violation of this chapter, the Labor Commissioner shall with reasonable promptness issue a civil wage and penalty assessment to the contractor or subcontractor or both. The assessment shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures due and shall include the basis for the assessment. The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment. The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body. However, no bonding company or surety shall be relieved of its responsibilities because it failed to receive notice from the Labor Commissioner.

Added Stats 2000 ch 954 § 9 (AB 1646), operative July 1, 2001.

§ 1742. (First of two: Operative until January 1, 2005) Review of assessment

(a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial hearing officer possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the director may reconsider or modify the

decision to correct an error, except that a clerical error may be corrected at any time.

The director shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

Added Stats 2000 ch 954 § 10 (AB 1646), operative July 1, 2001, operative until January 1, 2005.

Note—Stats 2000 ch. 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

§ 1742. (Second of two; Operative January 1, 2005) Review of assessment

(a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b)(1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge appointed by the Director of Industrial Relations. The appointed hearing judge shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the

person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall become operative on January 1, 2005.

Added Stats 2000 ch 954 § 11 (AB 1646), operative January 1, 2005.

Note—Stats 2000 ch. 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

§ 1742.1. (First of two; Operative until January 1, 2005) Liquidated damages

(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

Added Stats 2000 ch 954 § 12 (AB 1646), operative July 1, 2001, operative until January 1, 2005.

Note—Stats 2000 ch. 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

§ 1742.1. (Second of two; Operative January 1, 2005) Liquidated damages

(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the administrative law judge that he or she had substantial grounds for believing the assessment or notice to be in error, the administrative law judge shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not

apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall become operative on January 1, 2005.

Added Stats 2000 ch 954 § 13 (AB 1646), operative January 1, 2005.

§ 1743. Joint and several liability

(a) The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon. The Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

(b) From the amount collected, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(c) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(d) A final order under this chapter or a judgment thereon shall be binding, with respect to the amount found to be due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. The limitations period of any action on a payment bond shall be tolled pending a final order that is no longer subject to judicial review.

Added Stats 2000 ch 954 § 14 (AB 1646), operative July 1, 2001.

Article 1.5

Right of Action

§ 1750. Action for damages

(a) (1) The second lowest bidder, and any person, firm, association, trust, partnership, labor organization, corporation, or other legal entity which has, prior to the letting of the bids on the public works project in question, entered into a contract with the second lowest bidder, that suffers damage as a proximate result of a competitive bid for a public works project, as defined in subdivision (b), not being accepted due to the successful bidder's violation, as evidenced by the conviction of the successful bidder therefor, of any provision of Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code, may bring an action for damages in the appropriate state court against the violating person or legal entity.

(2) There shall be a rebuttable presumption that a successful bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of this code or of the Unemployment Insurance Code, or of both, was awarded the bid because that successful bidder was able to lower the bid due to this violation or these violations occurring on the contract for public work awarded by the public agency.

(b) For purposes of this article:

(1) "Public works project" means the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement, or renovation of a public building or structure.

(2) "Second lowest bidder" means the second lowest qualified bidder deemed responsive by the public agency awarding the contract for public work.

(3) The "second lowest bidder" and the "successful bidder" may include any person, firm, association, corporation, or other legal entity.

(c) In an action brought pursuant to this section, the court may award costs and reasonable attorney's fees, in an amount to be determined in the court's discretion, to the prevailing party.

(d) For purposes of an action brought pursuant to this section, employee status shall be determined pursuant to Division 4 (commencing with Section 3200) with respect to alleged violations of that division, pursuant to the Unemployment Insurance Code with respect to alleged violations of that code, and pursuant to Section 2750.5 with respect to alleged violations of either Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code.

(e) The right of action established pursuant to this article shall not be construed to diminish rights of action established pursuant to Section 19102 of, and Article 1.8 (commencing with Section 20104.70) of Chapter 1 of Part 3 of Division 2 of, the Public Contract Code.

(f) A second lowest bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of the Labor Code or of the Unemployment Insurance Code, or both, within one year prior to filing the bid for public work, and who has failed to take affirmative steps to correct that violation or those violations, is prohibited from taking any action authorized by this section.

Added Stats 1991 ch 906 § 1 (AB 1754).

Article 2

Wages

§ 1770. General prevailing wage rate; Determination; Payment of more than prevailing rate; Overtime work

The Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.

Enacted 1937. Amended Stats 1953 ch 1706 § 2; Stats 1976 ch 281 § 2.

§ 1771. Requirement of prevailing local rate for work under contract

Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

Enacted 1937. Amended Stats 1953 ch 1706 § 3; Stats 1974 ch 1202 § 1; Stats 1976 ch 861 § 2; Stats 1981 ch 449 § 1.

§ 1771.2. Action against employer that fails to pay prevailing wage

A joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) may bring an action in any court of competent jurisdiction against an employer that fails to pay the prevailing wage to its employees, as required by this article. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs.

Added Stats 2001 ch 804 § 1 (SB 588).

§ 1771.5. Labor compliance program

(a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

Added Stats 1989 ch 1224 § 2. Amended Stats 1999 ch 83 § 132 (SB 966).

§ 1771.6. Notice of withholding

(a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments.

The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on a bond, if their identities are known to the awarding body.

(b) The withholding of contract payments in accordance with Section 1726 or 1771.5 shall be reviewable under Section 1742 in the same manner as if the notice of the withholding was a civil penalty order of the Labor Commissioner under this chapter. If review is requested, the Labor Commissioner may intervene to

represent the awarding body.

(c) Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the awarding body shall not disburse any contract payments withheld.

(d) From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(e) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the awarding body that has enforced this chapter pursuant to Section 1771.5.

Added Stats 2000 ch 954 § 16 (AB 1646), operative July 1, 2001.

Note—Stats 2000 ch 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 21. This act shall become operative on July 1, 2001.

§ 1771.7. [Section repealed 2001.]

Added Stats 1989 ch 1224 § 4. Repealed Stats 2000 ch 954 § 17 (AB 1646), operative July 1, 2001. The repealed section related to appeal of enforcement action involving labor compliance program.

§ 1772. Workers deemed employed upon public work

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

Enacted 1937. Amended Stats 1992 ch 1342 § 7 (SB 222).

§ 1773. Ascertainment of prevailing rate; Data considered

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director of Industrial Relations. The holidays upon which those rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in theapplicable collective bargaining agreement. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code.

In determining the rates, the Director of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and the ratesthat may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved. The rate fixed for each craft, classification, or type of work shall be not less than the prevailing rate paid in the craft, classification, or type of work.

If the director determines that the rate of prevailing wage for any craft, classification, or type ofworker is the rate established by a collective bargaining agreement, the director may adopt that rate by reference as provided for inthe collective bargaining agreement and that determination shall be effective for the life of the agreement or until the director determines that another rate should be adopted.

Enacted 1937. Amended Stats 1953 ch 1706 § 4; Stats 1968 ch 699 § 1, operative July 1, 1969; Stats 1971 ch 785 § 1; Stats 1976 ch 281 § 3. Amended Stats 1999 ch 30 § 1 (SB 16).

§ 1773.1. Payments included in "per diem wages"

(a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

(d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required by a project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(e) For the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved. The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date.

Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct.

Added Stats 1959 ch 2173 § 1. Amended Stats 1969 ch 1502 § 1; Stats 1976 ch 281 § 4; Stats 1999 ch 30 § 2 (SB 16); Stats 2000 ch 954 § 18 (AB 1646), operative July 1, 2001.

Note—Stats 2000 ch 954 provides:

Note—Stats 2000 ch 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 21. This act shall become operative on July 1, 2001.

§ 1773.2. Specification of prevailing wage rates in call for bids

The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

Added Stats 1971 ch 785 § 2. Amended Stats 1974 ch 876 § 1; Stats 1977 ch 423 § 1. Amended Stats 1992 ch 1342 § 8 (SB 222).

§ 1773.3. Notifications of award of public works contract and of discrepancy in apprentices-journeymen ratio

An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

Added Stats 1972 ch 1399 § 2 as § 3098. Amended Stats 1974 ch 1095 § 1. Renumbered Stats 1978 ch 1249 § 6.

Former Sections:

Former § 1773.3, relating to requirements for filing general prevailing rates of per diem wages by awarding bodies, was added by Stats 1959 ch 1787 § 1 and repealed by Stats 1976 ch 281 § 5.

§ 1773.4. Procedure for review of rates

Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general prevailing rates of per diem

wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

Added Stats 1953 ch 1706 § 4.5. Amended Stats 1968 ch 699 § 2, operative July 1, 1969; Stats 1969 ch 301 § 1.

§ 1773.5. Rules and regulations

The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

Added Stats 1953 ch 1706 § 5. Amended Stats 1989 ch 1224 § 5.

§ 1773.6. Change in prevailing per diem wage rate

If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

Added Stats 1953 ch 1706 § 6. Amended Stats 1957 ch 1932 § 486; Stats 1963 ch 1786 § 68, operative October 1, 1963; Stats 1976 ch 281 § 6.

§ 1773.7. Charges for interagency services

The provisions of Section 11250 of the Government Code shall not be applicable to Sections 1773, 1773.4, and 1773.6.

Added Stats 1976 ch 281 § 8.

Former Sections:

Former § 1773.7, relating to exemption of certain departments from provisions of Sections 1773.4 and 1773.5, was added Stats 1953 ch 1706 § 7, amended Stats 1957 ch 1932 § 487, Stats 1963 ch 1786 § 69, and repealed Stats 1976 ch 281 § 7.

§ 1773.8. [Section repealed 1999.]

Added Stats 1968 ch 980 § 1. Repealed Stats 1999 ch 30 § 3 (SB 16). The repealed section related to specification requiring payment of travel and subsistence payment, and filing collective bargaining agreements to establish payment.

§ 1773.9. Determination of general prevailing rate of per diem wages

(a) The Director of Industrial Relations shall use the methodology set forth in subdivision (b) to determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed.

(b) The general prevailing rate of per diem wages includes all of the following:

(1) The basic hourly wage rate being paid to a majority of workers engaged in the particular craft, classification, or type of work within the locality and in the nearest labor market area, if a majority of the workers is paid at a single rate. If no single rate is being paid to a majority of the workers, then the single rate being paid to the greatest number of workers, or modal rate, is prevailing. If a modal rate cannot be determined, then the director shall establish an alternative rate, consistent with the methodology for determining the modal rate, by considering the appropriate collective bargaining agreements, federal rates, rates in the nearest labor market area, or other data such as wage survey data.

(2) Other employer payments included in per diem wages pursuant to Section 1773.1 and as included as part of the total hourly wage rate from which the basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, the director shall establish a prevailing employer payment rate by the same procedure set forth in paragraph (1).

(3) The rate for holiday and overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, the rate for holidays and overtime work, if any, included with the prevailing basic hourly rate of pay shall be prevailing.

(c) If the director determines that the general prevailing rate of per diem wages is the rate established by a collective bargaining agreement, and that the collective bargaining agreement contains definite and predetermined changes during its term that will affect the rate adopted, the director shall incorporate those changes into the determination. Predetermined changes that are rescinded prior to their effective date shall not be enforced.

Added Stats 1999 ch 30 § 4 (SB 16).

Note—Stats 1999 ch 30 provides:

SEC. 5. The Legislature declares that the intent of Section 1773.9 of the Labor Code, as added by Section 4 of this act, is to give effect to Assembly Concurrent Resolution No. 17 of the 1997–98 Regular Session of the Legislature (Res. Ch. 34, Stats. 1997) by codifying the methodology for calculating the general prevailing rate of per diem wages. In Assembly Concurrent Resolution No. 17, the Legislature declared that it "has relied on the long-established definitions of general prevailing rate of per diem wages in amending and extending the prevailing wage law contained in the California Labor Code on numerous occasions, and that it would be contrary to the intent of the Legislature for those definitions to be changed by administrative action, because the definitions have become incorporated by implication into these statutory provision."

§ 1774. Payment of not less than specified prevailing rates to workmen

The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

Enacted 1937.

§ 1775. Forfeiture for paying less than prevailing rate; Rights of workers

(a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political

subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(1) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor.

(2) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages.

Added Stats 1997 ch 757 § 2 (SB 1328), operative until July 1, 2001. Amended Stats 2000 ch 954 § 20 (AB 1646), operative July 1, 2001.

Note—Stats 1997 ch 757 provides:

SEC. 7. All contracts that are governed by Section 1775, 1776, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720) of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects.

Note—Stats 2000 ch 954 provides:

SEC. 21. This act shall become operative on July 1, 2001.

§ 1776. (First of two: Operative until January 1, 2003) Payroll record of wages paid; Inspection; Forms; Effect of noncompliance; Penalties

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through

which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's name and social security number. A joint labor management committee may maintain an action in a court of competent jurisdiction against an employer who fails to comply with Section 1774. The court may award restitution to an employee for unpaid wages and may award the joint labor management committee reasonable attorney's fee and costs incurred in maintaining the action. An action under this subdivision may not be based on the employer's misclassification of the craft of a worker on its certified payroll records. Nothing in this subdivision limits any other available remedies for a violation of this chapter.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

Added Stats 1997 ch 757 § 4 (SB 1328), operative until January 1, 2003. Amended Stats 2001 ch 804 § 2 (SB 588), repealed January 1, 2003.

§ 1776. (Second of two; Operative January 1, 2003) Payroll record of wages paid; Inspection; Forms; Effect of noncompliance; Penalties

(a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's social security number.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall become operative January 1, 2003.

Added Stats 1978 ch 1249 § 4. Amended Stats 1983 ch 681 § 1. Amended Stats 1992 ch 1342 § 10 (SB 222); Stats 1993 ch 589 § 107 (AB 2211); Stats 1997 ch 757 § 3 (SB 1328), operative January 1, 2003; Stats 1998 ch 485 § 121 (AB 2803), operative January 1, 2003; Stats 2001 ch 804 § 3 (SB 588), operative January 1, 2003.

Former Sections:

Former § 1776, similar to the present section, was enacted 1937, amended Stats 1949 ch 127 § 7, Stats 1976 ch 599 § 1, and repealed Stats 1978 ch 1249 § 3.

§ 1777. Violation of article or noncompliance with section setting requirements for payroll records as misdemeanor

Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of section 1776 is guilty of a misdemeanor.

Enacted 1937.

§ 1777.1. Penalties for willful violations of chapter; Notice; Hearing

(a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has any interest is ineligible for a period of not less than one year or more than three years to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has any interest is ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(c) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(d) Not less than semiannually, the Labor Commissioner shall publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project pursuant to this chapter. The list shall contain the name of the contractor, the Contractor's State License Board license number of the contractor, and the effective period of debarment of the contractor. The commissioner shall also place advertisements in construction industry publications targeted to the contractors and subcontractors, chosen by the commissioner, that state the effective period of the debarment and the reason for debarment. The advertisements shall appear one time for each debarment of a contractor in each publication

chosen by the commissioner. The debarred contractor or subcontractor shall be liable to the commissioner for the reasonable cost of the advertisements, not to exceed five thousand dollars ($5,000). The amount paid to the commissioner for the advertisements shall be credited against the contractor's or subcontractor's obligation to pay civil fines or penalties for the same willful violation of this chapter.

(e) For purposes of this section, "contractor or subcontractor" means a firm, corporation, partnership, or association and its responsible managing officer, as well as any supervisors, managers, and officers found by the Labor Commissioner to be personally and substantially responsible for the willful violation of this chapter.

(f) For the purposes of this section, the term "any interest" means an interest in the entity bidding or performing work on the public works project, whether as an owner, partner, officer, manager, employee, agent, consultant, or representative. "Any interest" includes, but is not limited to, all instances where the debarred contractor or subcontractor receives payments, whether cash or any other form of compensation, from any entity bidding or performing work on the public works project, or enters into any contracts or agreements with the entity bidding or performing work on the public works project for services performed or to be performed for contracts that have been or will be assigned or sublet, or for vehicles, tools, equipment, or supplies that have been or will be sold, rented, or leased during the period from the initiation of the debarment proceedings until the end of the term of the debarment period. "Any interest" does not include shares held in a publicly traded corporation if the shares were not received as compensation after the initiation of debarment from an entity bidding or performing work on a public works project.

(g) For the purposes of this section, the term "entity" is defined as a company, limited liability company, association, partnership, sole proprietorship, limited liability partnership, corporation, business trust, or organization.

(h) The Labor Commissioner shall adopt rules and regulations for the administration and enforcement of this section.

Added Stats 1989 ch 1224 § 10. Amended Stats 1998 ch 443 § 1 (AB 1569); Stats 2000 ch 970 § 1 (AB 2513).

§ 1777.5. Employment of apprentices on public works

(a) Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

(b) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either (1) the apprenticeship standards and apprentice agreements under which he or she is training or (2) the rules and regulations of the California Apprenticeship Council.

(d) When the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this section and may apply to any apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, the decision of the apprenticeship program to approve or deny a certificate shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that program. "Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, "contractor" includes any subcontractor under a contractor who performs any public works not excluded by subdivision (o).

(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Chief of the Division of Apprenticeship Standards, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this section that has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1-to-5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Chief of the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio, as set forth in this section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(1) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(2) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(3) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(4) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

(l) When an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m)(1) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

(2) At the conclusion of each fiscal year, the California Apprenticeship Council shall distribute training contributions received by the council under this subdivision, less the expenses of the Division of Apprenticeship Standards for administering this subdivision, by making grants to approved apprenticeship programs for the purpose of training apprentices. The funds shall be distributed as follows:

(A) If there is an approved multiemployer apprenticeship program serving the same craft or trade and geographic area for which the training contributions were made to the council, a grant to that program shall be made.

(B) If there are two or more approved multiemployer apprenticeship programs serving the same craft or trade and geographic area for which the training contributions were made to the council, the grant shall be divided among those programs based on the number of apprentices registered in each program.

(C) All training contributions not distributed under subparagraphs (A) and (B) shall be used to defray the future expenses of administering this subdivision.

(3) All training contributions received pursuant to this subdivision shall be deposited in the Apprenticeship Training Contribution Fund, which fund is hereby created in the State Treasury. Notwithstanding Section 13340 of the Government Code, all money in the Apprenticeship Training Contribution Fund is hereby continuously appropriated for the purpose of carrying out this subdivision and to pay the expenses of the division in administering this subdivision.

(n) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

(o) This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contract

when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000).

(p) All decisions of an apprenticeship program under this section are subject to Section 3081.

Added Stats 1937 ch 872. Amended Stats 1939 ch 971 § 1; Stats 1957 ch 699 § 1; Stats 1968 ch 1411 § 1; Stats 1969 ch 1260 § 1, effective August 31, 1969; Stats 1972 ch 1087 § 1, ch 1399 § 1; Stats 1974 ch 965 § 1; Stats 1976 ch 1179 § 2, effective September 22, 1976; Stats 1989 ch 1224 § 11. Amended Stats 1997 ch 17 § 91 (SB 947); Stats 1999 ch 903 § 2 (AB 921); Stats 2000 ch 135 § 124 (AB 2539) (ch 875 prevails), ch 875 § 1 (AB 2481).

Note—Stats 1999 ch 903 provides:

SECTION 1. The Legislature finds and declares that apprenticeship programs are a vital part of the educational system in California. It is the purpose and goal of this legislation to strengthen the regulation of apprenticeship programs in California, to ensure that all apprenticeship programs approved under Chapter 4 (commencing with Section 3070) of Division 3 of the Labor Code meet the high standards necessary to prepare apprentices for the workplaces of the future and to prevent the exploitation of apprentices by employers or apprenticeship programs. It is further the intent of the Legislature that apprenticeship programs should make active efforts to recruit qualified men, women, and minorities and train them in the skills needed for the workplace.

§ 1777.6. Prohibited discrimination in employment of apprentices

It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as registered apprentices on any public works, on the ground of the race, religious creed, color, national origin, ancestry, sex, or age, except as provided in Section 3077, of such employee.

Added Stats 1951 ch 1192 § 1. Amended Stats 1965 ch 283 § 8; Stats 1971 ch 280 § 1; Stats 1976 ch 1179 § 2, effective September 22, 1976.

§ 1777.7. Penalties for noncompliance with provisions involving employment of apprentices

(a)(1) A contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Chief if the amount of the penalty would be disproportionate to the severity of the violation. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed by the Chief, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(2) In lieu of the penalty provided for in this subdivision, the Chief may, for a first-time violation and with the concurrence of an apprenticeship program described in subdivision (d), order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(b) In the event a contractor or subcontractor is determined by the Chief to have knowingly committed a serious violation of any provision of Section 1777.5, the Chief may also deny to the contractor or subcontractor, and to its responsible officers, the right to bid on or be awarded or perform work as a subcontractor on any public works contract for a period of up to one year for the first violation and for a period of up to three years for a second or subsequent violation. Each period of debarment shall run from the date the determination of noncompliance by the Chief becomes a final order of the Administrator of Apprenticeship.

(c)(1) An affected contractor, subcontractor, or responsible officer may obtain a review of the determination of the Chief imposing the debarment or civil penalty by transmitting a written request to the office of the Administrator within 30 days after service of the determination of debarment or civil penalty. A copy of this report shall also be served on the Chief. If the Administrator does not receive a timely request for review of the determination of debarment or civil penalty made by the Chief, the order shall become the final order of the Administrator.

(2) Within 20 days of the timely receipt of a request for review, the Chief shall provide the contractor, subcontractor, or responsible officer the opportunity to review any evidence the Chief may offer at the hearing. The Chief shall also promptly disclose any nonprivileged documents obtained after the 20-day time limit at a time set forth for exchange of evidence by the Administrator.

(3) Within 90 days of the timely receipt of a request for review, a hearing shall be commenced before the Administrator or an impartial hearing officer designated by the Administrator and possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5.

(4) Within 45 days of the conclusion of the hearing, the Administrator shall issue a written decision affirming, modifying, or dismissing the determination of debarment or civil penalty. The decision shall contain a statement of the factual and legal basis for the decision and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party that the party has filed with the Administrator. Within 15 days of issuance of the decision, the Administrator may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(5) An affected contractor, subcontractor, or responsible officer who has timely requested review and obtained a decision under paragraph (4) may obtain review of the decision of the Administrator by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the final decision. If no timely petition for a writ of mandate is filed, the decision shall become the final order of the Administrator. The decision of the Administrator shall be affirmed unless the petitioner shows that the Administrator abused his or her discretion. If the petitioner claims that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the entire record.

(6) The Chief may certify a copy of the final order of the Administrator and file it with the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order. A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and be given the same preference allowed by the law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section. An awarding body that has withheld funds in response to a determination by the Chief imposing a penalty under this section shall, upon receipt of a certified copy of a final order of the Administrator, promptly transmit the withheld funds, up to the amount of the certified order, to the Administrator.

(d) If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

(1) The contract executed between the contractor and the subcontractor or the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.

(3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

(4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain a declaration signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

(e) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(f) The Chief shall consider, in setting the amount of a monetary penalty, in determining whether a violation is serious, and in determining whether and for how long a party should be debarred for violating this section, all of the following circumstances:

(1) Whether the violation was intentional.

(2) Whether the party has committed other violations of Section 1777.5.

(3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.

(4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.

(5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

If a party seeks review of a decision by the Chief to impose a monetary penalty or period of debarment, the Administrator shall decide de novo the appropriate penalty, by considering the same factors set forth above.

(g) The interpretation of Section 1777.5 and this section shall be in accordance with the regulations of the California Apprenticeship Council. The Administrator may adopt regulations to establish guidelines for the imposition of monetary penalties and periods of debarment and may designate precedential decisions under Section 11425.60 of the Government Code.

Added Stats 1939 ch 1224 § 13. Amended Stats 1999 ch 903 § 3 (AB 921); Stats 2000 ch 135 § 125 (AB 2539) (ch 875 prevails), ch 875 § 2 (AB 2481).

Former Sections:

Former § 1777.7, similar to the present section, was added Stats 1976 ch 538 § 2, amended Stats 1978 ch 1249 § 5, and repealed Stats 1989 ch 1224 § 12.

Note—Stats 1999 ch 903 provides:

SECTION 1. The Legislature finds and declares that apprenticeship programs are a vital part of the educational system in California. It is the purpose and goal of this legislation to strengthen the regulation of apprenticeship programs in California, to ensure that all apprenticeship programs approved under Chapter 4 (commencing with Section 3070) of Division 3 of the Labor Code meet the high standards necessary to prepare apprentices for the workplaces of the future and to prevent the exploitation of apprentices by employers or apprenticeship programs. It is further the intent of the Legislature that apprenticeship programs should make active efforts to recruit qualified men, women, and minorities and train them in the skills needed for the workplace.

§ 1777.8. [Section repealed 1991.]

Added Stats 1990 ch 451 § 1 (AB 116), effective July 31, 1990. Repealed Stats 1991 ch 640 § 1 (AB 64). The repealed section related to regulations regarding assessment of fees.

§ 1778. Taking or receiving portion of wages of workman or working subcontractor as felony

Every person, who individually or as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes, receives or conspires with another to take or receive, for his own use or the use of any other person any portion of the wages of any workman or working subcontractor, in connection with services rendered upon any public work is guilty of a felony.

Enacted 1937.

§ 1779. Charging fee for registration, giving information, or placing or assisting in placing person in public work as misdemeanor

Any person or agent or officer thereof who charges, collects, or attempts to charge or collect, directly or indirectly, a fee or valuable consideration for registering any person for public work, or for giving information as to where such employment may be procured, or for placing, assisting in placing, or attempting to place, any person in public work, whether the person is to work directly for the State, or any political subdivision or for a contractor or subcontractor doing public work is guilty of a misdemeanor.

Enacted 1937.

§ 1780. Placing order for employment where fee or valuable consideration involved as misdemeanor

Any person acting on behalf of the State or any political subdivision, or any contractor or subcontractor or agent or representative thereof, doing any public work who places any order for the employment of a workman on public work where the filling of the order for employment involves the charging of a fee, or the receiving of a valuable consideration from any applicant for employment is guilty of a misdemeanor.

Enacted 1937.

§ 1781. [Section repealed 1957.]

Enacted 1937. Repealed Stats 1957 ch 396 § 1. The repealed section related to penalties and remedies provided by §§ 1775 and 1777.

Article 3

Working Hours

§ 1810. Hours constituting day's work; Stipulation in contracts

Eight hours labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this State, or under the direction, or control, or by the authority of any officer of this State acting in his official capacity, or under the direction, or control or by the authority of any municipal corporation, or of any officer thereof. A stipulation to that effect shall be made a part of all contracts to which the State or any municipal corporation therein is a party.

Enacted 1937.

§ 1811. Limitation as to hours of service; Exception

The time of service of any workman employed upon public work is limited and restricted to 8 hours during any one calendar day, and 40 hours during any one calendar week, except as hereinafter provided for under Section 1815.

Enacted 1937. Amended Stats 1961 ch 238 § 1; Stats 1963 ch 964 § 1.

§ 1812. Record of hours worked; Availability for inspection

Every contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each worker employed by him or her in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Standards Enforcement.

Enacted 1937 as § 1814. Amended Stats 1945 ch 1431 § 51. Renumbered Stats 1961 ch 238 § 4. Amended Stats 1963 ch 964 § 2; Stats 1988 ch 160 § 123.

§ 1813. (First of two; Operative Until January 1, 2003) Penalty when workman required to work excess hours; Stipulation in contract; Cognizance and report of violations

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

Added Stats 1997 ch 757 § 6 (SB 1328), operative until January 1, 2003.

§ 1813. (Second of two; Operative January 1, 2003) Penalty when workman required to work excess hours; Stipulation in contract; Cognizance and report of violations

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which the workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him or her under the contract.

This section shall become operative January 1, 2003.

Enacted 1937 as § 1815. Amended Stats 1957 ch 399 § 1. Renumbered by Stats 1961 ch 238 § 5. Amended Stats 1963 ch 964 § 3. Amended Stats 1997 ch 757 § 5 (SB 1328), operative January 1, 2003; Stats 1998 ch 485 § 122 (AB 2803), operative January 1, 2003.

Former Sections:

Former § 1813, relating to report of nature of emergency, was enacted 1937, and repealed Stats 1961 ch 238 § 3.

§ 1814. Violation of article or noncompliance with section requiring records of hours worked as misdemeanor

Any officer, agent, or representative of the State or any political subdivision who violates any provision of this article and any contractor or subcontractor or agent or representative thereof doing public work who neglects to comply with any provision of Section 1812 is guilty of a misdemeanor.

Enacted 1937 as § 1816. Amended and renumbered Stats 1961 ch 238 § 6.

§ 1815. Work performed in excess of specified hour limitations; Compensation

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.

Added Stats 1941 ch 759 § 1, effective June 17, 1941, as § 1817. Amended and renumbered Stats 1961 ch 238 § 7. Amended Stats 1963 ch 964 § 4.

§ 1816. [Section renumbered 1961.]

Enacted 1937. Amended and renumbered § 1814 Stats 1961 ch 238 § 6.

§ 1817. [Section renumbered 1961.]

Added Stats 1941 ch 759 § 1, effective June 17, 1941. Amended and renumbered § 1815 Stats 1961 ch 238 § 7.

Article 4

Employment of Aliens

[Repealed]

§ 1850. [Section repealed 1970.]

Enacted 1937. Amended Stats 1957 ch 727 § 1. Repealed Stats 1970 ch 652 § 1.

§ 1851. [Section repealed 1970.]

Enacted 1937. Repealed Stats 1970 ch 652 § 1.

§ 1851.5. [Section repealed 1970.]

Added Stats 1957 ch 727 § 2. Repealed Stats 1970 ch 652 § 1.

§ 1852. [Section repealed 1970.]

Enacted 1937. Amended Stats 1945 ch 1431 § 52. Repealed Stats 1970 ch 652 § 1.

§§ 1853, 1854. [Sections repealed 1970.]

Enacted 1937. Repealed Stats 1970 ch 652 § 1.

Article 5

Securing Workers' Compensation

§ 1860. Contract clause requiring contractor to secure payment of compensation to employees

The awarding body shall cause to be inserted in every public works contract a clause providing that, in accordance with the provisions of Section 3700 of the Labor Code, every contractor will be required to secure the payment of compensation to his employees.

Added Stats 1965 ch 1000 § 2.

§ 1861. Certificate required to be signed and filed by contractor; Contents

Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: "I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

Added Stats 1965 ch 1000 § 2. Amended Stats 1979 ch 373 § 232.

Chapter 2

Public Agencies

Article 1

Municipal Employees

§ 1900. Hours off for meals; Salary deduction

Every employee of a city whose hours of labor exceed 120 in a week is entitled to be off duty at least three

Appendix 3 CALIFORNIA CONSTITUTION

Article XIII B

ARTICLE XIII B*

GOVERNMENT SPENDING LIMITATION

[*Total Annual Appropriations*]

SEC. 1. The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article. [*As amended June 5, 1990. Operative July 1, 1990.*]

[*Appropriations Limit Annual Calculation—Review*]

SEC. 1.5. The annual calculation of the appropriations limit under this article for each entity of local government shall be reviewed as part of an annual financial audit. [*New section adopted June 5, 1990. Operative July 1, 1990.*]

[*Revenues in Excess of Limitation*]

SEC. 2. (a)(1) Fifty percent of all revenues received by the State in a fiscal year and in the fiscal year immediately following it in excess of the amount which may be appropriated by the State in compliance with this article during that fiscal year and the fiscal year immediately following it shall be transferred and allocated, from a fund established for that purpose, pursuant to Section 8.5 of Article XVI.

(2) Fifty percent of all revenues received by the State in a fiscal year and in the fiscal year immediately following it in excess of the amount which may be appropriated by the State in compliance with this article during that fiscal year and the fiscal year immediately following it shall be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years.

(b) All revenues received by an entity of government, other than the State, in a fiscal year and in the fiscal year immediately following it in excess of the amount which may be appropriated by the entity in compliance with this article during that fiscal year and the fiscal year immediately following it shall be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years. [*As amended June 5, 1990. Operative July 1, 1990.*]

[*Appropriations Limit—Adjustments*]

SEC. 3. The appropriations limit for any fiscal year pursuant to Sec. 1 shall be adjusted as follows:

(a) In the event that the financial responsibility of providing services is transferred, in whole or in part, whether by annexation, incorporation or

* New Article XIII B adopted November 6, 1979. Operative commencing first day of fiscal year following adoption. Initiative measure.

otherwise, from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount.

(b) In the event that the financial responsibility of providing services is transferred, in whole or in part, from an entity of government to a private entity, or the financial source for the provision of services is transferred, in whole or in part, from other revenues of an entity of government, to regulatory licenses, user charges or user fees, then for the year of such transfer the appropriations limit of such entity of government shall be decreased accordingly.

(c) (1) In the event an emergency is declared by the legislative body of an entity of government, the appropriations limit of the affected entity of government may be exceeded provided that the appropriations limits in the following three years are reduced accordingly to prevent an aggregate increase in appropriations resulting from the emergency.

(2) In the event an emergency is declared by the Governor, appropriations approved by a two-thirds vote of the legislative body of an affected entity of government to an emergency account for expenditures relating to that emergency shall not constitute appropriations subject to limitation. As used in this paragraph, "emergency" means the existence, as declared by the Governor, of conditions of disaster or extreme peril to the safety of persons and property within the State, or parts thereof, caused by such conditions as attack or probable or imminent attack by an enemy of the United States, fire, flood, drought, storm, civil disorder, earthquake, or volcanic eruption. [*As amended June 5, 1990. Operative July 1, 1990.*]

[*Appropriations Limit—Establishment or Change*]

SEC. 4. The appropriations limit imposed on any new or existing entity of government by this Article may be established or changed by the electors of such entity, subject to and in conformity with constitutional and statutory voting requirements. The duration of any such change shall be as determined by said electors, but shall in no event exceed four years from the most recent vote of said electors creating or continuing such change. [*New section adopted November 6, 1979. Operative commencing first day of fiscal year following adoption. Initiative measure.*]

[*Contingency, Emergency, Unemployment, Etc., Funds—Contributions—Withdrawals—Transfers*]

SEC. 5. Each entity of government may establish such contingency, emergency, unemployment, reserve, retirement, sinking fund, trust, or similar funds as it shall deem reasonable and proper. Contributions to any such fund, to the extent that such contributions are derived from the pro-

ceeds of taxes, shall for purposes of this Article constitute appropriations subject to limitation in the year of contribution. Neither withdrawals from any such fund, nor expenditures of (or authorizations to expend) such withdrawals, nor transfers between or among such funds, shall for purposes of this Article constitute appropriations subject to limitation. [*New section adopted November 6, 1979. Operative commencing first day of fiscal year following adoption. Initiative measure.*]

[*Prudent State Reserve*]

SEC. 5.5. *Prudent State Reserve.* The Legislature shall establish a prudent state reserve fund in such amount as it shall deem reasonable and necessary. Contributions to, and withdrawals from, the fund shall be subject to the provisions of Section 5 of this Article. [*New section adopted November 8, 1988. Initiative measure.*]

[*Mandates of New Programs or Higher Levels of Service—State Subvention—Exceptions*]

SEC. 6. Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

(a) Legislative mandates requested by the local agency affected;

(b) Legislation defining a new crime or changing an existing definition of a crime; or

(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975. [*New section adopted November 6, 1979. Operative commencing first day of fiscal year following adoption. Initiative measure.*]

[*Bonded Indebtedness*]

SEC. 7. Nothing in this Article shall be construed to impair the ability of the State or of any local government to meet its obligations with respect to existing or future bonded indebtedness. [*New section adopted November 6, 1979. Operative commencing first day of fiscal year following adoption. Initiative measure.*]

[*Definitions*]

SEC. 8. As used in this article and except as otherwise expressly provided herein:

(a) "Appropriations subject to limitation" of the State means any authorization to expend during a fiscal year the proceeds of taxes levied by or for the State, exclusive of state subventions for the use and operation of local government (other than subventions made pursuant to Section 6) and further exclusive of refunds of taxes, benefit payments from retirement, unemployment insurance, and disability insurance funds.

(b) "Appropriations subject to limitation" of an entity of local government means any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity and the proceeds of state subventions to that entity (other than subventions made pursuant to Section 6) exclusive of refunds of taxes.

(c) "Proceeds of taxes" shall include, but not be restricted to, all tax revenues and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues. With respect to any local government, "proceeds of taxes" shall include subventions received from the State, other than pursuant to Section 6, and, with respect to the State, proceeds of taxes shall exclude such subventions.

(d) "Local government" means any city, county, city and county, school district, special district, authority, or other political subdivision of or within the State.

(e) (1) "Change in the cost of living" for the State, a school district, or a community college district means the percentage change in California per capita personal income from the preceding year.

(2) "Change in the cost of living" for an entity of local government, other than a school district or a community college district, shall be either (A) the percentage change in California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year for the jurisdiction due to the addition of local nonresidential new construction. Each entity of local government shall select its change in the cost of living pursuant to this paragraph annually by a recorded vote of the entity's governing body.

(f) "Change in population" of any entity of government, other than the State, a school district, or a community college district, shall be determined by a method prescribed by the Legislature.

"Change in population" of a school district or a community college district shall be the percentage change in the average daily attendance of the school district or community college district from the preceding fiscal year, as determined by a method prescribed by the Legisla

"Change in population" of the State shall be determined by adding (1) the percentage change in the State's population multiplied by the percentage of the State's budget in the prior fiscal year that is expended for other than educational purposes for kindergarten and grades one to 12, inclusive, and the community colleges, and (2) the percentage change in the total statewide average daily attendance in kindergarten and grades one to 12, inclusive, and the community colleges, multiplied by the percentage of the State's budget in the prior fiscal year that is expended for educational purposes for kindergarten and grades one to 12, inclusive, and the community colleges.

Any determination of population pursuant to this subdivision, other than that measured by average daily attendance, shall be revised, as necessary, to reflect the periodic census conducted by the United States Department of Commerce, or successor department.

(g) "Debt service" means appropriations required to pay the cost of interest and redemption charges, including the funding of any reserve or sinking fund required in connection therewith, on indebtedness existing or legally authorized as of January 1, 1979, or on bonded indebtedness thereafter approved according to law by a vote of the electors of the issuing entity voting in an election for that purpose.

(h) The "appropriations limit" of each entity of government for each fiscal year is that amount which total annual appropriations subject to limitation may not exceed under Sections 1 and 3. However, the "appropriations limit" of each entity of government for fiscal year 1978–79 is the total of the appropriations subject to limitation of the entity for that fiscal year. For fiscal year 1978–79, state subventions to local governments, exclusive of federal grants, are deemed to have been derived from the proceeds of state taxes.

(i) Except as otherwise provided in Section 5, "appropriations subject to limitation" do not include local agency loan funds or indebtedness funds, investment (or authorizations to invest) funds of the State, or of an entity of local government in accounts at banks or savings and loan associations or in liquid securities. [*As amended June 5, 1990. Operative July 1, 1990.*]

[*Exceptions to Appropriations Subject to Limitation*]

SEC. 9. "Appropriations subject to limitation" for each entity of government do not include:

(a) Appropriations for debt service.

(b) Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly.

(c) Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977–78 fiscal year levy an ad valorem tax on property in excess of 12½ cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes.

(d) Appropriations for all qualified capital outlay projects, as defined by the Legislature.

(e) Appropriations of revenue which are derived from any of the following:

(1) That portion of the taxes imposed on motor vehicle fuels for use in motor vehicles upon public streets and highways at a rate of more than nine cents ($0.09) per gallon.

(2) Sales and use taxes collected on that increment of the tax specified in paragraph (1).

(3) That portion of the weight fee imposed on commercial vehicles which exceeds the weight fee imposed on those vehicles on January 1, 1990. [*As amended June 5, 1990. Operative July 1, 1990.*]

[*Effective Date of Article*]

SEC. 10. This Article shall be effective commencing with the first day of the fiscal year following its adoption. [*New section adopted November 6, 1979. Operative commencing first day of fiscal year following adoption. Initiative measure.*]

[*Appropriations Limit on or after July 1, 1990*]

SEC. 10.5. For fiscal years beginning on or after July 1, 1990, the appropriations limit of each entity of government shall be the appropriations limit for the 1986–87 fiscal year adjusted for the changes made from that fiscal year pursuant to this article, as amended by the measure adding this section, adjusted for the changes required by Section 3. [*New section adopted June 5, 1990. Operative July 1, 1990.*]

[*Category Added or Removed from Appropriations Subject to Limitation—Severability*]

SEC. 11. If any appropriation category shall be added to or removed from appropriations subject to limitation, pursuant to final judgment of any court of competent jurisdiction and any appeal therefrom, the appropriations limit shall be adjusted accordingly. If any section, part, clause or phrase in this Article is for any reason held invalid or unconstitutional, the remaining portions of this Article shall not be affected but shall remain in full force and effect. [*New section adopted November 6, 1979. Operative commencing first day of fiscal year following adoption. Initiative measure.*]

[*Exceptions to Appropriations Subject to Limitation*]

SEC. 12. "Appropriations subject to limitation" of each entity of government shall not include appropriations of revenue from the Cigarette and Tobacco Products Surtax Fund created by the Tobacco Tax and Health Protection Act of 1988. No adjustment in the appropriations limit of any entity of government shall be required pursuant to Section 3 as a result of revenue being deposited in or appropriated from the Cigarette and Tobacco Products Surtax Fund created by the Tobacco Tax and Health Protection Act of 1988. [*New section adopted November 8, 1988. Initiative measure.*]

[*Exceptions to Appropriations Subject to Limitation*]

SEC. 13. "Appropriations subject to limitation" of each entity of government shall not include appropriations of revenue from the California Children and Families First Trust Fund created by the California Children and Families First Act of 1998. No adjustment in the appropriations limit of any entity of government shall be required pursuant to Section 3 as a result of revenue being deposited in or appropriated from the California Children and Families First Trust Fund. The surtax created by the California Children and Families First Act of 1998 shall not be considered General Fund revenues for the purposes of Section 8 of Article XVI. [*New section adopted November 3, 1998. Initiative measure.*]

ARTICLE XIII C *

VOTER APPROVAL FOR LOCAL TAX LEVIES

SECTION 1. Definitions. As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund. [*New section adopted November 5, 1996. Initiative measure.*]

* New Article XIII C adopted November 5, 1996. Initiative measure.

SEC. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. [*New section adopted November 5, 1996. Initiative measure.*]

SEC. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives. [*New section adopted November 5, 1996. Initiative measure.*]

Appendix 4 MISCELLANEOUS STATUTES

Government Code

Public Contracts Code

Chaptered Bills

Library References

Words and Phrases (Perm. Ed.)

Article 4

CONTRACTS FOR SERVICES

Section

Article 4 was added by Stats.1983, c. 1231, § 4, eff. Sept. 30, 1983.

Cross References

Direct service contracts of departments within health and welfare agency, review and approval in accordance with this article, see Health and Safety Code § 38012.
State procurement of materials, supplies, equipment and services, approval of contracts, inapplicability to contracts covered under this article or article 5, see § 10298.

United States Code Annotated

Service contract labor standards, see 41 U.S.C.A. § 351 et seq.

West's California Practice—Family Law Practice, Goddard, § 1320.

§ 6102. Guardianship and conservatorship proceedings

No fee shall be charged in proceedings for the appointment of a guardian or conservator for any persons receiving charity or relief under the laws of this state.

(Stats.1943, c. 134, p. 990, § 6102. Amended by Stats.1979, c. 730, § 51, operative Jan. 1, 1981.)

Law Revision Commission Comments

1979 Amendment

Section 6102 is amended to add the reference to a conservator. [14 Cal. L.Rev.Comm. Reports 501 (1978)]

Historical and Statutory Notes

Derivation: Pol.C. § 4295, added by Stats. 1907, c. 282, p. 547, § 1, amended by Stats. 1915, c. 422, p. 694, § 1; Stats.1917, c. 667, p. 1175, § 1; Stats.1919, c. 179, p. 269, § 1; Stats.1921, c. 326, p. 440, § 1; Stats.1923, c. 252, p. 507, § 1; Stats.1927, c. 200, p. 359, § 1; Stats.1935, c. 803, p. 2195, § 1; Stats.1937, c. 912, p. 2516, § 1; Stats.1939, c. 640, p. 2066, § 1.

Cross References

Costs for investigations of proposed guardianships, assessments, exceptions, see Probate Code § 1513.1.
Guardianship—Conservatorship law, see Probate Code § 1400 et seq.

Law Review Commentaries

Guardianship or "permanent placement" of children. Hasseltine B. Taylor, 54 Cal.L.Rev. 741 (1966).

Library References

Guardian and Ward ⇐13(1).
WESTLAW Topic No. 196.
C.J.S. Guardian and Ward §§ 11, 20.

Recommendations relating to Guardianship-Conservatorship Law, 14 Cal.L.Rev.Comm.Reports 501 (1978).

§ 6103. State and political subdivisions; filing and service fees; judgments for agencies; costs of court reporters

Neither the state nor any county, city, district, or other political subdivision, nor any public officer or body, acting in his official capacity on behalf of the state, or any county, city, district or other political subdivision, shall pay or deposit any fee for the filing of any document or paper, for the performance of any official service, or for the filing of any stipulation or agreement which may constitute an appearance in any court by any other party to the stipulation or agreement. This section does not apply to the State Compensation Insurance Fund or where a public officer is acting with reference to private assets or obligations which have come under his jurisdiction by virtue of his office, or where it is specifically provided otherwise. No fee shall be charged for the filing of a confession of judgment in favor of any of the public agencies named in this section.

No fee shall be charged any of the public agencies named in this section to defray the costs of reporting services by court reporters. Such fees shall be recoverable as costs as provided in Section 6103.5.

(Stats.1943, c. 134, p. 990, § 6103. Amended by Stats.1943, c. 319, p. 1316; Stats.1945, c. 1152, § 1; Stats.1951, c. 174, p. 423, § 1; Stats.1953, c. 1734, p. 3483, § 1; Stats.1970, c. 907, p. 1649, § 1; Stats.1978, c. 142, § 1.)

Historical and Statutory Notes

Derivation: Pol.C. § 4295, added by Stats. 1907, c. 282, p. 547, § 1, amended by Stats. 1915, c. 422, p. 694, § 1; Stats.1917, c. 667, p. 1175, § 1; Stats.1919, c. 179, p. 269, § 1; Stats.1921, c. 326, p. 440, § 1; Stats.1923, c. 252, p. 507, § 1; Stats.1927, c. 200, p. 359, § 1; Stats.1935, c. 803, p. 2195, § 1; Stats.1937, c. 912, p. 2516, § 1; Stats.1939, c. 640, p. 2066, § 1.

Cross References

Additional filing fees, liability, see Government Code §§ 70060, 74520.
Air pollution control permit fees, exemption from this section, see Health and Safety Code § 42311.
Clerk's fees, fees not subject to this section, see Government Code § 74672.
Confession of judgment, see Code of Civil Procedure § 1132 et seq.
County recorder, fees not to be charged for services to State or political subdivisions except for making copies, see Government Code § 27383.
Court reporter's fees, fees not subject to section, see Government Code § 70016.
South coast air quality management district, permit and variance fees, exemption from this section, see Health and Safety Code §§ 40500, 40510.
State Compensation Insurance Fund, see Insurance Code § 11770 et seq.

Library References

Costs ⇐96.
WESTLAW Topic No. 102.
C.J.S. Costs § 54.
California Practice Guide: Civil Appeals and Writs, Eisenberg, Horvitz & Wiener, see Guide's Table of Statutes for chapter paragraph number references to paragraphs discussing this section.
Legal Secretary's Handbook, Legal Secretaries, Inc., see Handbook's Table of Codes for paragraph number references to paragraphs discussing this section.
West's California Practice—Probate Court Practice, Goddard, § 46.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

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1. In general

Pol.C. § 4295 (repealed) prohibiting state, county, and township officials from performing any official services without payment of lawful fees except for the state, county, city, or other political subdivision was concerned with fees paid to state, county, and township officers and did not expressly apply to fees paid to city officers. Brunton v. Superior Court of Los Angeles County (1942) 20 Cal.2d 202, 124 P.2d 831.

Where constables are not authorized by local ordinance or charter provision to retain fees incurred in a criminal case for rendition of their official services, they are precluded from charg-

ing and collecting such fees from the county. 49 Ops.Atty.Gen. 115, 5–26–67.

This section exempts state or any public officer acting in his official capacity from payment of any fee for performance of any official service, except as provided in C.C.P. § 261b (repealed). 7 Ops.Atty.Gen. 16 (1946).

2. Construction with other laws

Section 25823 providing that county board of supervisors may collect compensation from private or public parties for right to dump took priority over § 6103 which exempts public entities from payment of fees for official services rendered by other public entities, since provision permitting compensation was a later and more specific provision and dealt expressly with particular subject it controls. Anaheim City School Dist. v. Orange County (App. 4 Dist. 1985) 210 Cal.Rptr. 722, 164 Cal.App.3d 697.

Where reference to this section in C.C.P. § 261b (repealed), relating to litigants' payment of filing fees in certain counties, was added by amendment to the bill after it was introduced, attention of legislature was particularly directed to such reference, and such reference would control other provisions making only an incidental reference to such subject-matter. People v. Moroney (1944) 24 Cal.2d 638, 150 P.2d 888.

C.C.P. § 261b (repealed), relating to payment of filing fees by litigants in certain counties, was enacted for purpose of providing a salary basis for compensation of court reporters in such counties as distinguished from a per diem fee; consequently, when the section was interpreted in light of purpose sought to be achieved, the state was not immune from filing fees thereby imposed on parties litigant. People v. Moroney (1944) 24 Cal.2d 638, 150 P.2d 888.

Provision in C.C.P. § 261b (repealed), that filing fee thereby required to be paid by parties litigant in the superior court in certain counties should not be subject to provision of this section was controlling over other provisions referring to state's immunity from costs, and the state was not exempt from such fees. People v. Moroney (1944) 24 Cal.2d 638, 150 P.2d 888.

Section 6103.1, relating to travel fees, is an exception to the exemption allowed by this section, which exempts political subdivisions from payment of fees for filing of documents or papers and for performance of official service. 48 Ops.Atty.Gen. 114, 11–18–66.

To the extent that § 27383 providing that no fee shall be charged by the recorder for services rendered to the state, to any municipality, county in the state or other political subdivision thereof, except for making a copy of a paper or record, conflicts with this section, the former prevails, in view of maxim of statutory construction that the later expression of legislative intent prevails over the earlier. 27 Ops.Atty.Gen. 402 (1956).

Under this section and Health & S.C., §§ 10625, 10626 (repealed), 10550 (repealed), the director of public health must collect fees for the verification of birth records for passports to permit the return of American citizens abroad, requested by the State Department of the United States. 6 Ops.Atty.Gen. 204 (1945).

3. Political subdivisions

The housing authority of the City of South San Francisco was a "political subdivision" within this section, and was not required to pay or deposit a fee for filing of pleadings in the justices' courts. 4 Ops.Atty.Gen. 145 (1944).

4. Public officers

State insurance commissioner in charge of insolvent insurance company's business is not mere private trustee or receiver, but "state officer" exempt from payment of fees for filing transcript on appeal from judgment against him. Mitchell v. Taylor (1935) 3 Cal.2d 217, 43 P.2d 803.

Under this section, exempting public offices from the payment of fees for the performance of official services, a district attorney is exempt from payment of fees for service of process in civil support proceedings brought pursuant to Pen.C. § 270f, Civ.C. §§ 139.5 (repealed), 231, (repealed), and Welf. & Inst.C. §§ 11476, 11479, 11484. 47 Ops.Atty.Gen. 23, 1–18–66.

5. Official services

Findings, on which judgment enjoining the enforcement of city ordinances was based, that plaintiff flood control district in applying for a permit to drill for oil under the ordinances acted through its officers in their official capacity, and that their fees were payable for official services of the city officials, did not constitute a holding that all fees of this type were prohibited by statute providing that no political subdivision should be required to pay any fee for performance of any official service, or that the injunction was intended to prohibit the charging of any such fees under any ordinance. Brunton v. Superior Court of Los Angeles County (1942) 20 Cal.2d 202, 124 P.2d 831.

Although by terms of county building ordinance, fee was chargeable for service of checking plans and issuing building permits, city desiring permit to make alterations and repairs on reservoir of city situated in unincorporated territory was not required to pay fee, in view of statute regarding fees chargeable for official services. City of Pasadena v. Fox (App. 2 Dist. 1936) 16 Cal.App.2d 584, 61 P.2d 332.

Monterey County and other public entities are not exempt from paying the reimbursement required by § 68097.1 et seq. because California highway patrol officers do not testify in civil cases as part of their "official service". 53 Ops.Atty.Gen. 322, 12–23–70.

Permit fees and inspection fees required by resolution of county board of supervisors regulating excavations and construction in its county roads are for performance of official services and, therefore, may not be recovered from districts because of prohibition in this section. 40 Ops.Atty.Gen. 15 (1962).

6. Permit or inspection fees

In view of the virtually plenary power of the regents of the University of California in the regulation of affairs, relating to the university and the use of property owned or leased by it for educational purposes, the regents, in constructing improvements solely for educational purposes, are exempt from local building codes and zoning regulations and are also exempt from payment of local permit and inspection fees. Regents of University of California v. City of Santa Monica (App. 2 Dist. 1978) 143 Cal. Rptr. 276, 77 Cal.App.3d 130.

Folsom state prison is exempt from the payment of fees levied for a permit issued by the Sacramento county air pollution control district pursuant to subd. (a) of Health & S.C. § 42311, which provides that an air pollution control district may adopt a schedule of fees for the issuance and renewal of permits, for the operation of its dry cleaning facility. 63 Ops.Atty. Gen. 769, 10–1–80.

Where construction modifications of city streets adjacent to a state university campus was done by personnel employed by the Trustees of the California State University and Colleges, the Trustees were not required to pay the plan-checking and inspection fees of the city. 62 Ops.Atty.Gen. 443, 8–22–79.

County ordinances adopting uniform building codes, whether by reference or otherwise, are binding upon other political entities within the territorial jurisdiction of the county such as mosquito abatement districts or cemetery districts which are created by the county, unless such building regulations are inconsistent with some general law or the political entity in question is a direct agency of the state, and in such case the public district may not be required to pay a fee for securing a building permit from the county as exempted by this section. 33 Ops.Atty.Gen. 149 (1959).

7. Recording fees

Deeds transferring title to real property to the public employees' retirement system cannot be subjected by a county to either its documentary transfer tax or its normal recording fees. 54 Ops.Atty.Gen. 218, 11–3–71.

County recorders are required to record releases of tax liens without fee when requested to do so by state board of equalization. 26 Ops. Atty.Gen. 49 (1955).

Recording fees were not required to be paid by the department of water and power of the City of Los Angeles for recording deeds in which the department appeared as grantor, in view of this section exempting the state or city or other political subdivision from payment of any fee for filing of any document or for performance of any official service. 24 Ops.Atty.Gen. 48 (1954).

Under this section, reclamation districts, mosquito abatement districts and county fire protection districts are entitled to the performance of services of the county recorder without payment of fees therefor, it being immaterial whether the district is supported by a general tax or special assessment, whether it exercises governmental functions of state concern or only municipal affairs or both as long as it performs a public function. 14 Ops.Atty.Gen. 178 (1949).

8. Filing fees

In action by the division of labor law enforcement to recover as assignee of wage claims pursuant to statute authorizing the division to bring actions for collection of wages where the employee needed assistance, the division was entitled to filing of the complaint without paying of fee. Division of Labor Law Enforcement v. Moroney (1946) 28 Cal.2d 344, 170 P.2d 3.

A county may not charge the state controller the $1.00 filing fee permitted by § 27361.4, applicable to the filing of all documents, in addition to the $6.00 fee specified by § 27361.3 for the recordation of a release of lien for property tax postponement. 64 Ops.Atty.Gen. 359, 4–29–81.

The department of water resources, which is created by Water C. § 150, and which will succeed to the duties of the department of finance under Water C. §§ 10500 to 10506, will not be required to pay filing fees on applications to appropriate water under Water C. §§ 10500 to 10506, since the department of finance is presently exempted from filing fees, by reason of Gov.C. §§ 11159 and 11160. 28 Ops.Atty.Gen. 28 (1956).

9. Sheriff's fees

Sheriff's fees were excepted from requirement of wage collection law that commissioner of labor statistics should pay no court costs in civil actions arising under the law because sheriff was not connected with official machinery provided for execution of court orders, though ser-

vices for which he was entitled to compensation might be necessary for disposition of action. Gue v. Superior Court In and For San Diego County (App. 1934) 1 Cal.App.2d 91, 36 P.2d 202.

Sheriffs, constables and marshals must charge fees for summoning a jury in a civil case except where services connected with such summoning are performed for a governmental agency which is exempt from the payment of such fees. 29 Ops.Atty.Gen. 31 (1957).

10. Reporting service fees

Under requirement of wage collection law that commissioner of labor statistics should pay no court costs, commissioner could not compel trial court to permit trial of contested civil action to be commenced without case deposit of portion of official court reporter's fees, where commissioner had not requested that trial proceed without being reported. Gue v. Superior Court In and For San Diego County (App. 1934) 1 Cal.App.2d 91, 36 P.2d 202.

Payment of the costs of transcribing, at the county's request, the tape recorded proceedings of a hearing conducted by the board of control with respect to the county's claim pursuant to Rev. & T.C. § 2250, providing that the state board of control should hear and decide claims by local agencies or school districts that they were not reimbursed for certain costs mandated by the state, may be required of the county by the board of control. 62 Ops.Atty.Gen. 609, 10–16–79.

After January 1, 1979, an exemption will exist as to the additional fee charged in many, if not most counties, for reporter services, which is collected by the county clerk at the time first papers are filed in a civil action; otherwise, the obligation of the county council for reporters' fees will remain the same. 61 Ops.Atty.Gen. 451, 10–24–78.

The California labor commissioner is required to pay the reporter's fee in Kern county upon filing an answer in a quiet title action. 31 Ops.Atty.Gen. 179, 4–18–58.

11. Use fees

Where gate fees were properly imposed by county pursuant to resolution of board of supervisors and fees were contemplated within economic feasibility of original solid waste management plan, cities were not exempt from payment of those fees. Garden Grove Sanitary Dist. v. Orange County (App. 4 Dist. 1984) 208 Cal.Rptr. 777, 162 Cal.App.3d 842.

12. Liability insurance fees

Reasonable and nondiscriminate fees or deposits to cover cost of insuring county against liability to members of public because of operations of one having right to excavate in county roads, and to insure that public district will restore road to its former state so far as possible, may be applied to public districts having such right, since such fees do not come under prohibition of this section. 40 Ops.Atty.Gen. 15 (1962).

13. Allowance of costs

General statutes allowing costs to parties were inapplicable to state, in absence of express provision respecting costs in suit to which state was party. Ridge v. Boulder Creek Union Junior-Senior High School Dist. of Santa Cruz County (App. 1 Dist. 1943) 60 Cal.App.2d 453, 140 P.2d 990.

Costs could not be awarded against the state. Innes v. McColgan (App. 4 Dist. 1942) 52 Cal. App.2d 698, 126 P.2d 930.

In action against state to recover interest on certain judgments, allowance of costs against state was error. Connecticut General Life Ins. Co. v. State (App. 1 Dist. 1941) 47 Cal.App.2d 88, 117 P.2d 377.

Generally, costs are not allowed against the state in absence of express statutory legislation People v. One Plymouth Sedan, Engine PJ45999 (App. 1 Dist. 1937) 21 Cal.App.2d 7. 69 P.2d 1011.

14. Discriminatory taxes

Local air pollution control district rule imposing air pollution fees on federal facilities while exempting local and state government agencies in public district from paying any fees was not unconstitutional discriminatory tax, absent allegation that district treated federal government and private entities in discriminatory manner. U.S. v. South Coast Air Quality Management Dist., C.D.Cal.1990, 748 F.Supp. 732.

15. Federal exemption

The United States department of state requesting verification of birth records is not exempt from payment of fees required by law to be fixed by director of public health for such service. 6 Ops.Atty.Gen. 204 (1945).

In suits brought by the office of price administration in justice's court, the office of price administration was required to pay the filing fees to the clerk, there being no exemption in favor of the Federal Government under Pol.C. § 4300e (repealed) nor this section. 5 Ops.Atty. Gen. 137 (1945).

purpose of obtaining documents for use in the plaintiff's civil action, and the documents must be produced unless one or more of the statutory exemptions set forth in the CPRA apply. County of Los Angeles v. Superior Court (Axelrad) (App. 2 Dist. 2000) 98 Cal.Rptr.2d 564, 82 Cal.App.4th 819, review denied.

7. Judgment

Court ruling on attorney's California Public Records Act (CPRA) request for documents was not bound, under doctrine of collateral estoppel, by discovery rulings barring disclosure of same documents in civil action filed by attorney's employer; there was no showing that issue raised in the CPRA proceeding was identical to that decided in the civil action, and there was no information concerning finality of the prior proceedings. County of Los Angeles v. Superior Court (Axelrad) (App. 2 Dist. 2000) 98 Cal.Rptr.2d 564, 82 Cal.App.4th 819, review denied.

While a court hearing a California Public Records Act (CPRA) request should be made aware of any prior discovery rulings issued with respect to the documents being requested in connection with a CPRA petition, the court is not bound by those rulings unless all of the collateral estoppel factors are present. County of Los Angeles v. Superior Court (Axelrad) (App. 2 Dist. 2000) 98 Cal.Rptr.2d 564, 82 Cal.App.4th 819, review denied.

8. Abuse of discovery

A claim that a plaintiff has abused discovery, however, should be made to the court assigned to the plaintiff's civil action, not to the court hearing the plaintiff's California Public Records Act (CPRA) petition. County of Los Angeles v. Superior Court (Axelrad) (App. 2 Dist. 2000) 98 Cal.Rptr.2d 564, 82 Cal.App.4th 819, review denied.

9. Scope of coverage

Extent of coverage of California Public Records Act (CPRA) is a matter to be developed by the courts on a case-by-case basis. California State University v. Superior Court (App. 5 Dist. 2001) 108 Cal.Rptr.2d 870, 90 Cal.App.4th 810, rehearing denied.

10. News media

In determining whether public records come within catchall exception to disclosure requirement under California Public Records Act (CPRA), purpose of the requesting party in seeking disclosure cannot be considered, and it is also irrelevant that the requesting party is a newspaper or other form of media, because the media have no greater right of access to public records than the general public. California State University v. Superior Court (App. 5 Dist. 2001) 108 Cal.Rptr.2d 870, 90 Cal. App.4th 810, rehearing denied.

§ 6252. Definitions

As used in this chapter:

(a) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.

(b) "Local agency" includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other local public agency; or nonprofit * * * entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952.

(c) "Person" includes any natural person, corporation, partnership, limited liability company, firm, or association.

(d) "Public agency" means any state or local agency.

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975.

(f) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

(g) "Member of the public" means any person, except a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office, or employment.

(Amended by Stats.1998, c. 620 (S.B.143), § 2.)

Historical and Statutory Notes

1996 Legislation

Legislative declaration of Stats.1996, c. 57 (S.B.141), § 30, relating to the rendition of professional services by a limited liability company, see Historical and Statutory Notes under Code of Civil Procedure § 699.720.

1998 Legislation

Stats.1998, c. 620, in subd. (b), substituted "entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of section 54952" for "organizations of local government agencies and officials which are supported solely by public funds"; inserted subd. (d) defining "Public agency"; and relettered subsequent subdivisions.

§ 6525. Mutual water company; agreements with public agencies

Notes of Decisions

Construction and application 1

1. Construction and application

Two public entities and a mutual water company may enter into a joint powers agreement to form a public financing authority for the purpose of issuing bonds under the Marks–Roos Local Bond Pooling Act of 1985 to finance the construction of projects over which the contracting parties exercise their common power. Op.Atty. Gen. No. 99–321 (March 28, 2000).

§ 6526. Agencies relating to water resources; exercise of powers

Notwithstanding any other provision of law, any public agency that is a member of the South East Regional Reclamation Authority, the Aliso Water Management Agency, the South Orange County Reclamation Authority, or the San Juan Basin Authority may exercise any power granted to those entities by any of the joint powers agreements creating those entities, whether or not that public agency is a signatory to any of these joint powers agreements granting that power or is otherwise authorized by law to exercise that power, for the purpose of promoting efficiency in the administration of these joint powers entities.

(Formerly § 6524, added by Stats.1994, c. 230 (S.B.1711), § 1, eff. July 18, 1994. Renumbered § 6526 and amended by Stats.1995, c. 91 (S.B.975), § 44.)

Historical and Statutory Notes

1995 Legislation

Subordination of legislation by Stats.1995, c. 91 (S.B. 975), to other 1995 legislation, see Historical and Statutory Notes under Business and Professions Code § 35.

Library References

Additional References

Infrastructure Finance: 'Exotic' Techniques. 1 Land Use Forum 189 (CEB, spring 1992).

§ 6527. Health care districts and nonprofit corporations; joinder to pool self-insurance claims or losses

(a) Notwithstanding any other provision of this chapter, where two or more health care districts have joined together to pool their self-insurance claims or losses, a nonprofit corporation which provides health care services that may be carried out by a health care district may participate in the pool, provided that its participation in an existing joint powers agreement, as authorized by this section, shall be permitted only after the public agency members, or public agency representatives on the governing body of the joint powers entity make a finding, at a public meeting, that the agreement provides both of the following:

(1) The primary activities conducted under the joint powers agreement will be substantially related to and in furtherance of the governmental purposes of the public agency.

(2) The public agency participants will maintain control over the activities conducted under the joint powers agreement through public agency control over governance, management, or ownership of the joint powers authority.

(b) Any public agency or private entity entering into a joint powers agreement under this section shall establish or maintain a reserve fund to be used to pay losses incurred under the agreement. The reserve fund shall contain sufficient moneys to maintain the fund on an actuarially sound basis.

(c) In any risk pooling arrangement created under this section, the aggregate payments made under each program shall not exceed the amount available in the pool established for that program.

(d) A public meeting shall be held prior to the dissolution or termination of any enterprise operating under this section to consider the disposition, division, or distribution of any property acquired as a result of exercise of the joint exercise of powers.

(e) Nothing in this section shall be construed to relieve a public benefit corporation that is a health facility from charitable trust obligations, or to exempt such a public benefit corporation from existing law governing joint ventures, or the sale, transfer, lease, exchange, option, conveyance, or other disposition of assets.

§ 17514. Costs mandated by the state

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

(Added by Stats.1984, c. 1459, § 1.)

Code of Regulations References

Test claim filing, see 2 Cal. Code of Regs. § 1183.

Law Review Commentaries

State environmental permit fees charged to federal facilities: distinguishing legal user fees from illegal taxes. Samuel D. McVey, 29 Santa Clara L.Rev. 879 (1989).

Notes of Decisions

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1. Enactments

Words "enacted after January 1, 1973" within Rev. & T.C. former § 2231 providing that "The state shall pay to each county, city and county, city and special district an amount to reimburse for the full costs, which are mandated by acts enacted after January 1, 1973, of any new state-mandated program or any increased level of service of an existing mandated program" do not mean "effective after January 1, 1973." Orange County v. Flournoy (1974) 117 Cal.Rptr. 224, 42 Cal.App.3d 908.

2. Appropriation

Provision of Rev. & T.C. former § 2231 that "The state shall pay to each county, city and county, city and special district an amount to reimburse for the full costs, which are mandated by acts enacted after January 1, 1973, of any new state-mandated program or any increased level of service of an existing mandated program" is not itself a "continuing appropriation," but rather, further legislative action is required. Orange County v. Flournoy (1974) 117 Cal.Rptr. 224, 42 Cal.App.3d 908.

3. Antecedent costs

Legislature was not constitutionally or statutorily required to reimburse school district for expenditures incurred in complying with state safety statutes enacted prior to 1975. Los Angeles Unified School Dist. v. State (App. 2 Dist. 1991) 280 Cal.Rptr. 237, 229 Cal.App.3d 552.

This section providing for reimbursement to local governmental units of costs mandated by State, so as to include only costs incurred on or after January 1, 1975, effectively precluded school district's claim for reimbursement for costs incurred as result of 1973 legislation. Los Angeles Unified School Dist. v. State (App. 2 Dist.1991) 280 Cal.Rptr. 237, 229 Cal.App.3d 552.

4. Claims

As to claim for reimbursement of state-mandated costs based on statute enacted after July 1, 1980 and filed with Board of Control prior to Jan. 1, 1985, Commission on State Mandates should determine if claim meets either definition found in Gov.Code § 17514 or Rev. & Tax Code §§ 2207, 2207.5; only if it does should claim be allowed. 68 Ops.Atty.Gen. 244, 9-11-85.

§ 17514.5. Repealed by Stats.1993, c. 216 (A.B.843), § 1

Historical and Statutory Notes

The repealed section, added by Stats.1984, c. 1459, § 1, defined the term "cost savings authorized by the state."

§ 17515. County

"County" means any chartered or general law county. "County" includes a city and county.

(Added by Stats.1984, c. 1459, § 1.)

§ 17516. Executive order

"Executive order" means any order, plan, requirement, rule, or regulation issued by any of the following:

(a) The Governor.

(b) Any officer or official serving at the pleasure of the Governor.

(c) Any agency, department, board, or commission of state government.

"Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code. It is the intent of the Legislature that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. "Major" means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility.

(Added by Stats.1984, c. 1459, § 1.)

§ 17517. Fund

"Fund" means the State Mandates Claims Fund.

(Added by Stats.1984, c. 1459, § 1.)

§ 17518. Local agency

"Local agency" means any city, county, special district, authority, or other political subdivision of the state.

(Added by Stats.1984, c. 1459, § 1.)

§ 17519. School district

"School district" means any school district, community college district, or county superintendent of schools.

(Added by Stats.1984, c. 1459, § 1.)

§ 17520. Special district

"Special district" means any agency of the state which performs governmental or proprietary functions within limited boundaries. "Special district"

Section
17559. Proceedings to set aside decision of commission; rehearing.
17560. Claims for reimbursement.
17561. State-mandated costs; reimbursement of local agencies and school districts; appropriations; disbursements; excessive claims.
17562. Legislative findings, declarations, and intent; evaluation of benefit of previously enacted mandates.
17563. Use of funds for any public purpose.
17564. Claims under specified dollar amount; combined claims; claims for direct and indirect costs; estimated and reimbursement claims.
17565. Reimbursement for costs incurred after operative date of mandate.
17567. Prorated claims; report.
17568. Valid reimbursement claims submitted after specified deadline; insufficient appropriations; prorated claims.
17570. Unfunded statutory or regulatory mandate; approved claims; review.
17571. Review of claiming instructions; modifications.

Article 1 was added by Stats.1984, c. 1459, § 1.

§ 17550. Reimbursement of local agencies and school districts

Reimbursement of local agencies and school districts for costs mandated by the state shall be provided pursuant to this chapter.

(Added by Stats.1984, c. 1459, § 1.)

Law Review Commentaries

State environmental permit fees charged to federal facilities: distinguishing legal user fees from illegal taxes. Samuel D. McVey, 29 Santa Clara L.Rev. 879 (1989).

§ 17551. Hearing and decision on claims

(a) The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution.

(b) The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district filed on or after January 1, 1985, that the Controller has incorrectly reduced payments to the local agency or school district pursuant to paragraph (2) of subdivision (d) of Section 17561.

(Added by Stats.1984, c. 1459, § 1. Amended by Stats.1985, c. 179, § 5, eff. July 8, 1985, operative Jan. 1, 1985; Stats.1986, c. 879, § 2.)

Historical and Statutory Notes

Operative effect of 1985 amendment, see Historical and Statutory Notes under Education Code § 42243.8.

Amendment of this section by § 2.5 of Stats. 1986, c. 879, failed to become operative under the provisions of § 56 of that Act.

Code of Regulations References

Action on proposed decision, see 2 Cal. Code of Regs. § 1188.1.
Definitions, hearings and decisions, see 2 Cal. Code of Regs. § 1187.
Form of decision, see 2 Cal. Code of Regs. § 1188.2.

within a reasonable time. The test claim may be based upon estimated costs that a local agency or school district may incur as a result of the statute or executive order and may be filed at any time after the statute is enacted or the executive order is adopted. The claim shall be submitted in a form prescribed by the commission. After a hearing in which the claimant and any other interested organization or individual may participate, the commission shall determine if there are costs mandated by the state.

(Added by Stats.1984, c. 1459, § 1.)

Code of Regulations References

Action on proposed decision, see 2 Cal. Code of Regs. § 1188.1.
Conduct of hearing, see 2 Cal. Code of Regs. § 1187.6.
Form of decision, see 2 Cal. Code of Regs. § 1188.2.
Notice of hearing, see 2 Cal. Code of Regs. § 1187.1.
Representation at hearing, see 2 Cal. Code of Regs. § 1187.8.
Test claim filing, see 2 Cal. Code of Regs. § 1183.

§ 17556. Findings

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts.

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

(Added by Stats.1984, c. 1459, § 1. Amended by Stats.1986, c. 879, § 4; Stats.1989, c. 589, § 1.)

Code of Regulations References

Filing request for reimbursement, see 2 Cal. Code of Regs. § 1184.

Notes of Decisions

Validity 1

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1. Validity

This section prohibiting commission on state mandates from finding costs mandated by State if it finds that local government has authority to levy service charges, fees, or assessments sufficient to pay for mandated program or increased level of service is facially constitutional under state constitutional provision requiring State to provide subvention of funds to reimburse local government for costs of state-mandated new program or higher level of service; considered in its context, section effectively and properly construes term "costs" in constitutional provision as excluding expenses that are recoverable from sources other than taxes. County of Fresno v. State (1991) 280 Cal.Rptr. 92, 53 Cal.3d 482, 808 P.2d 235.

§ 17557. Amount to be subvened; parameters and guidelines; allocation formula or uniform allowance; specifying fiscal years for reimbursement, test claim

If the commission determines there are costs mandated by the state pursuant to Section 17555, it shall determine the amount to be subvened to local agencies and school districts for reimbursement. In so doing it shall adopt parameters and guidelines for reimbursement of any claims relating to the statute or executive order. The successful test claimants shall submit proposed parameters and guidelines within 60 days of adoption of a statement of decision on a test claim. At the request of a successful test claimant, the commission may provide for one or more extensions of this 60–day period at any time prior to its adoption of the parameters and guidelines and for any length of time the commission specifies. If proposed parameters and guidelines are not submitted within the 60–day period and the commission has not granted an extension, then the commission shall notify the test claimant that the amount of reimbursement the test claimant is entitled to for the first 12 months of incurred costs will be reduced by 20 percent, unless the test claimant can demonstrate to the commission why an extension of the 60–day period is justified. A local agency, school district, and the state may file a claim or request with the commission to amend, modify, or supplement the parameters or guidelines. The commission may, after public notice and hearing, amend, modify, or supplement the parameters and guidelines.

In adopting parameters and guidelines, the commission may adopt an allocation formula or uniform allowance which would provide for reimbursement of each local agency or school district of a specified amount each year.

The parameters and guidelines adopted by the commission shall specify the fiscal years for which local agencies and school districts shall be reimbursed for

(c) Any savings achieved by the district's efficient and prudent expenditure of these funds shall be retained by the district in the county fund for expenditure by the district for other high priority capital outlay purposes.

(Added by Stats.1998, c. 407 (S.B.50), § 4, eff. Aug. 27, 1998.)

Historical and Statutory Notes

Legislative declarations, operative effect, provisions subject to voter approval, and ballot requirements for provisions in Stats.1998, c. 407, see Historical and Statutory Notes under Education Code § 100400.

Code of Regulations References

Office of Public School Construction, State Allocation Board,
Savings, see 2 Cal. Code of Regs. § 1859.103.
SFP application for funding, see 2 Cal. Code of Regs. § 1859.21.

§ 17070.65. Funds made available to General Services Department

From any moneys in one of the funds established pursuant to Section 17070.40, as appropriate, and approved for this purpose in the annual Budget Act, the board shall make available to the Director of General Services the amounts that the board determines necessary for the Department of General Services to provide the assistance, pursuant to this chapter, required pursuant to Section 15504 of the Government Code to facilitate the construction, modernization, reconstruction, or alteration of, or addition to, school buildings.

(Added by Stats.1998, c. 407 (S.B.50), § 4, eff. Aug. 27, 1998. Amended by Stats.2002, c. 33 (A.B.16), § 6, eff. April 29, 2002.)

Historical and Statutory Notes

Appropriation, effective date and ballot information relating to Stats.2002, c. 33 (A.B.16), eff. April 29, 2002, see Historical and Statutory Notes under Education Code § 17070.15.

Legislative declarations, operative effect, provisions subject to voter approval, and ballot requirements for provisions in Stats.1998, c. 407, see Historical and Statutory Notes under Education Code § 100400.

Cross References

Kindergarten–University Public Education Facilities Bond Act of 2002, see Education Code § 100600 et seq.
Kindergarten–University Public Education Facilities Bond Act of 2004, see Education Code § 100800 et seq.

§ 17070.70. Title to property

(a) Title, including, but not limited to, any leasehold interest as set forth in subdivision (c), to all property acquired, constructed, or improved with funds made available under this chapter shall be held by the school district to which the board grants the funds. Title, as defined solely for the purpose of a school district's eligibility to receive funds from the board pursuant to this chapter shall include an order for prejudgment possession issued by a court in an eminent domain proceeding.

(b) The applicant school district shall comply with all laws pertaining to the construction, reconstruction, or alteration of, or addition to, school buildings.

Article 1

LEGISLATIVE INTENT AND DEFINITIONS

§ 22000. Short title

This chapter shall be known and may be cited as the "Uniform Public Construction Cost Accounting Act."

(Formerly § 21000, added by Stats.1983, c. 1054, § 1. Renumbered § 22000 and amended by Stats.1986, c. 1019, § 37.)

Historical and Statutory Notes

1986 Legislation

Renumbering of this section as § 21800 and amendment by Stats.1986, c. 248, was subordinated to its renumbering and amendment by Stats.1986, c. 1019. See Historical Note under Bus. & Prof.C. § 5678.5.

§ 22001. Legislative findings and declarations

The Legislature finds and declares that there is a statewide need to promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state. This chapter provides for the development of cost accounting standards and an alternative method for the bidding of public works projects by public entities.

(Formerly § 21001, added by Stats.1983, c. 1054, § 1. Renumbered § 22001 and amended by Stats.1986, c. 1019, § 38.)

Historical and Statutory Notes

1986 Legislation

Renumbering of this section as § 21801 and amendment by Stats.1986, c. 248, was subordinated to its renumbering and amendment by Stats.1986, c. 1019. See Historical Note under Bus. & Prof.C. § 5678.5.

§ 22002. Definitions

(a) "Public agency," for purposes of this chapter, means a city, county, city and county, including chartered cities and chartered counties, any special district, and any other agency of the state for the local performance of governmental or proprietary functions within limited boundaries. "Public agency" also includes a nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.

(b) "Representatives of the construction industry" for purposes of this chapter, means a general contractor, subcontractor, or labor representative with experience in the field of public works construction.

(c) "Public project" means any of the following:

(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.

(2) Painting or repainting of any publicly owned, leased, or operated facility.

(3) In the case of a publicly owned utility system, "public project" shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

(d) "Public project" does not include maintenance work. For purposes of this section, "maintenance work" includes all of the following:

(1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.

(2) Minor repainting.

(3) Resurfacing of streets and highways at less than one inch.

which pertain to the control of cotton pests.

The membership shall consist of at least one cottongrower from each of the major cotton-growing counties in the state.

Any member of the board who misses two meetings of the board, without the permission of the board, is deemed to have resigned as a member of such board.

The board may meet in regular session each month. The chairman of the board or director may call any other meeting of the board at any time. Each member shall be allowed twenty-eight dollars ($28) per diem and mileage in accordance with the Board of Control rules for attending any meeting of the board.

The board shall annually review the effectiveness of the cotton pest control program.

The amendments to this section enacted at the 1973–74 Regular Session of the Legislature shall become operative February 1, 1975.

SEC. 5. Section 5 of Chapter 170 of the Statutes of 1967 is repealed.

SEC. 6. Section 6007 is added to the Food and Agricultural Code, to read:

6007. This article shall remain in effect only until July 1, 1977, and as of that date is repealed.

SEC. 7. There is hereby appropriated from the Department of Agriculture Fund the sum of three hundred thirty-one thousand nine hundred thirty-eight dollars ($331,938), in augmentation of the 1974–75 support budget of the Department of Food and Agriculture, for the purposes of carrying out the provisions of Article 5 (commencing with Section 6001), Chapter 9, Part 1, Division 4 of the Food and Agricultural Code.

SEC. 8. This act makes an appropriation for the usual current expenses of the state within the meaning of Article IV of the Constitution and shall go into immediate effect.

CHAPTER 1027

An act to add Section 1720.2 to the Labor Code, relating to the payment of prevailing wage rates.

[Approved by Governor September 23, 1974. Filed with Secretary of State September 23, 1974.]

The people of the State of California do enact as follows:

SECTION 1. Section 1720.2 is added to the Labor Code, to read:

1720.2. For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but, upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be an appropriation made by this act because the duties, obligations, or responsibilities imposed on local government by this act are minor in nature and will not cause any financial burden on local government.

CHAPTER 1028

An act to amend Section 13810 of the Penal Code, relating to the California Council on Criminal Justice, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 23, 1974. Filed with Secretary of State September 23, 1974.]

The people of the State of California do enact as follows:

SECTION 1. Section 13810 of the Penal Code is amended to read:

13810. There is hereby created in the state government the California Council on Criminal Justice, which shall be composed of the following members: the Attorney General; the Administrative Director of the Courts; 14 members appointed by the Governor, three of whom shall be the Commissioner of the Department of the Highway Patrol, the Director of the Department of Corrections, and the Director of the Youth Authority; five members appointed by the Senate Rules Committee; and six members appointed by the Speaker of the Assembly.

The appointees of the Governor shall include: a chief of police, a district attorney, a sheriff, a public defender, a county probation officer, one member of a city council, one member of a county board of supervisors, a representative of the Commission on Peace Officer Standards and Training, a faculty member of a college or university qualified in the field of criminology, police science, or law, and a person qualified in the general field of research, development, and systems technology. The Speaker of the Assembly and Senate Committee on Rules shall include among their appointments a judge designated by the Judicial Council, one private citizen, a representative of the cities and a representative of the counties, and seven persons who shall be elected officials of county or city government or appointed officials of county or city criminal justice

CHAPTER 1224

An act to amend Sections 1773.5, 1775, and 1777.5 of, to add Sections 1720.4, 1771.5, 1771.6, 1771.7, and 1777.1 to, and to repeal and add Section 1777.7 of, the Labor Code, relating to public works.

[Approved by Governor October 1, 1989. Filed with Secretary of State October 1, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 1720.4 is added to the Labor Code, to read:

1720.4. For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on behalf of, private nonprofit community organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate local or state organization of duly authorized employee representatives of workers employed on public works.

SEC. 2. Section 1771.5 is added to the Labor Code, to read:

1771.5. (a) Nothwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at signated time, a certified copy of each w ly payroll

containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

SEC. 3. Section 1771.6 is added to the Labor Code, to read:

1771.6. Notwithstanding Sections 1730, 1731, and 1734, any political subdivision which enforces this chapter in accordance with Section 1771.5 shall, at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, deposit all penalties or forfeitures withheld from any contract payment in the general fund of the political subdivision. Any court collecting any fines or penalties under the criminal provisions of this chapter, or any of the labor laws pertaining to public works, when the fines and penalties resulted from enforcement actions by a political subdivision pursuant to Section 1771.5, shall deposit the fines or penalties in the general fund of the political subdivision.

SEC. 4. Section 1771.7 is added to the Labor Code, to read:

1771.7. A contractor may appeal an enforcement action by a political subdivision pursuant to Section 1771.5 to the Director of Industrial Relations. Any ruling by the director shall be final and, notwithstanding Section 1732, any appeal shall waive the contractor's right to bring court action on the same issue.

SEC. 5. Section 1773.5 of the Labor Code is amended to read:

1773.5. The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

SEC. 6. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the c actor had knowledge of his or her oblig s under this part. e difference between the prevailing wag ates and the

amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both to pay each worker in full, the money shall be prorated among all workers.

SEC. 7. Section 1775 of the Labor Code is amended to read:

1775. The employer shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or under subcontract by the subcontractor. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the employer, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due an employer to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the employer, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due under this section. This action shall be commenced not later than six months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than six months after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the employer for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the employer to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

"Employer," as used in this section, means the contractor or the subcontractor, whichever one employs the worker.

SEC. 8. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all wages and penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and

in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the wages and penalties due under this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. The division may maintain a court action whether or not it has an assignment of the wage claim of the worker. No issue other than that of the liability of the contractor for the wages and penalties due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

SEC. 9. Section 1775 of the Labor Code is amended to read:

1775. The employer shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or under subcontract by the subcontractor. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the employer, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due an employer to cover all wages and penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the, employer the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with

the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the wages and penalties due under this section. This action shall be commenced not later than six months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than six months after acceptance of the public work, whichever last occurs. The division may maintain a court action whether or not it has an assignment of the wage claim of the worker. No issue other than that of the liability of the employer for the wages and penalties due shall be determined in the action, and the burden shall be upon the employer to establish that the wages and penalties demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

"Employer," as used in this section, means the contractor or the subcontractor, whichever one employs the worker.

SEC. 10. Section 1777.1 is added to the Labor Code, to read:

1777.1. (a) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period of not less than one year or more than three years. The period of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(b) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter. These periods of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(c) Any determination by the Labor Commissioner shall be made after a full investigation by the Labor Commissioner and a fair and impartial hearing and reasonable notice.

(d) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(e) The Labor Commissioner shall promulgate rules and regulations for the administration and enforcement of this section,

the definition of terms, and appropriate penalties.

SEC. 11. Section 1777.5 of the Labor Code is amended to read:

1777.5. Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise prov d in this section, in no case shall the ratio be less than one hour of apprentices

work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area e eds an average of 15 percent.

(b) The number of apprentices in training in such area exceed

ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

SEC. 12. Section 1777.7 of the Labor Code is repealed.

SEC. 13. Section 1777.7 is added to the Labor Code, to read:

1777.7. (a) In the event a contractor or subcontractor willfully fails to comply with Section 1777.5, the Director of Industrial Relations shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on, or to receive, any public works contract for a period of up to one year

for the first violation and for a period of up to three years for the second and subsequent violations. Each period of debarment shall run from the date the determination of noncompliance by the Administrator of Apprenticeship becomes an order of the California Apprenticeship Council.

(b) A contractor or subcontractor who violates Section 1777.5 shall forfeit as a civil penalty the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(c) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first time violation and with the concurrence of the joint apprenticeship committee, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(e) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

SEC. 14. (a) Section 7 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by both this bill and AB 254. It shall only become operative if (1) both bills are enacted and become effective January 1, 1990, (2) each bill amends Section 1775 of the Labor Code, and (3) SB 197 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 254, in which case Sections 6, 8, and 9 of this bill shall not become operative.

(b) Section 8 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by both this bill and SB 197. It shall only become operative if (1) both bills are enacted and become effective January 1, 1990, (2) each bill amends Section 1775 of the Labor Code, (3) AB 254 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after SB 197 in which case Sections 6, 7, and 9 of this bill shall not become operative.

(c) Section 9 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by this bill, AB 254, and SB 197. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1990, (2) all three bills amend Section 1775 of the Labor Code, and (3) this bill is enacted after AB 254 and SB 197, in which case Sections 6, 7, and 8 of this bill shall not become operative.

BILL NUMBER: AB 302 CHAPTERED
BILL TEXT

CHAPTER 220
FILED WITH SECRETARY OF STATE JULY 28, 1999
APPROVED BY GOVERNOR JULY 28, 1999
PASSED THE SENATE JULY 15, 1999
PASSED THE ASSEMBLY MAY 27, 1999
AMENDED IN ASSEMBLY MARCH 25, 1999

INTRODUCED BY Assembly Member Floyd

FEBRUARY 8, 1999

An act to amend Section 1720.3 of the Labor Code, relating to public works.

LEGISLATIVE COUNSEL'S DIGEST

AB 302, Floyd. Public works: prevailing wages.

(1) Existing law defines the term "public works" for purposes of requirements regarding the payment of prevailing wages, the regulation of working hours, and the securing of workers' compensation for public works projects. Existing law further requires that, except as specified, not less than the general prevailing rate of per diem wages be paid to workers employed on public works and imposes misdemeanor penalties for a violation of this requirement.

Existing law provides that for the purposes of provisions of law relating to the payment of prevailing wages, "public works" means, among other things, the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any state agency, including the California State University and the University of California.

This bill would revise the definition of "public works" for these purposes to include the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any political subdivision of the state, thereby requiring the payment of prevailing wages in connection with all such contracts involving any local public entity.

Because the violation of prevailing wage requirements by local public entities when engaged in these public works projects would result in the imposition of misdemeanor penalties, this bill would impose a state-mandated local program.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1720.3 of the Labor Code is amended to read:

1720.3. For the limited purposes of Article 2 (commencing with

Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIIIB of the California Constitution.

BILL NUMBER: SB 1999 CHAPTERED
BILL TEXT

CHAPTER 881
FILED WITH SECRETARY OF STATE SEPTEMBER 29, 2000
APPROVED BY GOVERNOR SEPTEMBER 28, 2000
PASSED THE SENATE AUGUST 30, 2000
PASSED THE ASSEMBLY AUGUST 28, 2000
AMENDED IN ASSEMBLY AUGUST 23, 2000
AMENDED IN ASSEMBLY AUGUST 18, 2000
AMENDED IN ASSEMBLY AUGUST 7, 2000
AMENDED IN SENATE APRIL 24, 2000

INTRODUCED BY Senator Burton

FEBRUARY 25, 2000

An act to amend Section 1720 of the Labor Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1999, Burton. Public work.

Existing law defines public works and establishes certain requirements that must be met by persons who enter into contracts for public works. Those requirements include provisions generally known as the prevailing wage laws. The prevailing wage laws require that all workers employed on public works be paid the general prevailing rate of per diem wages, as determined by the Director of Industrial Relations.

This bill would revise the definition of public works by providing that "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work. By requiring local government entities to comply with the provisions affecting public works, including the prevailing wage laws, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1720 of the Labor Code is amended to read:

1720. As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to

order of the Public Utilities Commission or other public authority. For purposes of this subdivision, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

BILL NUMBER: AB 1646 CHAPTERED
BILL TEXT

CHAPTER 954
FILED WITH SECRETARY OF STATE SEPTEMBER 30, 2000
APPROVED BY GOVERNOR SEPTEMBER 29, 2000
PASSED THE ASSEMBLY SEPTEMBER 1, 2000
PASSED THE SENATE AUGUST 30, 2000
AMENDED IN SENATE AUGUST 29, 2000
AMENDED IN SENATE AUGUST 25, 2000
AMENDED IN SENATE AUGUST 7, 2000
AMENDED IN SENATE AUGUST 30, 1999
AMENDED IN SENATE AUGUST 16, 1999
AMENDED IN SENATE JULY 1, 1999
AMENDED IN SENATE JUNE 24, 1999

INTRODUCED BY Assembly Member Steinberg

MARCH 4, 1999

An act to amend Sections 1723, 1726, 1727, and 1773.1 of, to add Sections 1741 and 1743 to, to add and repeal Sections 1742 and 1742.1 of, to repeal Sections 1730, 1731, 1732, 1733, and 1771.7 of, to repeal and amend Section 1775 of, and to repeal and add Section 1771.6 of, the Labor Code, relating to public works.

LEGISLATIVE COUNSEL'S DIGEST

AB 1646, Steinberg. Public works: payments.

(1) Existing law regulating public works contracts requires the awarding body of a public works contract to withhold and retain from payments to the contractor all wages and penalties that have been forfeited pursuant to the contract or existing law. The awarding body is required to transfer all wages and penalties retained, to the Labor Commissioner for disbursement pursuant to specified provisions whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties withheld within 90 days after the completion of the contract and formal acceptance of the job.

This bill would require the awarding body to report promptly any suspected violations of the laws regulating public works contracts to the Labor Commission and to retain all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner.

(2) Existing law authorizes the contractor to bring suit for the limited purpose of recovery of the penalties or forfeitures withheld. Existing law permits the Division of Labor Standards Enforcement to intervene in a contractor's suit for recovery of amounts withheld, provides for the deposit of wages for workers who cannot be located into the Industrial Relations Unpaid Wages Fund, and provides for the deposit of penalties into the General Fund. Existing law, until January 1, 2003, requires a contractor to withhold moneys due a subcontractor in an amount sufficient to pay the wages that are the subject of a claim filed with the Division of Labor Standards Enforcement, as directed by the division, if the body awarding the public works contract has not withheld sufficient moneys to pay the wage claims. Existing law requires the contractor to pay those moneys to the subcontractor after receipt of notification that the

claim has been resolved, or to pay those moneys to the awarding body, under specified circumstances.

This bill would repeal these provisions and instead would require the Labor Commissioner to issue a civil wage and penalty assessment to the contractor or subcontractor or both if the Labor Commissioner determines after investigation that there has been a violation of the laws regulating public works contracts. The bill would permit an affected contractor or subcontractor to obtain review of a civil wage and penalty assessment by transmitting a written request for a hearing to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment and would require an impartial hearing officer, until January 1, 2005, and then an administrative law judge appointed by the Director of Industrial Relations to commence a hearing within 90 days of receipt of the request. The bill would permit an affected contractor or subcontractor to obtain review of the decision of the director, until January 1, 2005, and then an administrative law judge by filing a petition for a writ of mandate to the superior court within 45 days after service of the decision. The bill would provide for liquidated damages in an amount equal to the amount of unpaid wages, as specified. The bill would also authorize informal settlement meetings.

The bill would provide that the contractor and subcontractor are jointly and severally liable for all amounts due pursuant to a final order or a judgment on that final order, but would require the Labor Commissioner to collect amounts due from the subcontractor before pursuing the claim against the contractor. The bill would require that the wage claim be satisfied from the amounts collected prior to those amounts being applied to penalties and that the money be prorated among all workers if an insufficient amount is recovered to pay each worker in full. The bill would require wages for workers who cannot be located to be placed in the Industrial Relations Unpaid Wage Fund, a continuously appropriated fund, and penalties to be paid into the General Fund.

(3) Existing law requires any political subdivision that enforces the laws regulating public works contracts and any court collecting fines or penalties that result from enforcement actions by political subdivisions to deposit penalties or forfeitures withheld from any contract payment in the General Fund of the political subdivision. Existing law authorizes a contractor to appeal an enforcement action by a political subdivision to the Director of Industrial Relations.

The bill would repeal and recast this provision to apply to any awarding body that enforces the laws regulating public works contracts in accordance with specified provisions of existing law. The bill would require such an awarding body to provide written notice of the withholding of contract payments to the contractor and subcontractor, as specified. The withholding of contract payments would be reviewable in the same manner as a civil penalty order of the Labor Commissioner.

(4) Existing law provides that per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, and subsistence pay, apprenticeship or other training programs, and similar purposes. Existing law requires the representative of any craft, classification, or type of worker needed to execute a public works contract entered into with the state to file with the Department of Industrial Relations, fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved for the purposes of determining the per diem wages.

This bill would specify the employer contributions, costs, and

payments that employer payments may include and would provide that employer payments not required to be provided by state or federal law are a credit against the obligation to pay the general prevailing rate of wages. However, credits for employer payments would not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing. This bill would expand the requirement that copies of collective bargaining agreements be filed with the Department of Industrial Relations to apply to representatives of any craft, classification, or type of worker needed to execute a public works contract entered into with a public entity other than the state. The bill would revise the filing requirements to permit, if the collective bargaining agreement has not been formalized, the temporary filing of a typescript of the final draft accompanied by a statement under penalty of perjury as to its effective date. Because this bill would impose additional duties on local agency employers, expand the scope of the existing crime of perjury, and provide that a violation of these provisions is a misdemeanor, this bill would impose a state-mandated local program.

(5) This bill provides that it would become operative on July 1, 2001.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 2. Section 1723 of the Labor Code is amended to read:

1723. "Worker" includes laborer, worker, or mechanic.

SEC. 3. Section 1726 of the Labor Code is amended to read:

1726. The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed.

SEC. 4. Section 1727 of the Labor Code is amended to read:

1727. (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

SEC. 5. Section 1730 of the Labor Code is repealed.

SEC. 6. Section 1731 of the Labor Code is repealed.

SEC. 7. Section 1732 of the Labor Code is repealed.

SEC. 8. Section 1733 of the Labor Code is repealed.

SEC. 9. Section 1741 is added to the Labor Code, to read:

1741. If the Labor Commissioner or his or her designee determines after an investigation that there has been a violation of this chapter, the Labor Commissioner shall with reasonable promptness issue a civil wage and penalty assessment to the contractor or subcontractor or both. The assessment shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures due and shall include the basis for the assessment. The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment. The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body. However, no bonding company or surety shall be relieved of its responsibilities because it failed to receive notice from the Labor Commissioner.

SEC. 10. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial

hearing officer possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

The director shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted

statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 11. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) (1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge appointed by the Director of Industrial Relations. The appointed hearing judge shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this

section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall become operative on January 1, 2005.

SEC. 12. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 13. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable

for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the administrative law judge that he or she had substantial grounds for believing the assessment or notice to be in error, the administrative law judge shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall become operative on January 1, 2005.

SEC. 14. Section 1743 is added to the Labor Code, to read:

1743. (a) The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon. The Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

(b) From the amount collected, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(c) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(d) A final order under this chapter or a judgment thereon shall be binding, with respect to the amount found to be due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. The limitations period of any action on a payment bond shall be tolled pending a final order that is no longer subject to judicial review.

SEC. 15. Section 1771.6 of the Labor Code is repealed.

SEC. 16. Section 1771.6 is added to the Labor Code, to read:

1771.6. (a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the

withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments.

The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on a bond, if their identities are known to the awarding body.

(b) The withholding of contract payments in accordance with Section 1726 or 1771.5 shall be reviewable under Section 1742 in the same manner as if the notice of the withholding was a civil penalty order of the Labor Commissioner under this chapter. If review is requested, the Labor Commissioner may intervene to represent the awarding body.

(c) Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the awarding body shall not disburse any contract payments withheld.

(d) From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(e) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the awarding body that has enforced this chapter pursuant to Section 1771.5.

SEC. 17. Section 1771.7 of the Labor Code is repealed.

SEC. 18. Section 1773.1 of the Labor Code is amended to read:

1773.1. (a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

(d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required by a project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(e) For the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved. The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date.

Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct.

SEC. 19. Section 1775 of the Labor Code, as amended by Section 1 of Chapter 757 of the Statutes of 1997, is repealed.

SEC. 20. Section 1775 of the Labor Code, as added by Section 2 of Chapter 757 of the Statutes of 1997, is amended to read:

1775. (a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(1) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor.

(2) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the

subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages.

SEC. 21. This act shall become operative on July 1, 2001.

SEC. 22. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIIIB of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Appendix 5 PAST AND CURRENT REGULATIONS

Register 56, No. 8—5-5-56

Register 77, No. 2—1-8-77

Register 99, No. 8; 2-19-99

Register 2002, No. 3; 1-18-2002

expense of the self-insurer, not more frequently than once each calendar year, and the expense incurred in making such examination and audit shall be paid by the self-insurer.

GROUP 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

Article 1. Definitions

16000. Person. The term "person" means any individual, partnership, corporation, association, or any local state, regional, national or international labor union, or any other organization, or any agent or officer thereof, authorized to act for and on behalf of any of the foregoing.

NOTE: Authority cited for group 3: Section 1773.5, Labor Code.

History: New group 3 (§§ 16000-16001, 16100-16101 and 16200-16205) filed 4-27-56; effective thirtieth day thereafter (Register 56, No. 8).

16001. Filing. Except where otherwise specifically provided by these Rules, the term "filing" means the deposit in the United States mail, postage prepaid and addressed to the person or agency with whom a paper or document is to be filed, except that in any event any paper or document required or permitted to be filed pursuant to these rules or pursuant to the prevailing wage provisions of the Labor Code, shall be deemed filed upon actual delivery to and receipt by such person or agency.

16002. Nearest Labor Market Area. The term "nearest labor market area" means that geographical area from which workmen of the crafts, classifications, and types to be used in the performance and execution of the public work will be drawn for employment upon such public work.

16003. Prevailing Rate. The term "prevailing rate" means the rate being paid to a majority of workmen engaged in the particular craft, classification or type of work within the locality if a majority of such workmen be paid at a single rate; if there be no single rate being paid to a majority, then the rate being paid the greater number.

16004. Wages. The term "wages" means all compensation of whatever description or form, and however ascertained or calculated, paid by employers to, for or on behalf of the employees.

Article 2. Determination and Publication of Prevailing Wage Rates

16100. Hourly Rates. Whenever there is no daily rate of wages generally prevailing for a given craft, classification or type of work, then the general prevailing rate of wages per hour shall be ascertained by the body awarding the contract or authorizing the public work for such craft, classification or type of work, and in such event the general prevailing rate of per diem wages shall be expressed as an hourly rate and shall be identified accordingly in the call for bids.

16101. Publication of Rates. In specifying wage rates in the published call for bids pursuant to Section 1773 of the Labor Code, the body awarding any contract for public work or otherwise undertaking public work shall directly list, identify and separately state in each published call for bids the prevailing rate of wages for each craft, classification or type of workmen needed to execute the contract.

Article 3. Petitions to Review Prevailing Wage Rate Determinations

16200. Authority Delegated to Labor Commissioner. The Labor Commissioner is the authorized representative of the Director of Industrial Relations for the purpose of acting on petitions filed pursuant to Labor Code Section 1773.4.

16201. Manner of Filing. Every petition pursuant to Section 1773.4 of the Labor Code shall be filed in triplicate with the director by delivery to the Labor Commissioner, 965 Mission Street, San Francisco 3, California. Petitions may be filed in person or by mail. The date of receipt of the petition by the Labor Commissioner shall constitute the date on which the petition is deemed filed.

16202. Form. Every petition or other document filed or served pursuant to these rules shall be printed or written upon good white paper of letter or legal size. The petition or other document, and all copies thereof served or filed, shall be clear and legible and if typewritten, shall be double-spaced, paged at the bottom, and all copies shall conform in all respects to the original petition or document. The petition or document shall be securely bound or stapled. The name, address and telephone of the organization filing the petition, or its attorney if the petition is filed by an attorney shall appear in the upper left-hand corner of the first page of the petition.

16203. Content. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(a) The name and address of the person filing the petition, together with the name and address of the person verifying the petition if different from the person filing the same.

(b) Whether the petitioner is a prospective bidder or the representative of a prospective bidder, or the representative of one or more crafts, classifications or types of workmen involved in the public work contract, together with a specific designation of the nature of petitioner's business, if he be a prospective bidder, or a designation of each craft, classification or type of workmen represented by him if the petitioner be a representative of one or more crafts, classifications or types of workmen involved in the public works project.

(c) The official name of the awarding body, together with the date on which the call for bids was first published and the name and location of the newspaper in which such publication was made. A true and correct full copy of the call for bids as published shall be attached to the petition.

(d) If petitioner be an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city or township, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(e) The manner in which the wage rate determination by the awarding body fails to comply with the provisions of Labor Code Section 1773.

(1) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of work needed to execute a contract is different from that ascertained by the awarding body shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim. Whenever such facts relate to a particular employer of such craft, classification or type of work, the facts stated must identify the employer by name and address and give the number or approximate number of workers involved.

(2) Every petition asserting that the awarding body has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the awarding body.

(3) Where the rates ascertained by the awarding body are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is to be performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

16204. Failure to Include Copy of Call for Bids. If the petition fails to contain a copy of the call for bids as provided in Section 16203(c), the director may dismiss the petition forthwith or may, if in his judgment good cause is shown, permit the petition to be amended to include such copy.

16205. Filing Copy With Awarding Body. If the petitioner be other than an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, file a copy of the petition with the awarding body. Immediately upon the filing of such copy with the awarding body, and not later than five days after the filing of the original petition, the petitioner shall file with the Labor Commissioner an affidavit of the filing with the awarding body.

(Next page is 901)

REVISION RECORD FOR REGISTER 56, No. 8

(May 5, 1956)

TITLE 18. PUBLIC REVENUES

CHAPTER 2. BOARD OF EQUALIZATION

SUBCHAPTER 4. SALES AND USE TAX

This part of Register 56, No. 8, contains all the additions, amendments, and repeals affecting the above-entitled portion of the California Administrative Code which were filed with the Secretary of State from April 21, 1956, to and including May 5, 1956.

It is important that the holders of the above-entitled portion of the code check the section numbers listed below as well as the page numbers when inserting this material in the code and removing the superseded material. In case of doubt rely upon the section numbers rather than the page numbers since the section numbers must run consecutively even though there may be an error in the paging.

SECTION CHANGES

Unless otherwise noted, the sections listed below are amended herein.

Section	Section
2203 added	2205 added
2204 added	2206 added

PAGE CHANGES

REMOVE Old Pages	INSERT Attached Pages
501-502	501-502
--------	548.1 through 548.4

Do Not Throw Away Superseded Material. Save it and place it in a separate file under the original heading (either the appropriate title or register heading). It will then always be possible to find the prior wording of any section by using the history notes provided.

NOTE: This revision sheet is not a part of the code and should not be inserted therein. It is chiefly for filing purposes. If preserved with the removed pages, it will afford a ready reference to the sections affected by agency action.

(Precedes page 501, Title 18)

GROUP 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

Article 1. Definitions

16000. Director. The term "Director" means the Director of the Department of Industrial Relations or a duly authorized representative.

NOTE: Authority cited for Group 3: Sections 54 and 1773.5, Labor Code. Reference: Sections 1770–1773.8, Labor Code.

History: 1. Repealer of Group 3, (Articles 1–3, Sections 16000–16004, 16100–16101 and 16200–16205) and new Group 3 (Articles 1–4, Sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1-3-77 as an emergency; effective upon filing (Register 77, No. 2). For prior history, see Register 56, No. 8.

16001. Division. The term "Division" means the Division of Labor Statistics and Research within the Department of Industrial Relations.

16002. Chief. The term "Chief" means the Chief of the Division of Labor Statistics and Research or a duly authorized representative, within the Department of Industrial Relations.

16003. Person. The term "person" means any individual, partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

16004. Public Works. The term "public works" as used in these regulations shall be as defined in Sections 1720, 1720.2 and 1720.3 of the Labor Code.

16005. Political Subdivision. The term "political subdivision" includes any county, city, district, township, public housing authority, or public agency of the State, and assessment or improvement districts.

16006. Awarding Body. The term "awarding body" means any state or local governmental agency, department, board, commission, bureau, district, office, authority, political subdivision, officer or agent awarding a contract for public work.

16007. Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these rules or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body, or the Division upon actual delivery to and receipt by such person, awarding body, or the Division.

16008. Nearest Labor Market Area. The term "nearest labor market area", for the purpose of following the procedures specified in Section 1773 of the Labor Code, means the nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

16009. Locality. "Locality" or "locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

16010. Employer Payments. The term "employer payments" includes:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees.

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents, or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected.

16011. Prevailing Rate. The term "prevailing rate" shall have the following meaning:

(a) When applied to the basic hourly rate of pay, the term means the rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers be paid at a single rate; if there be no single rate being paid to a majority, then the single rate being paid the greater number.

(b) When applied to other employer payments included in per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16012, (3), below, the term means, for each such type of payment, the single rate of contribution or cost being paid to or for the greater number of workers in the particular craft, classification or type of work who are paid the prevailing basic hourly rate of pay as defined in Section 16011(a), above.

(c) When applied to the rate for holiday or overtime work, the term means the single rate paid to or for the greater number of workers in the particular craft, classification or type of work who are paid the prevailing basic hourly rate of pay as defined in Section 16011(a), above.

16012. General Prevailing Rate of Per Diem Wages. (a) The term "general prevailing rate of per diem wages", and similar terms descriptive of determinations made by the Director pursuant to Sections 1773, 1773.1 and 1773.8 of the Labor Code and these rules and regulations, includes:

(1) the prevailing basic straight-time hourly rate of pay; and

(2) the prevailing rate for holiday and overtime work; and

(3) the prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like;

(I) apprenticeship or other training programs authorized by Section 3093 of the Labor Code;

(J) other bona fide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) *Provided,* that the term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) job related expenses other than travel time and subsistence pay;

(2) contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above in Section 16012;

(3) union, organizational, professional or other dues except as they may be included in and withheld from the basic hourly wage rate;

(4) industry or trade promotion;

(5) political contributions or activities;

(6) any benefit for employees, their families and dependents, or retirees, including any benefit enumerated above in Section 16012(3), where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit;

(7) such other payments as the Director may determine to exclude.

16013. Interested Party. Except where otherwise specifically provided by these rules and regulations, the term "interested party" means, when used with reference to a particular prevailing wage determination made by the Director,

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determination, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work, and/or

(3) Any awarding body concerned with the administration of a public works contract or proposed contract, which is subject to the particular prevailing wage determination.

Article 2. Determination of General Prevailing Rate of Per Diem Wages. Requesting and Publishing Determinations

16100. Recognized Crafts. The determinations of the Director will be limited to those crafts, classifications or types of workers employed in public works pursuant to Sections 1720, 1720.2 and 1720.3 of the Labor Code.

16101. Form of Expression. (a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The formula or method for calculating the prevailing hourly wage rate for overtime and holiday work and determining the hours of work for which overtime is paid.

(3) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of worker employed on the project, which is on file with the Director of Industrial Relations."

(4) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16012, (3), of these rules and regulations.

(5) The following statement when applicable: "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8".

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may (1) express the rate in the determination by specifying the formula or method used or (2) convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) As a supplement to each determination the Director will make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

16102. Method of Determination. The Director shall follow those procedures specified in Section 1773 of the Labor Code and in these rules and regulations when making prevailing wage determinations.

16103. Collective Bargaining Agreements. Filing. (a) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all of their collective bargaining agreements including any addenda which modify the agreements, as soon as practicable after their execution.

(b) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code and Section 16103, (a), of these rules and regulations shall be filed with and addressed to: Chief, Division of Labor Statistics and Research, P. O. Box 603, San Francisco, CA 94101.

(c) Collective bargaining agreements filed with the Division must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

(1) certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or a photocopy thereof, or a printed copy of a fully executed agreement showing the names of signatory parties, except in the case of a printed agreement the Director may require certification.

(2) names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement and provides any maps or additional information that may be needed to determine its precise geographic scope, if this is not clearly specified in the agreement;

(3) names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

(4) provides an estimate of the approximate number of workers currently employed under the terms of the agreement in California and, if practicable, in each county within the jurisdiction of the signatory local union or unions;

(5) provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

16104. Consideration of Other Data. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider further data from interested parties, and will give consideration to data submitted by any interested party, concerning the rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include but not be limited to the following for each project:

(a) The name, address, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16013;

(b) The basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16012 of these rules and regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(c) The number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(d) The location of the project;

(e) The name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(f) The type of construction (e.g. residential, commercial building, etc.);

(g) The approximate cost of construction;

(h) The beginning date and completion date, or estimated completion date, of the project;

(i) The source of data (e.g. "payroll records");

(j) The method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

16105. Collective Bargaining Agreements. Adoption. (a) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for any craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate in the form prescribed by these rules and regulations. Only those rates and employer payments specifically enumerated in Section 16012 of these rules and regulations shall be included in the rate adopted.

(b) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director will incorporate such changes in the determination.

(c) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The determination of the Director will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when said changes become definite and determined. A statement must be filed in the same manner as collective bargaining agreements are filed under Section 16103 of these rules and regulations. The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

16106. Errors. Corrections. Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination.

16107. Requesting Determinations. (a) When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout a large geographic area, the Director will issue an "area" determination based on that agreement. Area determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.

(b) An awarding body may request the Director to make a determination for particular crafts, classifications, or types of workers for which an area determination has not been made or issued, or has expired.

(c) Any awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that a prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. All requests for prevailing wage determinations must be in writing and must specify the location where the public work is to be performed, including the county, and the particular crafts, classifications, or types of workers for which a determination is needed.

16108. **Effective Dates of Determinations.** Area determinations issued by the Director will ordinarily show an issue date and an expiration date and will be effective until that expiration date, unless earlier modified, corrected, rescinded, or superseded by the Director; other determinations made on request will show an issue date but may not show an expiration date; *provided;* that determinations modified, corrected, rescinded, or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which the call for bids takes place less than 30 days after the filing of the agreement (see Section 1773.1 of the Labor Code).

16109. **Publication of Prevailing Rates by Awarding Bodies.** To the extent that an awarding body is required to specify the general prevailing rate of per diem wages in the published call for bids, in the bid specifications, and in the contract itself, pursuant to Section 1773.2 of the Labor Code, the rates as determined by the Director for each craft, classification, or type of worker needed to execute the contract, and in the form of expression adopted by the Director, shall be used. In lieu of specifying the rates in the call for bids, the bid specifications, and the contract, the awarding body may, pursuant to Section 1773.2 refer to copies of the applicable determinations of the Director on file at its principal office.

Article 3. Delegation of Authority: Petition to Review

16200. **Delegation of Authority. Chief, Division of Labor Statistics and Research.** (a) The Chief of the Division of Labor Statistics and Research is the authorized representative of the Director for the purpose of receiving collective bargaining agreements, petitions, and other documents and papers pertinent to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these rules and regulations.

(b) The Chief is the authorized representative of the Director for the purpose of gathering information needed to make prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code or these rules and regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purposes of the law.

(c) The Chief is the authorized representative of the Director for the purpose of responding to petitions to review determinations filed pursuant to Section 1773.4 of the Labor Code.

(d) All final determinations shall be made by the Director.

16201. **Petition to Review.** Those interested parties enumerated in Section 1773.4 of the Labor Code may file with the Chief, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

16202. **Manner of Filing. Petition to Review.** Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed in triplicate with the Director by delivery to the Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. Petitions may be filed in person or by mail.

16203. **Form.** Every petition or other document filed or served pursuant to Section 1773.4 of the Labor Code and Article 3 of these rules and regulations shall be printed or written upon good white paper of letter size (8½ × 11), except as such is a copy of a prior executed petition, document, letter or paper. The petition or other document, and all copies thereof served or filed, shall be clear and legible and if typewritten, shall be double-spaced, paged at the bottom, and all copies shall conform in all respects to the original petition or document. Where attachments are referred to and used, they must be noted, attached and identified properly. The petition or document shall be securely bound or stapled. The name, address and telephone number of the person filing the petition or other document, letter or paper, or of the attorney representing the person, shall appear in the upper left-hand corner of the first page of said item. The signature of the person verifying said item shall appear in the lower right-hand corner of the last page.

16204. **Content. Petition to Review.** Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(a) The name, address, and telephone number of the person filing the petition, together with the name, address and telephone number of the person verifying the petition, if different from the person filing the same.

(b) Whether the petitioner is an awarding body, or a prospective bidder or the representative of a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public work contract together with a specific designation of the nature of petitioner's business, if a prospective bidder, or a designation of each craft, classification or type of worker represented, if the petitioner be a representative of one or more crafts, classifications or types of workers involved in the public works project.

(c) The official name of the awarding body, together with the date on which the call for bids was first published and the name and location of the newspaper in which such publication was made. A true and correct full copy of the call for bids as published shall be attached to the petition.

(d) If petitioner be an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city or township, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(e) The manner in which the wage rate determination by the director fails to comply with the provisions of Labor Code Section 1773.

(1) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

(A) Whenever such facts relate to a particular employer of such crafts, classifications or types of workers, the facts stated must identify the employer by name and address and give the number or approximate number of workers involved.

(B) Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16103 of these rules and regulations.

(C) Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16105 of these rules and regulations.

(2) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(3) Where the rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is to be performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

16205. Failure to Include Copy of Call for Bids. If the petition fails to contain a copy of the call for bids as provided in Section 16204(c), the Director may dismiss the petition forthwith or may, if good cause is shown, permit the petition to be amended to include such copy.

16206. Filing Copy With Awarding Body. If the petitioner be other than an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, file a copy of the petition with the awarding body. Immediately upon the filing of such copy with the awarding body, and not later than five days after the filing of the original petition, the petitioner shall file with the Chief an affidavit of the filing with the awarding body.

Article 4. Hearing Procedures, Decision, Miscellaneous

16300. Director's Discretion to Act. The Director may in his or her discretion initiate an investigation or hold a hearing or take such other action as is reasonably necessary which would best effectuate the purposes of the law and of these rules and regulations, except as such action may be expressly prohibited by the law.

16301. Director's Choice of Action. In any matter or proceeding under these regulations, whether it be on the initiative of the Director, petition, or request by an interested party the Director shall take those actions he or she deems necessary in the best interest of the law and these regulations except as may be specifically provided otherwise by the law or these regulations.

16302. Hearings. When a hearing is held, it shall be in accordance with the following procedures:

(a) A time and place of the hearing shall be fixed.

(b) All interested parties made known to the Director shall be notified by registered or certified mail, return receipt requested, of the time and place of the hearing.

(c) Notification shall be at least one week in advance.

(d) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions.

(e) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(f) All witnesses testifying before the hearing officer shall testify under oath.

(g) A full transcript of the hearing shall be recorded.

16303. Hearing Officer. Decision. (a) The appointed hearing officer shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations.

(b) The decisions of the Director shall reflect a summary of the evidence, findings, or matters of fact and or law.

(c) The decision shall be sent, by certified or registered mail with return receipt requested, to all parties no later than 20 days after the hearing, except as may be earlier required in a Petition to Review pursuant to Section 1773.4 of the Labor Code.

(d) The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may reconsider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given all parties in the same manner as the notice of hearings as specified in Sections 16302, (b), (c), and (d) above and the decision upon reconsideration shall be as specified in (b), and (c) of this Section.

16304. Public Hearings. The hearing procedures enumerated in Sections 16302 and 16303, above, shall in no way be construed to affect the responsibilities or procedures pursuant to Title 2, Division 3, Part 1, Chapter 4.5 of the Government Code (commencing with Section 11371).

16305. Severability. If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provision or application, and to this end the provisions of these regulations are severable.

REVISION RECORD FOR REGISTER 77, No. 2
(January 8, 1977)

TITLE 18. PUBLIC REVENUES

CHAPTER 3. FRANCHISE TAX BOARD

SUBCHAPTER 3.5. BANK AND CORPORATION TAX

This part of Register 77, No. 2, contains all the additions, amendments, and repeals affecting the above-entitled portion of the California Administrative Code which were filed with the Secretary of State from 1-1-77, to and including 1-8-77. The latest prior register containing regulations of the above agency is Register 76, No. 46 (11-13-76).

It is suggested that the section numbers listed below as well as the page numbers be checked when inserting this material in the code and removing the superseded material. In case of doubt rely upon the section numbers rather than the page numbers since the section numbers must run consecutively. It is further suggested that superseded material be retained with this revision record sheet so that the prior wording of any section can be easily ascertained.

SECTION CHANGES

Unless otherwise noted, the sections listed below are repealed and added herein.

24349(k)
24349(k)(1) Repealed
24349(l)
24349(m) Repealed

PAGE CHANGES

Remove Old Pages	Insert Attached Pages
1802.4.1–1802.4.2	1802.4.1–1802.4.2
	1818.1–1818.10
1819–1820	1819–1820
1820A–1820B	
1820.1–1820.4	1820.1–1820.4

(Precedes page 1802.4.1, Title 18)

been filed, and after consideration of such exceptions the director shall decide that the exceptions to the report of the service do raise substantial and material factual issues, he shall direct the hearing officer to issue a notice of hearing, whereupon the procedures for a hearing and the issuance of the hearing officer's report provided for in subsection (e) of this section (including the provision for filing exceptions to the hearing officer's report) shall be followed. The director may adopt the recommendations of the hearing officer issued under subsection (d) or the report of the hearing officer issued under subsection (e) as his own. The service shall thereafter promptly proceed to take such action as may be called for by the decision of the director, after which the proceedings will be closed.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875. Runoff Elections.

(a) The service shall conduct a runoff election, without further order of the director, when an election in which a ballot providing for not less than three choices (i.e. at least two representatives and "neither" or "none") results in no choice receiving a majority of the valid ballots cast, which runoff election shall be held promptly following final disposition of any challenges, objections or exceptions which followed the prior election as provided in Section 15870. Only one runoff election shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are employed in an eligible category on the date of the runoff election shall be the only employees eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and "neither" or "none" is equally divided among the several choices, or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the director shall declare the first election a nullity and shall conduct another election among the three choices which received the greatest number of ballots in the original election; provided that in the event there was a tie in the original election between the third and fourth choices or among the third, fourth and other choices, the director shall in the runoff election include on the ballot all such tied choices. In the event two or more choices receive the same number of ballots, and if either (1) there are no challenged ballots which would affect the results of the election, or (2) after all challenges have been disposed of it is found that all eligible voters have cast valid ballots, there shall be no runoff election and the petition shall be dismissed. Only one such further election pursuant to this subsection (d) may be held.

(e) The provisions of Section 15870 above shall be applicable to a runoff election.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875.1. Relevant Federal Law.

In resolving questions of representation, the Director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. New section filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 2.3. Election Procedure Under San Francisco Bay Area Rapid Transit District Law

NOTE: Authority cited for Group 2.3: Section 54, Labor Code and Section 28851, Public Utilities Code.

HISTORY

1. New Group 2.3 (§§ 15900–15926) filed 1–5–73; effective thirtieth day thereafter (Register 73, No. 1).
2. Repealer of Group 2.3 (Sections 15900–15926) filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 3. Payment of Prevailing Wages upon Public Works

Article 1. Definitions

§ 16000. Definitions.

The following terms are defined for general use in these regulations within Group 3, Payment of Prevailing Wages Upon Public Works and Group 4, Awarding Body Labor Compliance Programs:

Area of Determination. The area of determining the prevailing wage is the "locality" and/or the "nearest labor market area" as determined by the Director. In determining the area, the mobility of each craft, classification and type of work will be considered.

Awarding body. Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.

Bid. Any proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind.

Certified. The affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

Chief of DAS. Chief of Division of Apprenticeship Standards or a duly authorized representative.

Chief of DLSE/Labor Commissioner. Chief of the Division of Labor Standards Enforcement or a duly authorized representative.

Chief of DLSR. Chief of the Division of Labor Statistics and Research or a duly authorized representative.

Coverage. This means being subject to the requirements of Part 7, Chapter 1 of the Labor Code as a "public work." This includes all formal coverage determinations issued by the Director of Industrial Relations.

DAS. Division of Apprenticeship Standards.

Date of Notice or Call for Bids. The date the first notice inviting bids was published in a newspaper of general circulation or promulgated in a legally sufficient manner which results in a contract being awarded with or without competitive bidding. This may also be referred to as the Bid Advertisement Date.

Days. Unless otherwise specified means calendar days.

DLSE. The Division of Labor Standards Enforcement.

DLSR. The Division of Labor Statistics and Research.

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Effective Date. The date upon which the determinations of the Director go into effect. This date is ten days after the issue date of the determination.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

Expiration Date. The date upon which the determinations of the Director are subject to change.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight–time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Helper. Any subjourneyman classification traditionally used to assist a journeyman. Under no circumstance may the Helper classification be used to replace statutorily required Apprentices.

Identify or Give Notice of Identity. This means to state the name, job title, address and current telephone number of a person or entity.

Interim Determination. Those determinations of the Director issued between the quarterly updates.

Issue Date–Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

LCP. A labor compliance program initiated and enforced by an awarding body in accordance with these regulations.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded.

Mistake, Inadvertence, or Neglect. Mistake, inadvertence, or neglect in failing to pay the correct general rate of per diem wages means the lack of knowledge that any reasonable person would also be expected to have under the same or similar circumstances.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Predetermined Changes. Definite changes to the basic hourly wage rate, overtime, holiday pay rates, and employer payments which are known and enumerated in the applicable collective bargaining agreement

(d) Residential Projects. Residential projects consisting of single family homes and apartments up to and including four stories are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally–funded or assisted residential projects controlled or carried out by an awarding body.

NOTE: Such projects may require a special determination by the Director which should be requested by the awarding body at least 45 days before the commencement of advertising of the call for bids by the awarding body.

(e) Commercial Projects. All non–residential construction projects including new work, additions, alterations, reconstruction and repairs. Includes residential projects over four stories.

(f) Maintenance. Public works contracts for maintenance are subject to prevailing wage rate payment as set forth in Section 1771 of the Labor Code.

NOTE: See Article 1 for definition of term "maintenance."

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. Amendment of subsection (a) and NOTE and adoption of subsections (a)(1)–(3) and (e) and relettering former subsection (e) to (f) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
2. Amendment of subsection (b) and (d) and NOTE filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
3. Change without regulatory effect repealing amendments to subsections (b) and (d) and NOTE filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

§ 16002. Coverage of Worker.

The determinations of the Director will cover those crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

NOTE: Authority cited: Sections 1723 and 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3 and 1771, Labor Code.

§ 16002.5. Appeal of Public Work Coverage Determination.

(a) Those interested parties enumerated in Section 16000 of these regulations may appeal to the Director of Industrial Relations or the Director's duly authorized representative as set forth in Section 16301 of these regulations a determination of coverage under the public works laws (Labor Code Section 1720 et seq.) regarding either a specific project or type of work under Section 16001(a) of these regulations. Such notice of appeal must be served within 30 days of the issuance of the coverage determination. The party appealing the determination must, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, give written notification to the awarding body and any other identifiable parties.

(b) The notice of appeal shall state the full factual and legal grounds upon which the determination is appealed, and whether a hearing is desired. The decision to hold a hearing is within the Director's sole discretion. The Director may appoint a hearing officer to conduct the hearing and propose a decision on the appeal. The Director shall make the final decision on the appeal.

(c) The authority of the Director to determine coverage of projects under the prevailing wage laws is quasi–legislative, and a final determination on any appeal is subject to judicial review pursuant to the Code of Civil Procedure, Section 1085.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16003. Requests for Approval of Volunteer Labor.

(a) An awarding body wishing to use volunteer labor on what would otherwise be a public works project, pursuant to Labor Code Section 1720.4 shall serve a written request for approval on the Director, not less than 45 days prior to the commencement of work on the facilities or structures.

(b) The request for approval shall fully set forth the awarding body's grounds for belief that the requirements of Labor Code Section 1720.4(a), (b), and (c) are satisfied, and shall list all the crafts and classifications of workers that typically perform the types of work needed for the project.

(c) The request for approval shall identify the unions which represent workers in the crafts or classifications listed in (b) within the locality in which the public work is performed.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1720.4, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 3. Duties, Responsibilities, and Rights of Parties

§ 16100. Duties, Responsibilities and Rights.

The parties listed in this section must comply with the provisions of the Labor Code applicable to the payment of prevailing wages on public works contracts.

(a) Department and Division Authority in Prevailing Wage Issues. The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the Division of Labor Standards Enforcement. The lead agency for the coordination on apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by the law or these regulations.

(b) The Awarding Body shall:

(1) Obtain the prevailing wage rate from the Director in accordance with Labor Code Sections 1771 and 1773.

(2) Specify the appropriate prevailing wage rates, in accordance with Labor Code Sections 1773.2 and 1777.5.

(A) The posting requirement is applicable for each job site.

EXCEPTION: If more than one worksite exists on any project, then the applicable rates may be posted at a single location which is readily available to all workers.

(B) If a wage rate for a craft, classification or type of worker is not published in the Director's general prevailing wage determinations, a request for a special determination should be made by the awarding body to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, at least 45 days prior to the project bid advertisement date.

(3) Notify DAS. See Labor Code Section 1773.3.

(4) Inform prime contractors, to the extent feasible, of relevant public work requirements:

NOTE: Requirement information may be disseminated at a preacceptance of bid conference or in a call for bids or at an award of bid conference.

The public works requirements are:

(A) the appropriate number of apprentices are on the job site, as set forth in Labor Code Section 1777.5.

(B) worker's compensation coverage, as set forth in Labor Code Sections 1860 and 1861.

(C) keep accurate records of the work performed on the public works project, as set forth in Labor Code Section 1812.

(D) inspection of payroll records pursuant to Labor Code Section 1776, and as set forth in Section 16400 (e) of these regulations.

(E) and other requirements imposed by law.

(5) Withhold monies. See Labor Code Section 1727.

(6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771.

(C) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost–of–living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

(D) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications may be considered.

(E) Holidays. Holidays specifically named in the collective bargaining agreement or determined by wage surveys shall be included in the wage determination. Overtime pay may be required as provided in Section 16200(a)(3)(F) of these regulations.

(F) Overtime. Overtime will be paid as indicated in the wage determination.

EXCEPTION 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 2: If the collective bargaining agreement provides for Saturday and Sunday work at straight–time, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 3: If the awarding body determines that work cannot be performed during normal business hours or work is necessary at off hours to avoid danger to life or property, no overtime is required for the first eight hours in any one calendar day, and 40 hours during any one calendar week.

EXCEPTION 4: No overtime payment is required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

(G) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(I) of these regulations.

(H) Rates for helpers. Rates for helpers will be published when the information available to the Director indicates that a practice of using such a subclassification prevails in a particular area, such as contained in a collective bargaining agreement, and within the parameters of the applicable collective bargaining agreement. In the absence of such determination, the helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor from the 1–5 apprentice–journeyman ratio requirements set forth in Labor Code Section 1777.5.

(I) Credit Available For Actual Payment of Fringe Benefit Costs up to the Prevailing Amount. The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)–(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

(b) Federal Rates. In reviewing rates predetermined for federal public works, the Director will consider those rates published pursuant to the Davis–Bacon Act.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

NOTE: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12–month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(4) the location of the project;

(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(6) the type of construction (e.g. residential, commercial building, etc.);

(7) the approximate cost of construction;

(8) the beginning date and completion date, or estimated completion date of the project;

(9) the source of data (e.g. "payroll records");

(10) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

NOTE: Authority cited: Sections 1773 and 1773.5, Labor Code. Reference: Sections 1770, 1771, 1773, 1773.1, 1773.5, 1773.8, 1777.5, 1810 and 1815, Labor Code.

vailing wage determinations must be confirmed in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of workers for which a determination is needed.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

HISTORY

1. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16206. Corrections.

Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination. The Director may correct any error issued in a determination by reissuing such determination.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

Article 5. Petitions to Review Prevailing Wage Determinations

§ 16300. Delegation of Authority.

(a) The Chief of DLSR is the authorized representative of the Director for the purpose of:

(1) Receiving collective bargaining agreements and other documents and papers pertaining to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations;

(2) Gathering information needed to make prevailing wage determinations under Part, Chapter 1, Article 2 of the Labor Code and these regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purpose of the law;

(3) Issuing prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations; and

(4) Responding to petitions regarding determinations.

(b) The Director reserves the right to make all final determinations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1771, 1772, 1773 et seq., 1774, 1775, 1776, 1777, 1777.5 et seq., 1778, 1779 and 1780, Labor Code.

§ 16301. Referral of Prevailing Wage Issues to Director's Office.

Any new or unresolved issue other than of a routine nature as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party may be referred to the Chief of DLSR as the Director's duly authorized representative for final determination, including appeals of any determination relating either to coverage or to the rate of the prevailing wage rate, subject only to Section 16300(b) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

§ 16302. Petition to Review Prevailing Wage Determinations.

Those interested parties enumerated in Section 1773.4 of the Labor Code, and defined in Section 16000 of these regulations, may file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

(a) Manner of Filing. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed with the Director by mail to the Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, or may be filed in person at 455 Golden Gate Avenue, 5th Floor, San Francisco, CA 94102.

(b) Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these regulations or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body or division upon actual delivery to and receipt by such person, awarding body, or division.

(c) Content of Petition. Every petition filed pursuant to Section 1773 of the Labor Code shall contain and separately state the following:

(1) The name, address, telephone number and job title of:

(A) the person filing the petition;

(B) the person verifying the petition, if different from the person filing;

(C) if applicable, petitioner's attorney or authorized representative.

(2) Whether the petitioner is an awarding body, a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public works contract;

(3) The nature of petitioner's business, if a prospective bidder, and a designation of each craft, classification, or type of worker represented, or types of workers involved in the public works project.

(4) (A) the official name of the awarding body;

(B) the date on which the call for bids was first published;

(C) the name and location of the newspaper in which such publication was made. An accurate copy of the call for bids as published shall be attached to the petition.

(5) If petitioner is an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city, township, or regional district, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(6) If the petitioner is a prospective bidder, then the parent or subsidiary corporations or associations related to such craft, classification or type of work, if any, shall be specified.

(7) The manner in which the wage rate determined by the Director fails to comply with the provisions of Labor Code Section 1773.

(A) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

1. Whenever such facts relate to a particular employer of such crafts, classifications, or types of workers, the facts stated must identify the employer by name and address and give the number of workers involved.

2. Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16200(a)(1) of these regulations.

3. Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16200(e) of these regulations.

(B) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(C) Where rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locali and relied upon in support of the petition.

(d) Filing Copy With Awarding Body. If the petitioner is not an awarding body, the petitioner may concurrently with the filing of the original

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

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Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A–1–131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name–print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Withholding of Funds from Contractor—Hearing Procedure

§ 16410. Definitions.

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720–1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New article 7 (sections 16410–16414) and section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New article 7 (sections 16410–16414) and section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New article 7 (sections 16410–16414) and section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New article 7 (sections 16410–16414) and section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16411. Notice to Contractor and Affected Subcontractor.

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209–16209.6), see Register 82, No. 51.

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Co violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval. The awarding body bears the burden of producing evidence that it meets the criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

(1) Cause for revocation of final approval includes, but is not limited to:

(A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(1) The contractor's duty to pay prevailing wages under Labor Code Section 1770 et seq., should the project exceed the exemption amounts;

(2) The contractor's duty to employ registered apprentices on the public works project under Labor Code Section 1777.5;

(3) The penalties for failure to pay prevailing wages (for non-exempt projects) and employ apprentices including forfeitures and debarment under Labor Code Sections 1775 and 1777.7;

(4) The requirement to keep and submit copies upon request of certified payroll records under Labor Code Section 1776, and penalties for failure to do so under Labor Code Section 1776(f);

(5) The prohibition against employment discrimination under Labor Code Section 1777.6; the Government Code, and Title VII of the Civil Rights Act of 1964;

(6) The prohibition against accepting or extracting kickback from employee wages under Labor Code Section 1778;

(7) The prohibition against accepting fees for registering any person for public work under Labor Code 1779; or for filling work orders on public works under Labor Code Section 1780;

(8) The requirement to list all subcontractors under Government Section 4100 et seq;

(9) The requirement to be properly licensed and to require all subcontractors to be properly licensed and the penalty for employing workers while unlicensed under Labor Code Section 1021 and under the California Contractors License Law, found at Business and Professions Code Section 7000 et seq;

(10) The prohibition against unfair competition under Business and Professions Code Section 17200–17208;

(11) The requirement that the contractor be properly insured for Workers Compensation under Labor Code Section 1861;

(12) The requirement that the contractor abide by the Occupational, Safety and Health laws and regulations that apply to the particular construction project;

(13) The requirement to provide affirmative action for women and minorities as required in the Public Contracts Code and in the contract;

(14) The prohibition against hiring undocumented workers, and the requirement to secure proof of eligibility/citizenship from all workers.

§ 16431. Annual Report.

The awarding body shall submit to the Director an annual report on the operation of its LCP within 60 days after the close of its fiscal year, or accompany its request for an extension of initial approval, whichever comes first. The annual report shall contain, at the minimum, the following information:

(1) Number of contracts awarded, and their total value;

(2) The number, description, and total value of contracts awarded which were exempt from the requirement of payment of prevailing wages pursuant to Labor Code Section 1771.5(a);

(3) A summary of penalties and forfeitures imposed and withheld, or recovered in a court of competent jurisdiction;

(4) A summary of wages due to employees resulting from failure by contractors to pay prevailing wage rates, the amount withheld from money due the contractors, and the amount recovered by action in any court of competent jurisdiction.

(b) A LCP whose contract responsibilities are statewide, or which involves widely dispersed and numerous contracts, or which is required to report contract enforcement to federal authorities in a federal format, may adopt a summary reporting format to aggregate small contracts and estimate numbers and dollar values required by (a)(1) and (2). A summary reporting format may be adopted by agreement with the Director after advance notice to interested parties, and a list of parties requesting such notice shall be kept by the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16432. Audits.

(a) Audits may be conducted when deemed necessary by the awarding body and shall be conducted upon request of the Labor Commissioner.

(1) An audit consists of a comparison of payroll records to the best available information as to the actual hours worked and classifications of workers employed on the contract. An audit is sufficiently detailed when it enables the LCP, and the Labor Commissioner in reviewing proposed penalties, to draw reasonable conclusions as to compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code, and to enable accurate computation of underpayment of wages to workers and of applicable penalties and forfeitures. Records shall be made available to show that the audits conducted are sufficiently detailed to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2. An audit record in the form set out in Appendix B presumptively demonstrates sufficiency.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 224, 226, 1773.2, 1776, 1777.5, 1778, 1810, 1815, 1860 and 1861, Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix B

Audit Record Form (suggested for use with Section 16432 audits)

An audit record is sufficiently detailed to "verify compliance with the requirements of Chapter"1, Public Works, of Part 7 of Division 2, when the audit record displays that the following procedures were accomplished:

(1) Audits of the obligation to secure workers' compensation means demanding written evidence of a binder issued by the carrier, or telephone or written inquiry to the Workers' Compensation Insurance Rating Bureau;

(2) Audits of the obligations to employ and train apprentices means inquiry to the program sponsor for the apprenticeable craft or trade in the area of the public works as to: whether contract award information was received, including an estimate of journeyperson hours to be performed and the number of apprentices to be employed; whether apprentices have been requested, and whether the request has been met; whether the program sponsor knows of any amounts sent by the contractor or subcontractor to it for the training trust, or the California Apprenticeship Council; and whether persons listed on the certified payroll in that craft or trade as being paid less than the journeyperson rate are apprentices registered with that program and working under apprentice agreements approved by the Division of Apprenticeship Standards;

(3) Audits of the obligation to pass through amounts made part of the bid for apprenticeship training contributions, to either the training trust or the California Apprenticeship Council, means asking for copies of checks sent, or when the audit occurs more than 30 days after the month in which payroll has been paid, copies of canceled checks;

(4) Audits of "illegal taking of wages" means inspection of written authorizations for deductions (listed in Labor Code Section 224) in the contractor or subcontractor's files and comparison to wage deduction statements furnished employees (Labor Code Section 226), together with an interview of several employees as to any payments not shown on the wage deduction statements;

(5) Audits of the obligation to keep records of working hours, and pay not less than required by Title 8 CCR Section 16200(a)(3)(F) for hours worked in excess of 8 hours are the steps for review and audit of Certified Weekly Payrolls under Title 8 CCR Section 16432;

(6) Audits of the obligations to pay the prevailing per diem wage, means such steps for review and audit of Certified Weekly Payrolls which will produce a report covering compliance in the areas of:

(A) All elements defined as the "General Prevailing Rate of Per Diem Wages" in Title 8 CCR Section 16000, which were determined to be prevailing in the Director's determination which was in effect on the date of the call for bids, available in its principal office, and posted;

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771, 1771.5, 1777.5, 1776, 1779, 1813, 1815 and 3077, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16437. Determination of Amount of Forfeiture by the Labor Commissioner.

(a) Where the LCP of the awarding body requests a determination of the amount of forfeiture, the request shall include a file or report to the Labor Commissioner which contains at least the following information:

(1) The deadline by which contract acceptance of filing of a notice of completion, under Labor Code Section 1775, plus 90 days, will occur;

(2) Any other deadline which if missed would impede collection;

(3) Evidence of violation, in narrative form;

(4) Evidence that an "audit" or "investigation," as defined in Section 16432 of these regulations, occurred;

(5) Evidence that the contractor was given the opportunity to explain why there was no violation, or that any violation was caused by mistake, inadvertence, or neglect, before the forfeiture was sent to the Labor Commissioner, and the contractor either did not do so, or failed to convince the awarding body of its position;

(6) Where the LCP of the awarding body seeks not only amounts of wages but also a penalty as part of the forfeiture, and the contractor has unsuccessfully contended that the cause of violation was mistake, inadvertence, or neglect, a short statement should accompany the proposal for a forfeiture, with a recommended penalty amount pursuant to Labor Code Section 1775;

(7) Where the LCP of the awarding body seeks only wages or a penalty less than $50 per day as part of the forfeiture, and the contractor has successfully contended that the cause of the violation was mistake, inadvertence, or neglect, then the file should include the evidence as to the contractor's knowledge of his or her obligation, including the program's communication to the contractor of the obligation in the bid invitations, at the prejob conference agenda and records, and any other notice given as part of the contracting process. With the file should be a statement, similar to that described in (6), and recommended penalty amounts, pursuant to Labor Code Section 1775;

(8) The previous record of the contractor in meeting his or her prevailing wage obligations.

(9) Whether the LCP has been granted initial, extended initial or final approval.

(b) The file or report shall be served on the Labor Commissioner not less than 30 days before the final payment or, if that deadline has passed, not less than 90 days before the expiration of the deadline to file suit under Labor Code Section 1775.

(c) A copy of the recommended forfeiture and the file or report shall be served on the contractor at the same time as it is sent to the Labor Commissioner. The awarding body may exclude from the documents served on the contractor copies of documents secured from the contractor during an audit, investigation, or meeting if those are clearly referenced in the file or report. Along with the copy served on the contractor shall be a notice stating all deadlines and rights of the contractor to contest the amount of forfeiture. A Notice of Deadlines in the format set out in Appendix C will presumptively fulfill the requirements of this subsection;

(d) The Labor Commissioner shall affirm, reject, or modify the forfeiture in whole or in part as to penalty, and/or wages due.

(e) The Labor Commissioner's determination of the forfeiture is effective on one of the two following dates:

(1) For programs with initial approval or an extension of initial approval pursuant to Section 16426 of these regulations, on the date the Labor Commissioner serves by first class mail, on the political subdivision and on the contractor, an endorsed copy of the proposed forfeiture, or a newly drafted forfeiture statement which sets out the amount of forfeiture approved. Service on the contractor is effective if made on the last address supplied by the contractor in the record. The Labor Commissioner's approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed.

(2) For programs with final approval, approval is effective 20 days after the requested forfeitures are served upon the Labor Commissioner, unless the Labor Commissioner serves a notice upon the parties, within that time period, that this forfeiture request is subject to further review. For such programs, a notice that approval will follow such a procedure will be included in the transmittal of the forfeiture request to the contractor. The Labor Commissioner's final approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of the date of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed, unless some other procedure has been adopted pursuant to 8 CCR Section 16427(d).

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1775, Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix C

Notice of Deadlines
(To Go to Contractor for Forfeitures under Section 16437)

"This document requests the Labor Commissioner of California to approve a forfeiture of money you otherwise would be paid. The [name of the labor compliance program] for the [name of the awarding body having this work done] is asking the Labor Commissioner of California to agree, in 20 days, that the enclosed package of materials indicates that you have violated the law."

"Failure to respond to the [name of the labor compliance program's] request that the Labor Commissioner approve a forfeiture by writing to the Labor Commissioner within 20 days of the date of service (date of postmark) of this document on you may lead the Labor Commissioner to affirm the proposed forfeiture, and may also end your right to contest those amounts further. You must serve any written response on the Labor Commissioner, the [name of the labor compliance program] and [name of the awarding body] by return receipt requested/certified mail. If you serve a written explanation, with evidence, as to why the violation did not occur, or why the penalties should not be assessed, within the 20 day period, it will be considered."

and

"If you change address, or decide to hire an attorney, it is your responsibility to advise both the [name of the Labor Compliance Program] and the Labor Commissioner by certified mail. Otherwise, notices will be served at your last address on file, and deadlines might pass before you receive such notices."

§ 16438. Deposits of Penalties and Forfeitures Withheld.

(a) Where the involvement of the Labor Commissioner has been limited to a determination of the actual amount of penalty, forfeiture or underpayment of wages, and the matter has been resolved without litigation by or against the Labor Commissioner, the awarding body having a LCP shall deposit penalties and forfeitures in its general fund. If an approved LCP is operated through an agent, penalties and forfeitures shall be deposited as provided in the agreement designating the agent for the awarding bodies involved.

(b) Where collection of fines, penalties or forfeitures results from court action to which the Labor Commissioner and awarding body are both parties, the fines, penalties or forfeitures shall be divided between the general funds of the state and the awarding body, as the court may decide.

(c) All amounts recovered by suit brought by the Labor Commissioner and to which the awarding body is not a party, shall be deposited in the general fund of the state.

(d) All wages and benefits which belong to an employee and are withheld or collected from a contractor or sub–contractor, either by withholding or as a result of court action pursuant to Labor Code Section 1775, and which have not been paid to the employee or irrevocably committed

with a Statement of Alleged Violations, which shall specifically set forth DLSE's allegations against the Respondent.

(A) Service of both the Notice of Hearing and Statement of Alleged Violations shall be complete when mailed, by first class postage, to the last address of record for the Respondent listed with the State Contractors License Board or, in the event the Respondent is not licensed by the State Contractors License Board, the last known address of the Respondent available to the awarding body or, in the case of a subcontractor, the last known address available to the general contractor with whom the subcontractor contracted in the performance of the public works project under investigation. In the event there is neither an address of record with the State Contractors License Board or the awarding body or general contractor, the Notice of Hearing and Statement of Alleged Violations shall be served pursuant to the provisions of the Code of Civil Procedure, sections 415.10 – 415.50, concerning the service of civil summons.

(B) The Notice of Hearing shall list the date, time and place of the hearing which shall not be scheduled sooner than forty–five days after the date of the mailing of the Notice of Hearing and Statement of Alleged Violations.

(C) The Respondent shall have the opportunity to review and copy such records from the investigative file of DLSE which are not subject to either attorney–client or work product privileges. The Respondent shall be entitled to a reasonable number of subpoenas but shall be liable for any costs of service of the subpoenas, or any other witness or mileage fees incurred.

Mileage and Witness fees shall be set as specified in Government Code section 68093. In the exercise of his or her discretion, the Hearing Officer may limit the number of witnesses subpoenaed either for the purpose of corroboration or for establishing a single material fact in issue, or where the Respondent has not furnished satisfactory evidence that the witness will be able to give necessary and competent testimony material to the issues at the hearing.

[The next page is 1415.]

Category 22

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know has within the preceding two years contracted or plans to contract with the Division of Labor Statistics and Research to provide services, supplies, materials, or machinery of any type for purposes of data processing, reproduction, or microfilming, to the Division, or has so contracted or plans to contract with the Department to so serve the Division.

Category 23

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know engages in or derives its income from, in whole or in part, a Transit District subject to the jurisdiction of the State Conciliation Service.

Category 24

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Fair Employment Practices Commission.

Subchapter 6. Prevailing Wage Hearings

Article 1. General

§ 17201. Scope and Application of Rules.

(a) These Rules govern proceedings for review of civil wage and penalty assessments and the withholding of contract payments under Articles 1 and 2 of Division 2, Part 7, Chapter 1 (commencing with section 1720) of the Labor Code, as well as any notice assessing penalties for noncompliance with payroll record obligations under Labor Code section 1776. The provisions of Labor Code section 1742 and these Rules apply to all such assessments and notices served on a contractor or subcontractor on or after July 1, 2001 and provide the exclusive method for an Affected Contractor or Subcontractor to obtain review of any such notice or assessment. These Rules also apply to transitional cases in which notices were served but no court action was filed under Labor Code sections 1731–1733 prior to July 1, 2001, in accordance with Section 17270 (Rule 70) below.

(b) These Rules do not govern debarment proceedings under Labor Code section 1777.1, nor proceedings to review determinations with respect to the violation of apprenticeship obligations under Labor Code sections 1777.5 and 1777.7, nor any criminal prosecution.

(c) These Rules do not preclude any remedies otherwise authorized by law to remedy violations of Division 2, Part 7, Chapter 1 of the Labor Code.

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

NOTE: Authority cited: sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742, 1771.5, 1771.6(b), 1773.5, 1776 and 1777.1–1777.7, Labor Code; and Stats. 2000, Chapter 954, §1.

HISTORY

1. New subchapter 6 (articles 1–7, sections 17201–17270), article 1 (sections 17201–17212) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17202. Definitions.

For the purpose of these Rules:

(a) "Affected Contractor or Subcontractor" means a contractor or subcontractor (as defined under Labor Code section 1722.1) to whom the Labor Commissioner has issued a civil wage and penalty assessment pursuant to Labor Code section 1741, or to whom an Awarding Body has issued a notice of the withholding of contract payments pursuant to Labor Code section 1771.6, or to whom the Labor Commissioner or the Division of Apprentice Standards has issued a notice assessing penalties for noncompliance with payroll record obligations under Labor Code section 1776;

(b) "Assessment" means a civil wage and penalty assessment issued by the Labor Commissioner or his or her designee pursuant to Labor Code section 1741, and it also includes a notice issued by either the Labor Commissioner or the Division of Apprenticeship Standards pursuant to Labor Code section 1776;

(c) "Awarding Body" means an awarding body or body awarding the contract (as defined in Labor Code section 1722) that exercises enforcement authority under Labor Code section 1726 or 1771.5;

(d) "Department" means the Department of Industrial Relations;

(e) "Director" means the Director of the Department of Industrial Relations;

(f) "Enforcing Agency" means the entity which has issued an Assessment or Notice of Withholding of Contract Payments and with which a Request for Review has been filed; *i.e.*, it refers to the Labor Commissioner when review is sought from an Assessment, the Awarding Body when review is sought from a Notice of Withholding of Contract Payments, and the Division of Apprenticeship Standards when review is sought from a notice issued by that agency that assesses penalties under Labor Code section 1776;

(g) "Hearing Officer" means any person appointed by the Director pursuant to Labor Code section 1742(b) to conduct hearings and other proceedings under Labor Code section 1742 and these Rules;

(h) "Joint Labor–Management Committee" means a joint labor–management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (section 175a of Title 29 of the United States Code).

(i) "Labor Commissioner" means the Chief of the Division of Labor Standards Enforcement and includes his or her designee who has been authorized to carry out the Labor Commissioner's functions under Chapter 1, Part 7 of Division 2 (commencing with section 1720) of the Labor Code;

(j) "Party" means an Affected Contractor or Subcontractor who has requested review of either an Assessment or a Notice of Withholding of Contract Payments, the Enforcing Agency that issued the Assessment or the Notice of Withholding of Contract Payments from which review is sought, and any other Person who has intervened under subparts (a), (b), or (c) of Rule 08 [Section 17208];

(k) "Person" means an individual, partnership, limited liability company, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character;

(*l*) "Representative" means a person authorized by a Party to represent that Party in a proceeding before a Hearing Officer or the Director, and includes the Labor Commissioner when the Labor Commissioner has intervened to represent the Awarding Body in a review proceeding pursuant to Labor Code section 1771.6(b).

(m) "Rule" refers to a section within this subchapter 6. The Rule number corresponds to the last two digits of the full section number. (For example, Rule 08 is the same as section 17208.)

(n) "Surety" has the meaning set forth in Civil Code section 2787 and refers to the entity that issues the public works bond provided for in Civil Code sections 3247 and 3248 or any other surety bond that guarantees the payment of wages for labor.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 2787, 3247 and 3248, Civil Code; Sections 12a and 12b, Code of Civil Procedure; Sections 6700, 6701, 11405.60 and 11405.70, Government Code; Sections 1720 et seq., 1722, 1722.1, 1726, 1741, 1742, 1742(b), 1771.5, 1771.6, 1771.6(b) and 1776, Labor Code; and 29 U.S.C. §175a.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17203. Computation of Time and Extensions of Time to Respond or Act.

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

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

(c) Where service of any notice, decision, pleading or other document is by first class mail, and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed is extended five days if the place of address is within the State of California, and 10 days if the place of address is outside the State of California but within the United States. However, this Rule shall not extend the time within which the Director may reconsider or modify a decision to correct an error (other than a clerical error) under Labor Code section 1742(b).

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1010–1013, Code of Civil Procedure; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17204. Appointment of Hearing Officers; Delegation of Appointment Authority to Chief Counsel.

(a) Upon receipt of a Request for Review of an Assessment or of a Notice of Withholding of Contract Payments, the Director, acting through the Chief Counsel (*see* subpart (c) below), shall appoint an impartial Hearing Officer to conduct the review proceeding.

(b) The appointed Hearing Officer shall be an attorney employed by the Office of the Director — Legal Unit. However, if no attorney employed by the Office of the Director — Legal Unit is available or qualified to serve in a particular matter, the appointed Hearing Officer may be any attorney or administrative law judge employed by the Department, other than an employee of the Division of Labor Standards Enforcement.

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

(d) The Director's authority under Labor Code section 1742(b) to appoint an impartial Hearing Officer, is delegated in all cases to the Chief Counsel of the Office of the Director or to the Chief Counsel's designated Assistant or Acting Chief Counsel when the Chief Counsel is unavailable or disqualified from participating in a particular matter. This delegation includes all related authority under Rule 40 [Section 17240] below to appoint a different Hearing Officer to conduct all or any part of a review proceeding as well as the authority to consider and decide or to assign to another Hearing Officer for consideration and decision any motion to disqualify an appointed Hearing Officer.

NOTE: Authority cited: Sections 7, 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 11425.30 and 11502(b), Government Code; and Sections 7, 55, 59 and 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17205. Authority of Hearing Officers.

(a) In any proceeding assigned for hearing and decision under the provisions of Labor Code section 1742, the appointed Hearing Officer shall have full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Director, to hold a prehearing conference, to issue a subpoena and subpoena duces tecum for the attendance of a Person and the production of testimony, books, documents, or other things, to compel the attendance of a Person residing anywhere in the state, to certify official acts, to regulate the course of a hearing, to grant a withdrawal, disposition or amendment, to order a continuance, to approve a stipulation voluntarily entered into by the Parties, to administer oaths and affirmations, to rule on objections, privileges, defenses, and the receipt of relevant and material evidence, to call and examine a Party or witness and introduce into the hearing record documentary or other evidence, to request a Party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding, to extend the submittal date of any proceeding, to exercise such other and additional authority as is delegated to Hearing Officers under these Rules or by an express written delegation by the Director, and to prepare a recommended decision, including a notice of findings, findings, and an order for approval by the Director.

(b) There shall be no right of appeal to or review by the Director of any decision, order, act, or refusal to act by an appointed Hearing Officer other than through the Director's review of the record in issuing or reconsidering a written decision under Rules 60 [Section 17260] and 61 [Section 17261] below.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11512, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17206. Access to Hearing Records.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 6250 et seq. Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17207. Ex Parte Communications.

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

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

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

AUTHORIZED REPRESENTATIVE OR PARTY WITHOUT ATTORNEY (Name, Address, and Telephone):	*For ODL use only:*
STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS	
In the matter of the Request for Review of: Requesting Party, vs. Enforcing Agency.	
AUTHORIZATION FOR REPRESENTATION BY NON-ATTORNEY (Rule 9(b))	Case No.: - PWH

(Name of Party) _____ designates the following individual or firm, who is not an attorney at law,* to serve as our authorized representative in this matter and to receive all notices in our behalf unless and until this Authorization is terminated or withdrawn by further written notice.

Specify Name, Address, and Telephone Number of Representative:

_____

_____

_____

_____

Date: _____

. . . . . .

(TYPE OR PRINT NAME OF ! OWNER, ! OFFICER, OR ! MANAGING AGENT WHO IS MAKING THIS DESIGNATION)

_____

(SIGNATURE)

Owner, Officer, or Managing Agent of Party

I accept this authorization.

Date: _____

_____

Authorized Representative

* *This form is not required for an authorized representative who is an Owner, Officer, or Managing Agent of the Party*

HISTORY

1. New article 2 (sections 17220–17229) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17221. Opportunity for Early Settlement.

(a) The Affected Contractor or Subcontractor may, within 30 days following the service of an Assessment or Notice of Withholding of Contract Payments, request a meeting with the Enforcing Agency for the purpose of attempting to settle the dispute regarding the Assessment or Notice.

(b) Upon receipt of a timely written request for a settlement meeting, the Enforcing Agency shall afford the Affected Contractor or Subcontractor a reasonable opportunity to meet for such purpose. The settlement meeting may be held in person or by telephone and shall take place before expiration of the 60–day limit for filing a Request for Review under Rule 22 [Section 17222].

(c) Nothing herein shall preclude the Parties from meeting or attempting to settle a dispute after expiration of the time for making a request or after the filing of a Request for Review.

(d) Neither the making or pendency of a request for a settlement meeting, nor the fact that the Parties have met or have failed or refused to meet as required by this Rule shall serve to extend the time for filing a Request for Review under Rule 22 [Section 17222] below.

(e) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, such a settlement meeting shall be admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, such a settlement meeting, other than a final settlement agreement, shall be admissible or subject to discovery in any administrative or civil proceeding.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742, 1742.1 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17222. Filing of Request for Review.

(a) Any Request for Review of an Assessment or of a Notice of Withholding of Contract Wages shall be transmitted in writing to the Enforcing Agency within 60 days after service of the Assessment or Notice. Failure to request review within 60 days shall result in the Assessment or the Withholding of Contract Wages becoming final and not subject to further review under these Rules.

(b) A Request for Review shall be transmitted to the office of the Enforcing Agency designated on the Assessment or Notice of Withholding of Contract Payments from which review is sought.

(c) A Request for Review shall be deemed filed on the date of mailing, as determined by the U.S. Postal Service postmark date on the envelope or the overnight carrier's receipt in accordance with Rule 03(b) [Section 17203(b)] above, or on the date of receipt by the designated office of the Enforcing Agency, whichever is earlier.

(d) An additional courtesy copy of the Request for Review may be served on the Department by mailing to the address specified in Rule 23 [Section 17223] below at any time on or after the filing of the Request for Review with the Enforcing Agency. The service of a courtesy copy on the Department shall *not* be effective for invoking the Director's review authority under Labor Code section 1742; however, it may determine the time within which the hearing shall be commenced under Rule 41(a) [Section 17241(a)] below.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742 and 1771.6(a), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17223. Transmittal of Request for Review to Department.

Within ten (10) days followings its receipt of a Request for Review, the Enforcing Agency shall transmit to the Office of the Director – Legal Unit, the Request for Review and copies of the Assessment or Notice of Withholding of Contract Wages, any Audit Summary that accompanied the Assessment or Notice, and a Proof of Service or other document showing the name and address of any bonding company or Surety entitled to notice under Rule 20(a) [Section 17220(a)] above. The Enforcing Agency shall transmit these items to the following address.

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR – LEGAL UNIT
ATTENTION: LEAD HEARING OFFICER
P.O. BOX 420603
SAN FRANCISCO, CA 94142–0603

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(a) and 1771.6(a), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17224. Disclosure of Evidence.

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

(b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor or Subcontractor the option, at the Affected Contractor or Subcontractor's own expense, to either (A) obtain copies of all such evidence through a commercial copying service or (B) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the Affected Contractor or Subcontractor.

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

(d) The Enforcing Agency shall make evidence available for review as specified in subparts (a) through (c) within 20 days of its receipt of the Request for Review; *provided that*, this deadline may be extended by written request or agreement of the Affected Contractor or Subcontractor. The Enforcing Agency's failure to make evidence available for review as required by Labor Code section 1742(b) and this Rule, shall preclude the Enforcing Agency from introducing such evidence in proceedings before the Hearing Officer or the Director.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(b) and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17229. Finality of Notice of Withholding of Contract Payments; Authority of Awarding Body to Recover Additional Funds.

Where a Notice of Withholding of Contract Payments seeks to recover wages, penalties, or damages in excess of the amounts withheld from available contract payments (*see* Rule 20(b)(2) [Section 17220(b)(2)] above), an Awarding Body may recover any excess amounts that become or remain due when the Notice of Withholding of Contract Payments has become final under Labor Code section 1771.6. To recover the excess amounts, the Awarding Body shall transmit to the Labor Commissioner the Notice together with any decision of the Director or court that has become final and not subject to further review. The Labor Commissioner in turn shall certify and file the final order with the superior court in accordance with Labor Code section 1742(d).

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(d) and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 3. Prehearing Procedures

§ 17230. Scheduling of Hearing; Continuances and Tolling.

(a) The appointed Hearing Officer shall establish the place and time of the hearing on the merits, giving due consideration to the needs of all Parties and the statutory time limits for hearing and deciding the matter. Parties are encouraged to communicate scheduling needs to the Hearing Officer and all other Parties at the earliest opportunity. It shall not be a violation of Rule 07 [Section 17207]'s prohibition on ex parte communications for the Hearing Officer or his or her designee to communicate with Parties individually for purposes of clearing dates and times and proposing locations for the hearing. The Hearing Officer may also conduct a prehearing conference by telephone or any other expeditious means for purposes of establishing the time and place of the hearing.

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

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

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

(e) The time limits for hearing and deciding a review proceeding shall also be deemed tolled (1) when proceedings are suspended to seek judicial enforcement of a subpoena or other order to compel the attendance, testimony, or production of evidence by a necessary witness; (2) when the proceedings are stayed or enjoined by any court order; (3) between the time that a proceeding is dismissed and then ordered reinstated under Rule 25 [Section 17225] above; (4) upon the order of a court reinstating or requiring rehearing of the merits of a proceeding; or (5) during the pendency of any other cause beyond the Director's direct control (including but not limited to natural disasters, temporary unavailability of a suitable hearing facility, or absence of budget authority) that prevents the Director or any appointed Hearing Officer from carrying out his or her responsibilities under these Rules.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New article 3 (sections 17230–17237) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17231. Prehearing Conference.

(a) Upon the application of any Party or upon his or her own motion, the appointed Hearing Officer may conduct a prehearing conference for any purpose that may expedite or assist the preparation of the matter for hearing or the disposition of the Request for Review. The prehearing conference may be conducted by telephone or other means that is convenient to the Hearing Officer and the Parties.

(b) The Hearing Officer shall provide reasonable advance notice of any prehearing conference conducted pursuant to this Rule. The Notice shall advise the Parties of the matters which the Hearing Officer intends to cover in the prehearing conference, but the failure of the Notice to enumerate some matter shall not preclude its discussion or consideration at the conference.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11511.5, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17232. Consolidation and Severance.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11507.3, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17233. Prehearing Motions; Cut Off Date.

(a) Any motion made in advance of the hearing on the merits, any opposition thereto, and any further reply shall be in writing and directed to the appointed Hearing Officer. No particular format shall be required; however, the following information shall appear prominently on the first page: (1) the case name (*i.e.*, names of the Parties); (2) any assigned case number; (3) the name of the Hearing Officer to whom the paper is being submitted; (4) the identity of the Party submitting the paper; (5) the nature of the relief sought; and (6) the scheduled date, if any, for the hearing on the merits of the Request for Review. The motion shall also include a Proof of Service, as defined in Rule 10 [Section 17210] above, showing that copies have been served on all other Parties to the proceeding.

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

(c) There shall be no right to a separate oral hearing on any prehearing motion, except in those instances in which an oral hearing has been specially requested by a Party or the Hearing Officer *and* in which the enforcement or forfeiture of a fundamental right is at stake. When the Hear-

tial communications, or has engaged in conduct which, in the judgment of the Hearing Officer, creates an appearance of bias, prejudice, or partiality.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 754, Evidence Code; Sections 11435.05–11435.65 and 68560–68566, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17249. Hearing Record; Recording of Testimony and Other Proceedings.

(a) The Hearing Officer and the Director shall maintain an official record of all proceedings conducted under these Rules. In the absence of a determination under subpart (b) below, all testimony and other proceedings at any hearing shall be recorded by audiotape. Recorded testimony or other proceedings need not be transcribed unless requested for purposes of further court review of a decision or order in the same case.

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

(c) The Parties may, at their own expense, arrange for the recording of testimony and other proceedings through a different means other than the one authorized by the Hearing Officer, *provided that* it does not in any way interfere with the Hearing Officer's control and conduct of the proceedings, and *further provided that*, it shall not be regarded as an official record for any purpose absent a stipulation by all of the Parties or order of the Hearing Officer.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17250. Burdens of Proof on Wages and Penalties.

(a) The Enforcing Agency has the burden of coming forward with evidence that the Affected Contractor or Subcontractor (1) was served with an Assessment or Notice of Withholding of Contract Payments in accordance with Rule 20 [Section 17220]; (2) was provided a reasonable opportunity to review evidence to be utilized at the hearing in accordance with Rule 24 [Section 17224]; and (3) that such evidence provides prima facie support for the Assessment or Withholding of Contract Payments.

(b) If the Enforcing Agency meets its initial burden under (a), the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment or for the Withholding of Contract Payments is incorrect.

(c) With respect to any civil penalty established under Labor Code section 1775, the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 500, 502 and 550, Evidence Code; and Sections 1742(b) and 1773.5, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17251. Liquidated Damages.

(a) With respect to any liquidated damages for which an Affected Contractor, Subcontractor, or Surety on a bond becomes liable under Labor Code section 1742.1, the Enforcing Agency shall have a further burden of coming forward with evidence to show the amount of wages that remained unpaid as of 60 days following the service of the Assessment or Notice of Withholding of Contract Payments. The Affected Contractor or Subcontractor shall have the burden of demonstrating that he or she had substantial grounds for believing the Assessment or Notice to be in error.

(b) To demonstrate "substantial grounds for believing the Assessment or Notice to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment or Notice was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment or Notice.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(b), 1742.1 and 1773.5, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17252. Oral Argument and Briefs.

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

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

(c) In addition to or as an alternative to post–hearing briefs, the Hearing Officer may also prepare proposed findings or a tentative decision or may designate a Party to prepare proposed findings and thereafter give the Parties a reasonable opportunity to present arguments in support of or opposition to any proposed findings or tentative decision prior to the issuance of a decision by the Director under Rule 60 [Section 17260] below.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17253. Conclusion of Hearing; Time for Decision.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1094.5, Code of Civil Procedure; and Section 1742(c), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 7. Transitional Rule

§ 17270. Applicability of These Rules to Notices Issued Between April 1, 2001 and June 30, 2001.

(a) These Rules shall apply to any notice issued by the Labor Commissioner or an Awarding Body with respect to the withholding or forfeiture of contract payments for unpaid wages or penalties under the prevailing wage laws in effect prior to July 1, 2001; *provided that*, the party seeking review has not commenced a civil action with respect to such notice under the provisions of Labor Code sections 1731–1733 [repealed effective July 1, 2001].

(b) An Affected Contractor or Subcontractor may appeal any such notice served between April 1, 2001 and June 30, 2001 by filing a Request for Review with the Enforcing Agency that issued the notice, in the manner and form specified in Rule 22 [Section 17222] above. Any such Request for Review shall be in writing and shall include a statement indicating the date upon which the contractor or subcontractor was served with the notice of withholding or forfeiture.

(c) This Rule shall *not* extend the time available to appeal the notice under the former law. A Request for Review of a notice issued prior to July 1, 2001 must be filed with the Enforcing Agency within ninety (90) days after service of the notice.

(d) A contractor or subcontractor who has sought review of a notice issued prior to July 1, 2001 by filing a court action under the repealed provisions of Labor Code sections 1731–1733 on or after July 1, 2001, shall, if said action would have been timely under those sections, be afforded the opportunity to dismiss the action without prejudice, after entering into a stipulation that the proceeding be transferred to the Director for hearing in accordance with these Rules. The stipulation shall also provide that the time for commencing a hearing under Rule 41 [Section 17241] shall not begin to run until the case has been formally transferred to and received by the Office of the Director.

(e) Any hearing request made pursuant to Labor Code section 1771.7 [repealed effective July 1, 2001] that has not been heard and decided by a Hearing Officer prior to July 1, 2001 shall be handled in accordance with these Rules.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New article 7 (section 17270) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

* * *

Appendix 6 DETERMINATIONS

U.S. Foodservice Contract Design, #99-024, September 22, 1999

Northridge Earthquake Recovery Project, #99-046m June 6, 2000

California State University, San Marcos, #2002-012, October 21, 2002

John O'Banion Community Learning Center, #2002-024, December 4, 2002

STATE OF CALIFORNIA GRAY DAVIS, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

September 22, 1999

Ms. Judith A. Cannedy
Credit Manager
U.S. Foodservice Contract Design
9844 Business Park Drive, Suite A
Sacramento, CA 95827

RE: Public Works Case #99-024
U.S. Foodservice Contract Design
James Madison Elementary School, San Leandro

Dear Ms. Cannedy:

This constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of Targeted Specialties, Inc./U.S. Foodservice Contract Design ("U.S. Foodservice") on the above named project. This coverage determination is made under the public works laws and pursuant to Title 8, California Code of Regulations section 16000(a). Based upon my review of the documents submitted, and for the following reasons, it is my determination that the work performed by U.S. Foodservice on the James Madison Elementary School Renovation and Expansion Project ("Project") is a public work for which prevailing wages must be paid.

W.A. Thomas Company, Inc. ("Thomas") is the general contractor on the Project. U.S. Foodservice, a subcontractor, will install kitchen equipment, tables, and countertops at the school. This work involves removal of the equipment from the shipping crates and setting, leveling and securing the equipment to a wall or counter using hand tools.

Labor Code section 1720 generally defines public works to mean "Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds..." Labor Code section 1772 states: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." The reconstruction and expansion work on the Project by Thomas' employees is a public works for which Thomas is paying its employees prevailing wages. The work performed by U.S. Foodservice constitutes construction. In addition, it is performed at the public work site and is essential to the school

facility project. As U.S. Foodservice's work is in the execution of a public works contract, its employees are also deemed to be employed upon a public work under Labor Code section 1772 and must be paid prevailing wages.

Sincerely,

Stephen J. Smith

Stephen J. Smith
Director

cc: Daniel M. Curtin, Chief Deputy Director and Acting Chief, DLSR
Marcy Vacura Saunders, Labor Commissioner
Henry P. Nunn, III, Chief, DAS
Vanessa L. Holton, Assistant Chief Counsel

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

IN RE: PUBLIC WORKS CASE NO. 99-046

NORTHRIDGE EARTHQUAKE RECOVERY PROJECT

CALIFORNIA STATE UNIVERSITY, NORTHRIDGE

INSPECTION WORK

I. INTRODUCTION AND PROCEDURAL HISTORY

On November 19, 1999, the Department of Industrial Relations (Department) issued a public works coverage determination that Ron Barr, Ashton Durand, Cleveland Harris and Stephen Risley ("Inspectors"), hired by Jenkins, Gales and Martinez ("JGM") as inspectors under JGM's subcontract agreement with Daniel, Mann, Johnson and Mendenhall ("DMJM"), were entitled to the payment of prevailing wages for their work on the Northridge Earthquake Recovery Project ("Project") pursuant to Labor Code sections 1720(a) and 1772.

On January 12, DMJM/JGM requested reconsideration of this determination. Because the California Code of Regulations only provides for appeals, the Director will treat DMJM/JGM's January 12, 2000 request for reconsideration as an appeal under California Code of Regulations, tit. 8, Regulation 16002.5.

The Inspectors responded to the appeal on February 24, 2000. On April 19, 2000, DMJM/JGM, as part of its request for

reconsideration, asked the Department to review several coverage determinations issued by the Department in the early 1990's. No other responses have been received.

II. ISSUES AND CONCLUSIONS ON APPEAL

DMJM/JGM argue that because Labor Code section 1720 and the Public Contracts Code consistently define "public works" as involving construction, alteration, repair or improvement, their contracts for inspection of the construction project fall outside the definition of a public works. Therefore, according to their argument, the work of the Inspectors would not be covered. DMJM/JGM also argue that they are not "contractors" or "subcontractors" and therefore the Inspectors are not employees hired in the execution of a contract for public works. DMJM/JGM also assert that the Inspectors are not "workmen" as defined by Labor Code section 1723. They submit several early Department public works coverage determinations in support of the proposition that inspectors are not covered employees.

In response, the Inspectors argue that DMJM/JGM's interpretation of Labor Code section 1720 is too narrow in scope. They argue, had the Legislature intended to exclude "service contracts" as covered work, it would have done so under Labor Code section 1720.4, which provides exclusions for certain categories of work from the public works definition. In addition, they argue that, because their work plays a vital role in the successful completion of the public work, they are

workers under Labor Code section 1772 who are employed by subcontractors in the execution of a public works contract. In furtherance of this argument, they point out the definition of contractors and subcontractors under Labor Code section 1722 does not exclude the classification of "inspectors." Finally, they argue that since 1977 the Department has included building construction inspectors in the prevailing wage determinations under Labor Code sections 1770, 1773 and 1773.1.

For the reasons discussed below, I find that the Project is a public work. I further find that DMJM and JGM are contractors and/or subcontractors and that the Inspectors are workers employed by JGM in the execution of this public work. For this reason, under section 1772, the Inspectors are deemed to be employed upon a public work and therefore prevailing wages must be paid to them.

III. RELEVANT FACTS

The underlying facts are not in dispute. DMJM was awarded a construction management contract by California State University, Northridge ("CSUN") to coordinate and oversee the Project. The purpose of the Project was to reconstruct and repair major earthquake damage suffered by the State University in the 1994 Northridge earthquake. The Federal Emergency Management Agency provided funding to CSUN for the Project.

0316

As part of its contract with CSUN, DMJM was to provide "construction inspection for compliance with applicable building codes, including ICBO standards, and requirements of the construction documents." This portion of DMJM's scope of work was subcontracted to JGM. Both DMJM and JGM have supplied copies of the "Project Action Sheets" (two pages) and several excerpts from the DMJM/JGM contract (identified internally as "Exhibit A", pp. 5-9 and "Exhibit A-Revised, Section B, Amendment No. 6," Bate Stamped 153-155), which set forth the duties and responsibilities of the Chief Inspector and Project Inspectors. These documents are collectively attached hereto as Exhibit 1 to this Decision.[1] Generally, the JGM inspectors were to ensure that all work is completed in strict compliance with the plans and specifications, issue citations for building code violations and verify that all tests required by the construction documents are completed.

Pursuant to this contract with DMJM, JGM hired Ron Barr, Ashton Durand, Cleveland Harris and Stephen Risley as Project Inspectors with the title Inspector II. Later, Mr. Risley was promoted to Chief Inspector.

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[1]It should be noted that neither side has provided this Department with complete copies of the contract between CSUN and DMJM, and DMJM and JGM. This Decision on Administrative Appeal accepts the representation of the parties that indeed these excerpts set forth the scope of work at issue herein.

IV. ANALYSIS

A. Prevailing Wages Must Be Paid Under Labor Code Section 1772 Because The Inspectors Were Employed By A Subcontractor In The Execution Of A Public Work.

Labor Code Section 1720(a) defines a public work as construction done under contract and paid for in whole or in part out of public funds. Section 1772 states, "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work."

Both parties agree that the Project is a public work. It is construction done under contract and paid for with public funds. Neither party disputes the fact that DMJM contracted with the awarding body, CSUN, for inspection services. In turn, DMJM subcontracted with JGM to perform the inspections. Notwithstanding the above, DMJM/JGM argue that they are not contractors or subcontractors whose employees are performing work in the execution of a public works project. They also contend that, because the scope of work under their contracts does not involve actual construction, alteration or repair of the Project, their contracts fall outside Labor Code section 1720. DMJM/JGM further contends that the Inspectors are not workers employed by contractors or subcontractors in the execution of a contract for public work. Finally, they cite early Department public works coverage determinations in support of their position that prevailing wages are not required to be paid to the Inspectors.

0318

1. The definitions of contractor and subcontractor, as well as the contract documents themselves, require a finding that DMJM is a contractor and JGM is a subcontractor.

Webster defines a contractor as "one who contracts" (Webster's Third New International Dictionary, Unabridged, 1967). Webster also defines a subcontractor as "[a] business firm that continues to perform part... of another's contract...." (Id.) Under these definitions, DMJM is a contractor and JGM is a subcontractor. As mentioned above, DMJM was awarded the contract as project manager for the reconstruction of the State University. The portion of this contract calling for inspections was contracted out to JGM.

Additionally, the documents supplied by the parties to this Appeal, which set forth the scope of the work of inspectors, refer to inspectors as employees of the contractor or subcontractor. (See Exhibit 1 and the document identified therein internally with Bate Stamp No. 153.)

Appellants argue that since their contracts involve construction management duties, including inspection and coordination of the building contractor's work on the public works project as opposed to the physical building of the project, they are not "contractors" or "subcontractors." They press for a narrow definition of these words to include only those contractors or subcontractors who contract to build the public work. The prevailing wage statutes do not provide such a narrow definition, however.

0319

Labor Code section 1722.1, enacted in 1978, simply states that contractors and subcontractors include the licensees, officers, agents and representatives of contractors and subcontractors. This statute does not state that contractors and subcontractors include only those persons or entities contracted to build the public work.

2. Protection under the public works law does not extend only to employees engaged in the actual building work.

It should first be noted that "[T]he overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (Lusardi Const. Co. v. Aubrey (1992) 1 Cal.4th 976.) Labor Code section 1772 extends this protection to "[W]orkers employed by contractors or subcontractors in the execution of any contract for public work..."

Therefore, the question is not whether the appellants' contracts require construction, but whether they involve work by employees of contractors or subcontractors in the execution of a public works contract. A review of the duties and responsibilities of the Inspectors outlined in Exhibit 1 of this Decision requires a finding that these Inspectors perform a vital role in the successful execution of the Project.

The fact the Public Contracts Code makes a distinction between "construction contracts" (Public Contracts Code section 10701) and "service contracts" (Public Contracts Code section 10707) provides no support for DMJM/JGM's position.

These code sections pertain specifically to the authority of the California State Universities to enter into construction and service contracts. They do not address the question whether workers hired in the execution of these contracts should be paid prevailing wages. Indeed, as noted above, this is the very purpose of the prevailing wage law.

3. Prevailing wages are to be paid to all workers employed on public works, not just those who are laborers, workmen or mechanics.

A finding that the Inspectors hired by JGM are to be paid prevailing wages is consistent with the mandate in Labor Code section 1771 that requires that prevailing wages be paid to "all workers...employed on public works." This code section was reviewed by the Attorney General in 70 Ops.Cal.Atty.Gen. 92 (1987). Here, the Attorney General was asked whether Labor Code section 1771 applies to employees of a private engineering firm who contracted to be the City Engineer. The Attorney General answered in the affirmative: "The prevailing wage provisions of Labor Code section 1771 apply to the employees of an engineering firm which contracts with a city to perform the duties of a City Engineer, except with respect to such duties which do not qualify as a public work."

The scope of work required to be performed by the employees of the private engineering firm included inspections and plan checking as well as survey work. Since the Project in this case qualifies as a public work and, since the work involves on-site inspections, the reasoning in this Attorney

General Opinion requires a finding that the employees of JGM must be paid prevailing wages under Labor Code section 1771.

Labor Code section 1723 states that the definition of "workman" includes a laborer, workman or mechanic. This code section does not exclude other types of workers, including inspectors and surveyors, as was made clear in the 1987 Attorney General Opinion referred to above. The Inspectors in this case are physically present on the public works site to ensure compliance with the plan specifications and code requirements. They are therefore workers employed on a public work.

4. The previous determinations submitted and relied on by DMJM/JGM in support of their argument have no precedential value and therefore are irrelevant.

DMJM/JGM's reliance on earlier Department determinations as precedent in support of their position is misplaced. Government Code section 11425.60, subsections (b) and (c) allow an administrative agency to select those decisions that contain significant legal or policy determinations to be designated as precedential. An index of these significant precedential decisions is to be publicized in the California Regulatory Notice Register (CRNR). Government Code sections 11425.10(a)(7) and 11425.60(a) state clearly that no agency decision can be relied on unless it has been designated as precedential.

0322

Pursuant to the above code sections, in 1999 the Department filed with the CRNR an index of its precedential determinations. None of the determinations submitted and relied on by DMJM/JGM were selected as precedential determinations. Hence their reliance on these earlier determinations is of little use in this decision.

Additionally, it should be recognized that since 1977 prevailing wage determinations have existed for "Building Construction Inspectors." This classification is found in "General Prevailing Wage Determinations Made by the Director of Industrial Relations pursuant to California Labor Code Part 7, Chapter 1, Article 2, Sections 1770, 1773, and 1773.1 for Commercial, Building Highway Construction and Dredging Projects." This Department has recently confirmed its obligation to assure enforcement of prevailing wages for this classification of workers. In letters to Operating Engineers' union representatives, this Department has confirmed its commitment to enforce this determination wherever it is applicable (attached as Exhibit 2).

V. CONCLUSION

For the reasons stated above, the initial coverage determination, dated November 19, 1999, is hereby sustained.

DATED: 6/9/00

Stephen J. Smith
Director

0323

STATE OF CALIFORNIA GRAY DAVIS, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

October 21, 2002

John W. Francis, Esq.
2600 East Nutwood Avenue, Suite 260
Fullerton, CA 92831-3106

Re: Public Works Case No. 2002-012
California State University, San Marcos
Student Housing Project

Dear Mr. Francis:

This constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based upon my review of the facts of this case and an analysis of the applicable law, it is my determination that construction of Student Housing at California State University, San Marcos ("Project") is a public work subject to the payment of prevailing wages.

Factual Background

The Project involves construction of apartment-style residential units, which will serve approximately 475 students of California State University, San Marcos ("University"). The Project also includes construction of a Community Building, within which will be a classroom, a student government meeting room and other related amenities. The building configurations and exterior elevations specifically are designed to conform to the University's architecture. The Project is sited on campus in a geographical area encompassing approximately 6.11 acres of University property within the City of San Marcos, County of San Diego ("Site").

The Project was formalized in a series of three contracts entered into on March 1, 2002. First, a Ground Lease was entered into between the Board of Trustees of the California State University ("Board") and the San Marcos University Corporation ("Corporation"), a California non-profit public benefit corporation. In that Ground Lease, the Corporation agreed to design, finance, construct and manage the Project, and the Board agreed to lease the Site to the Corporation for $10. The term of the Ground Lease commenced on the earlier of the date of recordation of a memorandum of the Ground Lease with the County

Recorder of San Diego County, or March 1, 2002, and will terminate on July 1, 2037, unless extended or sooner terminated as provided under the terms of the lease.

The Corporation in turn entered into a Development Agreement with Allen & O'Hara Education Services, LLC ("Developer") to undertake the design, construction, furnishing and equipping of the Project consistent with the Ground Lease. The Developer then hired the Ellias Construction Company, Inc. to act as the general contractor. Construction began on April 1, 2002. The anticipated completion date is July 1, 2003.

The Corporation also entered into an Indenture with First Union National Bank for the issuance of bonds, designated the San Marcos University Corporation Auxiliary Organization Student Housing Revenue Bonds ("Bonds"), in an aggregate principal amount not exceeding $27,990,000.

The Project cost is anticipated to be $27,990,000, which is to be funded by the Bonds. The Bonds will be retired using net revenue from the student housing.

Analysis

What is now Labor Code[1] section 1720(b)(as amended by statutes of 2001, chapter 938, section 2) is the applicable law. On projects such as this, the amended statute applies where the project formation documents were entered into on or after the effective date of the amendment. This amendment took effect on January 1, 2002. The relevant project formation documents - the Ground Lease, the Development Agreement and the Indenture - were entered into on March 1, 2002.

Section 1720(a)(1) defines public works to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds...." The Project is construction done under contract. The issue presented here is whether the Project is being paid for in whole or in part out of public funds.

Labor Code section 1720(b) specifies that, "'paid for in whole or in part out of public funds' means ... fees, costs, rents, ... or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven."

[1] Unless otherwise indicated, all statutory references are to the Labor Code.

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Under the Ground Lease, the Board has leased to the Corporation, for 35 years, for $10, an area of approximately 6.11 acres of property within the City of San Marcos, County of San Diego. A lease for $10 for 6.11 acres of land within San Diego County constitutes rent that is paid for at patently less than fair market value and consequently, a payment of public funds for construction under Labor Code section 1720(b).[2]

Conclusion

Based on the above analysis, I find that the Project is a public work for which prevailing wages must be paid.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director

[2] As discussed above, I find the Project to be a public work based on the below-market value rent constituting a payment of public funds for construction. I therefore need not address whether the Project would also be covered on the alternative grounds that the Corporation is the alter ego and/or agent of the Board for public works purposes. Similarly, I need not address whether Education Code section 89911, under which any obligation of the Corporation authorized by the Board is an obligation of the State of California, creates prevailing wage liability for this Project.

STATE OF CALIFORNIA GRAY DAVIS, *GOVERNOR*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

December 4, 2002

Arthur S. Lujan
Labor Commissioner
Department of Industrial Relations
Division of Labor Standards Enforcement
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

Re: Public Works Case No. 2002-024
John O'Banion Community Learning Center
Housing Authority of the County of Merced

Dear Mr. Lujan:

This constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, ("CCR") section 16000(a). Based upon my review of the facts of this case and an analysis of the applicable law, it is my determination that the John O'Banion Community Learning Center Project ("Project") is a public work subject to the payment of prevailing wages.

The Project includes demolition, site preparation and construction of a new 17,000 square-foot, one-story multi-purpose building in Merced. The owner and general contractor for the Project is the Housing Authority of the County of Merced ("Housing Authority"), which entered into sub-contracts with the successful bidders on the Project. Funding for the Project consists of a $150,000 Community Development Block Grant ("CDBG") from the U.S. Department of Housing and Urban Development ("HUD"), and a $1 million loan from the County Bank of Merced to the Housing Authority. The preliminary work for the Project, including surveying and architectural design, was funded by the CDBG funds, which are administered by the Housing Authority. The bank loan is a standard commercial loan from a private source that will be repaid from lease payments made by the tenants of the Center. Lockwood General Engineering, a subcontractor, will receive approximately $505,535 for performing demolition, site preparation, all grading work, site utilities installation and specified concrete work on the Project.

What is now Labor Code section 1720(a)(1)[1] (as amended by Statutes of 2001, Chapter 938, section 2 (Senate Bill 975)) defines "public works" in relevant part as: "Construction, alteration, demolition, installation or repair work done under contract and paid for in whole or part out of public funds." "Construction" includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land survey work. 8 CCR section 16000 defines "public funds" as state, local and/or federal monies.

This Project involves construction and demolition done under contract at both the pre-construction and construction stages. Although there is also a private bank loan funding the Project, under the applicable regulation the federal CDBG funds constitute public funds. The question appears to be whether the Project is subject to the payment of California prevailing wages.

In a letter dated February 4, 2002, HUD states that the CDBG funds will not trigger the Davis-Bacon requirements, and therefore the Project is not subject to the payment of federal prevailing wages. That federal prevailing wages are not required has no bearing in this case on whether state prevailing wages are required. Applicable to this issue is 8 CCR section 16001(b), which states:

> Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

Because the Project in this case is federally funded and assisted and is being administered by the Housing Authority, a California awarding body, California prevailing wages would apply.

In summary, pursuant to section 1720(a)(1) and 8 CCR section 16001(b), the work being done by Lockwood on this Project is a public work for which California prevailing wages must be paid.

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[1] All statutory code section references are to the Labor Code.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director

Appendix 7 LAW REVIEW ARTICLES

Koyama, Financing Local Government in the Post-Proposition 13 ERA; The Use and Effectiveness of Nontaxing Revenue Sources, 22 Pac. L.J. 1333(1991)

22 PACLJ 1333
(Cite as: 22 Pac. L.J. 1333)
<KeyCite Citations>

Pacific Law Journal
July, 1991

Comment

*1333 FINANCING LOCAL GOVERNMENT IN THE POST-PROPOSITION 13 ERA: THE USE AND EFFECTIVENESS OF NONTAXING REVENUE SOURCES

Julie K. Koyama

INTRODUCTION

In 1978, California voters approved initiative Proposition 13, amending the California Constitution. [FN1] Prior to Proposition 13, property taxes were the main source of revenue for local governments, [FN2] including cities, counties, and special districts. [FN3] *1334 Proposition 13, however, severely curbed the ability of state and local taxing jurisdictions to raise money by limiting annual levies on real property to one percent of the 1975-76 assessed value [FN4] and by restricting the passage of state tax increases. [FN5] Although Proposition 13 permits local taxing authorities to collect revenues through the use of "special taxes" under section 4 of the proposition, such taxes require a two-thirds vote of the local electorate. [FN6] As a result, revenues flowing to local governments from general property taxes have abruptly diminished. [FN7] Cities, counties, and special districts which had been dependent on property taxes to finance municipal improvements, services, and facilities were thus faced with the prospect of drastically reducing expenditures or finding new sources of revenue. [FN8]

Increasingly, municipalities have responded to the harsh fiscal effect caused by the taxing restrictions of Proposition 13 by turning to nontaxing revenue sources not subject to the provisions of the amendment. [FN9] Specifically, local governments have employed *1335 special benefit assessments [FN10] and governmental regulatory and service fees [FN11] to ease their financial burdens. [FN12] However, the use of these nontaxing alternatives has been challenged in recent years as circumventing the purposes of Proposition 13. [FN13]

Part I of this Comment surveys the background, relevant provisions, and fiscal impact of Proposition 13. [FN14] Part II examines court decisions interpreting Proposition 13 which have impacted the ability of local governments to raise revenues for municipal improvements, services, and facilities. [FN15] Part III analyzes the use and effectiveness of special benefit assessments and governmental regulatory and service fees to avoid the taxing restrictions of Proposition 13 and recoup lost revenues. [FN16] Part IV considers the current status and future of Proposition 13 and summarizes the role of California courts in shaping the amendment. [FN17] This Comment concludes that California courts have tempered the effect of Proposition 13's taxing restrictions by allowing local governments to develop nontaxing sources of revenue. [FN18]

*1336 I. PROPOSITION 13

A. Historical Background and Purposes

Prior to the enactment of Proposition 13, local property taxes in California were among the highest in the nation. [FN19] The adoption of Proposition 13 was the culmination of a long-standing protest by California landowners against burdensome property taxes, [FN20] and the event was widely characterized as a "taxpayer's revolt." [FN21] The "Jarvis-Gann Initiative" [FN22] was intended by its authors to provide effective property tax relief and, as a

corollary, reduce governmental waste and spending. [FN23] Moreover, since California had a tax surplus which the legislature refused to spend or rebate to taxpayers, high property taxes seemed unnecessary. [FN24] By *1337 approving Proposition 13, California voters greatly checked the taxing powers of their state and local governments. [FN25]

B. Summary of Relevant Constitutional Provisions

Proposition 13 provides a new scheme [FN26] for taxing real property and applies to all residential and commercial land uses. [FN27] Prior to the amendment, local governments generally had the power to impose any taxes and fees, within constitutional or legislative limits, [FN28] by a vote of their governing bodies. [FN29] However, Proposition 13 significantly curtailed the independent taxing authority of local jurisdictions. [FN30] The provisions that have restricted the ability of local governments to raise revenues are outlined briefly below.

Section 1 of Proposition 13 limits ad valorem taxes [FN31] on real property to one percent of the assessed value of such property. [FN32] Section 2 restricts inflationary increases in the assessed value of real property, or "full cash value base," [FN33] to two percent per year. [FN34] This section further rolled back the full cash value base of real property to the 1975-76 county assessor's valuation, subject to *1338 various adjustments. [FN35] While these two sections maintain proportion between property taxes and property values, [FN36] their effect was to severely reduce the traditional primary source of discretionary tax revenue available to local governments. [FN37]

Section 3 of Proposition 13 provides that "any changes in State taxes enacted for the purpose of increasing revenues" require a two-thirds vote of all members of both the assembly and the senate. [FN38] Local governments are directly affected by this restraint on the state legislature since many local governing bodies derive their taxing authority from enabling statutes. [FN39] Section 3 also expressly prohibits the legislature from imposing any new ad valorem taxes on real property or new taxes on the sales of real property. [FN40] This provision is significant since even a nonproperty tax which receives the requisite supermajority legislative approval may be struck down if it too closely resembles an ad valorem tax. [FN41]

Section 4 is a key provision in Proposition 13 since it compounds the fiscal crisis caused by the amendment's one percent *1339 ad valorem limitation [FN42] and prohibition of the enactment of new ad valorem and sales or transaction taxes on real property. [FN43] This section requires a two- thirds vote of the qualified local electorate for any new or increased "special tax." [FN44] A "special tax," as distinguished from taxes which flow to the local government's general fund, is one which is earmarked for a specific purpose. [FN45] Prior to the enactment of section 4, California law generally permitted any new or increased local taxes without voter approval. [FN46] The purpose of section 4 is to prevent local taxing jurisdictions from recouping their losses from decreased property taxes by imposing or increasing other taxes. [FN47]

C. Fiscal Impact

Proposition 13 has been characterized as "the most significant fiscal act of the people of California in modern times." [FN48] Only one year following approval of the initiative, property tax revenues dropped fifty-one percent, a $5.9 billion decrease from property tax revenues in the prior fiscal year. [FN49] The effect of Proposition 13 upon local governments was debilitating, since property taxes are the largest single source of tax revenue for cities, counties, and *1340 special districts, [FN50] and because all property tax revenues are devoted to support of local government activities. [FN51]

The California Legislature softened the impact of Proposition 13 by granting financial assistance to local governments. [FN52] Commonly referred to as a "bail-out," [FN53] the state aid program replaced some of the lost revenues caused by Proposition 13 through block grants and loans, [FN54] and implemented a method of distributing the proceeds of the one percent property tax to local governments. [FN55] However, in the early 1980's the legislature was forced to reduce financial assistance to local governments because of the severe recession. [FN56] Federal cutbacks and inflation compounded the cities' and counties' financial problems. [FN57] As a *1341 result, the long-term impact of Proposition 13 is now being felt by many municipalities. [FN58]

Because Proposition 13 is not susceptible to legislative repeal, [FN59] and since legislative efforts to assist local

governments have been insufficient, [FN60] cities, counties, and special districts have been forced to counter property tax revenue losses resulting from Proposition 13 by developing other sources of revenue, especially nontaxing levies, for the longer term since the alternative of cutting expenditures is politically unpalatable. [FN61] Expectedly, these efforts to generate revenues through alternative sources have been resisted as contrary to the provisions of Proposition 13. [FN62] However, California courts have responded favorably toward local taxing jurisdictions by restricting the application of Proposition 13. [FN63] It has been the courts, rather than the legislature, which have taken an active role in moderating the harsh fiscal impact of Proposition 13, as demonstrated by the decisions discussed below.

II. RELEVANT PROPOSITION 13 COURT DECISIONS

Since the enactment of Proposition 13, California courts have examined almost every aspect of the amendment. [FN64] The California ***1342** Supreme Court promptly reviewed the constitutionality of Proposition 13 in Amador Valley Joint Union High School District v. State Board of Equalization [FN65] and upheld the amendment. [FN66] The court noted that it was only addressing "those principal, fundamental challenges to the validity of Proposition 13 as a whole." [FN67] Thus, the interpretation and application of particular provisions was expressly left for later litigation. [FN68] Since the Amador decision, most of the litigation surrounding Proposition 13 ***1343** has focused on the amendment's one percent ad valorem tax and special tax- limitations, [FN69] which are discussed below.

A. The One Percent Ad Valorem Tax Limit

The scope of the one percent limit on ad valorem real property taxes in section 1 of Proposition 13 [FN70] was addressed by the California Supreme Court in Heckendorn v. City of San Marino. [FN71] San Marino drafted an ordinance authorizing a special tax which went into effect after approval by approximately eighty percent of the city's voters. [FN72] The plaintiff, a city property owner, filed a complaint alleging that the ordinance, which imposed a graduated tax based on the size of a real property parcel, [FN73] was an unconstitutional ad valorem tax. [FN74] However, the court upheld the ordinance, defining "ad valorem tax" in section 1 of Proposition 13 narrowly as "any source of revenue derived from applying a property tax rate to the assessed value of property." [FN75] Under this definition, the ordinance did not constitute an ad valorem tax since the ordinance involved no appraisal of property value and taxed parcels within a zone at the same rate, even if the actual value of the parcels differed. [FN76] The Heckendorn decision established that Proposition 13 only prohibits applying a tax rate directly to the ***1344** assessed value of property. [FN77] Thus, the supreme court seemingly opened the door to the use of taxes which are closely correlated to parcel values but not imposed on assessed property values. [FN78]

B. The Special Tax Two-Thirds Vote Requirement

Application of the two-thirds voter majority requirement for enactment of special taxes under section 4 of Proposition 13 [FN79] was first considered in Los Angeles County Transportation Commission v. Richmond. [FN80] Two years before the adoption of Proposition 13, the California Legislature created the Los Angeles County Transportation Committee (LACTC). [FN81] After the initiative was approved, the LACTC attempted to levy a sales tax for public transit purposes with only simple majority voter approval. [FN82] The defendant, LACTC's executive director, refused to implement the tax, and the LACTC filed a petition for writ of mandate. [FN83] The California Supreme Court issued an alternative writ, [FN84] holding that the LACTC was not a special district within the meaning of section 4, [FN85] and thus was not subject to the two-thirds voter majority requirement imposed by that section. [FN86]

***1345** In Richmond, the court concluded that the term "special district" as used in section 4 of Proposition 13 applies only to districts authorized to impose ad valorem property taxes. [FN87] The majority reasoned that section 4 should apply only to districts which lost property tax revenues as a result of Proposition 13, since section 4 was intended to limit the power of local governments to replace property tax revenue losses. [FN88] Thus, because the LACTC did not have the power to levy ad valorem taxes, the LACTC was exempted from the provisions of the amendment. [FN89]

The Richmond decision invited local taxing jurisdictions to circumvent the restrictions of Proposition 13 by replacing lost property tax revenues with the use of nonproperty tax special districts such as the LACTC. [FN90]

Justice Richardson's dissent characterized the majority's ruling as "a hole in the financial fence which the people in their Constitution have erected around their government" which would lead to wholesale avoidance of the purpose of Proposition 13. [FN91] The majority of the court, however, *1346 rejected the argument that its decision in Richmond would result in such legislative evasion of the restrictions of Proposition 13. [FN92] Indeed, the myriad of nonproperty tax special districts has not materialized as predicted by the dissent. [FN93]

However, Richmond was a harbinger of further erosion of Proposition 13 in a case decided later the same year, City and County of San Francisco v. Farrell, [FN94] which interpreted the term "special tax" in section 4 of the amendment. [FN95] Although the Richmond court declined to reach the issue of the meaning of "special taxes" as used in section 4 and decided the case on the "special districts" definition issue, [FN96] the supreme court did establish a "framework" for resolving future ambiguities in section 4 of Proposition 13. [FN97] In Richmond, the court could have interpreted the term "special districts" broadly [FN98] but declined to *1347 do so, stating that the language must be strictly construed and the ambiguities resolved in favor of permitting special districts to enact special taxes because of the "fundamentally undemocratic nature" of the supermajority vote requirement contained in section 4. [FN99] Thus, for policy reasons, the supreme court departed from the rules of construction applicable to constitutional initiatives set forth in Amador, [FN100] and adopted a rule of strict construction for interpreting section 4 of Proposition 13. [FN101]

The California Supreme Court followed the Richmond rule of strict construction and defined the term "special taxes" as used in section 4 narrowly in Farrell. [FN102] In Farrell, San Francisco had increased its payroll and gross receipts tax without the approval of two-thirds of the voters. [FN103] When the mayor approved a request for funding of municipal improvements to be appropriated from the gross receipts tax proceeds, Farrell, the city's controller, refused to allow the appropriation. [FN104] The defendant asserted that the increased gross receipts tax was an unconstitutional special tax under section 4 of Proposition 13. [FN105] However, the majority rejected Farrell's argument that section 4 required two-thirds voter approval for all new and increased nonproperty taxes. [FN106] The supreme court defined "special tax" as used in section 4 as a tax "levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental *1348 purposes." [FN107] Thus, San Francisco's tax, the proceeds of which were to be paid in the city's general fund, was not a special tax as contemplated by Proposition 13 because the tax was not levied for a specific purpose. [FN108]

While the supreme court in Farrell could have construed section 4 to include all nonproperty taxes, [FN109] the court chose the narrowest application of the section's supermajority vote requirement. [FN110] Farrell, at least in theory, permits a city to recoup its lost property tax revenues simply by adopting some other replacement tax with simple majority vote approval. [FN111] Farrell requires only that the proceeds from the new tax be deposited into the local government's general fund since proceeds collected for a specific purpose constitute a special tax requiring supermajority voter approval. [FN112] Although the Farrell result was partially nullified by the enactment of initiative Proposition 62 in 1986, [FN113] *1349 the decision illustrates the supreme court's desire to limit the application of Proposition 13.

C. Summary

As Heckendorn, Richmond, and Farrell indicate, the California Supreme Court has construed the provisions of Proposition 13 narrowly and the consequences of these decisions can be summed briefly. First, Proposition 13 is aimed primarily at controlling ad valorem property taxes. [FN114] However, the one percent limit on ad valorem taxes [FN115] is limited in application, since the California Supreme Court has narrowly defined "ad valorem" as a tax rate based solely on the assessed value of property. [FN116]

Second, city and county general revenue taxing powers remain unaffected by Proposition 13 except that new or increased nonproperty tax revenues levied for a specific purpose require approval by two-thirds of the local voters. [FN117] Of course, a new or increased nonproperty tax which too closely resembles an ad valorem tax is precluded by Proposition 13 even if approved by a supermajority local electorate vote, since Proposition 13 strictly prohibits such action. [FN118]

Thus, although the California Supreme Court initially approved the constitutionality of all sections of Proposition 13 [FN119] the court has since been unwilling to read the amendment expansively. This result is encouraging to

local governments. However, local taxing *1350 jurisdictions have received the biggest boost from the courts' tolerance of bold municipal moves to finance local government through nontaxing alternatives.

III. THE USE AND EFFECTIVENESS OF NONTAXING ALTERNATIVES TO AVOID PROPOSITION 13

On its face, Proposition 13 applies only to tax revenues, as opposed to nontax revenues. [FN120] Thus, an avenue is open to local taxing jurisdictions to offset the fiscal impact of Proposition 13 on ad valorem property taxes and special purpose nonproperty taxes by generating revenues through nontaxing levies. [FN121] Two specific types of nontax revenue devices are special benefit assessments and governmental fees, discussed below.

A. Special Benefit Assessments

A special assessment is "a charge imposed on particular real property for a local public improvement of direct benefit to that property." [FN122] An "assessment district" consists of the property or properties specially assessed to bear the expense of such improvement. [FN123] The theory underlying special assessments is that the assessed property receives a direct benefit as it increases in value due to the property's proximity to the local improvement. [FN124] This benefit to the property or properties within the district is greater than that received by the general public. [FN125] *1351 Therefore, a special assessment is fairly imposed on those benefitted, since the general public should not have to bear the expense when the public does not receive a corresponding benefit. [FN126]

An assessment district is formed by local legislative resolution; [FN127] no electorate approval is required. [FN128] The creation of special assessment districts takes place "as the result of a peculiarly legislative process," [FN129] and the authority of local governing bodies to impose special assessments is grounded in the taxing power of the sovereign. [FN130] Although a special assessment is imposed through the same mechanism used to finance the cost of a local government, special assessments are distinct from taxes, which are levied for general revenues and for general public *1352 improvements. [FN131] Hence, as the California Supreme Court has observed, a special assessment is not a tax at all, but simply a charge imposed to recoup the cost of a public improvement made for the special benefit of particular property. [FN132]

Prior to the enactment of Proposition 13, special assessment legislative acts [FN133] had been the most widely used procedure to finance construction of a variety of public improvements. [FN134] The use of special assessments became even more extensive after Proposition 13 as local governments sought to offset lost property tax revenues. [FN135] The effect of Proposition 13 upon special assessments was first examined in County of Fresno v. Malmstrom. [FN136] Fresno County attempted to collect assessments within a subdivision for the construction of streets. [FN137] However, the defendant, the Fresno County Treasurer and Tax Collector, refused to serve notice of assessment on the property owners, contending that the assessment in question contravened Proposition 13. [FN138] The Court of Appeal for the Fifth District granted the *1353 county's request for a writ of mandate to compel the county tax collector to serve the notice of assessment, ruling that the provisions of Proposition 13 did not apply to the assessment. [FN139]

The decision in Malmstrom resolved two questions regarding the continuing viability of special assessments after Proposition 13. [FN140] First, the court held that the one percent limit on ad valorem taxes did not apply to special assessments because the purposes of Proposition 13 would not be thereby furthered. [FN141] The court reasoned that it would be "illogical" to include special assessments within section 1, since that section was intended to control ad valorem taxes and limit wasteful governmental spending of general tax funds. [FN142] Second, the court held that special assessments did not require approval by a supermajority of voters because special assessments were not a tax per se, and thus not included in the definition of "special taxes" in section 4. [FN143] The court stated that while both special assessments and taxes may specially benefit particular property, a special assessment may not exceed the benefit conferred, whereas a special tax need not so specifically benefit the taxed property. [FN144] Malmstrom represents a significant rein on the effect of Proposition 13, since many public *1354 improvement projects financed previously with general taxes may now be financed with special assessments. [FN145]

Proposition 13 was further limited by the Second District Court of Appeal in Solvang Municipal Improvement District v. Board of Supervisors of the County of Santa Barbara. [FN146] In Solvang, the plaintiff, a special district,

created a parking district prior to Proposition 13 which was financed by non- voted special assessments against the benefitted property. [FN147] The Santa Barbara Board of Supervisors refused to collect the assessments after Proposition 13, contending that the assessments were unconstitutional under the amendment's one percent limit on ad valorem taxes. [FN148] The court upheld the validity of special assessments, despite the fact that the assessments were measured by the assessed value of benefitted parcels. [FN149] Following the rationale of the Malmstrom decision, the Solvang court held that the one percent limit of section 1 did not apply to any special assessment, even if assessed on an ad valorem basis. [FN150] Hence, special assessments may be levied according to the assessed value of property, but they do not constitute an ad valorem property tax. [FN151]

Despite mild language to the contrary, [FN152] the favorable decisions in Malmstrom and Solvang seemingly invited a switch by local governments from property taxes to special assessments for projects traditionally financed with general revenues, and California ***1355** courts have allowed municipalities to make this switch. [FN153] For example, in J.W. Jones Cos. v. City of San Diego, [FN154] the city created a system of "facility benefit assessments" (FBA) which were exacted from developers who applied for building permits to develop land in one of the city's new communities. [FN155] Under this scheme, proceeds of the FBA were collected in a special fund for exclusive use in constructing "a broad spectrum of public works" including parks, transit and transportation, libraries, fire stations, school buildings, and police stations for the benefit of the assessed parcels. [FN156] The plaintiff, a landowner and developer, challenged the assessment system, arguing that the FBA did not directly benefit the assessed property and were thus special taxes under section 4 of Proposition 13, [FN157] and that undeveloped and developed parcels were treated differently. [FN158] The Court of Appeal for the Fourth District upheld the city's financing scheme, stating that the FBA did not constitute special taxes and thus were not subject to the supermajority vote requirement of section 4 of Proposition 13, and that the system of assessing and placing liens on undeveloped properties only did not violate equal protection of the law. [FN159]

The J.W. Jones court acknowledged that San Diego's assessments did not fit within the traditional definition of special ***1356** assessments because the facility benefit assessments imposed a lien on parcels to pay for future improvements and because they were assessed on a unique basis. [FN160] However, the court stated that these anomalies did not prevent the city's levies from being valid special assessments rather than special taxes. [FN161] The court also determined that the lien provision of the city's ordinance did not create a discriminatory classification between undeveloped and developed properties because the benefits to the developed properties were only incidental. [FN162] As further justification for its holdings, the court indicated that the facility benefit assessments system was "necessary for the health and welfare of future residents of" the city. [FN163] A companion case to J.W. Jones, City of San Diego v. Holodnak, [FN164] upheld a similar FBA system for a wide variety of facilities and services [FN165] under the same rationale. [FN166] The court in J.W. Jones predicted the outcome of ***1357** Holodnak and future cases by strongly hinting that it desired to actively assist local governments to finance municipal growth. [FN167] Other cases have also extended the use of special assessments to finance operating expenses of local government, such as maintenance of flood control facilities [FN168] and road maintenance. [FN169]

The impact of these decisions has been to broaden the authority of the California Legislature to enact several bills authorizing local agencies to use special benefit assessments to augment their other revenue sources. [FN170] General law cities requiring enabling statutes in order to impose special assessments [FN171] have especially benefitted from the courts' tolerance of the use of special assessments since the California Legislature has interpreted relevant decisions as validating legislative action. [FN172] Specifically, the state legislature has authorized the use of special benefit assessments to ***1358** finance fire and police protection services, [FN173] flood control, [FN174] drainage and water management services, [FN175] and street lighting services. [FN176]

While the expanded use of special benefit assessments can be attributed to a willingness on the part of California courts to limit the application of Proposition 13, that is only a partial explanation. Another factor which accounts for the favorable judicial response is that the formation of special assessment districts is not subject to broad judicial review. [FN177] Although a special assessment must particulary benefit the assessed property, [FN178] courts give great deference to a local governing body's finding of benefit because the creation of an assessment district is an exercise of a municipality's sovereign taxing power. [FN179] Thus, so long as some special benefit to the assessed property can be demonstrated, the courts will probably uphold a local government's formation of a special assessment district. [FN180]

*1359 B. Governmental Regulatory and Service Fees

Local governments collect a multitude of fees for everything from building permits to garbage services to dog licenses. [FN181] The authority to collect such fees is derived from the state constitution or a specific legislative enactment. [FN182] Technically, governmental fees are not taxes, so long as they do not exceed the value of the benefit conferred or the service rendered. [FN183] These fees also are not assessed upon the value of property. [FN184] Thus, Proposition 13 seemingly does not affect the power of municipalities to raise revenues through use of such fees. [FN185] However, because of the increased interest in nontaxing alternatives after Proposition 13 was enacted, [FN186] California courts have considered the application of the amendment's provisions to a variety of governmental fees. [FN187]

*1360 There are two typical legal issues involved in challenges to the imposition of governmental fees. [FN188] The first is whether the fee is authorized by state law. [FN189] Without specific enabling or constitutional authority, the fee will be struck down. [FN190] The second issue is whether the fee is really a tax. [FN191] A local government's authority to impose fees derives from the its police power to regulate municipal activities for the public's health, safety, or general welfare, [FN192] while the taxing authority of local governments is restricted to the express purpose of raising general revenue. [FN193] Legislation implementing Proposition 13 expressly excludes from the definition of "special tax" any fee which does not exceed the reasonable cost of providing the regulatory activity or service for which the fee is charged and which is not levied for general revenue purposes. [FN194] Thus, a fee which is not reasonably equivalent to the cost of the regulatory activity or service, or which is deposited into the general treasury rather than a special fund may be deemed a tax and therefore prohibited by Proposition 13. [FN195]

California courts have reached varying conclusions regarding the use of governmental fees to generate nontaxing alternative sources of revenue. [FN196] The Third District Court of Appeal expressed the generally accepted rule regarding the validity of regulatory fees under Proposition 13 in Mills v. County of Trinity. [FN197] In Mills, the plaintiff challenged a county resolution *1361 providing both increased and new fees for processing land use applications [FN198] as prohibited by the special tax provision of Proposition 13. [FN199] The court upheld the resolution, concluding that land use regulatory fees do not constitute special taxes under section 4, when the fees charged to particular applicants do not exceed the reasonable cost of the regulatory activities. [FN200] The court refused to give an expansive reading of the term "tax" as used in Proposition 13's special tax provision, [FN201] indicating that state voters did not intend to put local governments in a "fiscal straitjacket." [FN202]

A different analysis was utilized by the Court of Appeal for the Second District in Trent Meredith, Inc. v. City of Oxnard. [FN203] The court upheld an ordinance requiring developers to either pay fees or dedicate land to local school districts as a precondition to issuance of a building permit. [FN204] The plaintiff, a subdivider, claimed the ordinance was unconstitutional because the development requirements constituted special taxes under section *1362 4 of Proposition 13. [FN205] The court held that the restrictions of Proposition 13 did not apply to the development fee and dedication requirements. [FN206] First, the court stated that the development requirements did not constitute ad valorem taxes because they were not assessed according to property values. [FN207] Second, because the court determined that the ordinance was an appropriate exercise of police power, to relieve conditions of overcrowding of local school facilities caused by new development, [FN208] the court stated that it was unnecessary to decide whether the ordinance requirements constituted a special tax. [FN209]

The Second District Court of Appeal, however, later decided a case on the "special tax" definition issue in California Building Industry Association v. Government Board of the Newhall School District of Los Angeles County. [FN210] In this case, defendant school districts levied taxes under the special tax provision of Proposition 13, after the resolution authorizing the taxes received the requisite two-thirds voter majority approval. [FN211] Plaintiff builders challenged the taxes, contending that the levies were actually "development fees" subject to statutory monetary limits. [FN212] The court adopted the definition of "special taxes" expressed in City and County of San Francisco v. Farrell, [FN213] and held that the school district's levies did not fall within the Farrell meaning. [FN214] The court concluded that the levies were more like development fees and *1363 should be considered as such. [FN215] Thus, the court invalidated the fees because they exceeded statutory monetary limits. [FN216]

In Beaumont Investors v. Beaumont-Cherry Valley Water District, [FN217] the Fourth District Court of Appeal considered whether a facilities fee enacted by a water district constituted a special tax under Proposition 13. [FN218] The court held that the fee fell under the ambit of section 4 since the fee exceeded the reasonable cost of constructing the water system. [FN219] The fee was therefore invalid since it had not been approved by a two-thirds vote of the district's qualified voters. [FN220] In support of its conclusion, the court stated that the purpose of Proposition 13 was to impose a "broad constitutional restriction" on the power of local agencies to impose special taxes. [FN221] Thus, any agency which sought to avoid the special tax limitations of section 4 through use ***1364** of "facilities fees" must bear the burden of proving that the assessment does not amount to a "special tax," a task the water district could not accomplish. [FN222]

The Fourth District Court of Appeal elaborated on the showing necessary to prove that a regulatory fee was not a special tax in San Diego Gas & Electric Co. v. San Diego City Air Pollution Control District. [FN223] The court stated that the local taxing agency should prove the estimated costs of the regulatory activity or service and the basis for determining the manner in which the costs are apportioned, so that the charges bear a reasonable relationship to the benefits from the regulatory activity. [FN224] Once the requisite showing is made, a regulatory fee may be upheld. [FN225] The court further noted that the imposition of fees was a reasonable way to achieve Proposition 13's goals of effective property tax relief, since the fees shifted the burden of costs from the taxpaying public to those who directly benefit from conducting the regulatory activity. [FN226]

The courts have been fairly strict in requiring a documented showing that a regulatory fee is not a special tax. For example, in Bixel Associates v. City of Los Angeles, [FN227] the Court of Appeal for the Second District struck down Los Angeles' development fee because the city had not met its burden of showing that a valid ***1365** method had been used for determining that the fees charged reasonably reflected the burden posed by the development. [FN228] The Bixel court refused to hear policy arguments supporting the city's decision to impose a fire hydrant fee, pointedly stating that the case was not about "the obvious need for the funding by the City of sophisticated fire protection in the post-Proposition 13 era" but only about determining the constitutionality of the fee. [FN229]

Thus far, the California Supreme Court has not clarified the scope of Proposition 13 with regard to governmental regulatory and service fees. [FN230] The existing cases indicate that the courts have been somewhat less tolerant of the use of governmental fees than of special benefit assessments. [FN231] One reason for the courts' stricter approach may be the fact that the wide range of governmental fees requires closer scrutiny than the narrow class of levies constituting special assessments. However, the cases also indicate that the courts have been less consistent in their analysis of such fees under Proposition 13. [FN232] These differing decisions are to be expected in the absence of firm guidance by the supreme court, but the cases also reflect the court's differing views of Proposition 13. [FN233] The courts' uncertainty can best be explained ***1366** by a brief consideration of the current status and future of Proposition 13 and a summary of the California courts' role in shaping the amendment, discussed below.

IV. PROPOSITION 13 TODAY AND IN THE FUTURE

After surviving an initial challenge to its constitutionality [FN234] and several severe tests thereafter, [FN235] Proposition 13 is still not safe from attack. [FN236] In 1989, the Supreme Court of the United States in Allegheny Pittsburgh Coal Co. v. County Commission [FN237] struck down a West Virginia taxing scheme similar to Proposition 13 as violative of the equal protection clause of the fourteenth amendment. [FN238] In Allegheny, the plaintiffs, various coal companies, challenged the Webster County assessor's method of property value appraisal, [FN239] contending that the method of appraisal resulted in recently sold properties having higher appraised value than properties that had not recently been sold. [FN240] The Supreme Court of the United States accepted the coal companies' argument that the method of appraisal created an unconstitutional discriminatory classification between new purchasers and existing landowners. [FN241] The Court reasoned that using the selling price of property to fix assessments was not rationally related to the county's objective of establishing accurate, current property values, since this method resulted in dramatic and ***1367** unequal differences in valuation of comparable properties. [FN242] While the Court did not state that all assessment schemes which use more than one method of assessing property in the same class are invalid, the Court indicated that such schemes must ensure that general adjustments of comparable property are "accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders." [FN243] Because the Webster County assessor's adjustments were neither prompt nor substantial enough to eliminate the disparity in appraisals of comparable

properties, the county's assessment scheme was struck down. [FN244]

The Allegheny decision left open the question of the constitutionality of Proposition 13, since the Court declined to decide whether the Webster County assessment scheme might be constitutional if it were the law of a state rather than a single county. [FN245] Whether the Court was indicating its approval of Proposition 13 or inviting a challenge to the amendment is arguable. [FN246] Numerous renewed challenges to the constitutionality of Proposition 13 have been filed since Allegheny, [FN247] however, several California courts of appeal have affirmed the validity of the amendment. [FN248]

***1368** While the ultimate validity of Proposition 13 is unclear after the Supreme Court of the United States' decision in Allegheny, local taxing jurisdictions in the meantime will have to continue finding adequate financing for local government activities. California courts have taken an active role in moderating the harsh fiscal impact of Proposition 13 by limiting the application of the amendment's key provisions. [FN249] Because Proposition 13 was ambiguous in a number of particulars, [FN250] the courts have had ample opportunity to give an expansive reading to the amendment, yet for the most part cases have been decided in favor of greater freedom by local governments to impose assessments. [FN251] This response by the courts cannot be unintended. The Proposition 13 court decisions reflect a conscious desire on the part of California courts to make Proposition 13 an effective scheme of property tax relief, but without crippling the ability of local governments to carry out municipal functions. [FN252] As a result of the courts' actions in shaping Proposition 13, some local governments' budgets have not suffered as dramatically as the authors of the amendment might have anticipated. [FN253]

***1369** CONCLUSION

California courts have tempered the effect of the taxing restrictions of Proposition 13 by allowing local governments to develop nontaxing sources of revenue. [FN254] The most effective source of nontaxing revenue is special benefit assessments. The courts have shown great tolerance for allowing special assessments to finance an expanded variety of municipal improvements and services. [FN255] To a lesser extent, the courts have also allowed the use of governmental regulatory and service fees. [FN256] While the validity of the use of these fees is not as predictable as the use of special assessments, governmental fees remain a viable source of nontaxing revenues, as evidence by the sheer number of these fees. [FN257]

While most local governments still regard Proposition 13 as a "dirty word," [FN258] California courts have kept the amendment from becoming a "fiscal straitjacket" [FN259] to local governments. [FN260] By taking an active role in shaping the provisions and application of Proposition 13, the courts have ensured that local taxing jurisdictions can find alternative sources of revenue despite the severe loss of property tax funds.

[FN1]. CAL. CONST. art. XIIIA §§ 1-6 (West Supp. 1991). Proposition 13 was placed on the June 1978 primary ballot through the initiative process. See CAL. CONST. art. II §§ 8, 10 (West 1983) (constitutional provisions for the state initiative process); CAL. ELEC. CODE §§ 3500-3524, 3530- 3579 (West 1977 & Supp. 1991) (statutes governing initiatives, excluding initiatives proposed by the legislature). Proposition 13 has been amended several times since 1978. References in this Comment are to the current amended text unless otherwise indicated. See infra notes 26-47 and accompanying text (discussing the relevant provisions of Proposition 13).

[FN2]. In 1977, one year before Proposition 13 was adopted, property taxes in California contributed 22.4% of city revenues, 36.3% of county revenues, and 67.4% of nonenterprise special district revenues. See CALIFORNIA LEGISLATIVE ANALYST, AN ANALYSIS OF THE EFFECT OF PROPOSITION 13 ON LOCAL GOVERNMENTS 6-10 (Oct. 1979) (prepared by the California Legislative Analyst pursuant to Cal. S.B. No. 154, 1979 Cal. Stat. ch. 292 (1978) and Cal. S.B. 2212, 1978 Cal. Stat. ch. 332 (1978)) [hereinafter LEGISLATIVE ANALYSIS]. Other significant sources of state and local government revenues are, in order of decreasing percentage of contribution: Sales and use taxes, personal income taxes, and corporate franchise and income taxes. 11 N. LANE, CALIFORNIA PRACTICE STATE AND LOCAL TAXATION § 1 (2d ed. 1987).

[FN3]. The following is an overview of the legal structure of local government in California. Cities and Counties: Cities and counties in California are either general law or chartered. CALIFORNIA ASSEMBLY, OFFICE OF RESEARCH, CALIFORNIA STATE AND LOCAL TAX SYSTEMS: A REVIEW OF MAJOR REVENUE

SOURCES 245 (July 1985) [hereinafter ASSEMBLY RESEARCH REPORT]. General law cities and counties are organized under the general laws of the state and must derive their authority to act from a constitutional grant of authority or from an act of the legislature. Id. In contrast, chartered cities and counties may act without specific statutory authority, subject to constitutional constraints. Id. Cities have constitutional authority to adopt a charter while counties may do so only with approval of the legislature. Id. Special Districts: Special districts are autonomous units of local government which provide governmental services, generally within unincorporated areas. Id. at 246. Examples of special districts include the following: Water districts, transit districts, waste disposal districts, and lighting and lighting maintenance districts. Id. Each special district's authority is restricted to those powers and activities specifically provided for in the special district's enabling statute. Id. at 247. The term "special district" as used in this Comment refers loosely to all local taxing districts, including school and police and fire protection districts, as well as those districts created by statute.

[FN4]. CAL. CONST. art. XIIIA §§ 1(a), 2(a) (West Supp. 1991).

[FN5]. Id. § 3. Proposition 13 provides for a maximum 2% annual increase of the assessed value of real property after the 1975-76 base year. Id. § 2(b). Further, any changes in the state taxing scheme must be approved by two-thirds of each of the two houses of the legislature, except that no new ad valorem taxes on real property may be imposed. Id. § 3.

[FN6]. Id. § 4. No definition of the term "special tax" appears in section 4. However, the California Supreme Court has construed this term to mean taxes "levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purposes." City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982). See infra notes 102-113 and accompanying text (discussing the Farrell decision).

[FN7]. See LEGISLATIVE ANALYSIS, supra note 2, at 3 (discussing the loss of property tax revenues effected by Proposition 13). Property tax revenues dropped 51% one year after the enactment of Proposition 13, a $5.9 billion decrease from revenues in the previous fiscal year. Id.

[FN8]. T. SCHWADRON & P. RICHTER, CALIFORNIA AND THE AMERICAN TAX REVOLT 70- 79 (1984). Examples of how local governments have reacted to Proposition 13 include curtailed local services, deferred facility maintenance, layoffs, and increased user fees. ASSEMBLY RESEARCH REPORT, supra note 3, at 239.

[FN9]. Henke, The Effect of Proposition 13 Court Decisions on California Local Government Revenue Sources, 22 U.S.F. L. REV. 251, 281-90 (1988); Lefcoe & Allison, The Legal Aspects of Proposition 13: The Amador Valley Case, 53 S. CAL. L. REV. 173, 190-91 (1979). See Kroll, California Cities v. Prop. 13, 3 CAL. LAW., Jun. 1983, at 28, 30 (stating that "cities and counties are beating the bushes for new taxes, fees and assessments" and "are developing creative ways of financing local government").

[FN10]. A special assessment is a charge imposed on particular real property for a local public improvement of direct benefit to that property. Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 29, 148 P. 217, 219 (1915). See infra notes 122-180 and accompanying text (discussing special assessments).

[FN11]. Governmental fees are charges exacted by local taxing authorities for regulatory activities or municipal services. Mills v. County of Trinity, 108 Cal. App. 3d 656, 660-61, 166 Cal. Rptr. 674, 676-77 (1980). See infra notes 181-233 and accompanying text (discussing governmental fees).

[FN12]. Kroll, supra note 9, at 30. See CALIFORNIA COMM'N ON GOV'T REFORM, FINAL REPORT 118 (Jan. 1979) (listing numerous new or increased county permit, service, and license fees in the year following the enactment of Proposition 13). See generally ANNUAL REPORTS OF THE STATE CONTROLLER, FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS (1980) (documenting 175% increase in special assessments levied between 1978 and 1980).

[FN13]. Kroll, supra note 9, at 31. See, e.g., City of Sacramento v. Drew, 207 Cal. App. 3d 1287, 1294, 255 Cal. Rptr. 704, 708 (1989) (school construction special assessment struck down); Bixel Assoc. v. City of Los Angeles,

216 Cal. App. 3d 1208, 1220, 265 Cal. Rptr. 347, 355 (1989) (fire hydrant fee struck down); Beaumont Investors v. Beaumont-Cherry Valley Water Dist., 165 Cal. App. 3d 227, 238, 211 Cal. Rptr. 567, 573 (1985) (water facilities fee struck down).

[FN14]. See infra notes 19-63 and accompanying text.

[FN15]. See infra notes 64-119 and accompanying text.

[FN16]. See infra notes 120-233 and accompanying text.

[FN17]. See infra notes 234-53 and accompanying text.

[FN18]. See infra notes 254-260 and accompanying text.

[FN19]. See U.S. BUREAU OF THE CENSUS, GOVERNMENT FINANCES IN 1976-77, at 64, table25 (1978) (documenting amount of per capita property taxes collected according to state). In the year preceding Proposition 13, only Alaska, Massachusetts, and New Jersey had higher per capita property taxes than California. Id.

[FN20]. Proposition 13 was the third attempt in 10 years to limit state and local government taxing power. CALIFORNIA ASSEMBLY REVENUE & TAXATION COMM., FACTS ABOUT PROPOSITION 13, THE JARVIS/GANN INITIATIVE 7 (1978). In 1968, Proposition 9, which proposed a 1% limit on the property tax rate, was defeated. Id. In 1972, Proposition 14, which would have limited the tax rate from 1.75% to 2%, was also defeated. Id. Proposition 13 received 4,280,689 "yes" votes (64.8%) to 2,326,167 "no" votes (35.2%). CAL. SECRETARY OF STATE, STATEMENT OF VOTE 39 (1978).

[FN21]. Henke, supra note 9, at 251.

[FN22]. Proposition 13 is often called the "Jarvis-Gann Initiative" after the names of its outspoken authors: Howard Jarvis and Paul Gann.

[FN23]. Henke, supra note 9, at 260. Proponents of Proposition 13 argued in the voters pamphlet, "More than 15% of all government spending is wasted! Wasted on huge pensions for politicians which sometimes approach $80,000 per year! Wasted on limousines for elected officials or taxpayer-paid junkets. Now we have the opportunity to trade waste for property tax relief." CALIFORNIA VOTERS PAMPHLET, 56-58, Jun. 6, 1978 (compiled by Cal. Secretary of State) (comments by H. Jarvis, Chairman, United Organization of Taxpayers and P. Gann, President, Peoples Advocate). A later Gann initiative, Proposition 4, which passed in 1979, directly addressed governmental spending. See CAL. CONST. art. XIIIB §§ 1-12 (West Supp. 1991), for full text of Proposition 4. Proposition 4 limits the amount of revenue which state and local governments may spend by imposing a ceiling on most appropriations. Id. § 1. The proposition provides that such appropriations may only increase consistently with increases in population and the consumer price index. Id.

[FN24]. Comment, Police and Fire Service Special Assessments Under Proposition 13, 16 U.S.F. L. REV. 781, 784 (1982). In the years preceding Proposition 13, huge state income tax surpluses accumulated as economic growth and inflation generated revenues far in excess of budget estimates. Lefcoe & Allison, supra note 9, at 176. The State Legislature failed to spend or refund the excess income tax dollars collected and, only after Proposition 13 was enacted, did the Legislature finally pass a form of inflation indexing designed to reduce the surplus. Id.

[FN25]. In 1977-78, the year prior to Proposition 13, California local property taxes were 51% above the national norm (norm is the average per $1000 of personal income for residents). SECURITY PACIFIC NAT'L BANK, TAXES AND OTHER REVENUE OF STATES AND LOCAL GOVERNMENT IN CALIFORNIA A4-A6 (1982) [hereinafter SECURITY PACIFIC STUDY]. One year after Proposition 13, local property taxes in California were 27% below the national norm. Id.

[FN26]. See CAL. REV. AND TAX. CODE §§ 50-100.5 (West 1987 & Supp. 1991) (statutes implementing Proposition 13).

[FN27]. CAL. CONST. art. XIIIA § 1(a) (West Supp. 1991).

[FN28]. See CAL. CONST. art. XI § 7 (West Supp. 1991) (homerule taxing authority provision for counties and cities); CAL. CONST. art. XIII § 37 (repealed provision authorizing state legislature to vest taxing authority in local governments); CAL. GOV'T CODE § 25202 (West 1988) (statute authorizing counties to levy property taxes); id. § 37100-37101 (West 1988 & Supp. 1991) (statutes authorizing cities to pass ordinances and levy license, sales, and use taxes).

[FN29]. LANE, supra note 2, § 4 (2d. ed. Supp. 1990) (citing CAL. CONST. art. XI § 5).

[FN30]. Id.

[FN31]. BLACK'S LAW DICTIONARY 51 (6th ed. 1991). An ad valorem tax is one based on the value of property.

[FN32]. CAL. CONST. art. XIIIA § 1(a) (West Supp. 1991).

[FN33]. The "full cash value base" of real property is the assessed value of such property. Id. § 2(a).

[FN34]. Id. § 2(b).

[FN35]. Id. § 2(a).

[FN36]. One of the concerns leading to the enactment of Proposition 13 was the rapid increase of property values in California. County of Fresno v. Malmstrom, 94 Cal. App. 3d 974, 980, 156 Cal. Rptr. 777, 780 (1979). However, the increased income of the property owners did not offset the increased property taxes. Id. Sections 1 and 2 prevent property taxes from rising so high that owners are forced to sell their property in order to pay the higher assessments. Comment, supra note 24, at 781, 784 n.22 (1982).

[FN37]. Henke, supra note 9, at 263. See infra notes 48-63 and accompanying text (discussing the fiscal impact of Proposition 13).

[FN38]. CAL. CONST. art. XIIIA § 3 (West Supp. 1991).

[FN39]. LANE, supra note 2, § 2. General law cities and counties must derive their authority to tax from a constitutional grant of authority or from an act of the legislature. ASSEMBLY RESEARCH REPORT, supra note 3, at 245. Under the California Constitution, counties and cities are authorized to impose taxes in the exercise of their police power. See CAL. CONST. art. XI § 7 (West Supp. 1991) (provision authorizing enactment of local ordinances and regulations for the general public welfare). All other taxing authority is derived from the state legislature. Nauman, Local Government Taxing Authority Under Proposition 13, 10 SW.L.J. 795, 804 (1978). See generally supra note 3 (discussing the legal structure of local government in California). The legislature may not impose taxes for local purposes but may authorize local governments to impose them. CAL. CONST. art. XIII § 24 (West Supp. 1991).

[FN40]. CAL. CONST. art. XIIIA § 3.

[FN41]. See Henke, supra note 9, at 263.

[FN42]. See CAL. CONST. art. XIIIA § 1(a)(West Supp. 1991)("The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property.").

[FN43]. See id. § 3 ("[N]o new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.").

[FN44]. Id. § 4.

[FN45]. City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982). See infra notes 102-113 and accompanying text (discussing the California Supreme Court's interpretation of "special taxes" as used in Proposition 13).

[FN46]. See, e.g., CAL. CONST. art. XI § 7 (West Supp. 1991)(homerule taxing authority provision for counties and cities).

[FN47]. Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 205-08, 643 P.2d 941, 945-47, 182 Cal. Rptr. 324, 328-30 (1982).

[FN48]. CALIFORNIA COMM'N ON GOV'T REFORM, FINAL REPORT 1 (Jan. 1979).

[FN49]. LEGISLATIVE ANALYSIS, supra note 2, at 3.

[FN50]. LANE, supra note 2, § 4.

[FN51]. Id. According to the Assembly Office of Research, "the quality of the functions performed by local jurisdictions has deteriorated." ASSEMBLY RESEARCH REPORT, supra note 3, at 239.

[FN52]. See CALIFORNIA ASSEMBLY REVENUE & TAXATION COMM., SUMMARY OF LEGISLATION IMPLEMENTING PROPOSITION 13 FOR FISCAL YEAR 1978-79, S.B. 154 at ii-iii (1978)(discussing the legislative financial aid plan provided in Senate Bill 154, the short-term program for implementing Proposition 13).

[FN53]. See, e.g., Henke, supra note 9, at 252; Comment, supra note 24, at 788 n.38.

[FN54]. For fiscal year 1978-79, the California Legislature allocated $4.2 billion to local governments and established a $900 million loan fund. CALIFORNIA COMM'N ON GOV'T REFORM, FINAL REPORT 17-19 (Jan. 1979). In fiscal year 1979-80, the "bail-out" was $4.9 billion, and in fiscal year 1980-81, the "bail-out" was $5.5 billion. Comment, supra note 24, at 788 n.39. State financial assistance was based on the surplus generated by the increase in other state taxes. Id. at 787-88. Although Proposition 13 reduced property tax revenues during 1978-79, the high rate of inflation that resulted increased other state taxes, including death and gift taxes, state property taxes on motor vehicles and mobile homes, taxes on corporation net income, and individual income taxes. See SECURITY PACIFIC STUDY, supra note 25, at A4-A12.

[FN55]. ASSEMBLY RESEARCH REPORT, supra note 3, at 232. Senate Bill 154, the local government bail-out bill, provided that the countywide proceeds of the 1% property tax collected by local assessors were to be distributed pro rata to local jurisdictions, based on the average percentage of annual property taxes revenues collected by the city, county, or district. Id. See generally Doerr, The California Legislature's Response to Proposition 13, 53 S. CAL. L. REV. 77, 77-79 (1979)(discussing the legislation implementing Proposition 13 and providing for the bail-out program); CALIFORNIA ASSEMBLY REVENUE & TAXATION COMM., OVERVIEW OF CURRENT COURT CHALLENGES TO PROPOSITION 13 AND ITS IMPLEMENTATION LAWS: ASSESSMENT OF SIMILAR PROPERTIES AND REVENUE ALLOCATION TO LOCAL AGENCIES 20-25 (Dec. 1989) (discussing the provisions and underlying policy of legislation implementing Proposition 13).

[FN56]. ASSEMBLY RESEARCH REPORT, supra note 3, at 235-39.

[FN57]. Id. at 249-50.

[FN58]. See, e.g., City of Oakland v. Digre, 205 Cal. App. 3d 99, 102, 252 Cal. Rptr. 99, 99 (1988) (Oakland faced anticipated $14.5 million deficit for fiscal year 1989 because of reduced federal funding and the long-term impact of reduced property tax revenues); Northgate Partnership v. City of Sacramento, 202 Cal. Rptr. 15, 17 (1984)(Sacramento faced revenue loss of approximately $16.6 million in fiscal year 1978-79 as a result of Proposition 13).

[FN59]. CAL. CONST. art. II § 10(c) (West Supp. 1991)("[T]he Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.").

[FN60]. According to the Assembly Office of Research, state fiscal relief since fiscal year 1978-79, while essential, "helped save a drowning person, but it did not help that person reach shore." ASSEMBLY RESEARCH REPORT, supra note 3, at 241.

[FN61]. See SCHWADRON & RICHTER, supra note 8, at 70-79 (discussing aftermath of Proposition 13 revolt).

[FN62]. See infra note 64 (describing cases interpreting the main provisions of Proposition 13).

[FN63]. See infra notes 64-119 and accompanying text (discussing relevant Proposition 13 court decisions).

[FN64]. See, e.g., Heckendorn v. City of San Marino, 42 Cal. 3d 481, 486- 89, 723 P.2d 64, 67-69, 229 Cal. Rptr. 324, 327-29 (1986)(defining scope of 1% ad valorem tax limit); City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982) (defining special tax provision); Carman v. Alvord, 31 Cal. 3d 318, 326-33, 644 P.2d 192, 197- 201, 182 Cal. Rptr. 506, 511-15 (1982) (interpreting bond indebtedness exception to 1% limitation provision); Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 205-07, 643 P.2d 941, 945-47, 182 Cal. Rptr. 324, 328-30 (1982) (interpreting application of two-thirds majority vote requirement); Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 219, 248, 583 P.2d 1281, 1283, 1302, 149 Cal. Rptr. 239, 241, 259 (1978) (deciding constitutionality of Proposition 13).

[FN65]. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal.Rptr. 239 (1978) (decided Sept. 22, 1978, only 3 months after Proposition 13 was adopted).

[FN66]. Id. at 219, 248, 583 P.2d at 1283, 1302, 149 Cal. Rptr. at 241, 259. The Amador case consolidated multiple constitutional challenges to Proposition 13, and the supreme court reached several holdings. First, the court held that Proposition 13 was a constitutional amendment rather than an impermissible "revision," and, therefore, an appropriate subject of the initiative process for amending the California Constitution. Id. at 229, 583 P.2d at 1289, 149 Cal. Rptr. at 247. Second, the court held that Proposition 13 did not violate the single subject requirement of the initiative process. Id. at 232, 583 P.2d at 1292, 149 Cal. Rptr. at 250. Third, the court held that Proposition 13 did not deny equal protection of the laws required by the fourteenth amendment of the United States Constitution. Id. at 237, 583 P.2d at 1294-95, 149 Cal. Rptr. at 252-53. Fourth, the court held that Proposition 13 did not impermissibly infringe upon the right to travel. Id. at 238, 583 P.2d at 1295, 149 Cal. Rptr. at 253. Fifth, the court held that Proposition 13 did not unconstitutionally impair contractual rights. Id. at 242, 583 P.2d at 1298, 149 Cal. Rptr. at 256. Sixth, the court held that Proposition 13 did not violate the title and ballot summary requirements for initiatives required by the California Constitution. Id. at 243, 583 P.2d at 1298, 149 Cal. Rptr. at 256. Lastly, the court held that Proposition 13 was not void for vagueness. Id. at 246, 583 P.2d at 1301, 149 Cal. Rptr. at 259.

[FN67]. Id. at 219, 583 P.2d at 1283, 149 Cal. Rptr. at 241.

[FN68]. Id. at 247-48, 583 P.2d at 1301, 149 Cal. Rptr. at 259. Specifically, the supreme court stated:

[W]e decline to reach the question whether the various interpretations put forth by the Legislature and State Board of Equalization are correct . . . . [W]e recently affirmed that "it seems apparent that we cannot, and should not, attempt to pass upon the meaning or validity of each contested provision in every hypothetical context--adjudication of these matters must await an actual controversy, and should proceed on a case-by-case basis as the need arises."

Id. at 247, 583 P.2d at 1301, 149 Cal. Rptr. at 259 (citing County of Nevada v. MacMillen, 11 Cal. 3d 662, 674, 522 P.2d 1345, 1352, 114 Cal. Rptr. 345, 352 (1974)).

[FN69]. While the courts have examined many other aspects of Proposition 13, this Comment only discusses decisions which have affected local government revenue sources. See generally CALIFORNIA TAX FOUND., PROPOSITION 13 REPORTER (1985), for a comprehensive compilation of Proposition 13 litigation.

[FN70]. CAL. CONST. art. XIIIA § 1(a) (West Supp. 1991).

[FN71]. 42 Cal.3d 481, 723 P.2d 64, 229 Cal. Rptr. 324 (1986).

[FN72]. Id. at 484, 723 P.2d at 65, 229 Cal. Rptr. at 325.

[FN73]. The challenged tax was graduated according to the city's zoning classifications, which were determined by real property parcel size. Id. at 484, 484-85 n.2, 723 P.2d at 65, 65-66 n.2, 229 Cal. Rptr. at 325, 325-26 n.2. However, within each zone, the ordinances imposed a flat tax rate on all parcels, despite any variations in size, improvements, and ultimate value. Id. at 484-85, 723 P.2d at 65-66, 229 Cal. Rptr. at 325-26.

[FN74]. Id. at 485, 723 P.2d at 66, 229 Cal. Rptr. at 326. New ad valorem taxes on real property are strictly prohibited under Proposition 13. CAL. CONST. art. XIIIA § 4 (West Supp. 1991).

[FN75]. Heckendorn, 42 Cal. 3d at 487, 723 P.2d at 67, 229 Cal. Rptr. at 327 (quoting CAL. REV. & TAX. CODE § 2202 (West 1987)).

[FN76]. Id.

[FN77]. Henke, supra note 9, at 275.

[FN78]. Id. For example, using floor area of buildings as well as lot area to define the steps in a graduated parcel tax presumably would not be precluded by Heckendorn, since no appraisal of property value is made. Id.

[FN79]. CAL. CONST. art. XIIIA § 4.

[FN80]. 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).

[FN81]. Id. at 199-200, 643 P.2d at 941-42, 182 Cal. Rptr. at 324-25.

[FN82]. Id. at 200, 643 P.2d at 942, 182 Cal. Rptr. at 325. LACTC's measure authorizing imposition of the sales tax was approved by 54% of the county voters. Id.

[FN83]. Id. Richmond, the executive director of the LACTC, refused to pay the State Board of Equalization the administrative costs of collecting the sales tax required by sections 7270 and 7272 of the Revenue & Taxation Code. Id. at 200 n.3, 643 P.2d at 942 n.3, 182 Cal. Rptr. at 325 n.3. Richmond's refusal to implement the tax was prompted by the California Attorney General's opinion that the tax ordinance was unconstitutional under section 4 of Proposition 13 because the ordinance had not received the approval of two- thirds of the voters. Id. at 200, 643 P.2d at 942, 182 Cal. Rptr. at 325 (citing 64 Op. Att'y Gen. 156 (1981)).

[FN84]. Id. at 200, 643 P.2d at 942-43, 182 Cal. Rptr. at 325-36. The supreme court invoked the exercise of its original jurisdiction in Richmond "[b]ecause of the importance of the issues involved and the need for their prompt resolution." Id.

[FN85]. Section 4 is applicable specifically to "[c]ities, counties and special districts." CAL. CONST. art. XIIIA § 4 (West Supp. 1991) (emphasis added).

[FN86]. Richmond, 31 Cal. 3d at 207-08, 643 P.2d at 947, 182 Cal. Rptr. at 330.

[FN87]. Id. at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328. In Arvin Union School Dist. v. Ross, 176 Cal. App. 3d 189, 221 Cal. Rptr. 720 (1985), the Second District Court of Appeal addressed an issue remaining after Richmond regarding whether the special tax restrictions of section 4 applied to special districts which were specifically authorized by statute to assess additional property taxes as needed. Id. at 193, 221 Cal. Rptr. at 722. The court held that Proposition 13 preempted the enactment authorizing collection of additional property taxes and affirmed the rule in Richmond that section 4's "special districts" language includes all entities empowered to levy on real property. Id. at 199, 221 Cal. Rptr. at 726.

[FN88]. Richmond, 31 Cal. 3d at 205-06, 643 P.2d at 945-46, 182 Cal. Rptr. at 329 (citing language in the June 1978 California Voters Pamphlet to support the court's conclusion). See supra note 23 (quoting comments made by the authors of Proposition 13 and printed in the California Voters Pamphlet).

[FN89]. Richmond, 31 Cal. 3d at 205-08, 643 P.2d at 945-47, 182 Cal. Rptr. at 328-30. Cf. Huntington Park Redevelopment Agency v. Martin, 38 Cal. 3d 100, 695 P.2d 220, 211 Cal. Rptr. 133 (1985). In Huntington Park, the supreme court clarified the Richmond rule, stating that the term "special districts" as used in section 4 of Proposition 13 encompasses only those agencies which are empowered to impose and collect property taxes. Id. at 105, 695 P.2d at 224, 211 Cal. Rptr. at 137. Thus, the court held that the plaintiff, a community redevelopment agency which did not have authority to impose and collect property taxes, was not a special district, even though the agency received a substantial share of property tax revenues collected by other governmental entities. Id. at 105-07, 695 P.2d at 222-24, 211 Cal. Rptr. at 135-37.

[FN90]. Henke, supra note 9, at 265-66 n.78.

[FN91]. Richmond, 31 Cal. 3d at 213, 643 P.2d at 950, 182 Cal. Rptr. at 333 (Richardson, J., dissenting). Specifically, Justice Richardson wrote:

The majority has cut a hole in the financial fence which the people in their Constitution have erected around their government. Governmental entities may be expected, instinctively, to pour through the opening seeking the creation of similar revenue-generating entities in myriad forms which will be limited only by their ingenuity.

Id.

[FN92]. Id. at 208, 643 P.2d at 947, 182 Cal. Rptr. at 330. The Richmond majority stated, "We cannot assume that the Legislature will attempt to avoid the goals of article XIIIA by [reorganizing special districts to remove their property-taxing power or creating new ones without such power]. In any event, that problem can be dealt with if and when the issue arises." Id.

[FN93]. Henke, supra note 9, at 267. Henke suggests that nonproperty tax special districts have not proliferated, partly because of the supreme court's liberal response to the "special tax" issue in City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982). Id.

[FN94]. 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982).

[FN95]. See id. at 53-54, 648 P.2d at 937-38, 184 Cal. Rptr. at 716-17 (discussing the Richmond decision as a precedent for the court's decision in Farrell).

[FN96]. Richmond, 31 Cal. 3d at 201-02, 643 P.2d at 943, 182 Cal. Rptr. at 326. While acknowledging that an ambiguity existed in the meaning of "special taxes" under section 4, the Richmond court indicated that it was only considering the meaning of the term "special districts." Id. Because the court determined that the LACTC was not a "special district" within the meaning of section 4, further analysis of section 4 was neither necessary nor appropriate.

[FN97]. Id. at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328. The Richmond court stated, "The purpose of our discussion [of the substance and effect of an extraordinary vote requirement] is not to throw doubt on the constitutionality of the two-thirds vote requirement in section 4, but rather to establish the framework in which the ambiguity in the language of the provision should be resolved." Id.

[FN98]. Id. at 202, 643 P.2d at 943-44, 182 Cal. Rptr. at 327. The Richmond court noted that the term "special district" is generally defined as "a legally constituted governmental entity established for the purpose of carrying on specific activities within definitely defined boundaries." Id. at 202, 643 P.2d at 943, 182 Cal. Rptr. at 326 (citing SENATE FACT FINDING COMM. REPORT ON REVENUE AND TAXATION, INTERGOVERNMENTAL FISCAL RELATIONS IN CALIFORNIA 177 (Jun. 1965). The defendant urged the court to interpret "special districts" to mean "any unit of local government other than a city or county that is empowered to levy a 'special tax.'" Id. at 202, 643 P.2d at 943, 182 Cal. Rptr. at 327.

[FN99]. Id. at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328.

[FN100]. 22 Cal. 3d 208, 219, 245-246, 583 P.2d 1281, 1283, 1300-01, 149 Cal. Rptr. 239, 241 257-58 (1978). The Amador court stated that constitutional initiatives must be "liberally construed" and that constitutional provisions and enactment must receive a "practical common-sense construction" which will meet "changed conditions and the growing needs of the people." Id.

[FN101]. Richmond, 31 Cal. 3d at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328.

[FN102]. City and County of San Francisco v. Farrell, 32 Cal.3d 47, 56- 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982).

[FN103]. Id. at 51, 648 P.2d at 936, 184 Cal. Rptr. at 714. The measure in Farrell, which extended the operation of an ordinance providing for a 0.4% increase in the tax rate, was passed by 55% of city and county voters. Id. at 51, 648 P.2d at 936-37, 184 Cal. Rptr. at 714-15.

[FN104]. Id. at 51, 648 P.2d at 937, 184 Cal. Rptr. at 715.

[FN105]. Id.

[FN106]. Id. at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

[FN107]. Id.

[FN108]. Id.

[FN109]. Henke, supra note 9, at 267-68. The Farrell court, like the court in Richmond, also had an opportunity to choose a broad interpretation of the ambiguous provision of Proposition 13 at issue. 32 Cal. 3d at 53-54, 648 P.2d at 938, 184 Cal. Rptr. at 716. If one regards the ad valorem property tax as the "regular" local tax, then the term "special" in section 4 can be understood to include all additional nonproperty taxes. Id. at 59, 648 P.2d at 941, 184 Cal. Rptr. at 719 (Kaus, J., dissenting). The defendant had argued that a "special tax" is an "extra, additional, or supplemental charge imposed . . . to raise money for public purposes." Id. at 53-54, 648 P.2d at 938, 184 Cal. Rptr. at 716.

[FN110]. Farrell, 32 Cal. 3d at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718. The supreme court's interpretation of the meaning of "special taxes" in Farrell is especially significant in light of an earlier decision, Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981). In Trent Meredith, although the Court of Appeal for the Second District did not attempt to define the meaning of "special taxes" in section 4, the court did express concern that if the term were defined as taxes collected and earmarked for a special purpose, local governments could easily avoid Proposition 13 by depositing their nonproperty tax proceeds in the general fund. Id. at 323, 170 Cal. Rptr. at 688. The Farrell majority did not address the court of appeal's concern, which was echoed in the dissenting opinions to Farrell. Farrell, 32 Cal. 3d at 58, 648 P.2d at 941, 184 Cal. Rptr. at 719 (Richardson and Kaus, JJ., dissenting).

[FN111]. Henke, supra note 9, at 276.

[FN112]. Farrell, 32 Cal. 3d at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

[FN113]. See 1986 Cal. Stat. prop. 62, codified at CAL. GOV'T CODE §§ 53720-53730 (West Supp. 1991) (codifying Initiative 62). Proposition 62 requires that a local governmental or district governing body approve by two- thirds vote the imposition of a general fund tax. Id. § 53722. Although the proposition also requires electorate approval to levy a general fund tax, only a simple majority is necessary. Id. § 53723.

[FN114]. See supra notes 19-25 and accompanying text (discussing the historical background and purposes of Proposition 13).

[FN115]. CAL. CONST. art. XIIIA § 1(a).

[FN116]. See supra notes 70-78 and accompanying text (discussing the Heckendorn decision, defining "ad valorem tax").

[FN117]. See supra notes 79-101 and accompanying text (discussing the Richmond decision, interpreting the application of the two-thirds voter majority requirement).

[FN118]. See supra notes 42-47 and accompanying text (discussing the restrictions of section 4). The California Constitution does permit increases in ad valorem taxes on real property above the 1% limit to pay interest and redemption charges on indebtedness for the acquisition or improvement of real property. CAL. CONST. art. XIIIA § 1(b).

[FN119]. See Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 208, 219, 248, 583 P.2d 1281, 1283, 1302, 149 Cal. Rptr. 239, 241, 259 (1978) (holding Proposition 13 to be a valid constitutional amendment).

[FN120]. See CAL. CONST. art. XIIIA §§ 1-6 (West Supp. 1991) (using term "tax" rather than another descriptive term such as "levy" or "assessment").

[FN121]. See generally Henke, supra note 9 (discussing the effect of Proposition 13 on existing local government revenue sources).

[FN122]. Solvang Mun. Improvement Dist. v. Board of Supervisors, 112 Cal. App. 3d 545, 552, 169 Cal. Rptr. 391, 395 (1980).

[FN123]. Russ Bldg. Partnership v. City and County of San Francisco, 44 Cal. 3d 839, 848, 750 P.2d 324, 329, 244 Cal. Rptr. 682, 687 (1988) (citing Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 683, 547 P.2d 1377, 1381, 129 Cal. Rptr. 97, 101 (1976). See generally CAL. STS. & HIGH. CODE §§ 5000- 6794 (West 1969 & Supp. 1991) (Improvement Act of 1911); id. §§ 10000-10706 (West 1969 & Supp. 1991) (Municipal Improvements Act of 1913).

[FN124]. Solvang, 112 Cal. App. 3d at 553, 169 Cal. Rptr. at 395.

[FN125]. Id. at 552, 169 Cal. Rptr. 395.

[FN126]. Id. The Solvang court stated that "[t]he general public should not be required to pay for special benefits for the few, and the few specially benefitted should not be subsidized by the general public." Id.

[FN127]. Russ Bldg., 44 Cal. 3d at 849, 750 P.2d at 329, 244 Cal. Rptr. at 687.

[FN128]. Southern Cal. Rapid Transit Dist. v. Bolen, 219 Cal. App. 3d 1446, 1466, 269 Cal. Rptr. 147, 159 (1990). In Bolen, the court stated that neither property owners nor nonproperty owners in a proposed district had a constitutional right to vote on the formation of an assessment district. Id. at 1463, 269 Cal. Rptr. at 157-58. However, the court noted that if the right to vote is conferred, the election must comply with equal protection requirements. Id. at 1464, 269 Cal. Rptr. at 158. Despite the lack of a constitutional right to vote on the imposition of an improvement assessment, interested parties are not completely foreclosed from challenging the proposed assessment. Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 683 n.4, 547 P.2d 1377, 1381 n.4, 129 Cal. Rptr. 97, 101 n.4 (1976). The local rulemaking body must afford such parties a hearing at which the parties may question any aspect of the proposed improvement, assessment, or district. Id. A majority of affected property owners protesting the proposed improvement can generally block the formation of a district, subject to a four-fifths majority override by the local rulemaking body. Id. Failure to follow proper procedure for asserting a challenges to a proposed assessment may preclude later litigation of the matter. See City of Larkspur v. Marin County Flood Control & Water Conservation Dist., 168 Cal. App. 3d 947, 956-58, 214 Cal. Rptr. 689, 695-97 (1985) (town did not object

at special hearing, which was exclusive procedure for asserting lack of benefit).

[FN129]. Dawson v. Town of Los Altos Hills, 16 Cal. 3d, 676, 683, 547 P.2d 1377, 1381, 129 Cal. Rptr. 97, 101 (1976).

[FN130]. Id. See Bryant v. Comm'r of Internal Revenue, 111 F.2d 9, 14 (9th Cir. 1940) (stating that a city derives its power to levy and collect special assessments from its power of taxation). See also CAL. CONST. art. XI § 7 (homerule taxing authority provision for counties and cities). A distinction should be made between general law cities and counties and charter cities. See supra note 3 (discussing the legal structure of local government in California). Local general law governments may impose special assessments only if specifically authorized by the state legislature. ASSEMBLY RESEARCH REPORT, supra note 3, at 247. However, charter cities are authorized to impose special assessments without legislative approval pursuant to the California Constitution. Id.

[FN131]. Solvang Mun. Improvement Dist. v. Board of Supervisors, 112 Cal. App. 3d 545, 553, 169 Cal. Rptr. 381, 396 (1980). See Northwestern Mut. Life Ins. Co. v. State Board of Equalization, 73 Cal. App. 2d 548, 552, 166 P.2d 917, 920 (1946) (enumerating the significant differences between a special assessment and a tax).

[FN132]. Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 29, 148 P. 217, 219 (1915). See Solvang, 112 Cal. App. 3d at 553, 169 Cal. Rptr. at 396 ("a special assessment is not a tax at all, but a benefit to specific real property financed through the use of public credit"). Property owners may pay for the special assessments either in cash or, at their option, by installments over a period of time. County of Fresno v. Malmstrom, 94 Cal. App. 3d 974, 978, 156 Cal. Rptr. 777, 779 (1979).

[FN133]. See, e.g., CAL. STS. & HIGH. CODE §§ 5000-6794 (West 1969 & Supp. 1991) (Improvement Act of 1911); id. §§ 8500-8851 (West 1969 & Supp. 1991) (Municipal Bond Act of 1915); id. §§ 10000-10706 (West 1969 & Supp. 1991) (Municipal Improvement Act of 1913).

[FN134]. Malmstrom, 94 Cal. App. 3d at 978, 156 Cal. Rptr. 779. Examples of public improvements are, streets, sidewalks, sewers, water systems, and lighting and public utility lines. Id.

[FN135]. Comment, supra note 24, at 797. In 1978-79, special assessments amounted to $36 million. Id. at 797, n.88. In 1979-80, that amount jumped to $98 million, an increase of almost 175%. Id.

[FN136]. 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (1979).

[FN137]. Id. at 977, 156 Cal. Rptr. at 778-79. Assessment proceedings were initiated by the Fresno County Board of Supervisors pursuant to Streets and Highways Code sections 10000 through 10600, the Municipal Improvement Act of 1913. Id.

[FN138]. Id. at 977-78, 156 Cal. Rptr. at 779. The defendant's argument that the assessment was unconstitutional was two-fold. First, the defendant contended that the assessment would result in a levy which exceeded the 1% limit of section 1 of Proposition 13. Id. Second, the defendant contended that the assessment constituted a "special tax" which had not been approved by a two-thirds vote of qualified electors under section 4 of the amendment. Id.

[FN139]. Id. at 986, 156 Cal. Rptr. at 784.

[FN140]. A later case, County of Placer v. Corin, resolved the related issue of whether Proposition 4, the enactment limiting state and local government appropriations and spending, applied to special assessments. 113 Cal. App. 3d 443, 170 Cal. Rptr. 232 (1980). See CAL. CONST. art. XIIIB §§ 1-12 (West Supp. 1991), for full text of Proposition 4. The Court of Appeal for the Third District held that the spending limitation of Article XIIIB did not apply to proceeds derived from special assessments. Corin, 113 Cal. App. at 449, 170 Cal. Rptr. at 236.

[FN141]. Malmstrom, 94 Cal. App. 3d at 981-82, 156 Cal. Rptr. at 781-82.

[FN142]. Id. at 980-81, 156 Cal. Rptr. at 780-81.

[FN143]. Id. at 983-85, 156 Cal. Rptr. at 782-83. Accord, Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981). In Trent, the Second District Court of Appeal agreed with the Fifth District's conclusion in Malmstrom that Proposition 13 did not affect special assessments because they were not taxes, special or otherwise. Id. at 323, 170 Cal. Rptr. at 688. Because Proposition 13 was inapplicable to special assessments, the Second District rejected the plaintiff's argument that Malmstrom defined the term "special tax" as used in section 4 of the amendment and refused to render any definition of "special taxes" in the case. Id. at 323, 328, 170 Cal. Rptr. at 688, 691.

[FN144]. Malmstrom, 94 Cal. App. 3d at 984, 156 Cal. Rptr. at 783.

[FN145]. See, e.g., CAL. GOV'T CODE §§ 50078-50078.20 (West 1983 & Supp. 1991) (statutes authorizing local governments to impose police and fire special assessments); id. §§ 53970-53979 (West 1983 & Supp. 1991) (statutes authorizing local governments to impose police and fire protection special taxes). See generally Benefit Assessments: A Born Again Revenue Raiser, CAL- TAX RESEARCH BULL. 1-8 (1981) (reporting on new enabling legislation for special assessments and increased use of special assessments after Malmstrom).

[FN146]. 112 Cal. App. 3d 545, 169 Cal. Rptr. 391 (1980).

[FN147]. Id. at 548, 169 Cal. Rptr. at 393.

[FN148]. Id.

[FN149]. Id. at 548, 557, 169 Cal. Rptr. at 393, 398.

[FN150]. Id. at 557, 169 Cal. Rptr. at 398. Special assessments may be levied on a variety of bases, including fixed and variable, as well as ad valorem. Id.

[FN151]. Id.

[FN152]. See, e.g., id. at 557, 169 Cal. Rptr. at 398 ("levies to meet general expenses of the taxing entity and to construct facilities to serve the general public . . . may not be transformed from general ad valorem taxes to special assessments by a mere change in the name of the levy").

[FN153]. Henke, supra note 9, at 283-85.

[FN154]. 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984).

[FN155]. Id. at 749-50, 203 Cal. Rptr. at 582-83. In the early 1960's, San Diego had created a general plan to develop land in "planned urbanizing areas," which included developing and new communities. Id. at 749-50, 203 Cal. Rptr. at 582. The J.W. Jones decision concerned the planned urbanizing area of North University City. Id. at 749, 203 Cal. Rptr. at 582. To finance the construction of public facilities within North University City, San Diego enacted an ordinance which authorized the city council to designate lands to be benefitted by public improvements and apportion the costs of the improvements among the parcels. Id. The ordinance conditioned the issuance of building permits upon the payment of "facility benefit assessments," and gave the city a lien on the benefitted parcels until the FBA were paid. Id.

[FN156]. Id. at 749, 203 Cal. Rptr. at 583.

[FN157]. Id. at 756, 203 Cal. Rptr. at 588. Jones contented that some of the public facilities financed by the assessments were remote and therefore only indirectly benefitted the assessed parcels. Id.

[FN158]. Id. at 756-57, 203 Cal. Rptr. at 588-89. Jones argued that only owners of undeveloped property were required to bear the burden of paying for public facilities while owners of both undeveloped and developed properties derived benefit from the new facilities. Id.

[FN159]. Id. at 758, 203 Cal. Rptr. at 589.

[FN160]. Id. at 755, 203 Cal. Rptr. at 587. The J.W. Jones court stated that San Diego's ordinance and assessments were "distant cousins" to traditional public work financing arrangements, since the times for commencing and completing the public facilities were not fixed but rather were subject to adjustment depending on growth needs and economic conditions. Id. The court noted that San Diego's assessments were also unique in that they were apportioned amongst the parcels according to the number of "net equivalent dwelling units" attributable to each parcel at its highest potential development under current zoning, rather than on a front or square footage or ad valorem basis, as are traditional assessments. Id.

[FN161]. Id.

[FN162]. Id. at 757, 203 Cal. Rptr. at 588. The court in J.W. Jones stated, "The levy on undeveloped properties only has a reasonable basis. The incidental fallout of benefit to developed parcels does not result in such equality as to offend equal protection concepts." Id.

[FN163]. Id. at 757-58, 203 Cal. Rptr. at 588-89. The court found that the assessment system was the key to implementing San Diego's controlled growth plan, without which future growth would be jeopardized. Id. The court also noted that the assessment scheme was reasonable and valid, stating that "narrow strictures of general law concepts of financing public utilities . . . do not accommodate the dynamics of explosive growth in sunbelt cities." Id. at 756, 203 Cal. Rptr. at 589.

[FN164]. 157 Cal. App. 3d 759, 203 Cal. Rptr. 797 (1984).

[FN165]. The FBA system in Holodnak authorized San Diego to designate areas of benefit in the city's new North City West community to be assessed for public improvements and to apportion costs among according to benefit received. Id. at 761, 203 Cal. Rptr. at 798. The public facilities to be financed by the assessment system included water lines, community parks, a library, a park and ride facility, a fire station, and widening of a bridge. Id.

[FN166]. Id. at 762, 203 Cal. Rptr. at 799. The court adopted portions of the J.W. Jones opinion as it addressed the contentions raised in Holodnak. Id. The court also made its own findings of special benefit to North City West conferred by special facilities financed by the FBA, and stated that San Diego's determination of special benefit was both supported by the record and conclusive. Id. at 762-63, 203 Cal. Rptr. at 799.

[FN167]. J.W. Jones, 157 Cal. App. 3d at 758, 203 Cal. Rptr. at 589. Specifically, the J.W. Jones court stated: "The vision of San Diego's future as sketched in the general plan is attainable only through the comprehensive financing scheme contemplated by the FBA. We view the precedents of yesterday's case law, not as barriers to growth, but as the guidelines to accomplish the needs of tomorrow." Id. The most questionable improvements financed by the FBA in Holodnak, the park and ride facility and bridge widening, were easily approved by the court. Holodnak, 157 Cal. App. at 763, 203 Cal. Rptr. at 799. The court found benefit to the assessed properties conferred by the park and ride facility, stating that the properties would benefit from a decrease in traffic and pollution, even though the facility was open to everyone. Id. Likewise, the court found that the assessed properties would be benefitted by widening of a bridge spanning the city's major interstate highway since ingress and egress to the new development would be expanded. Id.

[FN168]. See American River Flood Control Dist. v. Sayre, 136 Cal. App. 3d 342, 356, 186 Cal. Rptr. 202, 207 (1982) (special assessment for operating and maintenance costs of flood control district held valid).

[FN169]. See City Council of the City of San Jose v. South, 146 Cal. App. 3d 320, 332 335, 194 Cal. Rptr. 110, 118, 120 (1983) (special assessment for maintenance of landscaped median islands and their appurtenant areas held valid).

[FN170]. ASSEMBLY RESEARCH REPORT, supra note 3, at 251.

[FN171]. Local general law governments may impose special assessments only if specifically authorized by the state legislature. ASSEMBLY RESEARCH REPORT, supra note 3, at 247. See supra note 3 (discussing the legal structure of local government in California).

[FN172]. ASSEMBLY RESEARCH REPORT, supra note 3, at 251; Benefit Assessments: A Born Again Revenue Raiser, CAL-TAX RESEARCH BULL. 1-8 (1981).

[FN173]. See CAL. GOV'T CODE §§ 50078-50078.20 (West 1983 & Supp. 1991) (statutes authorizing local governments to impose police and fire special assessments).

[FN174]. See CAL. GOV'T CODE § 54710.5 (West Supp. 1991) (statute authorizing local governments to impose assessments for flood control services).

[FN175]. See id. (statute authorizing local governments to impose assessments for drainage and water management services).

[FN176]. See CAL. STS. & HIGH. CODE § 18165 (West Supp. 1991) (statute authorizing cities to impose assessments for street lighting).

[FN177]. See Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 684, 547 P.2d 1377, 1382, 129 Cal. Rptr. 97, 102 (1976) (stating that "the scope of judicial review of such actions is quite narrow . . ."). In Dawson, the supreme court indicated that the local rulemaking body "is the ultimate authority which is empowered to finally determine what lands are benefitted and what amount of benefits shall be assessed against the several parcels benefitted. . . . [Special assessments are] of a particularly legislative character, and the appropriate scope of review is firmly rooted in that consideration." Id. at 684-85, 547 P.2d at 1382, 129 Cal. Rptr. at 102.

[FN178]. See supra notes 122-132 and accompanying text (defining "special assessment").

[FN179]. See, e.g., White v. County of San Diego, 26 Cal. 3d 897, 904, 608 P.2d 728, 731, 163 Cal. Rptr. 640, 644 (1980). In White, the supreme court stated that a special assessment will not be set aside unless the "absence of benefit clearly appears from the record," and that the local government's "determination of benefit is conclusive." Id. See supra notes 127- 130 and accompanying text (discussing homerule taxing authority of counties and cities and legislative enactments authorizing the imposition of special assessments and the formation of assessments districts).

[FN180]. But see Harrison v. Board of Supervisors, 44 Cal. App. 3d 852, 858, 118 Cal. Rptr. 828, 831-32 (1975) (property not benefitted from storm sewers). Cf. City of Sacramento v. Drew, 207 Cal. App. 3d 1287, 1294, 255 Cal. Rptr. 704, 708 (1989) (public schools were not "of a local nature" within the meaning of the Municipal Improvement Act of 1913).

[FN181]. See, e.g., CALIFORNIA COMM'N ON GOV'T REFORM, FINAL REPORT 118 (Jan. 1979) (listing numerous new or increased county license, permit, and service fees in the year following the approval of Proposition 13).

[FN182]. ASSEMBLY RESEARCH REPORT, supra note 3, at 250.

[FN183]. See Mills v. County of Trinity, 108 Cal. App. 3d 656, 660, 166 Cal. Rptr. 674, 678 (1980) ("In narrower contexts, the word [tax] has been construed to exclude charges to particular individuals which do not exceed the value of the governmental benefit conferred upon or the services rendered to the individuals . . .").

[FN184]. Ordinarily, governmental fees are levied upon individuals and business entities. See generally, Bauman & Ethier, Development Exactions and Impact Fees: A Survey of American Practices, 50 L. CONTEMP. PROB. 51 (1987), for a thorough discussion of governmental fees and the issues raised by use of such fees.

[FN185]. CAL. CONST. art. XIIIA §§ 1-6 (West Supp. 1991) (using the term "tax" rather than another descriptive term, such as "levy," "charge," or "fee").

[FN186]. User fees have increased from $2,817 million in fiscal year 1971-72 to $11,135 million in fiscal year 1982-83, an increase of 295 percent. ASSEMBLY RESEARCH REPORT, supra note 3, at 252. In fiscal year 1982-83, user fees accounted for almost 41% of all city revenues and 19% of all county revenues. Id. at 256.

[FN187]. See, e.g., Alamo Rent-A-Car, Inc. v. Board of Supervisors, 221 Cal.App.3d 198, 205-06, 272 Cal. Rptr. 19, 24 (1990) (airport access fee upheld); Bixel Assoc. v. City of Los Angeles, 216 Cal. App. 3d 1208, 1220, 265 Cal. Rptr. 347, 355 (1989) (fire hydrant fee struck down); San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist., 203 Cal. App. 3d 1132, 1135, 250 Cal. Rptr. 420, 421 (1988) (pollution permit fee upheld); Beaumont Investors V. Beaumont-Cherry Valley Water Dist., 165 Cal. App. 3d 227, 238, 211 Cal. Rptr. 567, 573 (1985) (water connection fee struck down); Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 325, 170 Cal. Rptr. 685, 689 (1981) (school impact fee upheld); Mills v. County of Trinity, 108 Cal. App. 3d 656, 663, 166 Cal. Rptr. 674, 678 (1980) (new and increased fees for county services upheld).

[FN188]. Bauman & Ethier, supra note 184, at 54.

[FN189]. Id.

[FN190]. Id.

[FN191]. Id.

[FN192]. See CAL. CONST. art. XI § 7 (West Supp. 1991) (homerule taxing authority provision for counties and cities).

[FN193]. Bauman & Ethier, supra note 184, at 54.

[FN194]. CAL. GOV'T CODE §§ 50075-50076 (West Supp. 1991). See Beaumont Investors v. Beaumont-Cherry Valley Water Dist., 165 Cal. App. 227, 234, 211 Cal. Rptr. 567, 570 (1985) (discussing sections 50075 and 50076 of the Government Code).

[FN195]. Bauman & Ethier, supra note 184, at 54.

[FN196]. See supra note 187, for a list of cases involving the use of governmental regulatory and service fees.

[FN197]. 108 Cal. App. 3d 656, 166 Cal. Rptr. 674 (1980). The issue of whether Proposition 4, the enactment limiting government appropriations and spending, applied to governmental fees was discussed in Trend Homes, Inc. v. Central Unified School District, 220 Cal. App. 3d 102, 269 Cal. Rptr. 349 (1990). See CAL. CONST. art. XIIIB §§ 1-12 (West Supp. 1991), for the full text of Proposition 13. In Trend Homes, the Fifth District Court of Appeal held that if a fee is not a special tax within the meaning of Article XIIIA, Proposition 4 is not applicable. Id. at 115, 269 Cal. Rptr. at 356.

[FN198]. Mills, 108 Cal. App. 3d at 658, 166 Cal. Rptr. at 675.

[FN199]. Id. at 658-59, 166 Cal. Rptr. at 675. See CAL. CONST. art. XIIIA § 4 (West Supp. 1991) (provision restricting the imposition of special taxes).

[FN200]. Id. at 663, 166 Cal. Rptr. at 678. See Alamo Rent-A-Car, Inc. v. Board of Supervisors, 221 Cal. App. 3d 198, 208, 272 Cal. Rptr. 19, 25 (1990) (stating that governmental regulatory fees should be comprised of a "fair and reasonable" approximation of the overall benefit derived from the activity being regulated).

[FN201]. The Mills court utilized the rules of construction used to interpret constitutional provisions expressed in Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 244-45, 583 P.2d 1281, 1300, 149 Cal. Rptr. 239, 258 (1978), which requires the court to interpret enactments so as to give full effect to the framers' objectives. Mills, 108 Cal. App. 3d at 659, 166 Cal. Rptr. at 676.

[FN202]. Id. at 660, 166 Cal. Rptr. at 676. The trial court in Mills had construed the term "tax" broadly to include "all charges, however labeled, which are to exact money for the support of government or for public purposes." Id. The court of appeal rejected this construction since such an interpretation would render a county powerless to raise charges for proprietary functions. Id. The court reasoned that such a "draconian result" was probably never intended by the electorate. Id.

[FN203]. 114 Cal. App. 3d 317, 170 Cal. Rptr, 685 (1981).

[FN204]. Id. at 321, 170 Cal. Rptr. at 687.

[FN205]. Id. at 321, 170 Cal. Rptr. at 687. The ordinance had been enacted by the City of Oxnard without voter approval, and the plaintiff claimed that it thus violated the two-thirds voter majority approval requirement of section 4.

[FN206]. Id. at 328, 170 Cal. Rptr. at 691.

[FN207]. Id. at 325, 170 Cal. Rptr. at 689. The Trent court reasoned that the development requirements imposed by the city were not ad valorem taxes because the requirements were "not imposed upon the land in the subdivision as such but [are] imposed on the privilege of subdividing land." Id.

[FN208]. Id. at 325-28, 170 Cal. Rptr. at 698-91.

[FN209]. Id. at 325-28, 170 Cal. Rptr. at 689-91.

[FN210]. 206 Cal. App. 3d 212, 253 Cal. Rptr. 497 (1988).

[FN211]. Id. at 220, 253 Cal. Rptr. at 500.

[FN212]. Id. at 226, 253 Cal. Rptr. at 504.

[FN213]. City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982). See supra notes 102-113 and accompanying text (discussing the Farrell decision).

[FN214]. California Bldg., 206 Cal. App. 3d at 235, 253 Cal. Rptr. at 510-11.

[FN215]. Id. at 237, 253 Cal. Rptr. at 511. To support its conclusion that the school district's levies constituted development fees rather than special taxes, the court in California Bldg. stated that development fees are distinguishable from taxes because fees are voluntary, whereas taxes are compulsory. Id. at 236, 253 Cal. Rptr. at 510. The court also noted that development fees, unlike "special taxes" under section 4, are not intended to replace lost property tax revenues. Id. at 236, 253 Cal. Rptr. at 511.

[FN216]. Id. at 233, 253 Cal. Rptr. at 509. The defendants were required to comply with the financial limitations of California Government Code sections 53080 and 65995 because school districts have no independent taxing authority under the California Constitution. Id. The school districts' authority to impose development fees derived solely from legislative enactments since, as the court held, section 4 of Proposition 13 was not a self- executing grant of taxing authority. Id. at 226-33, 253 Cal. Rptr. at 504- 08.

[FN217]. 165 Cal. App. 3d 227, 211 Cal. Rptr. 567 (1985).

[FN218]. Id. at 230, 211 Cal. Rptr. at 568. In Beaumont, defendant water district charged the plaintiff developer a $750 per unit facilities fee to help pay for the construction of new water systems facilities necessitated by development. Id. at 231, 211 Cal. Rptr. at 568. The developer then brought suit, contending that the fee fell within the purview of section 4 of Proposition 13, which requires a two-thirds majority vote approval before a new special tax may be imposed. Id. at 232, 211 Cal. Rptr. at 569.

[FN219]. Id. at 238, 211 Cal. Rptr. at 573. The court in Beaumont explained that in order for a governmental fee to be exempt from Proposition 13, the fee must reasonably relate to the cost of the service for which it is imposed. Id. at 234, 211 Cal. Rptr. at 570. See CAL. GOV'T CODE §§ 50075- 50076 (West Supp. 1991) (authorizing cities, counties, and special districts to impose special taxes and specifically excluding from the definition of "special tax" any fee "which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes").

[FN220]. Beaumont, 165 Cal. App. 3d at 238, 211 Cal. Rptr. at 573.

[FN221]. Id. at 235, 211 Cal. Rptr. at 571 (quoting Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 248, 583 P.2d 1281, 1301, 149 Cal. Rptr. 239, 259 (1978)).

[FN222]. Beaumont, 165 Cal. App. 3d at 235-38, 211 Cal. Rptr. at 571-73. The court distinguished a factually similar special assessment case, J.W. Jones Cos. v. Holodnak, 157 Cal. App. 3d 745, 403 Cal. Rptr. 580 (1984), stating that in J.W. Jones the City of San Diego had worked up a detailed and sophisticated study and plan before imposing development charges, whereas the Beaumont Water District had not made an informed decision. Id. at 236-38, 211 Cal. Rptr. at 271-73.

[FN223]. 203 Cal. App. 3d 1132, 250 Cal. Rptr. 420 (1988). SDG & E involved a challenge to a county air pollution control district's method of apportioning costs of permit programs among agencies required to obtain operating permits. Id. at 1135, 250 Cal. Rptr. at 421. The court held that the district could properly recover actual costs of operation by apportioning them among all monitored polluting agencies based on an emissions fee schedule. Id. at 1148-49, 250 Cal. Rptr. at 430-31.

[FN224]. Id. at 1146, 250 Cal. Rptr. at 429.

[FN225]. Id. at 1147-48, 250 Cal. Rptr. at 430.

[FN226]. Id. at 1148-49, 250 Cal. Rptr. at 430.

[FN227]. 216 Cal. App. 3d 1208, 265 Cal. Rptr. 347 (1989). Bixel involved an ordinance which specified that fees collected from developers were to be deposited into a "Fire Hydrant Installation and Main Replacement Fund" to finance the cost of initial installation and upgrades of fire hydrants and the improvements or replacements of existing water mains. Id. at 1214, 265 Cal. Rptr. at 350.

[FN228]. Id. at 1219-20, 265 Cal. Rptr. at 354-55.

[FN229]. Id. at 1220, 265 Cal. Rptr. at 358.

[FN230]. In Russ Bldg. Partnership v. City and County of San Francisco, 44 Cal. 3d 839, 750 P.2d 324, 244 Cal. Rptr. 682 (1988), the supreme court did address a related issue. In Russ Bldg., plaintiff developers challenged the retroactive application of a transit fee ordinance to new office buildings. Id. at 845, 750 P.2d at 326, 244 Cal. Rptr. at 685. The court held that the fee did not impair the developers' vested rights, even though the developers had been issued building permits, had begun construction, and had made a substantial financial commitment to their projects almost two years before the ordinance was enacted. Id. at 846, 750 P.2d at 327, 244 Cal. Rptr. at 685.

[FN231]. See supra notes 196-233 and accompanying text (discussing court decisions reaching differing conclusions as to the validity of certain governmental fees after Proposition 13).

[FN232]. See supra notes 196-233 and accompanying text (discussing court decisions reaching differing conclusions based on differing rationales).

[FN233]. Compare Mills v. County of Trinity, 108 Cal. App. 3d 656, 660, 166 Cal. Rptr. 674, 676 (3d Dist. 1980) (court chose to interpret special tax provision of Proposition 13 narrowly and upheld regulatory fees, stating that

Proposition 13 was not intended to put local governments in a "fiscal straitjacket") with Bixel Assoc. v. City of Los Angeles, 261 Cal. App. 3d 1208, 1220, 265 Cal. Rptr. 347, 355 (2d Dist. 1988) (court struck down development fees and refused to hear policy arguments in support thereof, stating that the case was not about the "obvious need for funding by [Los Angeles] of sophisticated fire protection in the post-Proposition 13 era").

[FN234]. See Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 219, 249, 583 P.2d 1281, 1283, 1302, 149 Cal. Rptr. 239, 241, 259 (1978) (upholding the validity of Proposition 13).

[FN235]. See supra notes 64-119 and accompanying text (discussing relevant Proposition 13 court decisions).

[FN236]. See generally Glennon, Taxation and Equal Protection, 58 GEO. WASH. L. REV. 261, 293 (1989) (discussing the constitutionality of Proposition 13 after the Supreme Court of the United States' decision in Allegheny Pittsburgh Coal Co. v. County Comm'n, 109 S.Ct. 633 (1989)).

[FN237]. 109 S.Ct. 633 (1989).

[FN238]. Id. at 637.

[FN239]. In Webster County, an appraisal of value was made each time property ownership changed. Id. at 635. The appraisal value was the sales price of property, determined by the declared consideration in the deed of the property. Id.

[FN240]. Id. at 635-37.

[FN241]. Id. at 637.

[FN242]. Id. at 637-39.

[FN243]. Id. at 638.

[FN244]. Id. at 638-39.

[FN245]. Id. at 638 n.4. Specifically, the Court stated:

We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be. [Proposition 13] is grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of the property.

Id. See Glennon, supra note 236, at 301 (discussing the probability of success of an equal protection challenge to Proposition 13 and stating that a court could distinguish Allegheny if California government authorities came forward with a legitimate state interest justifying its policy of appraisal).

[FN246]. Glennon, supra note 236, at 294.

[FN247]. See ASSEMBLY RESEARCH REPORT, supra note 3, at 26-33 (discussing challenges to Proposition 13 filed after the decision in Allegheny).

[FN248]. See, e.g., City of Rancho Cucamonga v. Mackzum, 279 Cal. Rptr. 220 (Ct. App. 4th Dist. Mar. 20, 1991) (No. E007876) (claim that legislation implementing Proposition 13 violates equal protection of the laws struck down); R.H. Macy Co. v. Contra Costa County, 226 Cal. App. 3d 352, 357, 370, 276 Cal. Rptr. 530, 533, 541 (1991) (claim that change in ownership provision of Proposition 13 violates the equal protection, right to travel, and interstate commerce clauses of the United States Constitution struck down); Nordlinger v. Lynch, 225 Cal. App. 3d 1259, 1265, 1282, 275 Cal. Rptr. 684, 686, 698 (1991) (claim that acquisition value assessment method of Proposition 13 is unconstitutional after the Allegheny decision struck down).

[FN249]. See supra notes 64-119 and accompanying text (discussing relevant Proposition 13 court decisions).

[FN250]. Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 245, 583 P.2d 1281, 1301, 149 Cal. Rptr. 239, 257 (1978).

[FN251]. See Kroll, supra note 9, at 29.

[FN252]. See id. at 29-31 (describing the loopholes of Proposition 13 and the ability of local governments to find ways around the amemdment's tax limitations).

[FN253]. Id. at 29. Because the courts have narrowly interpreted all disputed sections of the measure, the impact of Proposition 13 on local governments is much less severe than expected. Id. The response of the courts led Proposition 13 co-author Howard Jarvis to state, "The court doesn't know what a tax is." Id.

[FN254]. See supra notes 120-233 and accompanying text (discussing court decisions impacting the use and effectiveness of nontaxing sources of revenue).

[FN255]. See supra notes 120-180 and accompanying text (discussing the effect of court decisions broadening the use of special assessments).

[FN256]. See supra notes 181-233 and accompanying text (discussing the use and effectiveness of governmental fees to generate revenues).

[FN257]. See generally Bauman & Ethier, supra note 184, for a complete analysis of the use of governmental fees on geographical and purpose bases.

[FN258]. Kroll, supra note 9, at 28.

[FN259]. Mills v. County of Trinity, 108 Cal. App. 3d 656, 660, 166 Cal. Rptr. 674, 676 (1980).

[FN260]. See supra notes 250-253 and accompanying text (describing the role of California courts in shaping Proposition 13).

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EXHIBIT D

BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

TEST CLAIM of CLOVIS UNIFIED SCHOOL DISTRICT, Test Claimant, Re: California Prevailing Wage Law.	)	TEST CLAIM No. 01-TC-28

NOTICE OF LODGING OF MATERIALS BY *AMICUS CURIAE* STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO

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NOTICE OF LODGING OF MATERIALS BY *AMICUS CURIAE* STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO

The State Building and Construction Trades Council of California, AFL-CIO (SBCTC) is lodging with the Commission on State Mandates the studies listed below. These studies are referred to in the SBCTC's accompanying submission to the Commission regarding the test claim of the Clovis Unified School District. The studies support the conclusion that state prevailing wage laws do not raise school construction costs.

1. Philips, Peter, Ph.D., A Comparison of Public School Construction Costs In Three Midwestern States That Have Changed Their Prevailing Wage Laws in the 1990s, February, 2001

   Summary: A study of public school construction costs in Kentucky, Ohio and Michigan over the period 1991-2000, found that the use of prevailing wages did not raise school construction costs by a statistically significant amount.

2. Prus, Mark, J., Ph.D., Prevailing Wage Laws and School Construction Costs: An Analysis of Public School Construction In Maryland and the Mid Atlantic States, January, 1999

   Summary: A study for the Prince George County's County City Council in Maryland compared school construction in three mid-Atlantic states (Delaware, Pennsylvania and West Virginia) with prevailing wages between 1991-1997 with two states (North Carolina and Virginia) that did not pay prevailing wages. The study found that the slight increase in costs for states with prevailing wages was statistically insignificant. Further, future savings in maintenance costs because of higher quality construction produced additional savings in prevailing wage states.

3. Bilginsoy and Philips, Prevailing Wage Regulations and School Construction Costs: Evidence from British Columbia, 24 Journal of Education Finance 415 (Winter 2000)

   Summary: Data from British Columbia shows no statistically significant increase in construction costs from a prevailing wage law.

4. Prus, Mark, J., Ph.D., The Effect of State Prevailing Wage Laws on Total Construction Costs, January, 1996

   Summary: Analysis of impact of state prevailing wage laws finds no significant impact on total construction costs.

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MICHAEL RUBIN
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ANGELA K. CHABOT
FELLOW

January 20, 2003

Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720 *et al.*
Public Contract Code Section 22022
Title 8, CCR, Section 16000 *et al.*
Statutes of 2001, Chapter 938 *et al.*

Dear Ms. Reynolds:

You were erroneously left off the service list for the materials we mailed in this case on Wednesday, January 15, 2003, so we are mailing them to you today.

Sincerely,

Scott A. Kronland

SAK:jp
Enclosure
cc: Shirley Opie, Assistant Executive Director
Commission on State Mandates
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JONATHAN WEISSGLASS

ANGELA K. CHABOT
FELLOW

January 20, 2003

Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720 *et al.*
Public Contract Code Section 22022
Title 8, CCR, Section 16000 *et al.*
Statutes of 2001, Chapter 938 *et al.*

Dear Mr. Shields:

Your name was erroneously left off the service list for the materials we mailed in this case on Wednesday, January 15, 2003, so we are mailing them to you today.

Sincerely,

Scott A. Kronland

SAK:jp
Enclosure
cc: Shirley Opie, Assistant Executive Director
Commission on State Mandates
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ANGELA K. CHABOT
FELLOW

January 20, 2003

Steve Smith
Mandated Cost Systems, Inc.
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720 *et al.*
Public Contract Code Section 22022
Title 8, CCR, Section 16000 *et al.*
Statutes of 2001, Chapter 938 *et al.*

Mr. Smith:

Your name was erroneously left off the service list for the materials we mailed in this case on Wednesday, January 15, 2003, so we are mailing them to you today.

Sincerely,

Scott A. Kronland

SAK:jp
Enclosure
cc: Shirley Opie, Assistant Executive Director
Commission on State Mandates
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ANGELA K. CHABOT
FELLOW

January 20, 2003

Keith B. Peterson
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720 *et al.*
Public Contract Code Section 22022
Title 8, CCR, Section 16000 *et al.*
Statutes of 2001, Chapter 938 *et al.*

Mr. Peterson:

Your name was erroneously left off the service list for the materials we mailed in this case on Wednesday, January 15, 2003, so we are mailing them to you today.

Sincerely,

Scott A. Kronland

SAK:jp
Enclosure
cc: Shirley Opie, Assistant Executive Director
Commission on State Mandates
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BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

TEST CLAIM of CLOVIS UNIFIED SCHOOL DISTRICT, Test Claimant, Re: California Prevailing Wage Law.	)	TEST CLAIM No. 01-TC-28

SUPPLEMENTAL PROOF OF SERVICE

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PROOF OF SERVICE

CASE: Test Claim of Clovis Unified School District, Test Claimant,
Re: California Prevailing Wage Law

CASE NO: Commission on State Mandates, Test Claim No. 01-TC-28

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On January 20, 2003, I served the following document(s):

Request to Submit Response to Test Claim; Response to Test Claim by *Amicus Curiae* State Building and Construction Trades Council Of California, AFL-CIO

Notice of Lodging of Materials by *Amicus Curiae* State Building and Construction Trades Council Of California, AFL-CIO

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I am readily familiar with the practice of Altshuler, Berzon for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

ADDRESSEE	PARTY
Sandy Reynolds Reynolds Consulting Group, Inc. P.O. Box 987 Sun City, CA 92586 Telephone: 909/672-9964 Facsimile: 916/672-9963	
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Keith B. Peterson — Claimant Representative
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117
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Facsimile: 858/514-8645

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this January 20, 2003, at San Francisco, California.

Jean Perley

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5. Azari-Rad, Philips, and Prus, Making Hay When it Rains: The Effect Prevailing Wage Regulations, Scale Economies, Seasonal, Cyclical and Local Business Patterns have on School Construction Costs, 27 Journal of Education Finance 997 (Spring 2002)

   Summary: Analysis of data finds that prevailing wage laws cause no statistically significant increase in school construction costs.

6. Philips, Peter, Ph.D., Square Foot Construction Costs for Newly Constructed State and Local Schools, Offices and Warehouses in Nine Southwestern and Intermountain States, 1992-1994 (September 1996)

   Summary: Study prepared for New Mexico State Legislature finds that square-foot construction costs for schools were lower in states with prevailing wage laws.

7. Wial, Howard, Do Lower Prevailing Wages Reduce Public Construction Costs?, Keystone Research Center Briefing Paper 99/2

   Summary: Analysis of data finds that lower prevailing wage rates would not reduce total school construction costs in Pennsylvania.

Dated: January 14, 2003

Respectfully submitted,

SCOTT A. KRONLAND
ALTSHULER, BERZON, NUSSBAUM,
RUBIN & DEMAIN

by: Scott Kronland
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Attorneys for *Amicus Curiae*
State Building and Construction Trades Council
of California, AFL-CIO

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BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

TEST CLAIM of CLOVIS UNIFIED SCHOOL DISTRICT, Test Claimant, Re: California Prevailing Wage Law.	)	TEST CLAIM No. 01-TC-28

PROOF OF SERVICE

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PROOF OF SERVICE

CASE: Test Claim of Clovis Unified School District, Test Claimant,
Re: California Prevailing Wage Law

CASE NO: Commission on State Mandates, Test Claim No. 01-TC-28

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On January 15, 2003, I served the following document(s):

Request to Submit Response to Test Claim; Response to Test Claim by *Amicus Curiae* State Building and Construction Trades Council Of California, AFL-CIO

Notice of Lodging of Materials by *Amicus Curiae* State Building and Construction Trades Council Of California, AFL-CIO

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I am readily familiar with the practice of Altshuler, Berzon for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this January 15, 2003, at San Francisco, California.

Jean Perley

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BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

TEST CLAIM of CLOVIS UNIFIED SCHOOL DISTRICT, Test Claimant, Re: California Prevailing Wage Law.	)	TEST CLAIM No. 01-TC-28

REQUEST FOR LEAVE TO FILE RESPONSE TO TEST CLAIM AND RESPONSE TO TEST CLAIM BY *AMICUS CURIAE* STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO

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REQUEST FOR LEAVE TO FILE RESPONSE TO TEST CLAIM

The State Building and Construction Trades Council of California, AFL-CIO ("SBCTC") respectfully requests leave to file this response to the test claim of the Clovis Unified School District. The test claim concerns California's prevailing wage law, Labor Code §1720 *et seq.* The prevailing wage law requires that contractors and subcontractors on construction projects paid for in whole or in part with public funds must pay their employees at least the wage rates determined by the Director of Industrial Relations to be prevailing for the same type of work in the same geographic area. The prevailing wage law, originally adopted in 1931, ensures that public works projects do not depress area labor standards.

The SBCTC is a federation of labor organizations comprising about 200 local unions and 20 district councils that collectively represent about 350,000 men and women working in the construction trades in California. These workers and their families have a significant interest in the protections provided by the prevailing wage law. That being so, the SBCTC regularly participates in legislative, administrative, and judicial proceedings that involve the prevailing wage law, and the SBCTC is familiar with the statutory and regulatory changes that are the subject of the test claim. The SBCTC believes that its response to the test claim will be of use to the Commission and will not delay the test claim proceedings.

Dated: January 15, 2003

Respectfully submitted,

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RESPONSE TO TEST CLAIM BY *AMICUS CURIAE* STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO

INTRODUCTION

The test claim concerns the State's prevailing wage law, Labor Code §1720 *et seq.*, which requires contractors and subcontractors on construction projects paid for in whole or in part out of public funds to pay their employees wages at least equal to the wages prevailing for the same type of work in the locality. California has had a prevailing wage law for public construction projects, including local agency construction projects, since 1931. *See* Stats. 1931, ch. 397. The Clovis Unified School District ("claimant") asks the Commission to determine whether any of the amendments since 1975 to the prevailing wage law or to the law's implementing regulations impose an unfunded state mandate on school districts. In this response, we make three main points.

First, the central "mandate" imposed by the prevailing wage law is the requirement that private contractors and subcontractors on public work must pay prevailing wages to their employees. This is a labor standards requirement imposed on private employers, not local agencies. If the wages are not paid, the private employer, not the local agency, is liable for back wages and penalties. To be sure, there is an argument that if private contractors have higher labor costs, they may seek to pass some of those costs on to their customers. The California Constitution, however, does not entitle local agencies to reimbursement for the possible "pass-through" costs of labor standards legislation – even if such costs exist. The contractor's cost of paying higher hourly wages to workers on a project may well be offset by the increased skill and productivity of those workers. Several recent studies conclude that the prevailing wage law does

not actually increase total school construction costs, and the claimant has presented no evidence to the contrary.

Second, the prevailing wage law does impose minor direct costs on school districts to administer and enforce the law. But what has occurred since 1975 is the exact opposite of an unfunded state mandate. The State has taken upon itself responsibilities that were formerly borne by local agencies to determine prevailing wage rates and to enforce the prevailing wage law.

Finally, the claimant is correct that there has been some expansion in the definition of "public work" since 1975. That is, there is some work that would not have been subject to the prevailing wage law in 1975 that is subject to the prevailing wage law now. (However, many of the changes to the definition of "public work" cited by the claimant were actually just clarifications of the pre-1975 statutory language, not substantive changes in the law.) The claimant does not present evidence, however, that these minor changes have actually had any practical effect on school district construction projects. As previously stated, moreover, the obligation to pay prevailing wages is imposed on private employers not local agencies. Any added administrative costs to local agencies from the expanded definition of "public work" are more than offset by the State's assumption since 1975 of most of the administrative and enforcement responsibilities previously borne by local agencies.

For these reasons, the test claim should be denied.

ARGUMENT

I. AS A GENERAL MATTER, THE PREVAILING WAGE LAW IMPOSES A MANDATE ON PRIVATE EMPLOYERS NOT LOCAL AGENCIES.

The core requirement of the prevailing wage law is that contractors and subcontractors on construction projects "paid for in whole or in part out of public funds" (Labor Code §1720(a)) must pay their employees "not less than the general prevailing rate of per diem wages for work of

a similar character in the locality in which the public work is performed" (Labor Code §1771), and must maintain payroll records to show that this obligation has been met (Labor Code §1776). The prevailing wage law is a form of minimum labor standards legislation intended to protect construction workers. Labor Code §90.5(a), (b); *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976. Employers on public work have a statutory obligation to pay prevailing wages regardless of whether the contract requires that prevailing wages be paid. *Lusardi Construction,* 1 Cal.4th at 986-88.

The obligation to pay prevailing wages does not apply to public employers. Labor Code §1771. Therefore, the prevailing wage requirement never operates as a mandate on local agencies. Local agencies are not liable if contractors and subcontractors fail to pay prevailing wages to their employees; instead, the contractors and subcontractors owe back wages to the employees and penalties to the local agency awarding the contract. Labor Code §1775(a); §1776(g).

It is not clear from the test claim whether the claimant seeks reimbursement from the State on the theory that requiring contractors and subcontractors on public work to pay prevailing wages operates as an "indirect" mandate on school districts by raising school construction costs. There is no authority for such a mandate claim under Article XIII B, §6 of the State Constitution. Under Government Code §17514, "[c]osts mandated by the state" means . . . increased costs which a local agency or school district *is required to incur*." (Emphasis supplied.) In this case, private contractors – not local agencies – are "required to incur" the costs of paying prevailing wages (assuming the contractors would not have paid prevailing wages anyway). There is no requirement that local agencies reimburse the private contractors for those costs.

Equally to the point, it is entirely speculative whether contractors' and subcontractors' costs of compliance with the prevailing wage law are passed through to school districts in the form of higher prices. Workers who are paid higher wages are also likely to be more skilled and productive. Such workers are also likely to suffer fewer workplace injuries, which reduces worker's compensation costs. Contractors who would use low-wage workers are also more likely to be irresponsible contractors in general, leading to problems completing the job in a timely manner and, often, to expensive litigation over the failure to perform work correctly. Labor costs are also only one component of the total costs of a construction project, and higher labor costs may be offset by changes in project specifications.

Indeed, recent studies by economists, which include several studies of school construction costs, have concluded that prevailing wage laws *do not result in increased construction costs.* We are lodging some of the relevant studies with the Commission under separate cover.

The impossibility of determining whether a mandate on private parties indirectly results in increased costs to local agencies, and in quantifying those costs, makes clear that Article XIII B, §6 the state Constitution is not concerned with mandates on private parties. If the costs of such mandates were relevant, the Commission would also have to consider the indirect benefits to local agencies of mandates on private parties. A prevailing wage law, for example, is likely to result in more employment for local workers and therefore to increased tax revenues to support local agencies; a prevailing wage law is also likely to result in increased support for school bond measures by labor organizations and others concerned with the creation of good jobs, and it may be that very bond money that makes the school construction project possible in the first place.

II. SINCE 1975, THE STATE HAS ASSUMED BURDENS OF ADMINISTERING AND ENFORCING THE PREVAILING WAGE LAW THAT WERE FORMERLY BORNE BY LOCAL AGENCIES.

The prevailing wage law does directly impose some minor administrative and enforcement costs on local agencies. What is puzzling about the filing of a test claim, however, is that the substantive changes to the prevailing wage law since 1975 have involved a transfer of administrative and enforcement responsibilities *from local agencies to the State*. Prevailing wage rates were once determined by local agencies; they are now determined by the State's Director of Industrial Relations. Local agencies once bore the bulk of the responsibility for enforcing the prevailing wage law; that responsibility now rests with the State's Labor Commissioner. Disputes about whether the prevailing wage law was violated were once resolved through expensive lawsuits in Superior Court between the contractor and the local agency; such disputes are now resolved through administrative proceedings before the state's Department of Industrial Relations, and the local agency need not even be a party to those proceedings.

The claimant sets out 21 administrative and enforcement tasks that it alleges to be new mandates imposed on local agencies since 1975. We address each one in turn and show that no new unfunded mandate was imposed.

Alleged Mandate No. 1

> "1) Pursuant to Labor Code Section 1773 and Title 8, California Code of Regulations, Section 16202, to obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for public works." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 1

Prior to 1975, the awarding body (*i.e.*, the local agency contracting for a public work) was required to determine the applicable general prevailing rate of per diem wages through a

procedure set out by statute. *See* Test Claim at 9-10 n. 14 (quoting Labor Code §1770, as it read in 1974); Test Claim at 11-12 n. 17 (quoting Labor Code §1773, as it read in 1974). Under current law, the responsibility for determining prevailing wage rates rests with the Director of Industrial Relations. Labor Code §1773. The awarding body obtains the wage rates from the Director, a far less onerous task than having to determine them in the first place.

Thus, the State has actually assumed much of the burden previously borne by local agencies, the opposite of imposing a mandate.

Alleged Mandate No. 2

> "2) Pursuant to Title 8, California Code of Regulations, Section 16204, to ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 2

Prior to 1975, the awarding body was required to determine the applicable general prevailing rate of per diem wages. *See* Response to Alleged Mandate No. 1, *supra*. This duty necessarily required local agencies to ensure that those rates were correct. The regulation cited, 8 C.C.R. §16204, deals with the effective date of the prevailing wage determinations issued by the Director. *See* 8 C.C.R. §16204(a). The only responsibility imposed on awarding bodies by this regulation is to obtain the correct determination (*i.e.*, a determination that is not outdated or has not yet become effective) from the Director. *See* 8 C.C.R. §16204 (a)(5). As explained in 8 C.C.R. §16204(a)(1)-(4), the Director's determinations have issue dates and expiration dates, so this is not difficult. The burden imposed on awarding bodies is far less onerous than the burden imposed on local agencies before 1975 to determine correct prevailing wage rates themselves. There is no new mandate.

Alleged Mandate No. 3

"3) Pursuant to Title 8, California Code of Regulations, Section 16001, to request from the Director of Industrial Relations a coverage determination regarding a specific project or type of work to be performed." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 3

Prior to 1975, there was no formal process for asking the Director of Industrial Relations for his or her determination whether a project is a public works project covered by the prevailing wage law. It was up to individual awarding bodies to make those determinations. The regulation cited, 8 C.C.R. §16001, sets out a procedure under which an interested party, including an awarding body, "may" file with the Director a request for a determination of whether a project is a public works project. 8 C.C.R. §16001(a)(1). There is no requirement that such a request be made, so there is no mandate imposed on local agencies.

Moreover, the ability to have the Director determine coverage shifts the burden from local agencies, who would previously have had to make such determinations, to the State. The awarding body's role in the coverage-determination process is minimal, consisting only of a duty to provide relevant documents to the Director that is imposed on all interested parties, not just the awarding body. *See* 8 C.C.R. §16001(a)(3). An awarding body determining coverage before 1975 would have had to obtain and analyze relevant documents to make its own determination; now it may simply forward them to the Director.

Alleged Mandate No. 4

"4) Pursuant to Title 8, California Code of Regulations, Section 16302, to file a petition for review of a determination of the Director of Industrial Relations of any rate or rates." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 4

Prior to 1975, the Director did not determine prevailing wage rates, so there was no process for reviewing the Director's determinations. *See* Response to Alleged Mandate No. 1, *supra*. The awarding body determined prevailing wage rates, and its determinations could be appealed to the Director. *See* Test Claim at 14-15 n. 21 (quoting Labor Code §1773.4, as it read in 1974). Under current law, an interested party "may" file a petition with the Director to review the Director's prevailing wage determination. Labor Code §1773.4; 8 C.C.R. §16302. There is no requirement that such a petition for review be filed.

Because filing a petition for review is optional, no mandate is imposed on local agencies. Moreover, the entire burden of determining prevailing wage rates has been shifted from local agencies, who no longer must defend their determinations, to the State.

Alleged Mandate No. 5

> "5) Pursuant to Labor Code Section 1773.4 and Title 8, California Code of Regulations, Section 16002.5, to appeal an incorrect determination made by the Director of Industrial Relations." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 5

Prior to 1975, there was no procedure for obtaining a determination from the Director of Industrial Relations as to whether a project is covered by the prevailing wage law (*see* Response to Alleged Mandate No. 3, *supra*), so there was no procedure for appealing such a determination. Under current law, an interested party "may" ask the Director to review his or her own determination as to whether a project is covered by the prevailing wage law. 8 C.C.R. §16002.5(a). Since this procedure is optional, it does not impose a mandate on local agencies.

Alleged Mandate No. 6.

"6) Pursuant to Labor Code Section 1773.2, to include a statement of prevailing rate of per diem wages in all calls and advertisements for bids, in the public works contract itself, and to post the statement at all job sites. In lieu of those requirements, the district may include a statement in the call for bids and contract a statement to the effect that copies of the prevailing rate of wages are on file in its principal office." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 6:

The same requirements existed prior to 1975. *See* Test Claim at 13 n. 19 (quoting Labor Code §1773.2, as it read in 1974); Test Claim at 16-17 n. 24 (quoting Labor Code §1773.8, as it read in 1974). Since the requirement existed in 1975, it is not a new mandate.

Alleged Mandate No. 7

"7) Pursuant to Labor Code Section 1771.1 and Title 8, California Code of Regulations, Section 16800 through 16802, to maintain records of ineligible contractors and subcontractors and to refuse to grant them public works projects of the district." [Test Claim, Item 2.]

SBCTC's Response to Alleged Mandate No. 7:

Neither the cited statute nor the cited regulations requires a local agency to take any actions when the Labor Commissioner debars a contractor or subcontractor. The Labor Commissioner, not the awarding body, keeps a list of debarred contractors and subcontractors. *See* 8 C.C.R. §16801(a)(2)(K). There is no mandate.

Alleged Mandate No. 8

"8) Pursuant to Labor Code Section 1773.3, to send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 8

This requirement has not changed since 1975. *See* Test Claim at 14 n. 20 (quoting Labor Code §1773.3 as it read in 1974). There is no new mandate.

Alleged Mandate No. 9

9) Pursuant to Labor Code Section 1776, when necessary or requested by the Director of Industrial Relations, to inspect and audit payroll records of contractors and subcontractors working on district public works projects.

SBCTC's Response to Alleged Mandate No. 9

Labor Code §1776 does not impose a mandatory requirement that awarding bodies inspect or audit payroll records. The requirement that contractors and subcontractors on public work maintain payroll records that are available for inspection by the awarding body pre-dated 1975. *See* Test Claim at 19 n. 28 (quoting Labor Code §1776, as it read in 1975). There is no new mandate.

Alleged Mandate No. 10

"10) Pursuant to Labor Code Section 1776 and Title 8, California Code of Regulations, Section 16402, when requested by appropriate parties, to obtain and provide copies of the payroll records of the contractors and subcontractors working on district public works projects. The records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 10

Labor Code §1776 does not require that local agencies redact the payroll records of contractors; this may be done by the contractors themselves. To the extent that the local agency incurs any processing costs, these can be charged to the requesting party in advance. *See* §1776(b)(3)("the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the . . . entity through which the request was made"). Consequently, if there is a new mandate, it is not an unfunded mandate.

Alleged Mandate No. 11

"11) Pursuant to Labor Code Section 1771.5 and Title 8, California Code of Regulations, Sections 16425 through 16439, to comply with all of the requirements of a Labor

Compliance Program, when initiated and enforced by the district. These requirements include:

(a) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of the prevailing wage laws;

(b) A prejob conference shall be conducted with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract;

(c) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury;

(d) The district shall review, and, if appropriate, audit payroll records to verify compliance with prevailing wage laws;

(e) The district shall withhold contract payments when payroll records are delinquent or inadequate; and

(f) The district shall withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred."

SBCTC's Response to Alleged Mandate No. 11

Nothing in Labor Code §1771.5 *requires* a local agency to operate a labor compliance program. A local agency that voluntarily chooses to do so can increase the monetary threshold for triggering the prevailing wage law (§1771.5) and can keep any fines and penalties collected. 8 C.C.R. §16438. Since creation of a labor compliance program is entirely optional, there is no mandate.

Alleged Mandate No. 12

"12) Pursuant to Labor Code Section 1771.6 and Title 8, California Code of Regulations, Section 17220, to provide contractors and subcontractors, and bonding companies and sureties with Notices of Withholding of Contract Payments when minimum wage law violations are discovered by the district. The notice shall be in writing and include the following information:

(a) A description of the nature of the violation and basis for the notice.

(b) The amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code Section 1742.1.

(c) The name and address of the office to whom a Request for Review may be sent.

(d) Information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments.

(e) Notice of Opportunity to request a settlement meeting under Section 17221.

(f) A statement appearing in bold or another type of face, that makes it stand out from other text, to the effect that failure to submit a timely request for review will result in a final order binding on the contractor and subcontractor, and on the bonding company." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 12

There is no requirement that a local agency enforce the prevailing wage law itself, through a labor compliance program, rather than simply reporting violations to the Labor Commissioner, as could be done prior to 1975. Labor compliance programs are entirely optional (*see* Response to Alleged Mandate No. 11, *supra*), so the guidelines for setting up such programs and initiating enforcement actions do not impose a mandate.

Alleged Mandate No. 13

"13) Pursuant to Labor Code Section 1726, to report any suspected violations of the prevailing wage laws to the Labor Commissioner." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 13

Prior to 1975, awarding bodies were required to "take cognizance" of prevailing wage violations. Test Claim at 6 n.6 (quoting Labor Code §1726, as it read in 1975). The reference to reporting such violations to the Labor Commissioner in the current version of §1726 does not impose a new mandate; rather, the ability to report such violations to the Labor Commissioner for action eases the burden on the awarding body to investigate and enforcing the law by itself.

Alleged Mandate No. 14

"14) Pursuant to Labor Code Section 1726, to withhold contract payments for underpaid wages and for penalties when, through the district's own investigation, the district determines a violation of prevailing wages has occurred." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 14

The same obligation existed in 1975. *See* Test Claim at 6 n. 7 (quoting Labor Code §1727, as it read in 1975). There is no new mandate.

Alleged Mandate No. 15

"15) Pursuant to Labor Code Section 1727, to withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 15

Since 1975, the State has assumed the bulk of the responsibility for enforcing the prevailing wage law, thereby easing the burdens on local agencies. The obligation to withhold funds in response to a notice from the Labor Commissioner is not materially different from the obligation that existed before 1975 to "take cognizance" of prevailing wage violations and to "withhold and retain" from contract payments funds that have been forfeited for failure to comply with the prevailing wage law. *See* Test Claim at 6 nn. 6 & 7 (quoting Labor Code §1726 and §1727, as they read in 1975). Not only is there no new mandate but the State's assumption of enforcement responsibilities has eased burdens on local agencies.

Alleged Mandate No. 16

"16) Pursuant to Labor Code Section 1727, to retain amounts withheld to satisfy a Civil Wage and Penalty Assessment until receiving a final order no longer subject to judicial review." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 16

The Response to Alleged Mandate No. 15 applies to this one as well. Before 1975, local agencies had an obligation to take cognizance of violations and withhold payments. The language added to Labor Code §1727 specifying that the funds should be withheld until the matter is resolved is just a clarification, not a change in the law.

Alleged Mandate No. 17

"17) Pursuant to Labor Code Section 1742, after July 1, 2001, and Title 8, California Code of Regulations, Section 17220, to comply with all due process requirements for the benefit of contractors and subcontractors when amounts are withheld pursuant to a Civil Wage and Penalty Assessment or a Notice of Withholding of Contract Payments,

including the providing of proper and timely notices, allowing them to review evidence relied upon, appearance and participation at hearings and the appeals therefrom." [Test Claim, Exhibit 2.]

SBCTC's Response No. 17

There is no obligation that local agencies enforce the prevailing wage law themselves, through labor compliance programs, rather than relying upon the Labor Commissioner to issue Civil Wage and Penalty Assessments. When the Labor Commissioner issues the Assessment, the Labor Commissioner is responsible for meeting all the procedural requirements of Labor Code §1742.

The current scheme for enforcing the prevailing wage law must also be contrasted with the scheme that existed in 1975. In 1975, prevailing wage disputes were settled in court, through expensive lawsuits to which the local agency was necessarily a party. The local agency would withhold contract payments and the contractor would sue the agency. The adoption of Labor Code §§1741-1742.1 (stats. 2000, ch. 954) created an administrative hearing system for resolving prevailing wage disputes. The local agency is not a party to those hearings when the Assessment has been issued by the Labor Commissioner. The administrative hearing scheme has substantially reduced the burden of prevailing wage enforcement on local agencies.

Alleged Mandate No. 18

"18) Pursuant to Labor Code Section 1742, after July 1, 2001, to respond to petitions for writs of mandates filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including the retention of counsel to file timely responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 18

In 1975, a local agency was required to withhold funds from a contractor if prevailing wages had not been paid. The only remedy for a contractor that disputed the withholding was to

sue the agency. Such lawsuits would be tried in the Superior Courts and appeals could be taken to the California Supreme Court. Under Labor Code §§ 1741-1742.5, prevailing wage violations are dealt with through the issuance of a Civil Wage and Penalty Assessment by the Labor Commissioner. A contractor that disputes the Assessment is entitled to an administrative hearing before the Director of Industrial Relations and can seek review of the Director's decision in the Court of Appeal. This is a much less expensive way of resolving the dispute than a trial in Superior Court, and the local agency awarding the contract is not a party to the administrative proceeding unless it voluntarily chooses to intervene or to issue its own Civil Wage and Penalty Assessment. Again, the burden on local agencies has been lessened.

Alleged Mandate No. 19

> 19) Pursuant to Labor Code Section 1742.1 and Title 8, California Code of Regulations, Section 16413, to grant and to participate in settlement meetings requested by contractors or subcontractor in an attempt to settle any disputed issue before formal hearing procedures." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 19

The requirement to participate in a settlement conference exists only if the local agency has voluntarily chosen to issue its own Civil Wage and Penalty Assessment, rather than report the suspected violation to the Labor Commissioner for issuance of an Assessment. When prevailing wage disputes were settled in Superior Court, moreover, there were often obligations on local agencies to attend mandatory settlement conferences or to participate in alternative dispute resolution procedures. There is every reason to believe that participation in administrative hearings will be much less burdensome than participation in court proceedings.

Alleged Mandate No. 20

> "20) Pursuant to Labor Code Section 1771.2, a joint labor-management committee may bring an action against an employer who fails to pay prevailing wages. As a necessary

party, the school district would be required to appear and participate in these legal proceedings." [Test Claim, Exhibit 2.]

SBCTC's Response to Alleged Mandate No. 20

Nothing in Labor Code §1771.2, or in any other statute or regulation, makes a local agency a necessary party to a lawsuit by a joint labor-management committee against an employer who fails to pay prevailing wages. There is no new mandate.

Alleged Mandate No. 21

"21) Pursuant to Labor Code Section 1776, to furnish copies of payroll records of a contractor or subcontractor to a joint labor management committee obliterated only to prevent disclosure of social security numbers." [Test Claim, Exhibit 2.]

SBCTC's Response

As explained in the Response to Alleged Mandate No. 10, nothing in Labor Code §1776 requires the local agency, rather than the contractor or subcontractor, to redact the payroll records. Moreover, local agencies are authorized to charge parties requesting records in advance for the costs of complying with their requests. If there is a new mandate, it is not an unfunded mandate.

III. THE ADMINISTRATIVE AND ENFORCEMENT BURDENS ON LOCAL AGENCIES OF THE MINOR EXPANSIONS IN THE DEFINITION OF "PUBLIC WORK" ARE MORE THAN OFFSET BY THE STATE'S ASSUMPTION OF MOST ADMINISTRATIVE AND ENFORCEMENT RESPONSIBILITIES.

The claimant also identifies seven alleged expansions in the definition of "public work" since 1975. These are alleged to be types of work that would be subject to the prevailing wage law today, but were not subject to the prevailing wage law in 1975. They are as follows:

"a) Pursuant to Labor Code Section 1720.2, the construction work is performed according to plans, specifications or criteria furnished by the district and where the district enters into a lease, as lessee, of the completed project during or upon completion of the construction;

(b) Pursuant to Labor Code Section 1720.3, hauling refuse from a public works site to an outside location;

(c) Pursuant to Labor Code Section 1720, the work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work;

(d) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for maintenance, including landscape maintenance;

(e) Pursuant to Labor Code Section 1720, the work is for installation works;

(f) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for field surveying work traditionally covered by collective bargaining agreements when the work is integral to the specific public works project; and

(g) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for residential and commercial projects when the public work is for student or faculty housing." [Test Claim, Exhibit 2.]

As the Department of Industrial Relations points out in its response to the test claim: The alleged changes in the definition of "public work" referred to in (d), (e) and (f) were not post-1975 substantive changes in the law; they codified administrative interpretations of the pre-1975 law. As for the expansion of the law alleged in (g), the regulation the claimant cites, 8 C.C.R. §16001, has nothing to do with the definition of "public work." Residential projects, including student and faculty housing projects, have always been covered by the prevailing wage laws when they are paid for in whole or in part out of public funds.

We agree that items (a), (b) and (c) represent minor expansions in prevailing wage coverage since 1975. However, the upshot of the amendments cited in (a), (b), and (c) is merely that the following work is now covered by the prevailing wage law but *might not* have been covered under pre-1975 law:

- An amendment to the Labor Code §1720.2 in 1980 added to the definition of "public work" a project that 1) is not paid for in whole or in part with public funds, 2) involves a construction contract between private parties, 3) involves property that is privately owned but, upon completion of the project, will have

more than 50 percent of the assignable square feet of the property leased to a public agency, 4) is performed according to plans, specifications and criteria supplied by the public agency, and 5) involves a lease agreement with the public agency that was entered into during or after the construction work began. *See* Test Claim at 27 n.41 (showing the amendment).

- An amendment to Labor Code §1720.3 in 1999 expanded the coverage of the prevailing wage law slightly to include contracts by a local agency for the hauling of refuse from a public works site an outside disposal service. *See* Test Claim at 29 n.43 (showing the amendment).

- An amendment to Labor Code §1720 in 2000 brought within the prevailing wage law "design and preconstruction" work. *See* Test Claim at 29-30 n.45 (showing the amendment). However, this work would have been covered before the amendment anyway if it were part of an overall construction project paid for which public funds. The amendment affects the situation in which the *only* work paid for with public funds is design and preconstruction work.

Nevertheless, although these were expansions in the definition of "public work" since 1975, the work that they address may well have been covered by the prevailing wage law anyway, under some other statute, depending upon the funds used for the project.[1] The claimant does not provide any evidence that the claimant has actually contracted for any construction work in the three years prior to the filing of the test claim that was covered by the prevailing wage law but would not have been covered by the pre-1975 law.

Assuming, however, that one of these expansions in the definition of public work is relevant to the claimant's activities, the obligation to pay prevailing wages is still an obligation imposed on contractors and subcontractors, not on local agencies, so it is not a reimbursable mandate. *See* pp. 3-4, *supra.*

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[1] For example, under Labor Code §1771.7, "[a]n awarding body that chooses to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004" for construction work must operate a labor compliance program to ensure that prevailing wages are paid on the project. This provision will affect school districts that use state bond money.

Although the prevailing wage law does impose some minor direct administrative and enforcement costs on local agencies, the costs incurred as a result of the expansion in the definition of public work would be de minimis. A clause requiring the payment of prevailing wages should already be in the standard-form contract used by local agencies. Local agencies are entitled to charge the requesting party in advance for the costs of processing requests for payroll records. *See* p. 11, *supra* (Response to Alleged Mandate No. 10). When a contractor violates the prevailing wage law, it forfeits penalties to the local agency. *See* Labor Code §1775(a), §1776(g). These penalties would more than offset the local agency's administrative costs of withholding payment from the contractors It also must be kept in mind that any additional costs to a local agency from the slight expansion in the definition of "public work" will be dwarfed by the savings to the local agency from the transfer since 1975 of most of the responsibility for administering and enforcing the prevailing wage law to the State on *all* of the local agency's public works projects.

CONCLUSION

For the foregoing reasons, the test claim should be denied.

Dated: January 15, 2003

Respectfully submitted,

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A Comparison of Public School Construction Costs

In Three Midwestern States that Have Changed Their Prevailing Wage Laws in the 1990s

Kentucky, Ohio and Michigan

By Peter Philips, Ph.D.

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February, 2001

Introduction

Proponents and critics of prevailing wage regulations have debated the merits of these regulations for some time. Proponents argue that these regulations promote the development of a skilled labor force in construction, improve work place safety, encourage quality construction, increase apprenticeship training and provide career opportunities in construction for local citizens. Proponents emphasize that prevailing wage regulations also induce contractors to provide health insurance and pension coverage that otherwise would be absent.

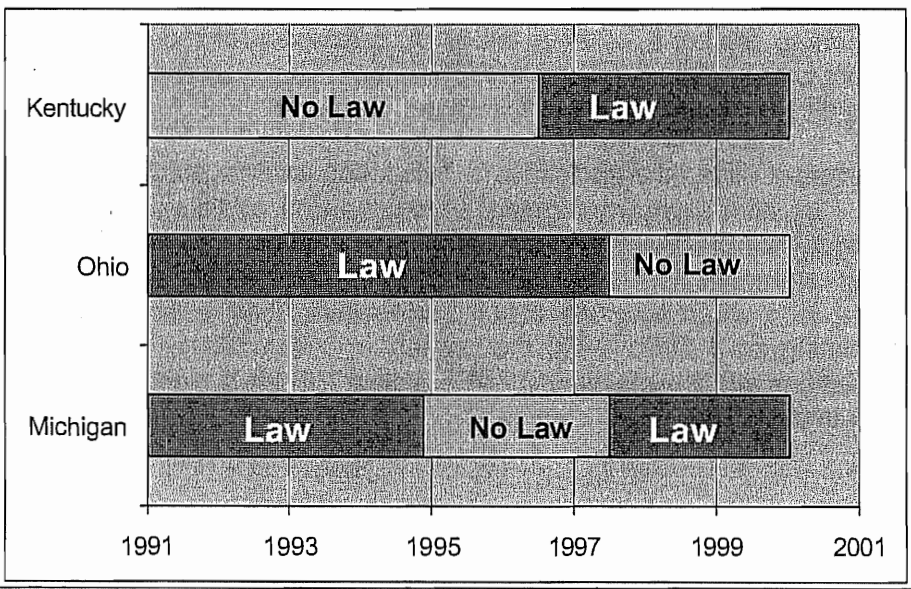
Critics of prevailing wage regulations concede some of the foregoing positions and contest others. But the main argument of critics of prevailing wage regulations is the contention that these laws raise public construction costs. This is a two-sided argument asserting that when prevailing wage regulations are applied they raise public construction costs and when these regulations are eliminated, public construction costs will go down. The magnitude of savings is thought to be substantial ranging anywhere from 10% to 30% or more of total construction costs.

This paper focuses on the specific question of whether or not the application of prevailing wage regulations raises costs, and if so, by how much. Those favoring this view theorize that prevailing wage regulations raise wage rates on public construction to higher levels than they otherwise would be. Increased wage rates should lead to increased construction costs that would be passed on to the government and eventually the taxpayer. Proponents of prevailing wage regulations counter that higher wage rates induce contractors to hire or train a more skilled and productive labor force. Higher wage rates also will encourage contractors to better manage their workers and provide them with better and more up-to-date equipment. These responses to higher wage rates may, according to this view, offset some or all of the costs of higher wage rates. Prevailing wage proponents also argue that a more skilled labor force leads to better quality construction that reduces downstream maintenance and repair costs.

This paper tests these competing hypotheses regarding the cost-effects of prevailing wage laws. The focus will be on new public school construction in Kentucky, Ohio and Michigan over the period 1991 to 2000. These states and

this time period were chosen because legislative and judicial changes in these states over this period form a natural experiment helpful in isolating the effects of these regulations on costs. In the 1990s, prior to July1996, Kentucky did not apply prevailing wage regulations to public school construction. Starting in July of 1996, the state's prevailing wage law regulated public school construction. By itself, this provides some before-and-after information about the effects of applying prevailing wages to school construction costs. Fortuitously, from the standpoint of science, Ohio in the 1990s did almost the opposite of Kentucky. Throughout the 1990s until July of 1997, Ohio applied its prevailing wage law to public school construction. Starting in July 1997, Ohio exempted public school construction from prevailing wage regulations. Thus, almost simultaneously, these neighboring states moved in opposite regulatory directions. The fact that Ohio lifted its law soon after Kentucky applied its law to public school construction helps this natural experiment isolate the effects of regulatory policy from other factors that change over time. From an experimenter's perspective, this is nice. But nicer yet, at around the same time, Michigan does yet a third thing with its prevailing wage law.

At the end of 1994, a judicial ruling suspended the application of Michigan's prevailing wage law to any public construction. This judicial suspension lasted until July of 1997 when a higher court ruling reapplied Michigan's prevailing wage law to all public construction, including schools. So Michigan suspended its law two-and-one-half years before Ohio, and Michigan reapplied its law in precisely the same month Ohio exempted schools from prevailing wage regulations. Figure 1 shows the variation in prevailing wage policies by state in the 1990s.



• Figure 1: Prevailing Wage Policy by State 1991-2000

With these variations in legal policies in hand, we are in a position to assess statistically whether or not changes in prevailing wage policies as they applied to public school construction raised or lowered the cost of building public schools.

The Data

The FW Dodge Corporation is a private company that provides bidding information to contractors. In so doing, the Dodge Corporation systematically gathers information on the "start" cost of construction projects. "Start" costs are the agreed-upon bid price of a project at the outset of a bid. The final cost of a project can vary from the start cost based on cost overruns. Proponents of prevailing wage regulations argue that one of the advantages of prevailing wage laws is that they reduce cost overruns. This argument asserts that absent prevailing wage regulations a cutthroat bidding system emerges where low-ball bidders undercut their competitors with unrealistically low bids in the hope and expectation that during the term of the project the contractor can recoup his profits through change orders. This argument asserts that prevailing wage regulations attract a set of bidders that will compete with each other over on-time completion, quality construction and productivity but eschew the strategy of low-ball bidding hooked into profiting from change orders.

We cannot test this argument with Dodge data because it does not include cost overruns subsequent to the acceptance of the bid. But with this one limitation in mind, the Dodge data form the single best source on school construction costs across states.

In addition to providing the accepted bid price, the dodge data indicate what kind of building project it is; what the total square feet of the project is; where the project will take place; when the bid was accepted; some details on the nature of the project, and other useful information.

This report uses data from 1991 t. We focus on new public school construction only. By eliminating renovation alterations and additions, we can focus on a relatively homogenous group of buildings—new public schools. We will ask the question—controlling for the size of these public schools, and where they took place, and when they were built, and whether they included a gymnasium-swimming pool facility—did the presence or the absence of prevailing wage regulations affect the total cost of the project? Table 2 describes the new schools used in this study.

Characteristic of Schools in Study	
Number of New Schools in Study	391
Average Square Foot Size of the School	86,415
Average Total Cost of the Project (Year 2000 dollars)	$8,483,937
Percent of All Schools	
Michigan	38%
Ohio	36%
Kentucky	26%
Percent of School with a Gym-Pool Facility	7%
Percent of Urban Schools	32%
Percent of Schools Built Under Prevailing Wages	49%

• Table 1: Description of the new schools used in the study

This study involves 391 new public schools built between 1991 and September 2000. Table 1 show that the average size of a school was 86,415 feet and the average total cost was $8,483,937 in year 2000 dollars. The consumer price index urban (CPI-U) was used to update earlier costs into year 2000 dollars.

Of the 391 new public schools in the study, Michigan accounted for 38%. Ohio accounted for 36% and Kentucky accounted for 26%. This reflects the relative size of the three states.

Dodge data indicated that 7% of the new schools included a swimming pool/gymnasium facility. In our statistical model we expect that even controlling for the size of the school project, the inclusion of such a facility is likely to raise the square foot cost of the new school.

Thirty-two percent of the new public schools were built in urban areas with the remaining 68% built in rural areas including smaller towns.

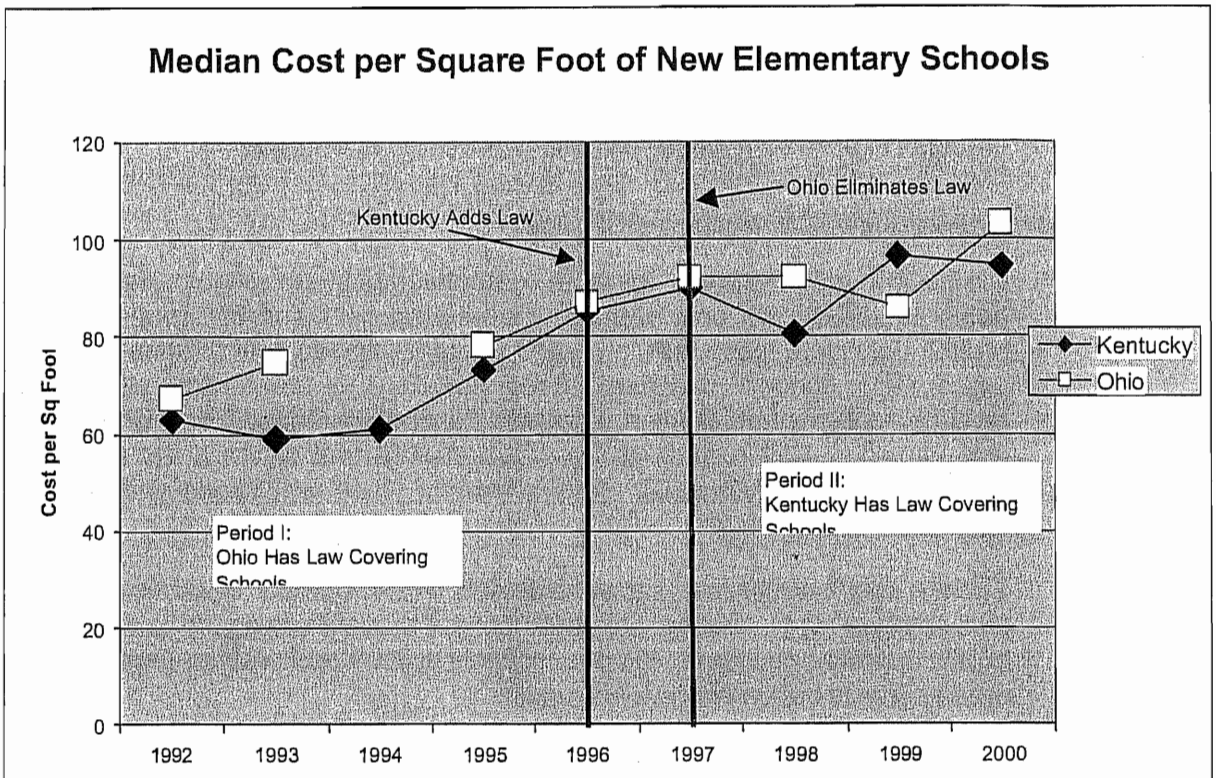
Almost half, 49% of the projects were built with prevailing wages while the remaining 51% were built without these regulations.

Table 2 shows the distribution of when the new public schools were built. Column c shows that 1991 had unusually few new public schools built, and the year 2000 had unusually many schools built. This reflects the two ends of the business cycle and building cycle. The year 1991 was a recession year and the economies of these states grew progressively from then through the 1990s. One result of this growth has been an expansion of school construction.

Year	Number of New Schools	Percent of Decade's Total New Schools Built in Each Year	Percent of Each Year's New Schools Built Under Prevailing Wage Laws
a	b	c	d
1991	5	1%	20%
1992	44	11%	61%
1993	28	7%	68%
1994	10	3%	50%
1995	39	10%	33%
1996	49	13%	37%
1997	53	14%	49%
1998	33	8%	58%
1999	56	14%	71%
2000	74	19%	30%
Total	391		49%

• Table 2: The time distribution of new school construction within the study

Table 2 also shows the annual percent of each year's new school construction that was done using prevailing wages. The balance tends to be stable over time. The dip in 1995 and 1996 is due to Michigan suspending its law in those years. (Michigan split construction in 1997 with the first half not using prevailing wages and the second half using this regulation.) In the year 2000, Ohio has a major increase in school construction, all done absent prevailing wages. This accounts for the somewhat lower percentage of new school built with prevailing wages in that year.



• Figure 2: Median Cost of New Public Elementary Schools in Kentucky and Ohio by Year

Figure 2 gives a general sense of the experiment we are going to perform. In Figure 2, the median square foot cost to build a new elementary school in Kentucky and Ohio are compared for the years 1992 to 2000. These data are not deflated. They are in the actual dollars reported at the time. Consequently, it is not surprising that the median cost rises with time. In our statistical model, we will deflate these prices using the Consumer Price Index and ask the question whether controlling for inflation, new school construction costs are still going up. We will also control for a variety of other factors that cannot be controlled for in a simple figure such as the one above. Our additional controls include a control for possible economies of scale associated with larger schools, a control for the differences between urban and rural construction, a control for fancy facilities, a control for tight construction markets possibly pushing up the real cost of construction. With these controls in place, we will look at variations in prevailing wage policies. In Figure 2, changes in prevailing wage policies are shown by two vertical lines, one in 1996 representing Kentucky's application of a prevailing wage regulation. And a second vertical line in 1997 representing Ohio's exemption of public schools from prevailing wages. If these laws had an effect on costs, one might expect to see a change in the general relationship between

median new public elementary school construction costs in the two states. Visually, this does not seem to appear. We will go beyond visual inspection to examine all 391 new schools and test whether or not, controlling for other factors, changes in prevailing wage regulations have made a difference.

Comparison of Mean Square Foot Cost

We begin our analysis with a simple comparison of the average or mean inflation-adjusted square foot cost of building a new school. The 391 new schools are broken down into those built in urban areas (126 schools) and those built in rural areas (265 schools). Urban areas include the areas around Cleveland, Columbus, Cincinnati, Dayton, Louisville, Lexington, Detroit, Flint, Grand Rapids and Lansing. Within each group of urban and rural schools, the schools are broken down into those built under prevailing wage regulations and those built without prevailing wages.

Table 4 shows the mean, standard deviation[1] and number of schools in each of four categories: 1) rural schools built without prevailing wages; 2) rural schools built with prevailing wages; 3) urban schools built without prevailing wages; and 4) urban schools built with prevailing wages.

		New Public Schools					
		Real (Inflation Adjusted) Square Foot Cost					
	a	b	c	d	e	f	g
1		Rural Schools			Urban Schools		
2		Mean	Standard Deviation	Number	Mean	Standard Deviation	Number
3	No Law	$96	$26	161	$114	$36	40
4	Law	$98	$24	104	$114	$34	86
5	t-test	-0.76			0.05		
6	Statistically Significant Difference?	No			No		

• Table 3: Comparison of the Real (Inflation-Adjusted) Square Foot Cost of New Public Schools by Urban and Rural Schools and Built without or with Prevailing Wages

[1] The standard deviation is, in essence the wiggle around an average. So for instance, if you had 5 children in a carpool ages 8, 9, 10, 11 and 12, the mean (or average) would be 10 years of age, and the standard deviation or wiggle around the mean would be 1.4 years.

The comparison of mean real square foot costs can be seen in rows 3 and 4, columns b and e. Considering rural schools first, the average or mean real square foot cost of schools built without prevailing wages was $96 per square foot while the mean real square foot cost of schools built with prevailing wages was $98 per square foot. There were 161 new rural schools built without prevailing wages in the sample and 104 new rural schools built using prevailing wages in this sample. (See column d, rows 3 and 4). The standard deviation is a statistical measure of the wiggle around each mean. It is used to construct a statistical test of whether or not the $2 difference in the average cost of construction per square foot is statistically significant. The statistical test is called a t-test. Typically, for there to be statistical significance, the t-statistic must be around plus or minus 2. In this case for rural schools where the difference is $2 per square foot, the t-statistic shown in column b, row 5 is -.75. What this means is, statistically speaking, there is no difference between the average square foot cost found for rural schools built with prevailing wages compared to the average square foot cost of schools built without prevailing wages.

Considering schools built in urban areas, in the sample, 126 new schools were built in urban areas with 40 being built without prevailing wages and 86 being built with prevailing wages. The average or mean real (inflation-adjusted) square foot cost of urban schools built with and without prevailing wages was almost equal. Indeed, rounding to whole dollars, they are equal at $114 per square foot (in year 2000 dollars).[2] Again, the t-test indicates that any minor difference in these two means (in this case 34 cents) is not statistically significant. Another way of putting this is: the difference in average real square foot construction cost for new public schools is due to random differences and statistically, the averages are equivalent. This conclusion holds both when comparing urban schools and when comparing rural schools built with and without prevailing wages.

A Statistical Model of New Public School Construction Costs

Table 4 presents the results of a statistical model of new public school construction costs. The model is called an ordinary least squares linear regression model. This type of statistical model is very commonly used by economists, epidemiologists and others studying social phenomena. The particular model in Table 4 uses the 391 new public schools built in Kentucky, Ohio and Michigan over the 1991 to 2000 period as data to help predict the effects of various factors on total new construction costs. The focus variable in

[2] If you do not round to whole dollars, the mean for schools built without prevailing wages was $114.17 and with prevailing wages it was $113.83.

the equation is the last variable in the model shown in gray on line 12. But before we get to this issue, let us examine the other aspects of the model.

	Model		Coefficient	t-statistic	Significance level	Statistically Significant?
1	a	b	c	d	e	f
2		(Constant)	4.45	16.05	0%	Yes
3	Size	Natural Log of the Total Square Feet of the Project	1.00	41.59	0%	Yes
4	Business Boom	Time (in years)	2.9%	5.58	0%	Yes
5	Location	School was built in Ohio	-12.6%	-3.70	0%	Yes
6		School was built in Kentucky	-14.6%	-4.03	0%	Yes
7		School was built in an urban area	10.5%	3.41	0%	Yes
8	Special Facilities	School had a gym/pool facility	9.2%	1.69	9%	Yes
9	Timing	School was started Winter quarter	-5.6%	-1.21	23%	No
10		School was started Spring quarter	-10.9%	-2.75	1%	Yes
11		School was started Summer quarter	-2.7%	-0.63	53%	No
12	Law	School was built with prevailing wages	0.7%	0.26	79%	No
13	**Total Cost of School**	**Natural log of real (inflation adjusted) total start cost of each new school (in year 2000 dollars)**				
14	Model statistics	Adjusted R-square (a goodness of fit statistic) = .85				
15		Number of new schools in the sample = 391				

• Table 4: A Linear Regression Model of the Total Square Foot Cost of Building New Public Schools in Kentucky, Ohio and Michigan Focusing on the Effect of Prevailing Wage Regulations

The first key factor in the model is the size of each of the 391 new schools. The coefficient of 1.00 says that as the square foot size of the school increases, the total cost of the school increases proportionately.[3] The second variable is simply time measured in years. This variable captures the fact that building costs have been rising faster than inflation in the 1990s. The cost data in the model are inflation adjusted using the Consumer Price Index. The time variable indicates that after adjusting for inflation, new public school construction costs in these three states have been rising at 2.9% per year from 1991 to 2000. This result is statistically significant. The reason building costs have been rising faster than inflation is because the economic boom has led to a very vigorous boom in building leading to heavy demand for construction services.

[3] In other studies, I have found in some cases that there were economies of scale in school construction costs. Namely, as school size increased, total cost went up but more slowly than total size went up. The absence of economies of scale among these 391 schools may be due to the relative homogeneity of the buildings in the sample

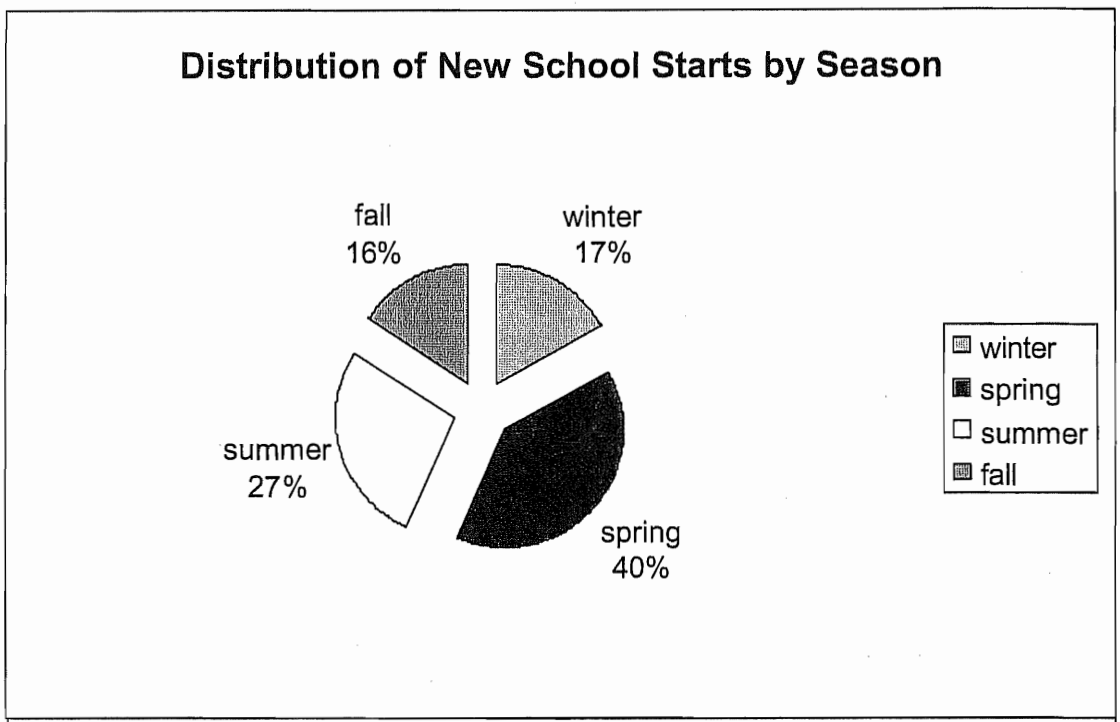
Rows 5, 6 and 7 in the model present three variables that control for where the school was built. Row 7 indicates whether or not the school was built in an urban area. Urban schools cost 10.5% more than rural schools controlling for other factors such as the size of the school. Rows 5 and 6 indicate whether or not the school was built in Ohio (row 5) or Kentucky (row 6). In the case of urban schools, the reference point was rural schools. In the case of Kentucky and Ohio, the reference point is Michigan. The model indicates that new Ohio schools cost 12.6% less than Michigan schools while new Kentucky public schools cost 14.6% less than Michigan new public schools. These results, too, are based on controlling for other factors such as the size of the school, when the school was constructed, whether or not the school was urban or rural and whether or not the school was built under prevailing wage mandates.

Rows 9, 10 and 11 indicate in what season the school was started. Row 9 indicates schools started in the winter quarter (January, February or March). Row 10 indicates schools started in the spring. And row 11 indicates schools started in the summer. In all three of these cases, the reference point is schools started in the fall. These seasonal variables get at the question of whether breaking ground on a new school in the face of winter weather raises the cost of building that school.

The model indicates that schools started in the winter were 5.6% cheaper than schools started in the fall. But this result is not statistically significant. The lack of statistical significance means that you cannot be sure there really is any difference in the total cost of schools started in the winter compared to the fall. In the case of schools started in the spring, they were 10.9% cheaper than schools started in the fall (again controlling for other factors such as the size of the school, whether it was an urban or rural school, etc.). In this case, the results of the model are statistically significant. That is, this statistical model indicates that you can be confident that breaking ground in the spring will lead to lower cost new school construction compared to breaking ground in the fall.[4] Breaking ground in the summer is estimated to be 2.7% cheaper than breaking ground in the fall, but this is not a statistically significant difference. The point of these results, however, is clear. Don't break ground into the teeth of winter. It will cost you. Indeed, the model shows that by starting in the spring instead of the winter saved enough money for each school to include a gymnasium/pool facility in its specifications. The 7% of all schools that had such facilities paid 9.2% more total costs, controlling for other factors. And compared to starting in the fall, starting in the spring would have offset the cost of a swimming pool.

[4] In most cases in the FW Dodge data, the start date is the date of bid acceptance. Given that there will be some lag between bid acceptance and ground breaking, fall probably means late fall and spring probably means late spring. Also, given the probable cause of increased costs associated with breaking ground in the late fall is weather, the effect of this seasonal factor is probably stronger in the colder areas within the sample of Michigan, Ohio and Kentucky.

Figure 3 shows that for the most part, school boards and contractors know this. Fully 40% of all new public schools in Kentucky, Ohio and Michigan started in the years 1991 to 2000 were started in the spring. Fall starts—the most expensive start time—accounted for only 16% of all starts. However, whatever drove schools boards to start schools in the fall compared to the spring also led them to pay a 10% premium for this choice of when to break ground.



• Figure 3 : Percent Distribution of New School Starts by Season for Kentucky, Ohio and Michigan, 1991-2000

The Effect of Prevailing Wages on Costs

Controlling for seasonality, controlling for differences in rural and urban construction costs, controlling for the size of the project and controlling for the state in which the project was built, the model estimates that using prevailing wage regulations raised school construction costs by 7/10th of 1%. But again, this is not a statistically significant result. In effect, the model says there is no effect on total costs associated with prevailing wages.

How can this be? Prevailing wage rates insure that all contractors must pay the wage rates that prevail for an occupation in an area. Without this regulation,

contractors are free to pay whatever they want (or the market will allow). The fact is that prevailing wage regulations induce contractors to hire a more skilled labor force and equip them with better, more up-to-date, tools, materials and equipment. It also induces management to compete over better management strategies and techniques. Thus, the higher wage rates are offset to a large extent by higher skilled, better equipped, and better managed workers.

It may be, however, with more observations, we would find that the 0.7% higher cost associated with prevailing wage regulations would turn out to be statistically significant. And, in a market where the government is obliged to accept the lowest bidder regardless of the reputation or history of the contractor, that 0.7% difference could lead to an entire changeover in the contractors doing business in building schools. But we must remember that this model is based on start costs—accepted bid price. The ultimate cost of a new school includes cost overruns and the downstream cost of maintenance. The potential 0.7% savings may be an offer for school boards to become penny wise and pound foolish.

Conclusion

A simple comparison of the mean (or average) inflation-adjusted square foot cost of building 391 new public schools in Kentucky, Ohio and Michigan broken down by urban and rural schools finds no statistically significant difference between those public schools built with prevailing wages and those public schools built without this regulation. A more complex statistical model that estimates new public school construction costs based on the size of the project, whether it was an urban or rural school, which state built the school, and at what time of the year the school was built again finds no statistically significant effect on total new school construction costs associated with whether or not the school was built with prevailing wages. While net effect of prevailing wage regulations is apparent, school boards can save 10% on new school construction costs by starting in the spring and not breaking ground in the face of winter weather. While 40% of all new schools do start in the spring, 16% of new schools had to pay this 10% penalty by starting as winter approached.

The data used in this study come from FW Dodge reports and show the start cost—or accepted bid price—of the new school. Final cost of new public school include cost overruns and downstream maintenance costs. The higher wage rates required by prevailing wage regulations insure that all contractors bidding on the job will use skilled labor when building the school. If you have to pay for the high-priced spread, you might as well buy it. Thus, prevailing wage regulations offer school boards some assurance that the project will be skillfully built and workers on the job will be carefully managed. Consequently, prevailing wage regulations provide some assurance against cost overruns and downstream maintenance costs.

Peter Philips grew up in Compton and Pomona, California. He received his B.A. from Pomona College in 1970 where he majored in economics and received the Leland Backstrand Graduating Senior Award in Economics. Philips received his M.A. in economics (1976) and his PhD in applied economics (1980) from Stanford University. Philips is a Professor of Economics at the University of Utah. He is co-editor of *Three Worlds of Labor Economics* (M.E. Sharpe, 1986) and coauthor of *Portable Pensions for Casual Labor Markets: the Central Pension Fund of the Operating Engineers* (Quorum Books, 1995). Philips has published widely on the canning and construction industries in journals such as the *Journal of Education Finance, Industrial and Labor Relations Review, Industrial Relations, Business History,* the *Journal of Economic History, Historical Methods, The Journal of Economic Literature, Oxford Encyclopedia of Economic History* and the *Cambridge Journal of Economics.* Philips has been a consultant for the U.S. Labor Department analyzing the supply of cannery labor in California, and he has worked as an expert on the Davis-Bacon Act for the U.S. Justice Department. The Davis-Bacon Act regulates wage payments to construction workers on federal public works. Philips is a respected expert on prevailing wage laws and on employment, training wages and benefits in the construction industry. He has testified before state legislative committees in Ohio, Indiana, Kansas, Oklahoma, New Mexico and California on their state prevailing wage laws. Along with other researchers at the University of Utah, Philips has analyzed the effects of prevailing wage laws on public construction costs, construction worker incomes, apprenticeship training, worker safety and minority access to construction work.

Philips is the senior labor economist at the University of Utah. He teaches a wide range of courses in the area of labor economics, econometrics, labor law, collective bargaining and economic history. Philips has received awards for his teaching and community service, including University of Utah Public Service Professorship, the University of Utah Presidential Teaching Scholar Award and the University of Utah, College of Social and Behavior Science Superior Teacher Award. Philips is married with two children.

Appendix

Simple Comparison of One Year Before and One Year After Legal Change in Kentucky, Ohio and Michigan

The following is a simple comparison of the average or mean square foot cost of new public schools one year before compared to one year after a change in the prevailing wage law in the three states—Kentucky, Ohio and Michigan.

Kentucky applies prevailing wage regulations to public school construction in July of 1996. Ohio exempts public schools from prevailing wage regulations in July of 1997. A Michigan court suspended the application of prevailing wage regulations in the state in December, 1994. A second court reapplied prevailing wage regulations in July of 1997.

These variations allow for four simple 12-month before-and-after comparisons--one for Kentucky, one for Ohio and two for Michigan. In this simple comparison there is no adjustment for inflation and no statistical tests for equality of means. All that is presented is the raw averages and the number of new public schools that comprise each average.

Average Square Foot Cost

	Before	# Schools	After	# Schools	Legal Change	Cost Change
Kentucky: No-Law to Law	$86	17	$86	15	Enactment	$0
Ohio: Law to No-Law	$77	7	$90	18	Repeal	$13
Michigan: Law to No-Law	$83	14	$94	5	Suspension	$11
Michigan: No-Law to Law	$101	40	$108	9	Resumption	$6

- A 1: Simple Comparison of Mean Square Foot Cost of New Public Schools for the 12 Months Before and After a Policy Change

Table A1 shows that for Kentucky, the mean square foot cost of 17 schools built in the 12 months prior to the application of prevailing wage regulation to public school construction equaled the mean square foot cost of 15 new public schools built in the 12 months after the application of prevailing wages. In Ohio, there was a $13 increase in the mean square foot cost of new school construction subsequent to the repeal of the application of prevailing wages to public school construction. In the case of Michigan, when the law was suspended, the mean square foot cost of new public school construction rose in the subsequent 12 months by $11 per square foot. When Michigan reapplied prevailing wages to public school construction, the mean square foot cost rose again by $6 per square foot.

Other factors that might influence these changes include inflation, tightening construction markets, and the mix between urban and rural schools. These factors are controlled for in the econometric model presented in the main body of this report.

Prevailing Wage Laws and School Construction Costs

An Analysis of Public School Construction in Maryland and the Mid Atlantic States

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About the Author

Mark Prus grew up in Northeastern Ohio and Arizona. He lived in Cumberland, Maryland briefly. He received his B. A. in economics from the University of Notre Dame in 1979. Prus received his Ph.D. (1985) from the University of Utah where he was the Marriner S. Eccles Fellow in Political Economy. Prus is an Associate Professor of Economics, and Chairman of the Economics Department at the State University of New York at Cortland. Prus has published widely on labor market issues in journals such as the *Journal of Economic History, The Journal of Economic Issues,* the *Cambridge Journal of Economics, Research in Economic History, and the Quarterly Review of Economics and Finance.* Prus is a respected expert on prevailing wage laws and their effects on construction costs. He has served as a consultant to the Construction Labour Relations Association of British Columbia and testified before the Department of Industrial Relations in California on their state prevailing wage law. He has presented the results of his research on the construction industry at the Western Economics Association Annual International Conference and the Economics Research Network.

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A number of people gave generously of their time in the preparation of this report. Dr. Yale Stenzler, of the Interagency Committee on School Construction, described at length the the process of public school construction funding in the state of Maryland and also provided me with copies of the reports on Prevailing Wages in Maryland produced by the Department of Fiscal Services. Dr. Stenzler also gave me the names of facility planners in each county, allowing me to check on the coverage, or lack thereof, of prevailing wage laws. Tammy Woolford and Richard Avalone at the Prevailing Wage Unit of the Maryland Department of Labor helped me identify school projects in Maryland built with prevailing wage requirements. Jim Correll of the Baltimore Building and Construction Trades and Sheldon Sugarman of the Baltimore City Wage Rate Commission helped me understand the application of Baltimore City's local prevailing wage law, and identify schools in Baltimore City built with prevailing wage requirements. Dr. David Miller generated the map of the Mid Atlantic states and Dr. Lisi Krall patiently read the entire report and offered helpful comments. All of these people, and many others patiently answered my questions, even when I asked them more than once. Without their help my chances of getting it right were much smaller. Or course I alone am responsible for any remaining errors.

A

Executive Summary

At the request of the Prince George's County Council, I conducted this analysis of the impact of prevailing wages on public school construction projects. The county council commissioned this study to guide them as they consider the adoption of a bill to require adherence to state prevailing wage rates in the construction of public schools. While the state of Maryland has a prevailing wage law, it mandates the payment of prevailing wages only for those school projects for which the state provides 75 percent or more of the funding. Prince George's County is embarking on a six year capital program for the construction and /or renovation of eighteen schools in the county.

I have attempted to address the following four concerns of the county council:

- Compare school construction costs in states with prevailing wage laws to those in states without prevailing wage laws in the mid Atlantic region.
- Compare school construction costs within Maryland for those local jurisdictions that pay prevailing wages to costs in those areas where prevailing wage rates are not required.
- Analyze the extent to which local contractors have been harmed by unfair competition from outside contractors due to the absence of prevailing wage requirements on school construction projects.
- Examine the extent to which the absence of prevailing wage rates in school construction impacts construction wages across the construction industry.

The analysis presented here provides answers to each of these questions primarily through the statistical manipulation of data on individual school construction projects provided by the F. W. Dodge Corporation. The analysis exploits variations across the mid Atlantic region, or within the state of Maryland, in the application of prevailing wage requirements. Within the mid Atlantic region, Delaware, Pennsylvania and West Virginia have prevailing wage laws that apply generally to public school construction. North Carolina and Virginia do not have state prevailing wage laws, and while Maryland has a state prevailing wage law, it only applies to public school construction projects if the state government provides 75 percent or more of the funding for the project. The Maryland state law does, however, allow for voluntary adherence to prevailing wages, and two local jurisdictions (Allegany County and Baltimore City) have elected to do so.

Chapter 1 presents a brief history of prevailing wage laws and their impact on construction costs. In Chapter 2 of this study, I examine the actual square foot construction costs of schools built in mid Atlantic states with and without prevailing wage laws over the period 1991 to 1997. This study includes data on school construction projects for Delaware, Pennsylvania, West Virginia, Maryland, North Carolina and Virginia. The first three states have prevailing wage laws that apply to school construction; the latter three do not. While square foot costs for new school construction are generally higher in prevailing wage law states, this may be due to regional differences in the cost of living. Public school construction costs also tend to be higher than private school construction costs, but this is true irrespective of whether or not a state has a prevailing wage law. A formal linear regression statistical model capable of controlling for these and other factors confirms the hypothesis that there is no measurable or statistically significant increase in construction costs associated with prevailing wage regulations.

Chapter 3 examines school construction costs within the state of Maryland. A previous study by the Department of Fiscal Services, which found that prevailing wage requirements within the state raised school construction costs by 15 percent, is examined. The results of that study are shown to be very sensitive to the inclusion or exclusion of particular variables. At the time of that previous study most schools were built in Maryland with prevailing wage requirements. Since that time changes in the allocation of state funds have led to the vast majority of schools being built without prevailing wages. Some local jurisdictions, however, have already adopted prevailing wage requirements of the kind being considered by Prince George's County. These include Allegany County and Baltimore City. A comparison of school construction costs between those jurisdictions with prevailing wages and those without is conducted. Controlling for other influences on costs, prevailing wage requirements do not measurably affect the costs of school construction.

Chapter 4 examines the relationship between prevailing wage laws and the extent of competition between contractors. One of the original intents of prevailing wage laws was to limit competition from itinerant contractors who would import low wage labor from outside the local labor market. Little empirical work has been done in the past to determine the extent to which this original intent has been fulfilled. Regression analysis is used to determine the nature of the correlation between prevailing wage laws and whether contractors from outside the local construction labor market are successful in bidding for school construction projects. Prevailing wage regulations appear to restrict the ability of urban contractors to win rural construction contracts but encourages rural contractors winning of urban jobs.

Chapter 5 looks at the impact that prevailing wage laws have on construction workers' wages. Using data from the U.S. Census Bureau's County Business Pattems, the wages of construction workers relative to all employees' wages are compared for prevailing wage and non-prevailing wage jurisdictions. Construction workers eam a premium in prevailing wage jurisdictions over other nonagricultural workers. This premium ranges from 7 to 16 percent.

1

Prevailing Wage Laws in Maryland and the U. S.: Their History, Intent And Impact

Nationally, prevailing wage laws date back to the Republican Congress of 1868 that passed a National Eight-Hour Law that provided for an eight-hour day on public construction. Congressional debate made it clear that when the working day was shortened from 12 or 10 hours per day to eight, workers were still to be paid the prevailing daily wage. Ulysses Grant was the first President to call for the enforcement of prevailing wage regulations. Kansas was the first state (1891) to pass a prevailing wage law. In upholding the constitutionality of this law, Supreme Court Justice John Marshall Harlan stated that the purpose of the law was to raise labor standards not only in construction but by example for all blue collar workers. Seven states passed prevailing wage laws between 1891 (Kansas) and 1923 (Nebraska). Sixteen states passed prevailing wage laws between 1931 and 1937. Maryland's prevailing wage law was originally passed in 1945. Eventually all but nine states would pass prevailing wage laws. (See Table 1.)

At the national level, the Davis-Bacon Act, passed in 1931, required payment of prevailing wages on federally financed construction projects. However, the original language of the law was vague, and prevailing wages generally were not determined before the acceptance of bids. In 1935, President Roosevelt signed clarifying amendments to the act, which became the basis of the current Davis-Bacon Act.

Prevailing wage laws emerged from a concern that cutthroat competition over wages in construction would lead the industry down a low-wage, low-skill development path. This was said to put the quality of construction at risk and lead to an itinerant, footloose, low-wage construction labor force. Poor construction workers would make poor neighbors and potential burdens on the community. Reasonably paid construction workers, on the other hand, held out the possibility of being solid neighbors, good citizens and productive members of the community. Government, by the operation of prevailing wage laws, was supposed to get out of the business of cutting government costs by cutting the wages of its citizens. Whatever labor standards had been established, whatever wages prevailed in a local community; that is what the law said government should pay on public works.

Like other prevailing wage laws, Maryland's prevailing wage law establishes minimum wage levels to be paid on public construction projects. Maryland's current law enacted in 1969, requires that prevailing wages be paid to workers on any public construction project which receives 50 percent or more in state funding and is valued at $500,00 or more. An earlier prevailing wage law, adopted in 1945, applied to highway projects in certain parts of the state. Public school construction is subject to prevailing wage requirements in Maryland if 75 percent or more of the funding comes from the state. While this threshold appears to have been met in the majority of school construction projects in the 1980s, changes in the method of allocating state funding for school construction in 1989 reversed this situation so that most schools in Maryland are built without prevailing wage requirements. Allegany County and Baltimore City have enacted local prevailing wage laws that typically apply to school construction projects. Baltimore City's Ordinance, approved in 1973, required the payment of minimum wages on "each and every contract in excess of five thousand dollars made by the Mayor and City Council of Baltimore." The minimum wages required in these contracts would be set by the Board of Estimates at least once every year to conform to area prevailing wage rates.

Since the late 1970s, prevailing wage laws at both the national and state level have come under pressure. Calls for repeal or reform of prevailing wage laws have been motivated by the suspicion that they increase public construction costs and hinder competition. Opponents of prevailing wage laws argue that they raise construction costs. Repeal of these laws would result in cost savings on the order of 20 to 30 percent according to some. If such savings were possible, it is argued, school districts could build five schools for the price of four.

But while a number of states have moved to repeal their prevailing wage laws, Prince George's county is not alone in considering the adoption of stronger prevailing wage statutes. Kentucky, for example, recently re-extended its state prevailing wage law to cover school construction costs. Outside of the United States, the provincial government in British Columbia adopted a prevailing wage regulation through its Skill Development and Fair Wage Act in 1992.

Estimating the Impact of Prevailing Wage Laws on Construction Costs

In all cases, policy makers are concerned with the costs associated with prevailing wage laws. Claims of the added cost associated with prevailing wage laws and of cost savings from repeal have not been adequately supported by empirical evidence. Some efforts to estimate the impact of prevailing wages are construction costs have used differences in wage rates between union and nonunion construction workers. Yet wage differences have a moderate effect on total construction costs. Labor costs are less than a third of total construction costs and may have been falling. In 1972, for instance, in an analysis of school construction costs, John Olsen found that

onsite wages and salaries excluding benefits were 28.2 percent of total costs. (Monthly Labor Review, 1979, p. 40) According to the Census of Construction, labor costs, counting benefits, on all types of construction were 30 percent of total costs in 1977 and had fallen to 26 percent by 1987.

A second problem leads us to question estimates of the impact of prevailing wage legislation on construction costs based on an analysis of wage differences. Because they assume implicitly that the same number of hours of each type of labor will continue to be employed and that labor is of invariant productivity the impact on costs is driven by the wage differential. Neither of these assumptions is necessarily appropriate. The payment of prevailing wages may serve to attract workers with more experience and training. Increased labor productivity may result in fewer hours of labor being required thus offsetting the higher wage rate. For instance, Allen has shown that unionized labor in the construction industry is between 17 and 52 percent more productive than nonunion labor. (Allen, 1984) Additionally, higher wage rates may lead contractors to substitute capital or other inputs for labor, mitigating the impact of higher wages rates on total construction costs.

These possibilities, alone or in combination, make the assumptions underlying the analysis of construction costs based on wage differences inappropriate and cast doubt on the estimates of cost savings. Specifically, it is difficult to imagine how savings of 20 to 30 percent are possible. To get a true picture of the impact of prevailing wage legislation's impact on total construction costs, one could evaluate not only differences in wage rates, but also productivity differences, the incidence of substitution, administrative costs and other ways in which the impact of these laws is either mitigated or enhanced. An alternative approach is to simply examine total construction costs directly and compare costs in the presence and absence of prevailing wage laws controlling for project differences.

Few studies have attempted to estimate the impact of prevailing wage legislation based on ***actual total construction costs***. Fraundorf, et. al., in "The Effect of the Davis-Bacon Act on Construction Costs in Rural Areas," examined 215 new, non-residential construction projects built in 1977 and 1978. (Fraundorf, 1983) Approximately half of these projects were federal projects built under the purview of the federal Davis Bacon Act specifying that prevailing wages be paid. The other half were privately owned projects constructed without the requirement that prevailing wages be paid. Data on total construction costs were then compared using multivariate regression analysis to control for the effects of factors other than the presence of prevailing wage requirements. This study controlled for differences in the type of structure, the types of materials used, and project size in an effort to focus on cost differences associated with labor cost differentials resulting from the dichotomy in regulatory regimes. It also attempted to control for regional differences in construction costs by grouping projects into four regions; Northeast, North Central, South and West. The dependent variable in their regression analysis was the natural log of the project's bid price deflated to 1977 dollars. The authors of the study found, somewhat

surprisingly, that federal construction projects governed by Davis Bacon were 23 percent more expensive than private construction projects controlling for other cost influencing factors.

When they re-estimate their basic model to correct for disproportionate response rates by region and building type, Fraundorf finds that the impact of Davis Bacon on total construction costs is as high as 30 percent. While they admit that these results are high, especially in light of a public-private wage differential estimated at 20 percent, they point out that the results are consistent with other aspects of the data. In particular they do not find evidence of factor substitution which would mitigate the impact of prevailing wage requirements. However, this does not explain why the impact on total costs is greater than the wage differential. They explore other factors that might contribute to the higher costs of federal Davis Bacon projects such as record keeping and reporting, and decreased competition. Neither of these factors appear to significantly contribute to costs on federally funded construction. (Fraundorf, et. al, 1983, p. 145)

One possible problem with the Fraundorf study is that regional differences in construction costs may have been inadequately controlled for. Given the relatively small sample size, the authors of this study had to group construction projects into relatively broad regions. This creates the potential for comparing a private project in a low cost state such as Idaho with a public project in a high cost state such as California. Since both projects are considered to be in the same region the cost differential is incorrectly attributed to the impact of prevailing wages when in fact it is due to differences in the cost of living or cost of materials between Idaho and California.

Another problem may result from the way in which building types were classified. Each construction project was placed into one of six categories; recreational buildings, storage facilities, industrial buildings, office-commercial, medical and other. These categories were then used to find matches between public and private construction projects. However, these six categories were sufficiently broad to allow rather dissimilar buildings to be considered comparable. For instance, in the category storage facilities, warehouses were grouped with barns as well as airplane hangars. Likewise office buildings were in the same category as restaurants. Differences in costs between public and private buildings may have resulted from differences in structure type and not from prevailing wage requirements. (Fraundorf, 1982, pp. 14-15)

A second and potentially more serious problem with this study is that it fails to adequately isolate the impact of prevailing wage legislation on construction costs. Specifically, Fraundorf compares private projects constructed in the absence of prevailing wage legislation with federal (i.e., public) projects built using workers paid the prevailing wage. This comparison, while seemingly appropriate, contains the potential for confounding cost differences related to prevailing wage laws with cost differences resulting from other differences between private and public construction projects. The authors recognize this possibility when they point out, "If the government is more exacting than private owners in its quality standards, labor hours (and costs) and

possibly material costs would be higher on government projects." (Fraundorf, 1983, p. 145) It may also be that the difference in bidding procedures for public and private contracts or differences in the time horizon of public and private owners may contribute to higher costs in the public sector. In other words, the cost differential that Fraundorf attributes to the effect of prevailing wage legislation may in fact be due to differences between public and private construction.

While the Fraundorf study suffered from certain problems in the specification of the model, it opened the way for the use of regression analysis for studying the impact of prevailing wage laws on public construction costs. I have used a regression model patterned after the Fraundorf study to analyze total construction costs and prevailing wage laws in the U.S. and in British Columbia. In my analysis of state prevailing wage laws, I found that while public projects were significantly more expensive than similar private projects, this was true in both prevailing wage law states and non-prevailing wage law states. Consequently, the higher costs of public projects could not be attributed to the presence of prevailing wage laws. In fact, the estimated effect of prevailing wage laws, controlling for other factors, including differences in the type of ownership, was not statistically different from zero.

Table 1: Prevailing Wage Laws by State, Year Passed and Repealed

States having prevailing wage laws	Year passed
Alaska	1931
Arkansas	1955
California	1931
Connecticut	1935
Delaware	1933
District of Columbia	1931
Hawaii	1955
Illinois	1931
Indiana	1935
Kentucky	1940
Maine	1933
Maryland	1945
Massachusetts	1914
Michigan	1965
Minnesota	1973
Missouri	1957
Montana	1931
Nebraska	1923
Nevada	1937
New Jersey	1913
New Mexico	1937
New York	1894
Ohio	1931
Oklahoma*	1909
Oregon	1959
Pennsylvania	1961
Rhode Island	1935
Tennessee	1953
Texas	1933
Washington	1945
West Virginia	1933
Wisconsin	1931
Wyoming	1967

States without prevailing wage laws
Georgia
Iowa
Mississippi
North Carolina
North Dakota
South Carolina
South Dakota
Vermont
Virginia

States that repealed prevailing wage laws	Year passed	Year of repeal
Alabama	1941	1980
Arizona	1912	1984
Colorado	1933	1985
Florida	1933	1979
Idaho	1911	1985
Kansas	1891	1987
Louisiana	1968	1988
New Hampshire	1941	1985
Utah	1933	1981

*The enforcement of Oklahoma's law was judicially suspended in 1995.

2

The Impact of Prevailing Wage Laws on School Construction Costs

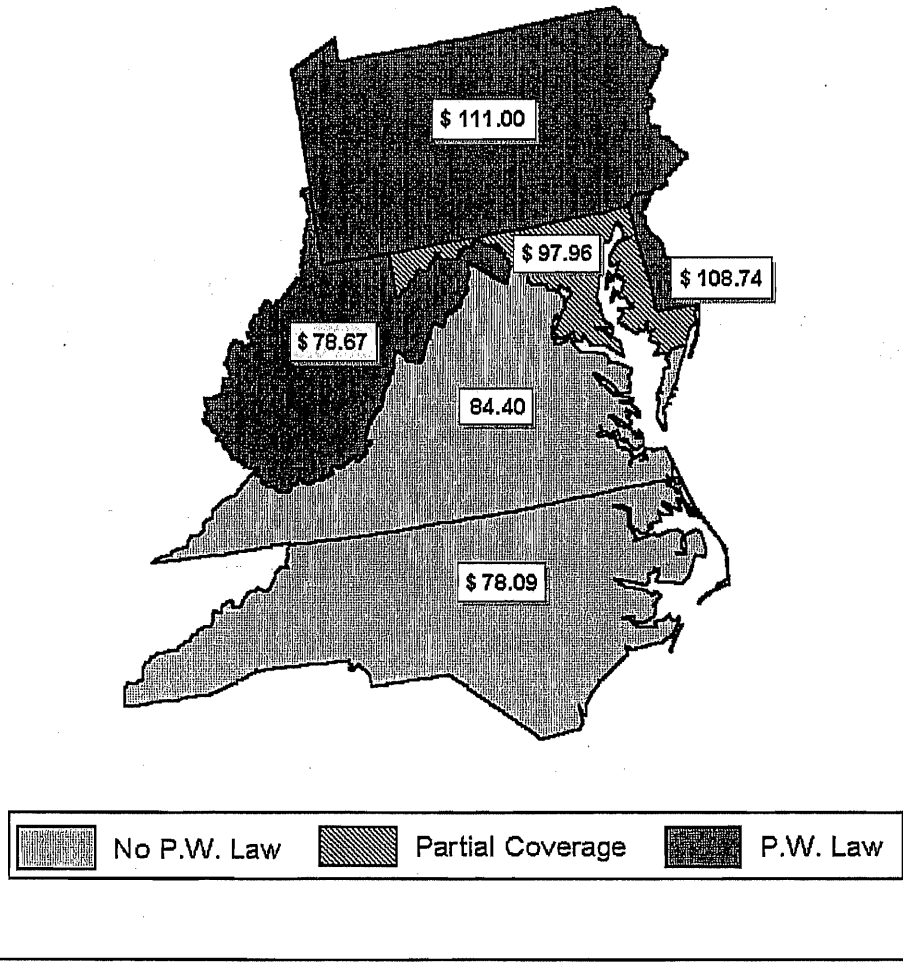
A Case Study of the School Construction Costs in Mid Atlantic States with and without Prevailing Wage Laws

One way of estimating the impact of prevailing wage laws on school construction projects that avoids the problems associated with the necessarily restrictive assumptions involved in wage rate comparisons, is to compare actual total school construction costs in the presence and absence of prevailing wage regulations. Maryland, while it has a state prevailing wage law, constructs most schools in the 1990s without requiring prevailing wages. In contrast, a number of surrounding states in the Mid Atlantic region have prevailing wage laws that generally apply to school projects. These include Pennsylvania, Delaware and West Virginia. Other states, namely, Virginia and North Carolina do not have a state prevailing wage law. This regional variation creates the opportunity for a "here and there" analysis of school construction costs using a multiple regression model similar to both the Fraundorf model and the model I have used previously to estimate the impact of state prevailing wage laws on public construction costs. Before that model is presented, I develop a more intuitive comparison of square foot costs for school construction.

A Comparison of School Construction Costs

As a first exercise in comparing school construction costs, the median square foot costs of new public schools built from 1991 to 1997 in each of the six states in the Mid Atlantic regionare presented in Figure 1. As can be seen, square foot costs are highest in Pennsylvania and Delaware and lowest in North Carolina, Virginia and West Virginia. While Pennsylvania and Delaware are two states with prevailing wage laws, and North Carolina and Virginia are states without prevailing wage laws, it would not necessarily be appropriate to conclude that prevailing wage laws raise school construction costs.

Figure 1: Median square foot school construction costs for Mid-Atlantic States with and without Prevailing wage laws.



Tables 2 and 3 show the median square foot construction costs for school construction projects in the mid Atlantic region over the period 1991 to July, 1997. The accepted bid price of the schools were inflated to 1997 dollars using the consumer price index-housing. This allows for a direct comparison of square foot costs for school construction projects in different years.[1] For all schools included in Table 2 the cost of schools in states without prevailing wage laws is $75.57 per square foot, while the square foot cost of schools in prevailing wage law states is $94.07. Schools in prevailing wage law states appear to cost 24.5 percent more. When school construction projects are disaggregated into elementary, middle and high school projects, we see that this difference is attributable to substantial differences in middle school and high school construction projects. The cost of elementary school projects in prevailing wage law states is actually lower.

Table 2: Square Foot School Construction Costs by States with and without State Prevailing Wage Laws (notice caution in footnote)

Square Foot School Construction Cost by States with and without State Prevailing Wage Laws

LEGAL STATUS	ELEMENTARY SCHOOLS Median	Number of Obs.	MIDDLE SCHOOLS Median	Number of Obs.	HIGH SCHOOLS Median	Number of Obs.
No Law	$82	N=14	$80	N=6	$67	N=8
Has Law	$60	N=4	$112	N=4	$124	N=1
% Increase in Cost	-26.7%		40.5%		85.4%	

Note: Data are for 1991 to 1997 Inflated to 1997 Dollars Using the Consumer Price Index-Housing
Source: F.W. Dodge Corporation Start Cost Data
Caution: these data are for private schools only--no public schools are included

However, Table 2 presents data for private schools only. These schools were built without prevailing wage regulations regardless of whether or not they were in a state with a prevailing wage law. Prevailing wage laws cover public projects only. The fact that the median square foot cost was higher for private schools in states with prevailing wage laws simply reflects the fact that the states without prevailing wage laws in the Mid Atlantic region are generally further south and may have dramatically different costs of living and costs of construction. Square foot construction costs are generally lower in these regions for private as well as public projects for a variety of reasons. Thus, in assessing school construction costs in states with and without state prevailing wage laws, we will need to take into consideration overall differences in construction costs in these groups of states.

[1] The data are from the F. W. Dodge Corporation, the standard service provider of project information in the construction industry. Alternative price indices were tried to examine whether results were dependent on the price index chosen. Results were basically the same regardless of the price index used to translate information into constant 1997 dollars.

Table 3 divides school construction into publicly and privately built schools. Combining all school construction projects, public schools cost $84.09 per square foot compared to $75.57 for private schools. Public schools cost 11.3% more per square foot than private schools. When school projects are disaggregated by type, public elementary schools cost 3 percent more than private schools, and public high schools cost more than 26% more per square foot to build than private high schools. **These data, however, refer only to public and private schools built in states that do not have a state prevailing wage law.** Thus, the public-private cost differential cannot be laid at the foot of prevailing wage regulations. This reminds us that in assessing the effects of prevailing wage regulations on building costs, we must keep in mind that similar public and private buildings, such as elementary schools or high schools, may differ in the quality and nature of their construction.

Table 3: Square Foot School Construction Costs by Public and Private Projects

Square Foot Public and Private School Construction Costs Compared							
OWNERSHIP OF PROJECT	Number of Obs.	ELEMENTARY SCHOOLS Median Sq. Ft. Cost	Number of Obs.	MIDDLE SCHOOLS Median Sq. Ft. Cost	Number of Obs.	HIGH SCHOOLS Median Sq. Ft. Cost	Number of Obs.
Private Project	N=80	$81.85	N=14	$79.78	N=6	$66.87	N=8
Public Project	N=52	$84.40	N=170	$80.43	N=48	$84.73	N=34
% Increase in Public Cost		3.1%		0.8%		26.7%	

Note: Data are for 1991 to 1997 Inflated to 1997 Dollars Using the Consumer Price Index-Housing
Note: Public Projects exclude Federal projects.
Source: F.W. Dodge Corporation Start Cost Data

Table 4 presents a more appropriate comparison, though it points to the problem of small subsample sizes at the same time. The square foot cost of new construction for elementary, middle and high schools is presented. These data are first broken down into states with state prevailing wage laws and states that do not have state prevailing wage laws. Then the data are broken down a second time into public schools and private schools. Finally, for both states with laws and states without laws, a comparison is made. How much more or less expensive is it to build a public school? Table 4 compares 76 public elementary schools in states with a prevailing wage law to the construction of 4 privately built elementary schools in those states. The public elementary schools cost 80% more per square foot than the private elementary schools. Perhaps this implies that prevailing wage laws raise elementary school construction costs by about 80%, though the magnitude of this cost differential exceeds virtually all estimates of the impact of prevailing wage requirements on costs.

Public middle schools actually cost 2.8% **less** than private middle schools in prevailing wage law states—compared to the .8% difference in states without

prevailing wage laws. Public high schools in non-prevailing wage law states cost 26.7% more than private high schools in those states. In stark contrast, in prevailing wage law states, public high schools cost 32.7% **less** than private high schools, though there is only one private high school (and an exceptionally costly one at that) in prevailing wage law states. While these small subsamples make any inference drawn from these comparisons shaky, the data in Table 4 do not provide strong support for the contention that prevailing wage laws raise school construction costs.

Table 4: Square Foot Cost of New School Construction Broken Down by State WITH and WITHOUT State Prevailing Wage Laws and then Broken Down by Public and Private Schools

LEGAL STATUS	OWNERSHIP OF PROJECT	ELEMENTARY SCHOOLS Median Sq. Ft. Cost	Number of Obs.	MIDDLE SCHOOLS Median Sq. Ft. Cost	Number of Obs.	HIGH SCHOOLS Median Sq. Ft. Cost	Number of Obs.
NO LAW STATE	Private Project	$81.85	N=14	$79.78	N=6	$66.87	N=8
	Public Project	$84.40	N=170	$80.43	N=48	$84.73	N=34
	% Increase in Public Cost	3.1%		0.8%		26.7%	
LAW STATE	Private Project	$59.97	N=4	$112.09	N=4	$124.35	N=1
	Public Project	$107.96	N=76	$108.99	N=22	$83.65	N=22
	% Increase in Public Cost	80.0%		-2.8%		-32.7%	

Note: Data are for 1991 to 1997 Inflated to 1997 Dollars Using the Consumer Price Index-Housing
Note: Public Projects exclude Federal projects.
Source: F.W. Dodge Corporation Start Cost Data

Using a Linear Regression Model to Measure the Effect of Prevailing Wage Laws on School Construction Costs.

In economics, a statistical technique called linear regression is a standard method for measuring the effect one factor has upon another controlling for other things. For instance, we can develop a model designed to predict the cost of building a school based on

- Whether it is an elementary, middle or high school
- how many square feet are in the project
- how many stories the building is
- what kind of building materials are used in construction
- whether or not the school is public or private, and

Controlling for these factors, we can then ask the question: if the school is being publicly built in a state with a prevailing wage law, will it cost more? This statistical technique is the same used by Fraundorf, et. al. to examine the impact of the Davis Bacon Act on public construction costs.

Table 5 presents a linear regression model that predicts total school construction costs (excluding land acquisition, architect fees and construction management fees) based on the size of the building, the number of stories, the type of building materials used, whether or not the school is an elementary, middle or high school, whether the school is public or private and whether the school was built under a prevailing wage law.

Table 5: A "Here-There" Cross State Linear Regression Model Predicting Total Construction Costs for New Elementary, Middle and High Schools, 1991-1997

Constant	-9.866	Yes	0%
Log of Total Square Feet	0.872	Yes	0%
Log of the Number of Stories	0.066	Yes	10%
Marker for Wall Board Framing	-0.016	No	60%
Marker for Wood Framing	0.055	Yes	8%
Marker for Steel Framing	-0.239	No	31%
Marker for Cement	-0.051	No	49%
Middle School	0.007	No	84%
High School	0.046	No	26%
Public Project	0.264	Yes	0%
Log of Regional CPI	3.334	Yes	0%
Effect of Prevailing Wage Law	0.038	No	26%

Dependent Variable: Log of the Total Project Value in 1997 Dollars Deflating with the CPI-Housing
Adjusted R Square = .887
Number of Observations = 358

This linear regression model covers the construction of schools in Delaware, Maryland, North Carolina, Pennsylvania, Virginia and West Virginia. In order to control for cost of living differences across states a cost of living index was included as a control variable. The model is a good fit of the data (as indicated by an adjusted R-square statistic of 89%).

The model indicates that as the size of a school goes up, the total cost of the school rises. But it also indicates that there are economies of scale associated with larger schools so that while the total cost goes up with increasing size, the square foot cost goes down. This is shown in the estimated effect (or coefficient) for the variable--the log of total square feet for the school being built. This coefficient is .87. This means that if you doubled the size of a school from (say) 50,000 square feet to 100,000 square feet, the size would go up by 100% but the cost would only go up by 87%. This indicates that as schools get larger, the total cost goes up, but the square foot cost goes down.

The model in Table 5 controls for a variety of technical factors--total square feet, number of stories, type of building materials--and the model also controls for whether or not a middle school costs more than an elementary school or whether a high school costs more than an elementary school. For a middle school of exactly the same size as an elementary school, built of the same material, having the same number of stories, the model estimates that a

middle school will cost .7% more. A high school of identical size, using the same materials will cost 4.6% more. Neither of these results, however, are statistically significant. There are three standard levels of statistical significance--1%, 5% and 10%. In simple terms, 10% means statistically I have a 1-in-10 chance of being wrong, and 1% means I have a 1-in-100 chance of being wrong. Rarely do economists accept higher levels of probability in this test as statistically significant. This means that for all practical purposes, an elementary school, a middle school and a high school of the same size will cost the same amount.

Now the model asks the question whether or not public schools cost more than private schools controlling for other factors such as size. The model estimates that public schools (in states with and without prevailing wage laws) cost 26.4% more than private schools. The estimated cost difference associated with public school buildings is statistically significant at all standard levels of probability. This cost difference may be due to design differences or other features typically found in public schools compared to private schools. Public school buildings may have a longer life span than private school buildings, or other factors may account for this cost difference. But this cost difference exists in both states with and without prevailing wage laws. This is not a cost differential that can be attributed to prevailing wage laws simply because this cost differential is found where there are no prevailing wage regulations.

Finally, the model estimates the cost effect of prevailing wage laws. The model estimates that controlling for other factors, building a public school in a prevailing wage law state will cost 3.8% more than building the same public school in a state without a prevailing wage law. However, this is not a statistically significant estimate. For all practical purposes there is no statistical difference between building a public school in a state with or without a prevailing wage law. How can the model say there is no difference in the cost of public school construction in states with prevailing wage laws compared to states without prevailing wage laws when Table 4 suggests that on average square foot public school construction costs are higher in states with prevailing wage laws? Once again, the answer is that, on average, private school construction costs are also higher in states with prevailing wage laws. Once these cross-state differences in construction costs are accounted for, there is no statistically measurable effect on total construction costs associated with prevailing wage regulations.

Conclusion

A "here-and-there" linear regression model was developed to estimate the effect of prevailing wage regulations on total construction costs for schools, controlling for other factors. This model controlled for the type of school, the size of the project, and building characteristics. It also controlled for general differences in construction costs between states with and without prevailing wage

laws and general differences between the cost of public and private construction (whether or not done under prevailing wage regulations). Controlling for these factors, this model could find no statistically significant impact on total construction costs due to prevailing wage requirements.

3

The Impact of Prevailing Wage Laws on School Construction Costs in Maryland

Introduction

In Chapter 2 we compared school construction costs in mid Atlantic states that have prevailing wage laws with costs in those states without prevailing wage laws in the mid Atlantic region. In this chapter, we exploit local variation in the application of prevailing wage laws to compare school construction costs within the state of Maryland. Unlike the previous comparison where the opportunity for dramatic differences in the cost of living could contaminate the results, comparing school construction costs in those jurisdictions with prevailing wage requirements in Maryland to costs of school construction for those jurisdictions where prevailing wages are not paid provides a clearer focus on the law's impact.

A Reconstruction of the Department of Fiscal Services' Study

This is not the first time the impact of prevailing wage laws on school construction costs in Maryland has been examined. A report prepared by the Department of Fiscal Services (January 1989) ten years earlier evaluated the impact of Maryland's prevailing wage with a special focus on public school construction.

The study examined 20 school projects funded by the Interagency Committee for Public School Construction in 1987 and 1988. Of these projects, 14 were built under the guise of prevailing wages while the remaining 6 were not. A multiple regression analysis was performed using square foot cost as the dependent variable and proxies for building design, location, and the applicability of prevailing wage regulations as independent variables. The model estimated that prevailing wage requirements raised school construction costs by approximately $11 per square foot, or roughly 15 percent.

The report by the Department of Fiscal Services includes a detailed discussion of the methodology and data used in coming to this conclusion. These data allow me to replicate the earlier study and discuss some problems

associated with the methodology and findings. I have reproduced the data from the Appendix 4 of the Department of Fiscal Services report in Table 6.

Table 6: Data on School Construction Projects Used in the 1989 Department of Fiscal Services Report on Maryland's Prevailing Wage Law

School Name	County	Year	% Sq Ft Renovation	% Est Site Preparation	% Special Conditions	Sq Ft Cost	Prevailing Wage ?
S. Middle	A. Arundel	1986	53	9	0	76	No
G. Fox	A. Arundel	1987	88	8	0	44	No
G. Washington	B. City	1987	0	11	0	88	Yes
Garrison	B. City	1987	91	10	0	73	Yes
Dundalk	B. County	1986	100	0	0	50	Yes
Sunderland	Calvert	1987	0	10	0	88	Yes
Appeal	Calvert	1987	40	9	0	90	Yes
Manchester	Carroll	1987	35	12	0	76	Yes
Voc/Tech	Carroll	1986	0	11	0	104	Yes
Jenifer	Charles	1986	0	11	0	82	Yes
Hillcrest	Frederick	1987	0	11	0	77	Yes
Dublin	Harfors	1986	92	3	1	38	Yes
F. Douglas	P. George's	1987	79	5	0	70	Yes
Flow Hill	Montgomery	1984	0	11	0	79	No
Oak View	Montgomery	1984	79	5	1	50	No
G. Lake	Montgomery	1986	0	7	11	106	No
B. Hills	Montgomery	1983	55	5	0	52	No
8th District	St. Mary's	1988	0	12	0	92	Yes
Bester	Washington	1987	99	5	0	75	Yes
Pinehurst	Wicomico	1988	82	6	2	70	Yes

Source: Department of Fiscal Services, "Maryland's Prevailing Wage Law: A Study of Costs and Effects"

Two potentially serious, and related, problems with the 1989 study are the limited number of observations and the intermingling of new schools with renovation projects. Of the 20 projects listed, 8 are new schools and the remaining 12 involve at least some renovation work. If we look only at the 8 new schools included in the study, there are 2 projects built in the absence of prevailing wage requirements and 6 schools constructed with prevailing wages. Comparing the mean square foot costs of construction, we find that schools built with prevailing wages cost $88.50 per square foot while schools built without prevailing wages averaged $92.50 per square foot. Prevailing wage schools were, on average, 4.5 percent less expensive. Given the variation even amongst new school costs, this difference is not statistically significant. In fact a careful examination of the raw data indicates that the most expensive new school in the sample was built without prevailing wage requirements. This observation is responsible for inflating the average cost of new schools in the absence of prevailing wages.

In order to overcome the problem of small sample size, school projects that included renovation work were added to the sample. When all 20 school

construction projects are compared, the average square foot costs of projects not requiring prevailing wages is $67.83 compared to $76.64 for those projects paying prevailing wages. This difference of 13 percent is not, however, statistically significant given the variation across both groups.

A large part of the variation in school construction costs can be attributed to the amount of renovation work included in the project. Renovation work itself is variable and affects square foot costs differently. For example, renovation work such as installing a new boiler would increase square foot costs significantly both because of the expense of materials and the small square footage involved. Painting, on the other hand, may be far less expensive overall, but also involve a large area, substantially lowering the square foot costs. Overall, square foot costs appear to decline as the percentage of square foot renovation work increases.

In order to illustrate some of the problems with the Department of Fiscal Services study I reconstruct their regression analysis. To begin with I use the 8 observations on new school projects and regress square foot costs against a dummy variable for the prevailing wage. Dummy variables are variables that indicate the presence or absence of a quality or characteristic, in this case, the presence or absence of prevailing wage requirements. The results of this regression are presented in Table 7. In the first model the estimated effect of prevailing wages on square foot costs is negative though not statistically significant. In addition, overall, the regression equation does not produce statistically significant results, pointing to the need to increase the number of observations. In the next model, renovation projects are included with new school projects. In addition to the prevailing wage variable, the percent of renovation work in the project is included as an explanatory variable. As expected, the percent of renovation work is negatively correlated with square foot costs as indicated by the minus sign on the coefficient. The effect of prevailing wage requirements, controlling for renovation work, is now positive though not statistically significant. In other words, while the sign of the estimated coefficient is positive, we cannot conclude that the effect is significantly different from zero. Thus prevailing wage requirements do not appear to have a measurable impact on costs!

The Department of Fiscal Services study also included information on other factors that could affect costs. These included the percent of total costs attributable to site preparation, and a control for region. Including site preparation in our regression equation, we find that site preparation is positively correlated with square foot costs but not significantly so. The percent renovation work remains significantly negatively correlated to square foot costs. Most importantly, while the estimated coefficient on the prevailing wage variable is still positive it is not statistically significant. Including the regional control, which identifies school projects in the Baltimore area, leaves the prevailing wage variable still not statistically different from zero.

Table 7: Regression Results for 20 Public School Projects Used in the Department of Fiscal Services Report on Prevailing Wage Laws, 1989

Variable	Model 1	Model 2	Model 3	Model 4	Model 5
Prevailing Wage	-4	8.222	5.987	7.468	12.3
	(-.426)	(-1.351)	(0.82)	(1.11)	(2.05)
% Sq Ft Renovation	-	-0.348	-0.294	-0.295	-0.177
		(-5.006)	(-2.734)	(-2.636)	(-1.684)
% Site Preparation	-	-	0.87	0.872	2.238
			(0.66)	(0.64)	(1.77)
Regional Control	-	-	-	0.733	0.906
				(0.08)	(0.12)
% Special Conds.	-	-	-	-	3.215
					(2.62)
Constant	92.5	83.76	74.784	74.825	52.731
	(11.38)	(13.95)	(5.01)	(4.85)	(3.39)
No. of Observations	8	20	20	20	20
Adjusted R Square	-0.132	0.57	0.555	0.525	0.659

Note: t-statistics are in parentheses.

Only when the control for special conditions costs is included in the regression model, as I do in the last column in Table 7, does the effect of prevailing wage requirements become significant. But this result, in which the prevailing wage variable is significantly positive for the first time, appears to hinge on the inclusion of one variable. This exercise in replication, if nothing else, points out the fragility of the results reported in the earlier study and calls for further efforts to estimate the effect of prevailing wage laws on school costs.

A Regression Analysis of School Construction Costs in Maryland

In order to overcome the primary limitation of the earlier analysis of school costs in the presence of prevailing wages, I use Dodge data from 1991 to 1997 to estimate a regression model like that presented in Chapter 2. In this case the observations used are limited to the state of Maryland. In contrast to the period used in the Department of Fiscal Services report, when a majority of schools were built with prevailing wages, changes in the way school projects were funded have reversed the situation so that the vast majority of school construction projects do not require the payment of prevailing wages. Consequently finding a sufficiently large number of prevailing wage projects for comparison was a challenge. Allegany County and Baltimore City have enacted local prevailing wage requirements for school projects, providing the bulk of observations. In addition, the Maryland State Department of Labor has identified a limited number of other school projects for which prevailing wage determinations were requested. These were projects for which the Maryland state law (requiring 75 percent state funding) applied.

The distribution of school projects by county and by type of construction within Maryland is presented in Table 8. Of the 186 school construction projects from 1991 to 1997, seventy one projects (38%) were new schools. The vast majority of projects were concentrated in Anne Arundel, Baltimore, Montgomery, and Prince George's counties. Eleven projects (6%) were identified as prevailing wage projects. Nearly 60 percent of the projects were elementary schools, with the others almost evenly divided between middle schools and high schools.

Table 8: Distribution of School Projects by County and type of Construction

County	Elementary	Middle	High School
Allegany	2	0	1
Anne Arundel	13	3	5
Baltimore	15	5	4
Calvert	3	1	1
Caroline	1	1	0
Carroll	4	4	0
Cecil	0	2	0
Charles	3	1	1
Dorchester	3	0	0
Frederick	3	5	0
Garrett	1	0	1
Harford	7	1	0
Kent	0	1	0
Montgomery	23	10	5
Prince George's	12	1	4
Queen Anne's	1	0	0
St Mary's	2	0	1
Somerset	0	1	1
Talbot	2	0	1
Washington	4	0	5
Wicomico	0	0	1
Worcester	1	0	0

Source: F. W. Dodge Corporation

Table 9 presents the results of a linear regression model identical to that used in the previous chapter that predicts total school construction costs (excluding land acquisition, architect fees and construction management fees) based on the size of the building, the number of stories, the type of building

materials used, whether or not the school is an elementary, middle or high school, whether the school is public or private and whether the school was built under a prevailing wage law.

Table 9: Regression Results Estimating School Construction Costs within Maryland

Variable	Estimated Effect	Statistically Significant	Probability
Constant	7.383	Yes	0%
Log of Total Square Feet	0.678	Yes	0%
Log of the Number of Stories	-0.02	No	84%
Marker for Wall Board Framing	-0.017	No	86%
Marker for Wood Framing	0.162	Yes	10%
Marker for Cement	-0.022	No	90%
Marker for Steel Framing	-0.167	No	57%
Middle School	-0.019	No	85%
High School	0.329	Yes	0%
Renovation	-0.252	Yes	0%
Public School	0.406	Yes	0%
Effect of Prevailing Wage Law	0.018	No	90%

Dependent Variable: Log of the Total Project Value in 1997 Dollars Deflating with the CPI-Housing
Adjusted R Square = .817
Number of Observations = 124

Just as in the case of the Cross state regression model presented in Chapter 2 the model used here to analyze school construction costs within Maryland is a good fit of the data (as indicated by an adjusted R-square statistic of 82%). In other words, 82 percent of the variation in total school construction costs is accounted for by the explanatory variables listed in Table 9.

Again, the model indicates that as the size of a school goes up, the total cost of the school rises. But it also indicates that there are economies of scale associated with larger schools so that while the total cost goes up with increasing size, the square foot cost goes down. The estimated effect (or coefficient) for the variable--the log of total square feet for the school being built-- is .68 indicating that as the square feet of a school project doubles, the cost increases by only 68 percent.

The model in Table 9 controls for a variety of technical factors--total square feet, number of stories, type of building materials--and the model also controls for whether or not a middle school costs more than an elementary school or whether a high school costs more than an elementary school. For a middle school of exactly the same size as an elementary school, built of the same material, having the same number of stories, the model estimates that a middle school will cost 2 percent less. This result, however, is not statistically significant. On the other hand, a high school of identical size, using the same materials will cost 33% more.

Now the model asks the question whether or not public schools cost more than private schools controlling for other factors such as size. The model estimates that public schools (in areas with and without prevailing wage laws) cost 40.6% more than private schools. The estimated cost difference associated with public school buildings is statistically significant at all standard levels of probability. This result is consistent with the result for the cross state comparison in Chapter 2 and, again, is likely due to design differences or other features typically found in public schools compared to private schools. It is important to recognize that this cost difference exists in both areas with and without prevailing wage laws, and, as such, is not a cost differential that can be attributed to prevailing wage laws simply because this cost differential is found where there are no prevailing wage regulations.

Finally, the model estimates the cost effect of prevailing wage laws. The model estimates that controlling for other factors, building a public school in a prevailing wage law jurisdiction within Maryland will cost 1.9% more than building the same public school without prevailing wage requirements. However, this is not a statistically significant estimate. For all practical purposes there is no statistical difference between building a public school with prevailing wages and building a public school without prevailing wages.

4

Prevailing Wage Laws And Competition Between Contractors

Date Limitations

One of the original rationales for prevailing wage laws was the proposition that such regulations would discourage outside contractors from bringing into an area low wage labor that undercut local wage and working conditions. No academic studies have been done to test whether or not this is indeed one of the effects of these regulations.

This report is able to shed some light on this question using F.W. Dodge reports of public school contracts awarded to general contractors in the six states of Maryland, Pennsylvania, Delaware, West Virginia, Virginia and North Carolina over the period October 1996 to September 1998. The data are limited to information regarding the origin of general contractors. No information regarding the origin of subcontractors is available.

The data also do not provide information regarding the workers employed by the contractor. It is possible for an outside general contractor to come into an area and hire many, if not all, workers locally. In other words, the data do not distinguish between an outside contractor bringing in cheap labor and an outside contractor hiring local labor at wage rates consistent with local labor market conditions.

Definition of Outside Contractor

With these data limitations in mind, the following analysis looks at three questions. First, within states, do prevailing wage laws influence the movement of urban contractors from major metropolitan areas to suburban and rural areas? Second, within states, do prevailing wage laws influence the movement of suburban and rural contractors into major metropolitan areas? Three, across states, do prevailing wage laws influence the movement of out-of-state contractors into other states influenced?

Analytical Framework

Obviously factors other than prevailing wage regulations can influence whether or not outside contractors bid on distant jobs. In this analysis we are able to control for two of these factors.

First, the size of the project will influence the universe of contractors willing to bid on that project. Presumably there are economies of scale that will make distant projects that are larger more attractive to potential bidders. Thus, all other things being equal, the larger the project the more likely it is that outside contractors will bid on the job and the more likely it is that one of those outside contractors will win the bid. Thus, we predict that the dollar value of a school project will be positively correlated with the probability that the general contractor is an outside contractor.

Second, population density will make it more likely that an "outside" contractor will be close at hand. Heavily urbanized areas, such as around Philadelphia or Baltimore, are more likely to be exposed to and provide outside contractors compared to rural areas of West Virginia or Eastern North Carolina. Using the percent urban of a state's population as a proxy for the density of economic activity and the proximity of outside contractors, we predict that the more urban an area, the more likely will the contractor winning a school project be an outside contractor.

With these two controls in place, we examine whether or not prevailing wage regulations influence the probability that the winning contractor on a public school job is an outside contractor.

General Patterns in the Data

Urban-Suburban-Rural Patterns within State

Within the six states--Maryland, Delaware, Pennsylvania, West Virginia, Virginia and North Carolina, the data provide 601 cases where a public school project was awarded to a general contractor. Of these awards, 368 were awarded without the influence of prevailing wage regulations while 233 were awarded under prevailing wage regulations. In order to examine the flow of contractors between urban, suburban and rural areas, these contract awards and contractors were divided into urban and non-urban areas based on the zip codes of the school owner and the zip codes of the general contractor. Within the six states under analysis, Baltimore, Philadelphia, Wilmington, Pittsburgh, Richmond, Norfolk-Virginia Beach-Newport News, Greensboro-Winston Salem-High Point and Raleigh-Durham-Chapel Hill were determined to be major metropolitan areas. No area in West Virginia was classified as a major metropolitan area.

Whenever the zip code of a general contractor or owner fell within the urban boundaries of one of these major metropolitan areas, that owner or contractor was labeled an urban owner or contractor. All remaining owners and contractors within these six states were put in one suburban-or-rural group. This labeling allows us to analyze the movement of contractors within these six states across this line drawn between major metropolitan centers and other areas within each state.

Table 10: Distribution of Contractors Working Inside and Outside "Local" Area

	Law	No Law
City Contractor Working in Suburban or Rural Area	11%	13%
Suburban or Rural Contractor Working in City	10%	5%
Cross-Boundary Work Subtotal	**21%**	**18%**
City Contractor Working in City	8%	31%
Suburban or Rural Contractor Working in Suburbs or Rural Area	71%	51%
Within Boundary Work Subtotal	**79%**	**82%**

Table 10 excludes out-of-state contractors in order to focus on the movement of general contractors within each state working on public school projects. Table 10 shows that within these six states most bids are won by general contractors coming from within the sector from which the bid is offered. This is true both for jurisdictions that enforce prevailing wage regulations and jurisdictions that do not have these laws. For instance, 79% of all bids under prevailing wage regulations were won by contractors coming from within the sector from which the bid originated. In comparison, 82% of the bids offered without prevailing wage regulations were won by contractors coming from within the sector from which the bid originated. Thus, regardless of legal regimes, roughly four-out-of-five in-state general contractors working on public schools came from the same sector as the school owner.

Movement of Contractors within the Suburban-Rural Sector

In this analysis, the suburban-rural sector in each state is geographically large. There may be considerable geographical movement of contractors within each state within the suburban-rural sector. The potential distance traveled, of course, depends upon the size of the state.

Table 11: Measurement of Distance Traveled by Differences in Zip Code

	Average Zip Code Difference Between Owner and General Contractor	Zip Code of Owner			Average Difference as a Percent of the Range
		Minimum	Maximum	Range	
WV Law	347	24740	26807	2067	17%
MD No Law	14	21629	21740	111	13%
VA No Law	294	22030	24588	2558	12%
DE Law	21	19711	19901	190	11%
PA Law	412	15037	19609	4572	9%
NC No Law	147	27016	28906	1890	8%

Table 11 measures the distance traveled by suburban and rural general contractors to build public schools by using zip codes. This table only looks at suburban and rural contractors within a state who received a public school construction contractor within the suburban-rural sector of that state. In column three the average difference between the zip code of the school owner and the general contractor is reported.[2] Columns four, five and six report the minimum and maximum zip codes of school owners in each state and the range or difference between the top zip code and the bottom zip code. The range of zip codes is correlated to the size of suburban-rural sector of the state. The range for Maryland is smaller than the range for Delaware simply because the school projects put out to bid in Delaware during the period of this study were geographically more disperse than the suburban and rural jobs let out to bid in Maryland. Thus, the zip code range measures the size of the public school market within the suburban-rural sector of each state rather than the geographical size of this sector. Only when every corner of the state has jobs open to bid will the zip code range be perfectly correlated with the geographical range of the state.

The focus column in Table 11 is the last column which shows the average difference between the zip code of the owner and the zip code of the general contractor as a percent of the range of zip codes for owners. Obviously in-state contractors in Delaware cannot move as far to jobs as instate contractors in Pennsylvania or Virginia. This percentage standardizes for the different sizes of each state. In absolute terms, Delaware contractors do not move nearly as far as Pennsylvania contractors. In relative (or percentage) terms, Delaware and Pennsylvania contractors move similar distances.

In either absolute or relative terms, there is no clear pattern of movement correlated to the presence or absence of prevailing wage laws. In absolute terms, Pennsylvania and West Virginia suburban and rural contractors move the most while Delaware contractors move second to the least. These are the three states where prevailing wage laws govern suburban and rural public school construction. In relative terms, West Virginia contractors move the most followed by Virginia and Maryland. There is no obvious stacking of these states' contractor mobility patterns in relative terms by legal policy. It may be that patterns would emerge if the suburban-rural sector was broken apart into two sectors and/or additional states were added to the analysis. However, these research extensions were not possible within the time frame of this report.

[2] In technical terms, the absolute value of the difference is reported. Using absolute values avoids the problems created by two equally distant contractors but where one has a lower zip code than the owner and the other has a higher zip code. Using absolute values treats these two hypothetical contractors as equally distant from the owner.

An Analysis of the Influence of Prevailing Wage Laws on the Movement of Contractors across the Major Metropolitan Boundary Controlling for Other Factors

The basic conclusion of the foregoing analysis is that most general contractors building schools are local. However, at the margin, distant contractors do come into local areas. And their impact on local labor markets and construction markets may be disproportional to their numbers. Consequently, it is reasonable to pursue the question--what determines the crossing of the line? What determines the movement of an urban contractor into the suburban-rural sector of public school construction. What determines the movement of a suburban or rural contractor into the urban sector? What determines the movement of an out-of-state contractor into a state?

To answer these questions we again use the statistical technique of multivariate regression analysis. The specific form of regression analysis used to answer the above questions is called logistic regression analysis. This is the appropriate tool when asking a yes-no question such as is the contractor an outside contractor? What a logistic regression model does is ask a question such as--will the contractor be an urban contractor working in a rural area (yes-no)--and then pose a set of variables designed to predict whether or not under certain circumstances the contractor in the rural area will have come from a major metropolitan area. What we want to do is design such a model and insert into it the presence or absence of prevailing wage regulations to focus on the question do prevailing wage laws influence the presence or absence of outside contractors.

What other variables might influence whether or not a contractor will be a local or outside contractor? We propose three factors or variables that might help decide whether or not a local contract is won by an outside general contractor. First. the size of the contract. Our reasoning here is as follows. It costs money to bid on contracts. The farther away the project, the more information the contractor has to gather, the more costs and risks the contractor undertakes. Larger jobs are more likely to cover these risks and costs. So distant contractors are more likely to bid on and therefore more likely to win big jobs compared to smaller jobs. Our data set includes both new school construction, and additions, renovations and repairs. We expect outside contractors to be more common when these jobs are large. We will measure size by the total dollar value of the project.

Second, economies can be densely populated or sparsely populated. In heavily urbanized areas the physical distance between a major metropolitan area and suburban and rural areas will be closer than in less urbanized, more sparsely populated areas. The cost of crossing the line between the suburbs and the city or even between states will be lower the extent to which states are more urban.

So we hypothesize that the states within our sample that are more urbanized are more likely to experience the use of outside contractors.

Third, the wider the difference between the wages paid between a city and the surrounding suburban and rural areas the more likely it will be that suburban and rural contractors will move into the urban area and that urban contractors will not move out into suburban and rural areas. Furthermore, we expect that the higher one state's wages are relative to another, the more likely will out-of-state contractors come into that state. These are the expectations that we had in building what turned out to be four logistic regression models. One asks what is the probability that a urban contractor would win a suburban or rural school construction project? The second asks what it the probability that a suburban or rural contractor would win and urban school project? And the last two ask the question what is the probability that an out-of-state contractor would win an in-state school job? Table 12 shows the results of this statistical modeling.

Table 12: Regression Results Predicting the Probability of a Contractor Being Awarded a School Construction Project

Variables in Model:	Urban Contractor to Rural Owner		Rural Contractor to Urban Owner		Out of State into State			
					Model 1		Model 2	
	(a)	(b)	©	(d)	(e)	(f)	(g)	(h)
Constant	8.14	14%	**-21.56**	**0%**	**-5.15**	**2%**	**36.56**	**0%**
Total Cost of Project	**5.67E-09**	**1%**	**-9.90E-08**	**5%**	**7.73E-08**	**0%**	2.87E-08	32%
Urbanization of State	0.02	12%	**0.05**	**4%**	**0.04**	**2%**	0.02	35%
City Wage Relative to State Wage	**-12.26**	**2%**	**14.79**	**0%**			**-41.55**	**0%**
Prevailing Wage Regulation	-0.41	12%	**1.02**	**2%**	**-0.82**	**1%**	-0.51	28%
Model Statistics:								
Chi Square Test of Fit	**15.46**	0%	**21.08**	**0%**	**25.69**	**0%**	**204.00**	**0%**
Total Number of Contractors	572		572		634		633	
Number of Contractors Working Across Line	57		39		61		61	

Numbers in Bold Are Statistically Significant

In columns a and b of Table 12, the results of modeling the question what is the probability that an urban contractor would win a suburban or rural school project are presented. There is a constant and four variables in the model. There are 572 observations, 57 of which are urban contractors who won suburban-rural public school projects. The Chi Square statistic indicates that the model does a reasonable job of predicting the observed outcomes. In all these models the constant is in for technical reasons. Thus for purposes of general exposition this variable can be ignored. Now to the interesting stuff.

As we expected, the sign on the coefficient in column (a) for total cost of project is positive indicating that the larger the rural project--all other things being

equal--the more likely is an urban contractor to bid on that project and therefore the more likely is the prospect that an urban contractor will win that project. The model also reports that the more urbanized a state, the more likely will urban contractors venture across the line into suburban and rural school construction. However, this result is not statistically significant. The higher the urban wage relative to suburban and rural wages--the wider is this wage gap--the less likely is the urban contractor to win jobs in suburban and rural areas. This result is statistically significant. Finally, controlling for these factors, the presence of a prevailing wage law discourages urban contractors from working in rural areas but again this is not statistically significant. In short, we can say that the bigger the project the more likely an urban contractor will venture forth into outlying areas but the wider the wage gap between higher paying urban areas and lower paying outlying areas, the less likely will the urban contractor move out into these areas. Prevailing wage laws do not appear to strongly affect this dynamic.

The dynamic determining whether a rural contractor comes into the city is somewhat different. Not surprisingly, the wider the wage gap between the rural and urban area, the more likely will the rural/suburban contractor win jobs in the urban area. The more densely packed the economy as measured by urbanization, the more likely will the suburban/rural contractor cross the line into urban school construction. These are both expected and statistically significant results. Now for some surprises. First of all, rural contractors are more likely to take on urban school construction to the extent that the urban project is small (not large). This result is statistically significant and is contrary to the expectations we had when we built the model. Why would it be that urban contractors go after larger projects in rural areas but that suburban/rural contractors go after smaller projects in urban areas? Our data include both new school construction, additions, renovations and repairs as long as the total value of the project exceeded $750,000. The average value of a project was over $4 million. We suspect that suburban/rural general contractors competing in urban areas are at a disadvantage if the project is large or technical. They may have a less skilled work force or support staff. Consequently, they aim at smaller, less demanding projects. Conversely, the city contractors may be best positioned in suburban/rural markets when the project is large and technically demanding. Thus, the result we obtained may not be as surprising as it seems.

But prevailing wage laws (all other things being equal) encourage the use of suburban/rural contractors in urban areas. This is told from the positive sign to the coefficient for prevailing wage laws in column (c) and this result is statistically significant. Now this is a surprise. Urban areas have higher wage rates. In Virginia and North Carolina there are no regulations requiring that a suburban/rural contractor pay those higher wage rates. But in Maryland, a suburban/rural contractor working in Baltimore must pay those higher rates. This is also true in Pennsylvania and Delaware. (West Virginia does not have a major metropolitan area.) Why would forcing suburban/rural contractors into

paying urban wage rates facilitate suburban/rural contractors winning urban jobs?

We can think of two possible explanations. First, this result may be an artifact of the age and structure of cities in the North versus the South. The Southern cities in our sample are conglomerate cities--Greensboro, Winston Salem, High Point--Raleigh, Durham, Chapel Hill. Our Northern cities (Baltimore, Pittsburgh, Philadelphia) are not sprawling conglomerates. Furthermore, Table 10 shows that a greater proportion of all school construction in the South is occurring in the major metropolitan areas compared to the metropolitan areas in the North. Perhaps in the Northern city contractors have moved their offices to the suburbs where more work is occurring and yet these contractors maintain their city operations as well. Perhaps in the South the institutional gap between city and suburb-rural areas has not been bridged by the movement of city contractors outside the metropolitan areas.

A related explanation involves unionization. Construction is more unionized in the North. Union contractors move from area to area but hire locally and pre-determined locally bargained wages. Collectively bargained contracts and the provision of local labor from hiring halls reduces the uncertainty of ramping up a job in a distant area. Perhaps the positive effect of prevailing wage regulations on the probability of a suburban/rural contractor obtaining an urban school project is capturing the effect of collective bargaining reducing the cost of bidding and working at a distance. Further research is required to test these and possibly other explanations for this result.

Models 1 and 2 presented in columns (e) through (h) examine the factors that influence the hiring of out-of-state contractors. Model 1 includes all the explanatory variables except the wage gap between construction workers within the state compared to construction workers from the state of the out-of-state contractor.[3] The cross-state wage is eliminated from model 1 simply because its effect shown in model 2 is so strong that it is helpful to see what the model shows without including this variable.

Model 1 shows what we expected. The larger the project, the more likely it is to go to an out-of-state contractor. In more economically dense urbanized states, the more likely is the job to go to an out-of-state contractor. This is capturing the effect of the urban corridor running from New York City to Washington DC on the use of out-of-state contractors. Finally, prevailing wage laws discourage the use of out-of-state contractors. All of these are statistically significant results. But the statistical significance of these results disappear when we add the wage of the state compared to the wage of the state from which the outside contractor comes from. This variable swamps the measurable effects of

[3] Data on state wages come from the 1992 Census of Construction. Data on metropolitan wages are from the 1994 BLS Occupational Wage Survey . By normalizing on wage rates in each year relative to the US average for that year and then comparing them, the inflationary differences between the years is eliminated.

all other variables, and more surprisingly it says that the closer the wage is between the two states, the more likely will an outside contractor be used. What is going on here? We think this captures a proximity effect. Namely, New York contractors are working in Pennsylvania and Eastern Tennessee contractors are working in Western North Carolina. For the most part, contractors cross state lines where those lines are close at hand and consequently the wage differences will be minimal. In model 2, the signs of the other variables have not changed compared to model 1, but their statistical significance has fallen away. We believe that the tentative conclusion should be that prevailing wages do discourage the use of out-of-state contractors but to be confident about that conclusion more research is necessary.

Conclusion

Most construction work is done by local contractors. Less than 10% of all school projects valued above $750,000 in the six states under study are done by general contractors from outside those states. Within states, 80% of all school projects are done by contractors that come from the urban or suburban/rural sector within which the job was let. Within the suburban/rural sector of each state, general contractors move farthest in states that are larger. With only six states under study, prevailing wage regulations do not appear to effect the distances over which suburban/rural contractors look for work.

Do prevailing wage laws discourage the use of outside contractors? Multivariate logistic regression analysis provides only tentative answers to this question. Across state lines we believe the answer is yes--prevailing wage laws discourage out-of-state general contractors. But more research is required to be confident in this answer. Prevailing wage laws may discourage urban contractors from working in rural areas and conversely, may encourage suburban/rural contractors working in urban areas. But these results also are fragile and require further research. Our data were limited to information on general contractors. The relationship of prevailing wage laws to the movement of specialty contractors may differ to some extent.

5

The Impact of Prevailing Wage Laws on Wages in the Construction Industry

Introduction

In the preceding portions of this report I have shown that prevailing wage requirements do not have the dire negative consequences on either school construction costs or the competitive environment that many of the laws opponents espouse. The question to which I now turn considers one possible positive consequence of prevailing wage laws, namely, the extent to which they serve their intention of promoting the path of high wage, high skill development within the construction industry. In this chapter, I analyze construction wages in prevailing wage and non-prevailing wage environments to determine whether they are significantly higher in prevailing wage jurisdictions compared to non-prevailing wage jurisdictions.

In thinking about this question, economists tend to employ a simple labor market model in which prevailing wage regulations impose a minimum wage above the equilibrium wage that would exist if supply and demand were left unfettered. Consequently, prevailing wages are assumed to always be above the competitive equilibrium wage in a local labor market.

This conception of the issue, however, ignores the institutional detail of how prevailing wages are determined. The idea underlying the administration of nearly all prevailing wage laws is to protect local labor market standards. In other words, the determination of what contractors must pay as the prevailing wage is based on existing local labor market conditions. Of course, the devil is in the details. Workers within a single trade may not always receive exactly the same wage; wage rates will different depending on a number of factors. These include unionization, seniority, and differences in certification or training, urbanization and possibly others.

In the state of Maryland, prevailing wages are determined by the Prevailing Wage Unit of the Department of Labor according to the following

formula. If 50 percent or more of all workers in a trade are paid exactly the same rate, that rate is considered the prevailing wage. If less than 50 percent are paid the same rate, then the prevailing wage is the wage paid to 40 percent or more of the workers within a trade. If less than 40 percent receive the same rate, then the prevailing wage is determined as the weighted average of the wage rates received by workers within a trade. Prevailing wage determinations are made for each county within Maryland, and Baltimore City.

Especially in cases where the weighted average method for determining the prevailing wage is used, the prevailing wage may not differ significantly from what economists imagine to be the "equilibrium" wage. Consequently, prevailing wage laws, far from increasing wage rates, may simply reinforce existing labor market conditions. On the other hand, in areas with concentrations of unionized construction workers high enough for the 40 percent rule to kick in, there can be a significant difference between the prevailing wage and the nonunion wage. In the final analysis, whether prevailing wage laws inflate wage rates is an open question subject to empirical verification.

Empirical Analysis of Construction Industry Wages

Data for such an analysis of construction industry earnings is available from the U.S. Bureau of the Census through their County Business Patterns series. These data report number of employees and annual payroll by two digit Standard Industrial Classification (SIC) code. County Business Patterns reports on the construction industry in general and also disaggregates the industry into general contractors, heavy and highway construction, and specialty contractors. A limitation of these data is that workers in school construction cannot be distinguished from workers in other market segments. Consequently, it is not possible to draw any direct inference about the impact that the inclusion or exclusion of school construction from prevailing wage requirements might have on construction workers' wages. Similar data are also available through the Census Bureau on a statewide level. These data can be used to construct an index of relative earnings in the construction industry for prevailing wage and non-prevailing wage areas.

In Table 13, I present results of a statewide comparison of relative earnings levels for the years 1993 through 1996, the most recent year for which data are available. The states included are the Mid-Atlantic states used throughout this study. For the purposes of this analysis Maryland was excluded from the analysis. The prevailing wage states used here include Delaware, Pennsylvania and West Virginia. The "no law" states include North Carolina and Virginia. The relative earnings index was calculated by dividing the average annual earnings per employee in the construction industry by the average annual earnings per employee in all nonagricultural industries. A comparison of the relative earnings indexes indicates that for the construction industry as a whole

(SIC 15), the relative earnings of employees is higher in prevailing wage law states than in non-prevailing wage law states. Earnings in non prevailing wage law states were approximately equal to average nonagricultural earnings. In prevailing wage law states, construction workers earned a 9 to 15 percent premium over average nonagricultural employees. These results are consistent with the proposition that prevailing wage laws tend to raise the wages of workers in the construction industry.

Table 13: Earnings of All Construction Industry Workers Relative to All Non-Agricultural Employees by Prevailing Wage and No Prevailing Wage Law States

Year	Prevailing Wage Law	No Prevailing Wage Law
1993	1.12	1.01
1994	1.15	1.02
1995	1.09	1.00
1996	1.11	1.01

Source: U.S. Bureau of the Census

The Census Bureau's County Business Patterns reports number of employees and payroll by SIC code for the years 1988 to 1996. In Table 14, I use these data to calculate the relative earnings of construction workers to all nonagricultural workers with Maryland. For the state as a whole, construction workers earn premiums similar to the premiums earned in other prevailing wage law states, namely from 7 to 16 percent more than nonagricultural employees.

Table 14: Relative Earnings of Construction Workers in Maryland

Year	Relative Earnings Index
1988	1.16
1989	1.14
1990	1.14
1991	1.14
1992	1.11
1993	1.11
1994	1.13
1995	1.07
1996	1.08

Source: County Business Patterns, 1988-1996

Disaggregating the data for Maryland by county allows us to examine the impact of the differential coverage of school construction by prevailing wage laws. Counties were characterized as having a prevailing wage law or not depending on the existence of a local statute covering school construction for that jurisdiction. This is an imperfect test because, as mentioned earlier, it is not possible to identify only those workers employed in school construction. Consequently, the impact of prevailing wage laws covering school construction could be overwhelmed by Maryland's general prevailing wage law covering public construction. Nevertheless, it appears that in most years, those jurisdictions having prevailing wage laws covering schools have higher relative earnings for construction workers, as shown in Table 15.

Table 15: Relative Earnings of Construction Workers to All Non-Agricultural Workers, by School Prevailing Wage Law Jurisdiction, 1988-1996

Year	Prevailing Wage Law	No Prevailing Wage Law
1988	1.38	1.14
1989	1.08	1.14
1990	1.22	1.13
1991	1.33	1.12
1992	1.17	1.11
1993	1.19	1.11
1994	1.12	1.13
1995	1.06	1.08
1996	1.15	1.07

Source: County Business Patterns, 1988-1996

A statistical test of the difference between the average relative earnings index in prevailing wage law jurisdictions and non-prevailing wage law jurisdictions indicates that, overall, earnings are higher in prevailing wage law jurisdictions. One might be tempted to conclude that, since Baltimore City is a prevailing wage jurisdiction, that high wages in this urban center are pulling the average up. But this would not be an appropriate inference because it ignores the fact that construction worker wages in Baltimore are being compared to the earnings of other workers in Baltimore. What this test, and all of the numbers presented throughout this chapter, indicates is that construction industry earnings do appear to be higher in areas with prevailing wage laws. This conclusion is consistent with one of the original intents of prevailing wage laws, namely, to promote a path of high wage economic development.

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PREVAILING WAGE REGULATIONS AND SCHOOL CONSTRUCTION COSTS: EVIDENCE FROM BRITISH COLUMBIA

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PREVAILING WAGE REGULATIONS AND SCHOOL CONSTRUCTION COSTS: EVIDENCE FROM BRITISH COLUMBIA

The stock of public school buildings constructed during the baby boom is aging along with that generation of Americans. Soon much of this building stock will have to be replaced.[1] The financing of this rebuilding of America's schools is an emergent political issue of considerable importance. Given these pressures on school construction financing, any proposal that promises to substantially lower the price tag for this reconstruction garners considerable public interest and potential support. One such proposal is the elimination of prevailing wage regulations that in 31 states and the District of Columbia govern the payment of wage rates on public school construction.[2] Prevailing wage laws require that state mandated wage rates be paid on public road and building construction. The purpose of these laws is to encourage collective bargaining in construction and to discourage the payment on public works of wages below those prevailing locally. Critics of prevailing wage laws assert that these laws raise public construction costs and discourage nonunion contractors from bidding on public works.

Some politicians and school officials believe that the elimination of prevailing wage regulations could cut public school construction costs by 10 to 40 percent. For instance, Gary Johnson, the Governor of New Mexico, in his 1997 address to the New Mexico state legislature foretold a 33 percent reduction in total state school construction costs from the elimination of the state's prevailing wage law.[3] In Ohio in 1997 the state legislature held hearings on the possible elimination of prevailing wage regulations for school construction. School officials foresaw substantial cost savings from such an exemption. For instance, Rick Savors,

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Deputy Director of Legislative Networks for the Ohio School Boards Association (OSBA) testified that

> The OSBA believes that the state's current prevailing wage law adds significant costs to a project and limits the number of contractors willing to offer bids on school contracts…The cost savings for districts, taxpayers and the state can be significant…those savings could reach perhaps as high as 30-40 percent in some instances.[4]

In the same hearings, Richard Maxwell, Deputy Executive Director for Government Relations for the Buckeye Association of School Administrators (BASA) testified:

> BASA supports the exclusion of the prevailing wage provision for school construction and facility improvements. This exclusion will benefit Ohio's schools by extending the scarce taxpayer's dollars to improve facilities. As a superintendent of schools for 23 years in districts I managed many school buildings built in 1912 through 1964. We had an extensive program of renovation and improvement of these buildings…BASA members tell us they believe they can do 10-15 percent more construction and renovation if the prevailing wage provisions did not apply to school construction and renovations.[5]

The primary basis for asserting that the elimination of prevailing wage regulations on school construction will substantially lower total school construction costs is the proposition that absent these regulations, wage rates on school construction would be substantially lower. In consideration of Ohio Senate Bill 102, Jim Shirey, Legislative Liaison for the Athens Ohio City Schools Board of Education made this argument explicit.

"Prevailing Wage" is *nothing less* than price fixing perpetrated by state government. Prevailing Wage sets the price of construction labor at union scale, *regardless* if the local labor market. One of the contractors who testified on this bill before the Senate Finance Committee did a study of *actual* construction costs and he showed *very clearly* that Prevailing Wage can inflate the cost of construction labor by as much as 60 percent.[6]

There are no academic studies on the relationship between prevailing wage regulations and school construction costs. This paper attempts to inform the ongoing debate over the impact of the prevailing wage laws on school construction costs by using a unique dataset from Canada. Wages including benefits constitute about 30 percent of the total construction cost, excluding land acquisition and architectural costs.[7] The province of British Columbia (B.C.) established the Skill Development and Fair Wage Policy (SDFWP) on March 30, 1992. It mandated payment of the prevailing wage on public construction projects and determined "fair" wage schedules for each occupation within the building trades. The fair wage was set at about 90 percent of the collectively bargained wage rate for each construction occupation in B.C. The B.C. experiment with prevailing wages provides a new opportunity to make an empirical assessment of the debated question of whether or not prevailing wage regulations measurably increase school construction costs. The objective of this paper is to compare final construction costs before and after the SDFWP was implemented in order to determine whether legislated wages resulted in higher school construction cost in British Columbia. For this purpose we will use final cost data from new elementary and secondary public school construction projects from six school districts in B.C. tendered between 1989 and 1995.

The paper is organized as follows. Section 1 presents a brief review of the empirical studies on the impact of the prevailing wage laws on public construction, and states the contribution of this paper to that literature. Section 2 describes the data. Section 3 presents an empirical model to test for the impact of the SDFWP. The model is estimated and results are discussed in section 4. Section 5 concludes.

1. The Literature

In this section we will first outline the general features of the debate over the prevailing wage laws. In the last part of the section we will outline the specific findings concerning school construction.

The literature on the construction cost impact of prevailing wage laws focuses almost exclusively on the U.S. federal Davis Bacon Act. With one exception, the Davis-Bacon literature estimates cost savings from the elimination of the federal regulation to range from 1 to 3 percent of total federal construction costs. The one exception estimates a 26 percent savings in rural building construction from the elimination of federal prevailing wage regulations.

Because the Davis Bacon Act was passed in 1931, there is no possibility of comparing the cost of construction prior to and subsequent to the passage of this act. This leaves three avenues of research. The first estimates what wage rates would be paid on federal construction absent prevailing wage regulations and then tries to compute what total costs would be under two wage rate regimes. The second exploits a moment of time in 1971 when the Davis Bacon act was suspended for 34 days. The last compares the cost of construction on public works with comparable private construction projects.

The first and most common method in the literature tries to assess what wage rates would be paid on federal construction absent Davis-Bacon. With this calculation in hand, these studies then attempt to estimate theoretically what construction costs would be under these hypothetical wage rates. Finally, these studies then attempt to compare hypothetical construction costs under hypothetical wage payments. As expected, this line of research is fraught with debates over the methodology.

Most studies of this type conclude that the Davis-Bacon wage rate is biased upwards toward the union wage, and consequently predict that Davis Bacon raises the cost of construction.[8] The estimated cost inflation attributable to this wage differential is in the order of 1.5 to 3 percent of public construction expenditure (Gujarati, 1967; GAO, 1979, 1983; Goldfarb and Morrall, 1978, 1981; Gould, 1971; Gould and Bittlingmayer, 1980; GAO, 1979,

1983; Thieblot, 1986). On the other hand, Bourdon and Levitt (1980) found no such bias, and Allen (1983) argued that the Davis-Bacon effect is modest, raising construction costs merely by 0.3 to 0.4 percent.

Thieblot (1975) adopted a second, more direct approach by taking advantage of President Nixon's temporary suspension of the Davis-Bacon in 1971. Thieblot compared bid prices of projects tendered but not contracted in this period with their rebid prices in the following period. He concluded that in the absence of Davis-Bacon the lowest bid were lower by 0.63 percent. Thieblot's re-examination of the data leads him to the conclusion that savings, including administration and wage costs, would be as much as 4.74 percent if the Davis-Bacon were repealed (Thieblot, 1986, 105-106).

Fraundorf *et al.* (1983), followed a third methodology. They utilized multivariate methods to determine the impact of prevailing wage laws on construction costs directly. Fraundorf *et al.* compared 215 federal and private non-residential construction projects controlling for non-labor cost factors (such as the type of structure, technical characteristics, size, and geographic location). They found that federal projects were 26 percent more expensive than the private projects, and attributed this difference to the Federal Davis-Bacon Act.

The Fraundorf result is substantially higher than previous studies and may be the academic basis for claims by school officials that total construction costs can be cut by 10 to 40 percent through the elimination of prevailing wage regulations. However, the Fraundorf study has two weaknesses that the present study overcomes. First, the Fraundorf study is not a study of school construction costs. It may be that school construction is distinct from rural building construction. Second, the Fraundorf study derives its projected cost savings from a comparison of public building costs to private building costs. If private buildings differ from public buildings in ways that are not adequately controlled for, this may conflate cost differences derived from public-private building differences with cost differences derived from prevailing wage regulations. Our study attempts to overcome these potentially confounding factors by focusing only on public school construction.

Because state and provincial prevailing wage regulations differ in their specifications and implementations, and school construction is regulated at the state and provincial level, a variety of case studies are needed. Our study is limited to assessing the effect of one prevailing wage law in one province at one particular period of time.

2. The Data

The recent experience of B.C. with the SDFWP permits an assessment of the impact of wage regulation on us the school construction cost by controlling for many factors that confounded the results of the studies mentioned above. The empirical analysis of this paper is based on tender data compiled by the Construction Labour Relations Association of B.C. from six school districts (out of 18) for a study of the impact of the SDFWP on construction costs (Government of Canada, 1997). These school districts are all located in the southern Lower mainland education region of B.C. and are geographically in close proximity. The data cover 54 new school construction projects tendered and completed between 1989 and 1995. Of the 54 tenders, 25 were received before March 31, 1992 and 29 were received afterwards, allowing the comparison of costs before and after the establishment of the SDFWP. All projects cost more than $250,000[9] and were therefore covered by the Fair Wage Policy during the period it was in effect. In addition to the final cost, the raw data also provide information on the list of bidders and bid prices for all projects, the contract price, the type of school (elementary or secondary), and structural characteristics of projects, including gross area, construction type, foundations, and special features (e.g. remote location, difficult site). For many projects estimated and/or actual durations of construction are available. Thus, while the number of observations is relatively small, the data have the advantage of being appropriately detailed. In addition, we also collected information on the size of the general contractors to whom the contract was awarded.

Table 1 summarizes the distribution of school types across the two periods. The number and the type of schools are distributed approximately evenly across the two periods. Gross

sizes of elementary schools range from 2,017 to 3,950 square-meters, while secondary school gross sizes range from 6,033 to 15,787 square-meters.

Table 2 reports summary statistics for the unit (square-meter) final cost (in 1989 prices). The average unit cost is $1,423 but there is a significant difference between the pre- and post-SDFWP periods. After the establishment of the Policy, the average unit final cost increases by $207, from $1,308 to $1,515. This 16 percent difference, which is statistically significant at the one percent level suggests that the SDFWP constitutes a serious burden on the public purse.

In the next section, we will address this question in a multi-variate context controlling for other potentially relevant factors that may impinge on the unit cost of construction.

3. The Empirical Model

The cost of construction, by definition, is equal to the sum of the bid price and change orders. The unit bid price, in turn, is equal to the sum of the estimated cost of production and the profit margin. Let FP stand for the unit final price, m be the mark-up rate, and CO be the total change orders cost, the latter including the mark-up on change orders.[10] Estimated total cost of construction, in turn, can be written as the sum of labor and non-labor costs. Letting w and n stand for the prices of labor and non-labor inputs, and L and N stand for the quantities of labor and non-labor inputs, the final cost can be written as:

$$FP = (1+m)(wL+nN)+CO. \qquad (1)$$

This equation is the basis of the empirical model to be used in predicting the cost of construction. Four sets of factors that potentially affect the independent variables are the physical features of the project, state of the construction business cycle and the degree of competition among contractors, regulatory environment in the labor market, and characteristics of the contractor.

Physical features of the project (including the size, the type of foundation and frame, location, number of stories, type of school) influence the quantity and the type of inputs.

Fraundorf *et al.*, controlled for technical characteristics such as foundation, frame, exterior walls, floor finishing, and frame type. In our sample there is little, if any, variation in technical characteristics for which information is available. Structural specifications of all projects were reported in the cost estimation forms prepared by the architect prior to bidding. Almost all schools are steel frame structures with slab on grade foundation. The type of school -- elementary vs. secondary -- summarizes most of the other technical differences. Secondary schools are larger than elementary and require approximately twice as long to build. If there exist economies of scale to size or longer construction period, secondary schools are expected to have lower unit costs. Finally, secondary schools are more likely to include higher unit cost structures (e.g. laboratories) on the one hand, lower cost areas such as sports fields, on the other.[11] These considerations make it difficult to form an expectation on how the school type would affect the unit cost. In order to control for these technical features we introduce a dummy variable that takes the value of one for secondary schools and zero for the elementary. We also utilize dummies for school districts to control for any potential location effects.

Input prices vary with the state of the economy, reflecting relative abundance of the labor, capital and intermediate goods. Hence the unit cost is expected to be pro-cyclical. The impact of the cycle on the mark-up is indeterminate. During the expansion of the economic activity, for instance, the firm may raise the profit margins taking advantage of rising demand. It is also conceivable that the firm shaves the mark-up in order to protect its market share from potential entrants attracted to the industry. In order to capture the construction industry business cycle effects we fitted a linear annual trend to the values of non-residential building permits (in constant prices) over the 1989-1995 period by ordinary least squares. We then measured the cyclical fluctuation in the construction sector activity as the percentage deviations of actual values of permits from the trend values. It should be borne in mind that this measurement of the cycle based on the annual experience of only seven year is crude. Quarterly data would probably yield a more precise profile of the cycles, but they are not yet available.

The immediate effect of the SDFWP on the construction cost is via the wage rate. If the legislated wage is higher than the market wage, then labor costs increase. This anticipation is the basis of most of the empirical studies on the cost effect of the prevailing wage laws. It should be

kept in mind that this cost effect would be tempered by substitution between different qualities of labor as well as between labor and capital. Total cost is not expected to rise proportionately because contractors facing higher labor costs would alter techniques of production, employing more capital and skilled labor intensive techniques.

In addition, the SDFWP may also affect the final cost by changing the type of uncertainty facing the bidders. Assuming that there is a monotonic relationship between the accepted bid price and the final cost of construction, the final cost would be influenced by the degree of competition because each contractor takes into consideration the number of bidders its competing against in determining the mark-up. The auction theory predicts that if the "independent private values" model applies then bidders lower their mark-ups in the face of higher competition in order to maximize their chances of winning the contract.[12] This "competition effect" implies that the mark-up and the bid price are inversely related to the number of bidders. When the "common values" model applies, however, bidders would be subject to the so-called "winner's curse." The winner's curse refers to the fact that in a first-price sealed-bid auction, although expected value of each bidder's bid is unbiased, the winning bid will be biased downward, or that the winner is the one who underestimated the construction cost the most. Consequently, the winner is likely to make less than anticipated profits or may even lose money (Thaler, 1988). Since rational bidders do not make consistent errors, the optimum bidding requires experienced bidders protect themselves from the winner's curse by adding a surcharge to the estimated cost. Optimal behavior under the common values model requires this surcharge to rise with the number of competing bidders, offsetting the competition effect. To the extent that the SDFWP reduces uncertainty over labor costs, the relationship between the bid price and the degree of competition measured in terms of the number of bidders would change from more to less positive or from less to more negative following the implementation of the Law. In the extreme case where introduction of the law results in a switch from common to private values model, the degree of competition would influence bid prices positively before the passage of the Law and negatively afterwards. Bilginsoy (1999) uses the B.C school tender data of the projects considered in this paper to provide evidence for such a switch in the response of bid prices to the degree of competition.

The cost of construction also depends on the capital stock and capacity utilization of the contractor. If there are economies of scale associated with larger size, final cost should decline with the size of the firm. If the contractor faces diminishing returns as it approaches full capacity, final cost would increase. Ideally, one should be able to control for the capital and the level of activity separately, but the data do not allow this. Instead, it is possible to build a dataset for the "size" of the contractor, defined as the average annual volume of sales. The obvious shortcoming of this variable is that it cannot distinguish between the capital stock and capacity utilization, and therefore its impact on the final cost is indeterminate. In the absence of data that can make finer distinctions, we used this as a proxy to control for the firm characteristics. We constructed data series on size from the *Canadata* database and the *Journal of Commerce*'s "Substantial Performers" and "Leaders" reports of the leading contractors for 1992, 1995 and 1996.[13]

Theory suggests little about determinants of change orders. There is some evidence indicating that cost overruns may be directly related to the size of the project, and that the cost overrun is more likely if the bid is below the owner's estimate (Jahren and Ashe, 1990). Although it is possible to control for the area of the school, data on owner's pre-tender estimate are far from complete in our sample and therefore not included as an explanatory variable. There may be a direct link between change orders and the SDFWP, however. Dyer and Kagel (1996, p.1470) identify negotiations over the change orders one method whereby a contractor who has underbid may recoup his/her losses. If we follow this argument, change orders are expected to be higher in the SDFWP period when contractors are more likely to be victims of the winner's curse. We calculated the change orders for the projects in the data set as a percentage of the accepted bid price. For all the projects in the dataset, the average change order was 2.08 percent of the lowest bid price. For the pre- and post-SDFWP periods, however, the mean values of change orders were 2.54 and 1.68 percent, respectively. The difference in means is statistically significant at the 10 percent level, providing some evidence for the hypothesis that change orders declined after the establishment of the Policy. Hence it may be hypothesized that the SDFWP affects the final cost directly by lowering the final unit cost.

Finally, the final cost of construction may change gradually over time for reasons other than those listed above. Such factors may include technological changes which raise productivity and lower cost over time, improving methods of cost estimation, gradual specification changes in construction,[14] or adjustment process of contractors to the new legal regime. In order to capture the effect of these gradual changes we add a monthly time index starting in January 1989 to the explanatory variables. Since it is impossible to distinguish between the separate effects of these secular factors on this monthly time trend we do not have any priors on the direction of its impact on the final cost.

The project size was excluded from the final regression equation because it was highly correlated with the school type and therefore introduced collinearity problems. The estimated regression equation is then:

$$\begin{aligned} ln(Final\ Cost) = {} & \beta_0 + \beta_1 Secondary\ school + \beta_2 Construction\ cycle \\ & + \beta_3 (1/Number\ of\ bidders) + \beta_{4i} Contractor\ size_i \\ & + \beta_5 Time + \beta_{6j} District_j + \eta. \end{aligned} \quad (2)$$

Final Cost is the square-meter final cost of construction deflated by the non-residential construction price index, *Number of bidders* is the number of bidders per tender, *Contractor size* is a vector of dummy variables for contractor size categories (indexed by *i*), *Time* is the monthly time trend starting in January 1989, and *District* is a vector of dummy variables for the six school districts (indexed by *j*). η is the error term.

4. Estimation

We estimated regression equation (2) for the whole period, as well as the pre- and post-SDFWP periods by the ordinary least squares method. This method not only shows how the SDFWP affected the final cost controlling for these variables, but also if and how the response of the final cost to these variables were altered after the establishment of the Policy. In estimation, contractor size turned out to be statistically insignificant in all regressions and, given degree of freedom constraints, we decided to exclude these from the final regressions results reported on Table 3.

Table 3 reports the parameter estimates of equation (2) for two specifications of the model. In the first specification, reported by columns (1) to (3) the time index is omitted. In column (1) the regression is run over the complete sample. According to the adjusted R2 of column (1) the equation explains 33 percent of the total variation of the variation in unit final costs for the whole sample Columns (2) and (3) apply the equation separately to the pre- and post-SDFWP sub-periods. We tested the hypothesis that the coefficients of explanatory variables are equal across the two sub-periods. This test yielded the F-value of 5.73, which is statistically significant at the one percent level. Rejection of the hypothesis of stability of coefficients across the periods indicates that it is inappropriate to pool the pre- and post-SDFWP periods in estimating the final cost regression equation.

Indeed the explanatory power of the regression increases significantly once the sample is divided on the basis of the legal regime. Adjusted coefficients of determination reported in columns (2) and (3) are 0.55 and 0.48, substantially higher than what is found in the case of the full sample. According to the second column of Table 3, before the establishment of the Policy, secondary school unit cost was on average 14.4 percent higher than that of the elementary schools. The negative coefficient of *Construction cycle* indicates countercyclical behavior for final cost but the parameter estimate is not statistically significantly different from zero. The final cost increases with the number of bidders for the project and this result is statistically highly significant (p=0.003). All else being constant, an increase in the number of bidders (at the mean)

raises the square-meter final cost by 3.3 percent. This is consistent with the optimum bidding behavior of contractors who realize that they are susceptible to the "winner's curse." Contractors face collective uncertainty over the cost of the project prior to the SDFWP and, as economic theory suggests, they increase their bid prices in response to an increase in the number of bidders.

The third column shows that after the SDFWP secondary school unit cost was still higher than that of the elementary but now only by 5.6 percent and this result is not statistically significant. Final cost is pro-cyclical and, again, the result is statistically significant (p=0.03): a one percent increase above the trend growth raised the square-meter cost by approximately 0.7 percent. The most striking effect of the SDFWP concerns the impact of the number of bidders. The sign of the coefficient is now positive (p=0.03): a unit increase in the number of bidders (at the mean) now lowers the unit final cost by 1.8 percent. In comparison with the pre-SDFWP period, this finding suggests a change in the type of uncertainty facing the bidders. It is now private uncertainty, rather than collective, that is more relevant in the bidding process and rising competition induces contractors to lower their mark-ups (and consequently bids and final cost) in order to increase the probability of winning the contract.[15]

In order to compare average unit costs of the pre and post-SDFWP periods we predicted the construction cost of an elementary school in school district 6. We assumed that the building permits grow at the trend rate and that eight contractors make bids for the project. Under these assumptions, the predicted average construction cost is $1,238 before the SDFWP and $1,313 afterwards. This cost differential is not statistically significantly different from zero. The 95 percent confidence interval for the pre-SDFWP prediction ($1,097-$1,397) includes the post-SDFWP figure.

The remaining three columns of Table 3 report estimation results of the specification including the time index. Estimation of this specification yields results that are consistent with those reported earlier.Again the hypothesis of structural stability of coefficients across the two periods is rejected at the one percent level (F-value=5.20). In the pre-SDFWP period secondary schools are more expensive to build by 12.5 percent (p=0.02). The cost of construction is varies directly with the number of bidders. An increase in the number of bidders

(at the mean) is estimated to raise the final cost by 2.0 percent (p=0.09). Unit construction cost is also estimated to rise at 0.6 percent per month (p=0.08). In the post-SDFWP period, the type of school no longer makes a difference on the cost of construction. Similar to the earlier finding reported on column (3), final cost is inversely related to the number of bidders. It declines by 2.27 percent in response to a unit rise in the number of bidders (at the mean). The final price also declines by 0.05 percent per month in the post-SDFWP period. Final cost is not responsive to the business cycle in either period. While the theory did not predict unambiguous sign for the coefficient of this variable, it should still be remembered that quarterly data on business cycles would have yielded more reliable assessment of the cyclical behavior of the final school construction costs.

We again predicted the average cost of construction under the assumptions stated above. These predictions do not indicate a significant change in the cost of construction following the establishment of the SDFWP. The predicted cost increased gradually between January 1989 and March 1992, reaching $1,347 just before the establishment of the SDFWP. At the end of March 1992, the SDFWP was established. On April 1992, the predicted price jumped to $1,474, and then it declined gradually. It took about 20 months for the price to decline to its March 1992 level.

5. Conclusion

A number of politicians and school officials proposed the elimination of prevailing wage regulations as a means to lower public school construction costs. The B.C. data, at first sight, seem to support this view. The bi-variate "before and after" comparison of final unit price indicate that the SDFWP caused the construction cost to increase by 16 percent, even higher than some of the figures estimated by the critiques of the U.S. prevailing wage law. This difference is also found to be statistically highly significant. However, when the same experiment is carried out controlling for other factors including the construction business cycle, number of competitors, type of school, district dummies, and the time trend, this result is no longer holds. There is indeed a structural break in the determination of the final cost after the SDFWP, but

there is no evidence of significant changes in the unit costs before and after the establishment of the SDFWP. Instead, what is observed is a 6.1 percent increase in price, if the impact of the time trend is ignored. No statistical significance can be attached to this figure. If time trend is also included in the analysis, the price rises by 9.4 percent at the time of introduction of the Law followed by a steady decline afterwards. This steady decline, over time, offsets the immediate inflationary cost impact. These findings indicate that the appeal for the repeal of prevailing wage laws to reduce the school construction costs and the burden on the public budget is misguided.

Regression results also indicate that the prevailing wage affects construction costs through a variety of subtle channels that are overlooked in the literature. Present findings suggest two factors playing important roles in cost determination. The first is the impact of competition on the final price. The final price is directly (inversely) related to the number of bidders before (after) the SDFWP. This finding supports the hypothesis that the SDFWP altered the nature of uncertainty facing the bidders and made bid surcharges to avoid the winner's curse unnecessary. The second factor is the trend change. We do not know exactly which factors lie behind the rising trend costs in the pre-SDFWP and declining trend of the post-SDFWP periods. Possible answers to this question may lie in the areas of technological and non-wage regulatory changes, as well as the learning behavior of contractors and their adjustment process to the changing regulatory environment. SDFWP may also affect costs by lowering the cost of change orders.

TABLES

Table 1: School Construction Projects in Six B.C. Districts: 1989-1995

	Pre-SDFWP	Post-SDFWP	Whole period
Elementary School	18	21	39
Secondary School	7	8	15
All Schools	25	29	54

Table 2: Final Square-meter School Construction Cost (in 1989 prices – Can.$)

	No. of Obs.	Mean	Median	Stan. Dev.	Range
All Tenders	54	$1,423	$1,440	$217	$968-1,811
Pre-SDFWP	25	1,308[a]	1,248	189	968-1,690
Post-SDFWP	29	1,515[a]	1,508	195	1,194-1,811

Note: We tested the hypotheses that means and standard deviations of the post-SDFWP periods are equal to their pre-SDFWP counterparts (one-tailed tests). Superscript a indicates that the hypothesis is rejected at the one percent level.

Table 3: Regression Model for Final Cost

(Dependent variable: natural log of square-meter cost)

	Specification 1			Specification 2		
	Whole Period	Pre-SDFWP	Post-SDFWP	Whole Period	Pre- SDFWP	Post-SDFWP
	(1)	(2)	(3)	(4)	(5)	(6)
Constant	7.272	7.379	7.007	7.118	7.115	7.260
	(88.30)***	(81.84)***	(70.39)***	(76.11)***	(42.97)***	(49.28)***
School type	0.090	0.144	0.056	0.094	0.125	0.040
(=1 if secondary)	(1.94)*	(3.03)***	(1.26)	(2.56)**	(2.75)**	(0.97)
Construction	0.007	-0.008	0.007	0.008	-0.009	-0.002
Cycle	(1.94)**	(1.24)	(2.27)**	(2.47)**	(1.50)	(0.45)
1/(No. of bidders)	-0.646	-2.063	1.390	-0.380	-1.268	1.757
	(1.31)	(3.50)***	(2.36)**	(0.81)	(1.82)*	(3.11)***
Time				0.002	0.006	-0.005
				(2.85)***	(1.85)*	(2.18)**
District dummies	Included	Included	Included	Included	Included	Included
R^2	0.43	0.70	0.63	0.52	0.76	0.71
Adj. R^2	0.33	0.55	0.48	0.42	0.61	0.57
F	4.19***	4.74***	4.28***	5.21***	5.23***	5.05***
Observations	54	25	29	54	25	29

NOTE: t-statistics in parentheses. ***, ** and * indicate statistical significance at the 1 5, and 10 percent levels, respectively.

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ENDNOTES

[1] For instance, Thompson, *et al.* (1994, p. 553) state "...it is truly startling to recognize that almost half of all school buildings in the nation have only marginal future utility, and another 20%-30% are candidates for reconstruction or abandonment because they are more than 50 years old."

[2] The first state prevailing wage law was passed in Kansas in 1891. Eventually 41 states would adopt such legislation. Between 1979 and 1988, nine states repealed their prevailing wage laws. In 1995, Oklahoma's law was judicially overturned and in 1997 Ohio exempted school construction from the purview of its prevailing wage law. The federal Davis Bacon Act was passed in 1931. Because most public school construction does not include federal funds in the U.S., public school construction is regulated by state laws.

[3] "...without the constraint of the Little Davis-Bacon Act, we could build four schools instead of three for the same amount of money." New Mexico Governor Gary Johnson, State of the State Address, January 16, 1996.

[4] Rick Savors, Ohio School Boards Association Deputy Director of Legislative Networks, Testimony on Ohio Senate Bill 102, May 8, 1997.

[5] Richard Maxwell, Testimony on Ohio Senate Bill 102, May 8, 1997.

[6] Jim Shirey, Testimony on Ohio Senate Bill 102, May 8, 1997 (emphasis in the original).

[7] This result is from the U.S. *Census of the Construction Industry, 1992, Industry Series, United States Summary*, CC92-I-27 Table 3, page 27-8. There is no comparable

construction census for Canada. The data are for contractors with payroll. The numerator of the ratio of labor costs to total costs includes total wages paid to construction workers plus the value of both legally mandated benefits (such as social security) and voluntary benefits (such as a private pension) paid for by the employer. This benefit figure includes not only benefits paid to construction workers but also to all other clerical and support workers employed by construction contractors. Thus, this is an overestimate of the wages and benefits paid to workers covered by prevailing wage regulations. The denominator is the net value of construction work done. This figure avoids double counting associated with subcontracting.

Anecdotally construction contractors sometimes report higher labor costs as a percent of total costs. While labor costs as a percent of total costs vary among contractors and any one contractor is unlikely to reflect the average, anecdotal reports suffer from a second handicap. Often when contractors calculate their labor costs as a percent of total costs, they are thinking of labor costs to them. Consequently they exclude their charge for capital depreciation and profit to the purchaser of their services. The U.S. *Census of Construction* figure includes the contractor's markup in the total costs paid by the owner or purchaser of the construction. This is the relevant figure when trying to assess the effect of a savings on labor costs to school board construction costs.

[8] Davis Bacon periodically surveys counties. Davis Bacon sets the "prevailing" wage rate at the modal rate found in the survey for specific occupations if the mode accounts for 50 percent plus one wage rates found. Otherwise, the average wage rate is said to prevail.

[9] All prices are in Canadian $.

[10] The mark-up on change order is likely to be different from *m* because the change order price is negotiated separately. Dyer and Kagel (1996) argue on the basis of U.S. field data that contractors who underbid may use these negotiations to recover their losses.

[11] The data provide only the gross area size.

[12] Private values model implies that the bidders' estimation errors of cost of construction are independent. In the alternative case of common values model, estimation errors are interdependent. The latter would be the case if all bidders face some common uncertainty concerning the cost of construction which may be attributable to factors such as weather conditions or the state of the general labor market (Milgrom, 1989).

[13] We identified six size categories in terms of average volume of sales: less than $15 million, $15 to 30 million, $30 to 60 million, $60 to 100 million, $100 to 200 million, and above $200 million.

[14] In B.C., school construction specifications, including building, mechanical and electrical codes, were changed in the late 1980s and early 1990s in order to make structures more earthquake resilient.

[15] The assumption of exogeneity of the number of bidders deserves further comment. The number of bidders may be exogenously determined if the bid/no-bid decision is influenced by the desirability of the project. If so, the number of bidders would no longer be an appropriate measure of the degree of competition, and the estimated parameters would be biased and inefficient. In the economics of auctions literature it is suggested that the decision to bid would be affected by factors including the variance of the estimated value of the project and

asymmetric distribution of information across the bidders. These factors were shown to be significant in the outer continental shelf (OCS) hydrocarbon lease auctions (Gilley and Karels, 1981; Hendricks and Porter, 1988). In addition, in school construction some contractors may chose not to bid in school districts that are difficult to work with. These problems are not serious in our sample because school construction is a far more standard item to bid in comparison with the OCS leases and the scope of asymmetric information across contractors, if any exists, is likely to be very narrow. The variance of the submitted bids for any project suggests a much smaller variation in cost estimates. Inspection of "special features" in the architect's cost estimation forms indicates little variation across projects and between the pre- and post-SDFWP periods, and supports these contentions. Finally, the spread of the average number of bidders across districts is quite narrow, ranging from 7.3 to 9.3, and do not suggest that contractors deem any district to be less desirable than the others.

The Effect of State Prevailing Wage Laws on Total Construction Costs

by

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Introduction

Prevailing wage laws have been a part of public policy in the United States at both the federal and state levels since the early part of this century. These laws require that construction workers be paid the "prevailing rate" when working on publicly funded construction projects. They were initially established to neutralize the government's monopsonistic power as a purchaser of certain types of construction labor and to support the social objective of maintaining a family wage.

Currently, the question of whether prevailing wage laws continue to make public policy sense is being debated. One of the most significant issues in this public policy debate is what impact prevailing wage laws have on publicly funded construction costs. Opponents of prevailing wage laws argue that they raise construction costs. Repeal of these laws would result in cost savings on the order of 20 to 30 percent according to some. If such savings were possible, it is argued, school districts could build five schools for the price of four.

Claims of cost savings from the repeal of prevailing wage laws, however, are generally based on analysis of the effect of higher wage rates on construction costs. Yet wage differences have a moderate effect on total construction costs. Labor costs are less than a third of total construction costs and have been falling. In 1972, for instance, in an analysis of school construction costs, John Olsen found that onsite wages and salaries excluding benefits were 28.2 percent of total costs. (Monthly Labor Review, 1979, p. 40) According to the Census of Construction, labor costs counting benefits on all types of construction were 30 percent of total costs in 1977 and had fallen to 26 percent by 1987.

A second problem leads us to question estimates of the impact of prevailing wage

legislation on construction costs based on an analysis of wage differences. Because they assume implicitly that the same number of hours of each type of labor will continue to be employed and that labor is of invariant productivity the impact on costs is driven by the wage differential. Neither of these assumptions are necessarily appropriate. The payment of prevailing wages may serve to attract workers with more experience and training. Increased labor productivity may result in fewer hours of labor being required thus offsetting the higher wage rate. For instance, Allen has shown that unionized labor in the construction industry is between 17 and 52 percent more productive than nonunion labor. (Allen, 1984) Additionally, higher wage rates may lead contractors to substitute capital or other inputs for labor, mitigating the impact of higher wages rates on total construction costs.

These possibilities, alone or in combination, make the assumptions underlying the analysis of construction costs based on wage differences inappropriate and cast doubt on the estimates of costs savings. Specifically, it is difficult to imagine how savings of 20 to 30 percent are possible . To get a true picture of the impact of prevailing wage legislation's impact on total construction costs, one could evaluate not only differences in wage rates, but also productivity differences, the incidence of substitution, administrative costs and other ways in which these laws's impact is either mitigated or enhanced. An alternative approach is to simply examine total construction costs directly and compare costs in the presence and absence of prevailing wage laws controlling for project differences.

Previous Estimates of Impact on Total Costs

Only one studies have attempted to estimate the impact of prevailing wage legislation based on actual total construction costs. Fraundorf, et. al., in "The Effect of the Davis-Bacon Act on Construction Costs in Rural Areas," examined 215 new, non-residential construction projects built in 1977 and 1978. (Fraundorf, 1983) Approximately half of these projects were federal projects built under the purview of the federal Davis Bacon Act specifying that prevailing wages be paid. The other half were privately owned projects constructed without the requirement that prevailing wages be paid. Data on total construction costs were then compared using multivariate regression analysis to control for the effects of factors other than the presence of prevailing wage requirements. This study controlled for differences in the type of structure, the types of materials used, and project size in an effort to focus on cost differences associated with labor cost differentials resulting from the dichotomy in regulatory regimes. It also attempted to control for regional differences in construction costs by grouping projects into four regions; Northeast, North Central, South and West. The dependent variable in their regression analysis was the natural log of the project's bid price deflated to 1977 dollars. The authors of the study found, somewhat surprisingly, that federal construction projects governed by Davis Bacon were 23 percent more expensive than private construction projects controlling for other cost influencing factors. When they re-estimate their basic model to correct for disproportionate response rates by region and building type, Fraundorf finds that the impact of Davis Bacon on total construction costs is as high as 30 percent. While they admit that these results are high, especially in light of a public-private wage differential estimated at 20 percent, they point out that

the results are consistent with other aspects of the data. In particular they do not find evidence of factor substitution which would mitigate the impact of prevailing wage requirements. However, this does not explain why the impact on total costs is greater than the wage differential. They explore other factors that might contribute to the higher costs of federal Davis Bacon projects such as record keeping and reporting, and decreased competition. Neither of these factors appear to significantly contribute to costs on federally funded construction. (Fraundorf, et. al, 1983, p. 145)

One possible problem with the Fraundorf study is that regional differences in construction costs may have been inadequately controlled for. Given the relatively small sample size, the authors of this study had to group construction projects into relatively broad regions. This creates the potential for comparing a private project in a low cost state such as Idaho with a public project in a high cost state such as California. Since both projects are considered to be in the same region the cost differential is incorrectly attributed to the impact of prevailing wages when in fact it is due to differences in the cost of living or cost of materials between Idaho and California. Another problem may result from the way in which building types were classified. Each construction project was placed into one of six categories; recreational buildings, storage facilities, industrial buildings, office-commercial, medical and other. These categories were then used to find matches between public and private construction projects. However, these six categories were sufficiently broad to allow rather dissimilar buildings to be considered comparable. For instance, in the category storage facilities, warehouses were grouped with barns as well as airplane hangars. Likewise office buildings were in the same category as restaurants. Differences in costs between public and private buildings may have resulted from differences in

structure type and not from prevailing wage requirements. (Fraundorf, 1982)

A second and potentially more serious problem with this study is that it fails to adequately isolate the impact of prevailing wage legislation on construction costs. Specifically, Fraundorf compares private projects constructed in the absence of prevailing wage legislation with federal (i.e., public) projects built using workers paid the prevailing wage. This comparison, while seemingly appropriate, contains the potential for confounding cost differences related to prevailing wage laws with cost differences resulting from other differences between private and public construction projects. The authors recognize this possibility when they point out, "If the government is more exacting than private owners in its quality standards, labor hours (and costs) and possibly material costs would be higher on government projects." (Fraundorf, 1983, p. 145) It may also be that the difference in bidding procedures for public and private contracts or differences in the time horizon of public and private owners may contribute to higher costs in the public sector. In other words, the cost differential that Fraundorf attributes to the effect of prevailing wage legislation may in fact be due to differences between public and private construction.

Estimating the Impact of State Prevailing Wage Laws

This study analyzes the impact of prevailing wage legislation on total construction costs using data on nonresidential construction in the United States. The data are from the F. W. Dodge Company, an organization that collects and disseminates data on construction projects to the construction industry. These data give information on construction costs at the start of the project, or bid price. They also contain information on detailed structure type, project location,

project scale, and technical characteristics of the project such as number of stories and type of frame. The Dodge data also distinguish between public, private and federal projects. One advantage of the Dodge data is that they report on a large number of construction projects allowing for a more appropriate geographical breakdown of projects. In addition, the Dodge data make it possible to compare construction costs on similar projects in the private and public sectors for states both with prevailing wage laws and without. This is essential if one is to sort out the cost differences associated with public construction from the cost differences associated with prevailing wage laws.

The Model

The model used here to estimate the effect of prevailing wage legislation on construction costs is :

$$C = a + b_1S + b_2T + b_3B + b_4A + b_5ST + b_6Altadd + b_7Pubcode + e$$

where $C =$ start cost or bid cost; $S =$ project scale as measured by square footage; $T =$ a vector of dummy variables indicating detailed structure type; $B =$ a vector of building material dummy variables; $A =$ a vector of state dummy variables; $ST =$ the number of stories; $Altadd =$ a dummy variable indicating whether the project was an alteration or addition as opposed to new construction; and $Pubcode$ = a dummy variable indicating that the project is public. This model is nearly identical to the one used by Fraundorf to estimate the impact of the federal Davis Bacon Act on total construction costs. It is appropriate for estimating the cost difference between public and private construction projects holding other factors such as building type, building materials, state in which the project is undertaken, building size and complexity constant. In

states with prevailing wage laws, the cost difference between public and private projects may be thought of as measuring the inflationary impact of the law.

Data

The most notable difference between the Fraundorf analysis and this study is the focus here on the impact of state prevailing wage laws, also known as little Davis Bacon acts, on costs. In the first instance, I selected construction projects in states that had prevailing wage laws in 1990. This focus on state prevailing wage laws's impact on costs, as opposed to Davis Bacon's impact, is useful for sorting out differences in costs associated with prevailing wage laws from cost differences between public and private buildings. Moreover, given that many states are currently considering reforms or repeal of their little Davis Bacon acts, the impact of state laws on construction costs is an important question to answer. The projects selected were nonresidential construction categorized as offices, hospitals, elementary schools, middle schools, secondary schools, garages and warehouses. These categories are similar to those used by Fraundorf, et al., but are more specific and consequently less likely to result in comparisons between dissimilar structures. For example, hospitals is a more detailed class of structures than medical buildings, and warehouses is similarly more specific than storage facilities. Unlike Fraundorf, I included both new construction and additions/alterations. In states with prevailing wage laws additions/alterations to public structures and roads are also covered.

The results of a multiple regression analysis using the natural log of real total project cost as the dependent variable indicate that, controlling for other relevant factors, in states that have prevailing wage laws public buildings are reported in Table 1. Public projects in states having

prevailing wage laws are 27.6 percent more expensive than private structures. These results are very similar to the results obtained by Fraundorf. in terms of the magnitude of the estimated impact. Given that the prevailing wage laws in these states apply to public projects, this estimated cost differential can be attributed to the law's existence.

This approach to estimating the impact of prevailing wage laws on construction costs, like the earlier study by Fraundorf is unable to distinguish between cost differences due to ownership differences and cost differences that result from prevailing wage requirements. By comparing public projects built in states where prevailing wage laws are in effect with private projects, the impact of the law is confounded with cost differences between public and private projects.

To illustrate the problem the model presented earlier was re-estimated using data on construction projects from states without prevailing wage laws. Similar controls were used to insure that public projects were being compared with similar private projects. The results of this regression are reported in the third column of Table 1. Once again, public projects are significantly more expensive (31.7 percent) than comparable private projects. But because the projects examined were located in states that currently do not have prevailing wage laws, the cost differential can no longer be attributed to the law's impact. This result lends support to the notion that the public may be a more exacting owner than the private sector. It also suggests that it is inappropriate to assume that the higher costs of public projects are attributable to the presence of prevailing wage laws. A more appropriate analysis recognizes that there are two different dimensions to construction cost differentials. On the one hand, comparisons of public projects versus private projects can determine the extent to which the government may be a more

exacting owner. The other dimension considers the presence or absence of prevailing wage legislation. Combining these two different dimensions creates four different possibilities; private projects built where no prevailing wage law exists, public projects with no prevailing wage law, private projects where prevailing wage laws exist, and public projects with prevailing wage laws. Only the last category of construction projects is directly affected by the presence of a prevailing wage law.

Table 1: Regression Results

Variable	States w/ Laws Coefficient	States w/o Laws Coefficient
SCHOOL	.586013**	.769542**
HGHSCHL	.712087**	.878536**
HOSP	1.077311**	1.229640**
WARE	.016312	.425241**
OFFICE	.242328**	.588873**
PUBCODE	.276200**	.317366**
STEELDUM	-.045994	-.081977
WOODFRM	.150933**	.061925**
CEMENTDM	.091849**	.118236**
LNSQFEET	.562699**	.581263**
STORIES	.071699**	.110672**
ALTADD	-.160042**	-.066969**
(Constant)	8.187471**	7.569623**
	Adjusted R^2 = .62534 N = 5136 F = 210.08747	Adjusted R^2 = .67164 N = 2717 F = 186.24560

Dependent Variable is ln(real total costs) where total costs are reported in 1994 dollars
** coefficient is significant at the .01 level
the coefficients for the state dummy variables are not reported

Thus, in order to appropriately assess the impact of prevailing wage legislation on construction costs, this category must be isolated from each of the other possibilities.

The model used here to estimate the effect of prevailing wage legislation on construction costs is :

$C = a + b_1S + b_2T + b_3B + b_4A + b_5ST + b_6Altadd + b_7PW + b_8Pubcode + b_8Interact + e$

where C = start cost or bid cost; S = project scale as measured by square footage; T = a vector of dummy variables indicating detailed structure type; B = a vector of building material dummy variables; ST = the number of stories; A = a vector of state dummy variables; $Altadd$ = a dummy variable indicating whether the project was an alteration or addition; PW = a dummy variable indicating the presence or absence of a prevailing wage law; Pub = a dummy variable indicating ; $Interact = (PW \times Pubcode)$. The key components of this model are the variables *PW*, *Pubcode* and *Interact*. In combination these three variables allow us to estimate the effect of prevailing wage laws separately from the effect of public ownership. The *Pubcode* variable estimates the cost differential that exists between public and private projects, ceteris paribus, regardless of whether a prevailing wage law is in effect. The *PW* variable estimates the effect of prevailing wage laws on construction projects in states with laws regardless of whether they are public or private. Finally, the *Interact* variable picks up the direct effect of prevailing wage legislation on public projects since it is equal to one only in those cases where there is a public project in a state with prevailing wages. This model was estimated using the combined data for states with and without prevailing wage laws. The results are reported in Table 2. The coefficient on the interaction term (*Interact*) is positive but statistically insignificant indicating that the direct effect of prevailing wage laws on the cost of public construction projects is negligible. The presence of

a prevailing wage law also does not appear to have any significant effect on the costs of construction projects. Public projects in all states, however, are significantly more expensive (25.9 percent) than private projects as indicated by the coefficient on the variable *Pubcode*.

Conclusions

The results of this multivariate analysis of the impact of state prevailing wage laws on total construction costs indicates that, in contrast to earlier academic analyses as well as some casual statements, there is no measurable cost difference between similar structures as a result of prevailing wage requirements. Consequently, reforming or repealing these laws will not lead to the kinds of substantial savings promised by proponents of repeal. At the same time there are significant measurable cost differences between public and private projects of a similar nature. Researchers and politicians both should try to determine 1). why this differential exists and how and 2). what steps could be taken to lessen the difference.

Table 2. Regression Results: Determinants of Construction Costs for All States

Variable	Coefficient
SCHOOL	.628581**
HGHSCHL	.747973**
HOSP	1.109748**
WARE	.132805**
OFFICE	.342607**
PUBCODE	.259601**
LAW	.180579
INTERACT	.050779
STEELDUM	-.053093*
WOODFRM	.118633**
CEMENTDM	.106521**
LNSQFEET	.569458**
STORIES	.081728**
ALTADD	-.128803**
(Constant)	7.952916**

Adjusted R Square = .63792
N = 7854
F = 224.18097

Dependent Variable is ln(real total costs) where total costs are reported in 1994 dollars
** coefficient is significant at the .01 level
the coefficients for the state dummy variables are not reported

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Biographical Sketch

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Making Hay When It Rains: The Effect Prevailing Wage Regulations, Scale Economies, Seasonal, Cyclical And Local Business Patterns Have On School Construction Costs

BY HAMID AZARI-RAD, PETER PHILIPS, AND MARK PRUS

Construction is a boom-bust industry with expected and predictable seasonal fluctuations in activity along with expected, but much less predictable, cyclical swings in business. Consequently, contractors and workers alike have come to believe in the adage "make hay while the sun shines." When business is brisk, workers accept long hours and contractors take all the business they can handle. Industry suppliers also live and die with the business cycle often raising prices when demand is brisk. Everyone involved in construction seeks to make enough money in the good times to tide them over the bad times that inevitably will come.

Good times for the construction industry, however, may correspond to bad times for the purchasers of construction services. When the construction industry is working full tilt, consumers may be wise to delay purchases until things slow down. Furthermore, large local consumers of construction services, such as school districts, may create their own tight conditions by starting large and multiple projects that create local "cost storms" in local construction markets. This paper asks the question whether school districts would be wise to time their purchases of construction services to avoid overheated construction markets, and spread out their construction

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TABLE 1
AVERAGE ANNUAL INFLATION IN THE CONSUMER PRICE INDEX, THE BUILDING COST INDEX AND THE CONSTRUCTION COST INDEX, 1974-99 AND 1991-99

	Annual Inflation		
Period	CPI-U	BCI	CCI
1974-99	5.3%	4.4%	4.6%
1991-99	2.7%	2.8%	2.8%

plans to avoid overheating the market themselves. In attempting to avoid tight construction markets, school districts may be well advised to pay attention to the seasons as well as the business cycle to avoid beginning construction at the same time as everyone else.

The construction industry is not the only institution that tries to "make hay while the sun shines." Overall strong economic conditions tend to reduce public debt and may favor the prospect of passing school construction bonds. It may not be politically or demographically feasible to delay school construction until economic conditions quiet down. Consequently school districts may consider additional or alternative strategies for containing school construction costs. This paper will consider two possible alternatives; deregulation of public construction and economies of scale in the size of school buildings.

Along with being a highly cyclical part of the economy, construction is also a regulated industry. Especially relevant to public school construction and renovation, prevailing wage requirements regulate the payment to labor in many jurisdictions. Some argue that the elimination of prevailing wage regulations would allow for a significant drop in public school construction cost by cutting the wages and benefits paid to construction workers. Others argue that lower wages will result in a less skilled and less equipped public construction work force that will wipe out most and perhaps all of the savings anticipated by those favoring deregulation. This paper will test these alternative hypotheses by comparing school construction costs in regulated and unregulated environments.

Building larger schools to capture technical economies of scale in construction is a classic cost savings strategy. But can bigness backfire if the project puts excess demand on local construction services driving up prices? Would school districts be better off building somewhat smaller schools spaced out over a longer period to avoid straining local construction services?

In this paper we present estimates of the relative payoffs of these alternative ways of cutting school construction costs—timing purchases, deregulating wages and building larger.

Inflation and School Construction Costs

In the last 25 years, overall building and construction costs in the United States have roughly kept pace with inflation.[1] In the most recent expansion, overall building and construction costs have also tracked inflation closely. Table 1 compares the annual average inflation in the Consumer Price Index-Urban (CPI-U) with the Building Cost Index (BCI) and the Construction Cost Index (CCI) issued by the industry publication *Engineering News Record* (ENR). This comparison shows that over the 25-year span, 1974-99, construction costs have risen somewhat more slowly than the CPI-U, while in the last expansion, construction costs have risen just slightly faster than the CPI-U.

There are no school construction cost indices, but anecdotal evidence suggests that in recent years, school construction costs have risen faster than the overall indices of construction costs. For instance, the June 2000, *Engineering News Record* quarterly cost report states:

A very hot school construction market is also warming up costs. "Realistically, when it comes to schools, you can double the inflation rate shown by most construction cost indexes," says Gregory M. Clark, vice president of estimating for M.A. Mortenson Co., Minneapolis. Tight market conditions allow "busy subcontractors to increase margins by at least that much," he says.

1. The U.S. Bureau of Labor Statistics (BLS) issues the consumer price index-urban (CPI-U). This is the common measure of changes in the prices consumers face. The CPU-U uses a "market-basket-of-consumer goods" approach where prices of the same collection of market basket of finished products are compared across time. This index may be broken down into components within the market basket including a housing cost index. However, this housing cost is not a construction cost but a rental cost of a given type of house. The BLS does not issue an index on construction costs. *Engineering News Record* (ENR), a long-standing construction industry publication, has since World War I issued two indices, a building cost index (BCI) and a construction cost index (CCI) that are widely relied upon by construction industry analysts to track cost trends in this industry. These indices a market-basket-of-inputs approach rather than trying to identify a standard building output. Each ENR index takes a given amount of steel, lumber, cement and labor, multiplies these inputs by their prices in two time periods and compares the results. The major problem with this approach is that it cannot capture changes in labor productivity over time. The difference between the two ENR indices is the BCI is more applicable to structures where labor costs are a smaller proportion of total costs and labor skill is needed more in the construction process. The CCI is more appropriate in projects where labor costs are a relatively higher proportion to total costs and skilled labor is a small part of all labor hired. Both indices are derived from a survey of 20 major cities including two from Canada. Both use the same "shopping cart" of materials purchased (steel, cement, and lumber) but the CCI includes 200 hours of common labor while the BCI uses 68.38 hours times the average wage rate from three skilled trades (bricklayers, carpenters and structural iron workers). Tim Grogan, "Using ENR's Indexes: How It's Done," *Engineering News Record* 244, no. 12 (2000): 112. CPI-U from the U.S. Bureau of Labor Statistics, Most Requested Series, Prices and Living Conditions, Consumer Price Index All Urban Consumers, http://stats.bls.gov/top20.html.

TABLE 2
NOMINAL AND REAL AVERAGE SQUARE FOOT CONSTRUCTION COST FOR NEW SCHOOLS, BY TYPE OF SCHOOL, 1992 TO JUNE 1999 AND ANNUAL RATE OF CHANGE

Elementary Schools					
Year	Number	Nominal	% Change	Real	% Change
1992	351	$69.12		$81.88	
1993	247	$74.33	7.5%	$85.49	4.4%
1994	167	$74.25	-0.1%	$83.28	-2.6%
1995	419	$81.46	9.7%	$88.84	6.7%
1996	361	$83.95	3.1%	$88.93	0.1%
1997	454	$89.53	6.6%	$92.71	4.2%
1998	407	$86.96	-2.9%	$88.66	-4.4%
1999	283	$97.56	12.2%	$97.56	10.0%
Middle Schools					
Year	Number	Nominal	% Change	Real	% Change
1992	199	$66.23		$78.45	
1993	119	$72.41	9.3%	$83.29	6.2%
1994	78	$70.35	-2.9%	$78.89	-5.3%
1995	200	$71.39	1.5%	$77.86	-1.3%
1996	139	$83.11	16.4%	$88.04	13.1%
1997	204	$81.90	-1.5%	$84.81	-3.7%
1998	153	$88.18	7.7%	$89.90	6.0%
1999	67	$95.59	8.4%	$95.59	6.3%
High Schools					
Year	Number	Nominal	% Change	Real	% Change
1992	100	$76.94		$91.14	
1993	81	$76.39	-0.7%	$87.87	-3.6%
1994	55	$75.45	-1.2%	$84.61	-3.7%
1995	170	$76.49	1.4%	$83.43	-1.4%
1996	147	$84.48	10.4%	$89.49	7.3%
1997	166	$81.75	-3.2%	$84.65	-5.4%
1998	149	$89.53	9.5%	$91.29	7.8%
1999	152	$100.01	11.7%	$100.01	9.6%

School districts are becoming more aware of fast-moving costs and have started raising budgets to better match inflation, says Randy Lowrance, the Houston-based regional building manager for Gilbance Building Co. He says construction costs have jumped about 12 percent during the last two years.[2] Our own data on nominal and real average square foot construction costs of new schools from 1992 to June 1999 is consistent with the view that school construction costs are outpacing inflation. Table 2 shows average square foot accepted bid price for public and private schools broken down into elementary, middle and high schools.

2. Tim Grogan and Stephen H. Daniels, "Second Quarterly Cost Report," *Engineering News Record* 244, no. 25 (2000): 91.

TABLE 3
NUMBER AND PERCENT DISTRIBUTION OF NEW SCHOOLS BUILT IN THE U.S.,1991-1999

	Regulatory Status			
	No Law		Prevailing Wage Law	
Ownership	Count	Table %	Count	Table %
Private School	151	3.0%	182	3.7%
Public School	1901	38.2%	2740	55.1%

Starting in the mid-1990s these prices began to rise not only in nominal terms but after controlling for consumer goods inflation with the CPI-U. This rise in costs over-and-above inflation accelerates recently with real annual increases for 1999 equaling 10 percent, 6.3 percent and 9.6 percent for elementary, middle and high schools respectively.

Why should school construction costs outpace not only the growth in the consumer price index but also the growth in the cost of other types of building construction? ENR suggests that in recent years school districts have overwhelmed local construction markets. ENR argues that "Today's schools are larger, more complex and built in gusts of new construction, not one at a time." These building programs "create their own cost storms."[3] An alternative hypothesis may be found in the fact that public school construction, which accounts for the majority of all school construction, is in many jurisdictions regulated by prevailing wage restrictions. Table 3 shows that over the period 1991 to 1999, 55.1 percent of all new schools built in the U.S. were public schools built under prevailing wage regulations.

These regulations, which do not apply to the private sector construction, may explain why school construction costs are currently rising faster than other types of construction.

THE DATA

To test the effects of economies of scale in construction, prevailing wage regulations and business cycle effects on school construction costs, we turn to F. W. Dodge data on accepted bid prices for new schools built in the United States. The F.W. Dodge Corporation has provided bidding information to building contractors since the 1940s.[4] As part of this service, F.W. Dodge collects data on the

3. Grogan and Daniels, "Schools: Big Programs Stir Costs," *Engineering News Record*, ibid.

4. Currently FW Dodge is, along with *Engineering News Record*, a subsidiary of McGraw Hill. See http://www.fwdodge.com/ and http://www.fwdodge.com/ for descriptions of each subsidiary.

accepted bid price of a variety of public and private construction projects. For this paper, we have collected F.W. Dodge accepted bid prices for new schools, both public and private, built between the second half of 1991 and the first half of 1999. Accepted bid prices do not include any cost over-runs associated with change orders that take place during the life of the project. Change orders can occur due either to a change in the scope of the project or due to an unforeseen or omitted condition of the project that is encountered after the project has begun. Accepted bid prices cover construction costs and do not include land acquisition. A basic assumption of this paper is that the results we find regarding school construction costs as measured by accepted bid price will also generally hold for final construction costs as well. The virtue of using Dodge accepted bid price data is that it provides us with thousands of observations. No other centralized, cross-state, source of public and private school construction costs exists.

In addition to accepted bid prices, the Dodge data provides us with the date of bid acceptance, the state in which the school was built, the type of school (public or private, elementary, middle or high school), and the square foot size of the project. These data allow us to construct a model where the total cost of a new school is a function of the size of the school, the type of school, the location of the school, the season in which the project begins and the year in which the project begins. In order to capture business cycle effects on school construction costs, we add data on annual average overall state unemployment rates[5], and in order to capture the effects of prevailing wage regulations we add dummy variables indicating the existence of any such law.[6]

Table 4 presents the distribution of new schools by state for our sample. The distribution reflects both state size, demographic growth and business cycle conditions during the time period of our sample, 1991-99.

5. U.S. Bureau of Labor Statistics, Most Requested Series, Employment and Unemployment, Local Area Unemployment Statistics, http://stats.bls.gov/top20.html.

6. Over the entire time period of our analysis, 18 states did not have prevailing wage laws regulating school construction. These are Alabama, Arizona, Colorado, Georgia, Florida, Idaho, Iowa, Kansas, Louisiana, Mississippi, New Hampshire, North Carolina, North Dakota, South Carolina, South Dakota, Utah, Vermont and Virginia. Oklahoma's law was judicially annulled at the end of 1995. Kentucky applied its law to schools in July of 1996. Ohio suspended the application of its law to schools in July of 1997. Michigan's law was judicially suspended for the period between late 1994 and mid-1997. Maryland's law applied to some schools but not to most over the period of our analysis.

TABLE 4
PERCENT DISTRIBUTION OF NEW SCHOOLS BUILT BY STATE

State Distribution of New Schools in Sample					
State	Percent of Sample	State	Percent of Sample	State	Percent of Sample
Texas	12.4%	Kentucky	1.9%	New Jersey	1.1%
California	10.6%	Minnissota	1.8%	Louisiana	0.7%
Florida	6.4%	Ohio	1.7%	West Virginia	0.6%
Georgia	6.0%	Massachusetts	1.7%	Iowa	0.6%
North Carolina	4.3%	Indina	1.6%	Nebraska	0.5%
Arizona	3.2%	Nevada	1.6%	Alaska	0.5%
Washington	3.0%	Mississippi	1.5%	Maine	0.4%
Tennessee	2.8%	Maryland	1.5%	South Dakota	0.4%
Michigan	2.8%	Utah	1.5%	Connecticut	0.3%
Illinois	2.6%	Arkansas	1.4%	New Hampshire	0.3%
Virginia	2.5%	New York	1.4%	Wyoming	0.2%
Missouri	2.5%	Idaho	1.2%	Montana	0.2%
Pennsylvania	2.4%	Oklahoma	1.2%	North Dakota	0.2%
Wisconsin	2.4%	Kansas	1.1%	Vermont	0.2%
South Carolina	2.2%	New Mexico	1.1%	Delaware	0.2%
Alabama	2.0%	Oregon	1.1%	Hawaii	0.1%
Colorado	2.0%			Rhode Island	0.04%

TABLE 5
COUNT OF NEW SCHOOLS, MEAN SQUARE FOOT SIZE, NUMBER OF PROJECTS IN A CITY AND STATE UNEMPLOYMENT RATE BY YEAR

		Square Feet		Number of Projects in a City			State Unemployment	
	Count	Mean	Std Deviation	Mean	Std Deviation	Maxi-mum	Mean	Std Deviation
1991	106	78,343	61,442	1.90	2.11	13	6.6%	1.4%
1992	650	83,812	60,083	2.15	2.89	45	7.4%	1.6%
1993	447	82,455	62,413	2.18	2.77	22	7.0%	1.7%
1994	300	86,328	61,815	2.34	4.83	46	5.8%	1.5%
1995	789	92,530	69,485	1.99	2.24	22	5.4%	1.2%
1996	647	87,666	78,143	2.27	4.29	73	5.4%	1.2%
1997	824	93,067	74,421	2.08	2.68	26	4.9%	1.2%
1998	709	84,256	65,324	1.96	2.31	21	4.5%	1.0%
1999	502	81,388	64,905	2.36	3.98	45	4.3%	1.0%

Table 5 shows the number of new schools started (count) by year along with the means and standard deviations for the square foot size of these new schools, the number of school projects of all types including new, additions and alterations started in a single city in a year, and each state's unemployment rate.

TABLE 6
PERCENT DISTRIBUTION WITHIN THE SAMPLE OF SCHOOLS BY TYPE, OWNERSHIP AND WHEN BID WAS ACCEPTED

	Percent of Sample
Elementary Schools	55.4%
Middle Schools	23.9%
High Schools	20.7%
Public Schools	93.3%
Private Schools	6.7%
Bids Accepted in Winter	22.2%
Bids Accepted in Spring	32.3%
Bids Accepted in Summer	25.4%
Bids Accepted in Fall	20.1%

Table 5 also includes the maximum number of new projects of any type begun in a city in any one year. The square foot data will be used to measure technical economies of scale in building schools. The number of projects of any type begun in a city in a year will be used to measure possible local crowding effects caused by bunching school construction. Moreover, the state unemployment rates will be used to measure business cycle effects on school construction costs.

Our data do not support the notion that over the 1990s, new schools have become larger as suggested by ENR. Nor does it support the proposition that school districts are increasingly bunching their new school projects together. However, there is considerable variation in school size and the number of projects begun in local areas. It remains to be seen whether larger schools yield economies of scale or whether the bunching of projects creates excess demand pressures in local construction markets. There is also considerable variation in the business cycle within our sample as measured by state unemployment rates. These rates also indicate a clear tightening of general labor markets over time.

Table 6 shows the percent distribution of new schools within the sample by school type (elementary, middle and high schools), ownership (public or private) and bid acceptance date (winter, spring, summer or fall). Elementary schools account for over half of the number of new schools built. Public schools account for 93.3 percent of the sample. Bid acceptances peak in the spring and fall off most in the fall.

Finally, Table 7 shows the size of new schools both in physical and CPI-U deflated monetary terms by elementary, middle and high schools. High schools are largest holding the greatest potential for

TABLE 7
AVERAGE SQUARE FOOT SIZE AND REAL TOTAL COST OF SCHOOLS IN SAMPLE BY TYPE

	School Type		
	Elementary	Middle	High
Square Feet	65,001	101,615	128,819
Real Total Cost (CPI-U)	$6,089,243	$9,189,945	$12,469,829

economies of scale on the one hand, and creating excess demand for local construction services on the other. In general, we conclude that our sample provides considerable and informative variation in a range of factors that can be used to model variations in school construction costs.

THE MODEL

We estimate the effect of construction market crowding, business cycle effects and prevailing wage legislation on school construction costs using the following fixed effects model:

$$LnCost_{it} = \alpha_i + \beta_0 LnUnemploy_{it} + \beta_1 LnNumprojects_{it} + \beta_2 SizeThreshold_{it} + \beta_3 Squarefeet_{it} + \beta_4 Middleschool_{it} + \beta_5 Highschool_{it} + \beta_6 Winter_{it} + \beta_7 Spring_{it} + \beta_8 Summer_{it} + \beta_9 PWL_{it} + \beta_{10} Public_{it} + \beta_{11}(PWLxPublic)_{it} + \varepsilon_{it}$$

where *lnCost* is the start cost or bid cost deflated using the consumer price index.[7] $a\delta_i$ is the individual effect for each state. The natural log of the state unemployment rate, for all workers for each state, *LnUnemploy*, is used as one indicator of market crowding. When unemployment rates are low, we anticipate that construction labor markets will be tight and school construction costs higher. This double log formulation allows us to interpret the coefficient on the variable *LnUnemploy* as an elasticity. That is, a ten percent change in a state's unemployment rate will lead to a constant X percent change in costs. *LnNumprojects* is a second variable that we use to test for market crowding. When school districts start multiple projects in a given year, they may create tight market conditions and drive up costs. Finally, the variable *SizeThreshold* is used to test for a third type of market crowding, namely the construction of large projects. *SizeThreshold* is a dummy variable that equals one if the school being built is over 167,773 feet. We use

7. In unpublished tests, the use of an alternative, a private building cost index published by the *Engineering News Record* yielded very similar results to the tests reported here.

the natural log of the square footage of each project, *Squarefeet,* to account for economies of scale. Again, we use a double log formulation to generate an elasticity. *Middleschool* and *Highschool* are dummy variables identifying school type in order to test for cost differences between elementary, middle and high schools. When the dependent variable is logged and the independent variable is dichotomous, the coefficient on the dummy variable is interpreted as a percent change in the unlogged value of the dependent variable due to the presence of the variable being indicated. Thus, the dummy variables for school type test whether cost differences exist between elementary, middle and high schools and by what percent. *Winter, Spring* and *Summer* are dummy variables indicating the quarter in which the project was started. The hypothesis here is that starting projects in the fall builds into the teeth of winter weather conditions and may raise total bid price. *PWL* is a dummy variable indicating that the project is built in a state with a prevailing wage law. The geographical dispersion of prevailing wage laws is not random. These laws are common in the North and West and absent during our time period in the South. The Great Plains and Mountain states show considerable variation in legal regime. *Public* is a dummy variable indicating that the project is a public school. The product *(PWLxPublic)* is an interaction term that equals one for public schools in states with prevailing wage laws and zero in all other cases.

Results

We test our model on two samples—all new schools and new high schools. The high school subsample isolates the largest type of school and allows for a sharper focus on the question whether large schools can generate local "cost storms" either through the number of projects begun in a year or the size of any single project. In both samples we group the independent variables into five categories—economies of scale, type of school (elementary, middle, high school and public vs. private ownership), seasonal start time, market crowding or demand stimulating factors, and prevailing wage regulations. Columns a and c in Table 8 show the estimated coefficients for these variables for each of the samples. The model fits both samples well with adjusted r-square values of .87 and .91 for the all schools and high schools samples respectively. The dummy variables for states are not reported in Table 8. The reference state in both samples is Texas—the omitted state dummy variable.

TABLE 8
ORDINARY LEAST SQUARE REGRESSION RESULTS OF A MODEL EXPLAINING VARIATION IN THE NATURAL LOG OF REAL TOTAL NEW SCHOOL CONSTRUCTION COSTS

		Dependent Variable= Log of the Value of the Accepted Bid in 1999 Dollars Using the CPI-U	Sample 1 All Schools		Sample 2 High Schools	
			Co-efficient	Standard Error	Co-efficient	Standard Error
		Independent Variables:	a	b	c	d
	1	(Constant)	*5.57*	0.09	*5.57*	0.21
Economy of Scale	2	Log of Sq. Feet	*90.6%*	0.01	*91.0%*	0.01
Type	3	Middle School	0.3%	0.01		
of	4	High Schools	*4.6%*	0.01		
School	5	Public School	*15.3%*	0.03	*14.00%*	0.06
Seasonal	6	Bid Accepted in Winter	-2.5%	0.01	-3.30%	0.03
Start	7	Bid Accepted in Spring	-0.1%	0.01	1.50%	0.03
Time	8	Bid Accepted in Summer	-1.5%	0.01	2.20%	0.03
Market	9	Log of State Unemployment Rate	*-21.5%*	0.02	*-20.1%*	0.06
Crowding	10	Log of Number of Projects in a City	*3.6%*	0.01	*6.0%*	0.02
Factors	11	Schools Over 167,773 Sq. Feet	*8.7%*	0.02	*12.00%*	0.03
Prevailing	12	Jurisdictions with a PW Law	-0.5%	0.04	1.60%	0.11
Wage	13	Public School Covered by PW Law	2.2%	0.03	-3.50%	0.08
Regulation	14	Combined Effect of PW Law	1.8%	0.03	-1.90%	0.07
	15	Adjusted R-square	0.87		0.91	
	16	Number of Observationa	4,974		1,029	

ECONOMIES OF SCALE

In both samples the estimated elasticity is .91 indicating that a 100 percent increase in the square foot size of the project (or a doubling of the project size) will, all other things being equal, increase total costs by 91 percent. Thus, if a school district is considering building two new schools of one size or one new school twice that size, our results indicate that, all other things being equal, that the two-school option would cost 4.7 percent more than the one-school option.[8]

8. Example: two 50,000 square feet schools costing $5,000,000 each for a total of $10,000,000 versus one 100,000 square foot school costing $9,550,000 [$5,000,000+(.91 times $5,000,000)]. The additional cost of two schools, $450,000 divided by the cost of one large school, $9,550,000, equals 4.7 percent.

The functional form of our model assumes that economies of scale are constant across the range of school size within our sample. While this may not be so, some support for this assumption comes from the fact that the point estimate for the economy of scale is the same for both the entire sample of all schools and the high school sample that entails, on average, larger schools. In the case of the scale economy coefficients, the standard error is larger for the smaller high school sample compared to the larger all school sample. We attribute this larger standard error to the smaller sample size rather than a fundamentally different economy of scale pattern obtaining for the high school sample.

Type of Schools

In sample 1, the model controls for differences in the cost of elementary, middle and high schools with two dummy variables identifying middle and high schools with elementary schools being the reference. Our results do not find a statistically significant difference between the cost of middle schools compared to elementary schools controlling for other factors such as size of school. However, we do find that controlling for other factors, high schools cost 4.6 percent more than elementary schools. We attribute this difference to differences in the equipment in science labs, computer facilities and other material costs.

We also find that public schools cost 15.3 percent more than private schools, controlling for other factors. This result holds for public schools that are not built under prevailing wage regulations as well as those regulated by prevailing wage requirements. We attribute this sizable cost differential to differences in the specification of public schools.

Seasonal Start Time

Construction work is seasonal, although variation in seasonal work itself varies across the country based on weather patterns. For each new school project, we identify which quarter in the year the bid was accepted. Groundbreaking would begin some time after bid acceptance. We test in both samples whether or not real bid acceptance price in the winter, spring or summer is different from that of the fall. In unreported regressions, we tested all three other possible reference seasons. In no case do we find a statistically significant difference in accepted bid price associated with the seasons. In the all school sample there is some suggestion that bid acceptance in the winter yields lower prices than any other time. The coefficient for the winter dummy variable in the large sample just barely misses statistical significance at the 5 percent level and

is significant at 10 percent. If this result is believed, it suggests that a winter bid acceptance yields a 2.5 percent cost savings over a fall bid acceptance. Winter bid acceptances lead to ground-breaking towards spring while fall bid acceptance moves construction towards the winter. We interpret these results to suggest that there may be a premium associated with ground breaking and predominately outdoor construction work that heads into the teeth of winter. We do not find support for the idea that building into the peak season of construction work (the summer) by itself taxes local construction services and through seasonal crowding increases costs.

MARKET CROWDING AND STIMULATING EXCESS DEMAND

We present three separate measures of the potential for increased school construction costs because of tight local construction services markets. The first is the unemployment rate for all workers in the state in which the school is being built. This is meant to capture not only general labor market conditions but also general economic conditions within the state and to which the local construction services market will be tied. The effect of the state business cycle as measured by the state unemployment rate is statistically significant and substantial. The coefficient of .21 indicates that a doubling of the state unemployment rate from (say) 3 percent to (say) 6 percent lowers total school construction costs by 21 percent. We attribute this to a lowering of all locally determined construction costs including labor, materials and contractor margins. Indeed, it may be primarily affected by contractor margins where in bad times contractors may operate at a loss to cover fixed costs and retain key workers. These same contractors may seek to recoup these periods of loss with extra normal margins in tight construction services markets.

The second measure of market crowding is the number of projects begun in a locality in a given year. The locality is a city and the project number includes addition and alteration projects over $750,000 as well as new schools. The hypothesis is that increasing the number of projects in a locality at the same time will create an excess demand for school construction services and increase the cost of new school construction. In the all school sample, we find an elasticity of .04 indicating that a doubling of the number of projects begun will, controlling for other factors, lead to a 4 percent increase in the cost of the new school. The point estimate of this effect is larger in the high school sample indicating a 6 percent increase in total high school cost due to the doubling of the number of projects (of all types) in the local area.

The third measure of market crowding is a dummy variable

identifying new schools larger than 167,773 square feet. This demarcation isolates the largest 10 percent of the schools in the all-school sample. The hypothesis here is that large schools will strain local construction services causing excess demand and higher prices. In the all-school sample, we find that controlling for other factors, notably economies of scale due to size and the difference between high school costs and the costs of middle and elementary schools, we find a big school effect of 8.7 percent. This means that building larger enjoys economies of scale but at some point bigness may offset some or all of these scale economies due to market crowding effects.

It may be, however, that our control for high school costs is inadequate. Because schools above 167,000 square feet will predominately be high schools, it is possible that our bigness variable is picking up aspects of high school construction rather than aspects of market crowding. To test this, we look only at the sample of high schools. In this sample we retain this square foot cutoff of 167,773 square feet which ends up including about 30 percent of all new high schools. We retain the absolute cutoff on the theory that it is absolute size that crowds construction services markets rather than the relative size of schools. We find a point estimate of the bigness effect to larger. We estimate in the second sample that building above the cutoff raises construction costs by 12 percent. In both the case of number of projects and size of the project, the point estimates in the two samples tend to fall within each other's 95 percent confidence ranges forestalling the conclusion that these estimates are statistically significantly different from each other.

Prevailing Wage Regulations

Prevailing wage regulations do not cover private schools. Furthermore, in our sample of new schools built between 1991 and 1999, 41 percent of all public schools were not built under prevailing wage restrictions. These variations allow us to test the hypotheses that public schools built under prevailing wage regulations cost more than public schools not built under prevailing wage laws. This test is a two- stage process. First, we employ three dummy variables to identify the four possible situations—1) a private school built in a jurisdiction with no prevailing wage regulation; 2) a public school built in a jurisdiction with no prevailing wage regulation; 3) a private school built in a jurisdiction with prevailing wage regulations; and 4) a public school built in a jurisdiction with prevailing wage regulations. The three dummy or indicator variables are one indicating whether a school is public or private, a second indicating whether the school (public or private) was built in a ju-

risdiction with prevailing wage regulations, and a third dummy variable identifying public schools built in jurisdictions having prevailing wage laws. These three dummy variables allow for a unique identification of the four possible states with the reference state (where all dummies=0) being a private school in a jurisdiction with no prevailing wage regulation. In the first stage of our test of the effects of prevailing wage regulations on school construction costs, our ordinary least squares regression model estimates these three dummy variables for each sample. The estimates are found in rows 5, 12 and 13 of Table 8.

In the second stage of our test, we ask the question whether a public school in a jurisdiction with a prevailing wage regulation costs more than a public school in a state without such a regulation. Both these sets of schools are public. Consequently, the value of the public school dummy is the same for both and does not account for any potential difference. However, public schools in states with prevailing wage regulations have the value 1 for two dummies that take on the value 0 for public schools in states that do not have prevailing wage regulations. These two dummy variables—schools (both public and private) in jurisdictions with prevailing wage laws, and public school in a jurisdiction with a prevailing wage law, are in rows 12 and 13 of Table 8. By themselves, neither of these coefficients addresses our question. By adding these two coefficients together we obtain the regression estimate of the increase in school cost over a public school in a no-law state associated with a public school in a law state. This combined coefficient is shown in row 14, columns a and b, for the all-school and high school samples respectively. These combined coefficients of 1.8 percent in the all-school sample and –1.9 percent in the high school sample are not statistically significantly different from a zero coefficient at any standard level of significance.[9] Thus, we conclude that the elimination of prevailing wage regulations in jurisdiction in which they exist will not yield measurable savings on school construction costs.[10]

9. The test of statistical significance is the sum of the estimated coefficients divided by the square root of the variance of the first plus the variance of the second plus two times the covariance. Keller and Hartman find similar results to our all-school sample in their study of Pennsylvania schools. However, relying upon an account ng method rather than a statistical method for measuring the impact of prevailing wages on costs, they cannot estimate the statistical significance of their finding. Edward C. Keller and William T Hartman, "Prevailing Wage Rates: The Effects on School Construction Costs, Levels of Taxation, and State Reimbursements," *Journal of Education Finance* 27 (2001): 713-728.

10. Bilginsoy and Philips found similar results analyzing a Canadian case using a different data set. Cihan Bilginsoy and Peter Philips, "Prevailing Wage Regulations and School Construction Costs: Evidence from British Columbia," *Journal of Education Finance* 25 (2000): 415-432.

Conclusion

Building larger schools is a traditional way of saving on school construction costs and we estimate that a doubling of school size will cut costs by 4.7 percent over two separate schools half the size of the larger one. However, the technical benefits of economies of scale at some point encounter the market problems associated with excess demand caused by large-scale construction. Very large schools may cost from 8 percent to 12 percent more due to the excess short-run demand that they generate among local contractors, suppliers and workers. Economies of scale in school size have additional auxiliary costs and benefits associated with effect of size on administration, commuting costs and pedagogy. Other building cost-saving strategies exist and are worth considering. Two potential strategies do not offer cost saving promise. Seasonal timing of construction may save based on weather conditions, but there does not appear to be savings from strategies that attempt to avoid seasonal market crowding at least in the case of new schools. Prevailing wage regulations raise the hourly wage rate paid on public school construction. But the higher labor productivity that comes with these higher wage rates or other economies associated with better construction management appear to offset the higher mandated wage rates. In any case there is no measurable difference, controlling for other factors, in public schools built with and without prevailing wage regulations. School districts' best option for construction cost savings lie in planning the pattern of new school construction. Specifically, school districts that can build countercyclically can enjoy a buyer's advantage during economic downturns that appears pronounced in the construction industry. A doubling of the unemployment rate can lead to a 21 percent decline in school construction costs. Spacing out projects so that many projects are not begun in the same period also promises to save money. If builders make hay when the sun shines, school districts should build schools in the rain.

Square Foot Construction Costs for Newly Constructed State and Local Schools, Offices and Warehouses in Nine Southwestern and Intermountain States 1992-1994

Prepared for the Legislative Education Study Committee of the New Mexico State Legislature
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by

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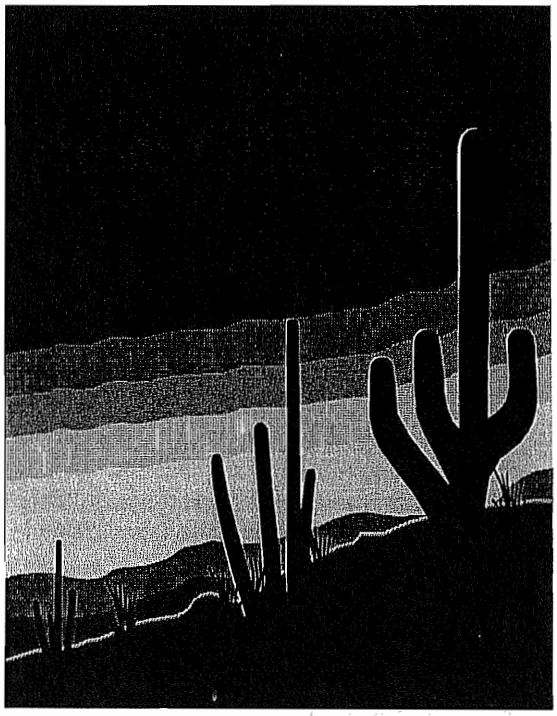
Abstract: This study compares public square foot construction costs in five southwestern and Intermountain states that have state prevailing wage laws with four states in the same region that do not have state prevailing wage laws. The five "have-law" states are New Mexico, Texas, Oklahoma, Wyoming and Nevada. The four "no-law" states are Arizona, Utah, Idaho and Colorado.[1] These states are often used by either New Mexico or Utah in making public school teacher salary comparisons. During the time period of the study, 1992-94, elementary schools cost $6 per square foot less in the five-state group with prevailing wage laws. Middle schools cost $11 less per square foot in the states with prevailing wage laws. High schools cost $11 less per square foot in the states with prevailing wage laws. Warehouses cost $35 dollars less per square foot in states with prevailing wage laws and office buildings cost $2 per square foot more in the five state group with prevailing wage laws. When Texas is removed from the "have-law" group, elementary and middle schools still cost less in the remaining four "have-law" states while high schools cost $5 more per square foot in the remaining "have law" states and offices cost $8 more per square foot in the remaining "have law" states. By far, the highest number of observations is for elementary schools and this group generates the most stable and reliable results with an 8% cost advantage favoring the "have-law' group when Texas is included and a 5% cost advantage favoring the "have-law" group when Texas is excluded. New Mexico's 14 newly built elementary schools during the time period of the study, 1992-94, cost $66 per square foot as compared to $72 in Arizona, $72 in Utah and $80 in Colorado, the three surrounding states without state prevailing wage laws. Construction costs are sensitive to regional differences in cost of living as well as prevailing wage law regulations, building design and other factors. Consequently, when the number of observations falls for a specific building type, these results must be treated cautiously. An aggressive conclusion from these data would be that prevailing wage laws promote collective bargaining and apprenticeship training and consequently lower public construction costs. A more conservative conclusion from these data notices that these cost differences found do not provide support for the proposition that the elimination of prevailing wage laws saves on public construction costs.



[1] Two cities in Colorado, Denver and Peublo retain prevailing wage regulations.

Contents

I. About the Author

Peter Philips received his B.A. from Pomona College (1970) and his M.A. (1976) and Ph.D. (1980) from Stanford University. He is a Professor of Economics at the University of Utah. He is co-editor of *Three Worlds of Labor Economics* and co-author of *Portable Pensions in Casual labor Markets*. Philips has published widely on the canning and construction industries in a variety of academic journals including *Industrial and Labor Relations Review*, *Industrial Relations*, *Business History Review*, the *Journal of Economic History*, and the *Cambridge Journal of Economics*. Philips has received awards for his teaching and community service including the University of Utah Presidential Teaching Scholar and the Lowell Bennion University Service Professor. Philips has served as an expert advisor to the U.S. Justice Department on the history and impact of the Davis-Bacon Act. He has testified before legislative committees in California, Indiana, Ohio and Oklahoma regarding aspects of those states' prevailing wage laws. Some of Philips' previous research has been funded by the U.S. Labor Department, by alumni of the University of Utah's economics department, by the AFL-CIO and by construction industry organizations. Readers of this report who have questions, comments, suggestions or criticisms may contact the author at the Economics Department, University of Utah, Salt Lake City, UT 84112; (801) 585-6465; PHILIPS@ECON.SBS.UTAH.EDU. The author welcomes and encourages such communication.

II. Acknowledgments

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III. Introduction

A primary reason to repeal state prevailing wage laws is to attempt to save on state public construction costs. It is argued that state prevailing wage laws encourage the use of unionized construction contractors. It is well known that union construction workers receive higher wage rates and consequently, it is argued that these higher wage rates lead to unnecessarily higher public construction costs. This report attempts to test the proposition that the elimination of state prevailing wage laws lowers public construction costs by focusing on the states surrounding New Mexico that do and do not have state prevailing wage laws. The design of this study is to select states that New Mexico uses when making comparisons of public teacher salaries. New Mexico is well situated for such a study design because some of the surrounding states have state prevailing wage laws (Texas and Oklahoma[2]) and some do not (Utah, Arizona, Colorado).

In addition, because the author is from Utah and has an interest in the effect of Utah's repeal of its prevailing wage law on state expenditures, the states surrounding Utah are also included in this study.

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[2] The time period for this study is 1992 to 1994. In the fall of 1995, Oklahoma's state supreme court declared its state law unconstitutional. In 1982 Oklahoma's legislature, in order to save administrative costs, dropped its procedure for determining what the prevailing wage rate was and adopted the federal Davis-Bacon rates. In 1995, the state supreme court declared this an unconstitutional delegation of state powers to the federal government. For the purposes of this study, Oklahoma is treated as a state with a prevailing wage law.

These are Nevada and Wyoming which have state prevailing wage laws and Idaho which does not have a prevailing wage law. Also, I understand Nevada school teacher salaries are sometimes used in comparison with New Mexico public teacher salary comparisons. In any case, the data are presented in such a way as to see the effects of the inclusion or exclusion of any one or several of these states. States such as California are excluded from this comparison of public construction costs for the same reason that California would be excluded from a comparison of school teacher salaries. Significant variations in the cost of living alter private and public sector construction costs. One way to control for this effect is to select states with similar costs of living.

This study also focuses on a short time period, 1992 to 1994 in order to reduce the confounding effects of inflation and the business cycle on comparison of construction costs. All costs are analyzed in 1994 dollars using the consumer price index urban as a deflator.

The major focus of this study is on school construction costs because this type of construction is commonly affected by state prevailing wage laws and because this type of public construction provides many observations allowing for more reliable statistical results. For comparison, this study also includes public offices and warehouses. Not surprisingly, there are considerably fewer public office buildings and warehouses built in the selected region during the selected time period. The results for these types of buildings should be viewed conservatively for both statistical and practical reasons. Statistically, the fewer observations only permit more tentative conclusions. Practically, if one wished to save public construction cost by altering prevailing wage law regulations, one should focus on where most state public construction takes place. That would lead to a relatively sharper focus on school construction compared to other building types.

This study is in three main parts plus two appendices. Section IV reviews the relevant literature on school construction. No published studies exist that focus on school construction and prevailing wage laws. However, the U.S. Bureau of Labor Statistics did publish one study of school construction costs in the early 1970s. This study found that despite an almost 50% wage rate differential in school construction between the Northeast and the South in 1972, labor costs as a percent of total construction costs were basically the same. The study attributed this to possible differences in labor productivity and the cost of materials by region.

Again studying construction in the 1970s, economist Steven Allen found that union construction labor productivity was 20 percent to 50 percent higher than nonunion construction labor productivity. However, Allen also found that schools built by union contractors were more expensive than schools built by nonunion contractors. Allen's sample was small so that he was forced to combine elementary schools with middle and high schools. Furthermore, Allen's sample contained only 11 nonunion schools and 57 union-built schools across the entire U.S.. In contrast to Allen, this study presents data for 223 schools built only in nine Intermountain and Southwestern states. This allows me to control for differences in square foot costs associated with differences between high schools and elementary schools as well as eliminate the confounding effects of regional differences in cost of living.

Section V presents an analysis of training in construction as it relates to prevailing wage laws and union/nonunion differences in contractor strategies. This section shows that in the case of Utah, apprenticeship training declined dramatically after the repeal of Utah's state prevailing wage law. Neither nonunion contractors nor state vocational education programs significantly made up for the loss in jointly managed union-contractor programs in the union sector of construction. Economic theory identifies two problems or market failures that lead to greater training when there is collective bargaining in construction. These are the free rider problem and the bait-and-switch problem. Basically, because construction workers often move from contractor to contractor as work shifts from construction site to construction site, nonunion contractors are hesitant to train workers who will only end up working for their competitors. In the collective bargaining context, the rule is "who comes around goes around". For example, I train the apprentice who may end up working for you while you train the apprentice who because he or she is a member of the union and I am a union contractor, I know he or she may end up working for me. Thus, the

collectively bargained contract tends to overcome the free rider problem and permit training. U.S. Bureau of Apprenticeship data reflect this by showing that three out of every four construction apprentices enrolls in a joint union-management apprenticeship program even though union contractors employ only 25% to 50% of the labor force. Furthermore, in union-management apprenticeship programs graduation rates are relatively high. This is because there is a jointly hired apprenticeship coordinator who serves as a policeman insuring that the quality of the training is good and apprentices are rotated through a variety of work experiences. On the nonunion side there usually is no policeman insuring that training takes place. Thus, some nonunion contractors are tempted into a bait-and-switch strategy of promising training but only providing helper experience. Consequently, the graduation rate on the nonunion side of apprenticeship training is much lower. The combined consequence of free-ride and bait-and-switch problems means that almost nine out of every ten journeyman construction workers graduating from formal, monitored, structured and planned apprenticeship programs come from the unionized sector of construction. This accounts for the higher productivity of unionized construction contractors that tends to pay for the higher union wage rates.

Section VI presents the results of comparing the square foot construction costs in five types of public buildings (elementary schools, middle schools, high schools, offices and warehouses) in five states with prevailing wage laws (New Mexico, Texas, Oklahoma, Wyoming and Nevada) with four states without prevailing wage law regulations (Utah, Arizona, Colorado and Idaho). These results show that if anything, square foot construction costs are lower in the states with state prevailing wage laws compared to those without these laws. Comparing New Mexico to the four states without prevailing wage laws yields the same result. Excluding Texas from the group of states with prevailing wage laws (because Texas has a majority of observations in this group) also yields the same result. While one cannot conclude that prevailing wage laws definitely lower state construction costs, one can conclude that in this region of the country and these types of structures, especially schools and especially elementary schools (where we have the largest number of observations) there is no evidence to support the proposition that state prevailing wage laws raise public construction costs.

Appendix A lists the F.W. Dodge data for New Mexico used in this study. It should be noted that all cost data in this study are accepted bid prices or start costs. These costs do not include change orders or other sources of cost over-runs. F.W. Dodge does not collect final cost data. An attempt was made to collect final cost data but this proved to be impractical. A large and well financed study might succeed in collecting final cost data but there is no central source for these kind of statistics.

In Appendix B to this report, this study presents data from the *U.S. Census of Construction* showing that labor costs as a percent of total costs in construction runs around 25% to 30%. This is helpful data in setting the limits on plausible estimates of how much money one might save by eliminating state prevailing wage laws. Clearly any estimate asserting that one might save 25% to 30% on total public construction costs by eliminating state prevailing wage laws is unrealistic given that labor costs including benefits are only 25% to 30% of total costs.

IV. Review of the Relevant Literature.

Summary of a U.S. Bureau of Labor Statistics Study of Wages and School Construction Costs

In 1979, the U.S. Bureau of Labor Statistics published a study of school construction costs by region in the United States. In contrast to the material I will present below, the BLS study did not break out schools into elementary, middle and high schools. Nor did it break down construction by state. Rather, the BLS study aggregated school types and presented data on four regions, northeast, midwest, south and west. The relevant data for our purposes is presented below.

Table 1: Hourly Wage Rates and Total Costs as a % of Total Construction Costs

Elementary and Secondary School Construction		
1972	Hourly Wage Rate	Wages as a Percent of Total Cost
Northeast	$7.75	27.9%
North Central	$7.43	29.3%
South	$5.22	27.3%
West	$7.22	29.0%

Source: U.S. Bureau of Labor Statistics, John G. Olsen, "Labor and Material Requirements for New School Construction," *Monthly Labor Review*, April 1979, Vol. 102, Number 4, p. 41.

The key point to be derived from Table 1 is to note that hourly wage rates varied considerably between the Northeast region and the South ($7.75 versus $5.22 in 1972). In contrast, wage costs as a percent of total costs were almost the same in the two regions (27.9% versus 27.3%). The analyst, John Olsen, commented on these facts as follows:

> Average hourly earnings also varied by region. Hourly earnings for all construction workers averaged $6.78, ranging from $5.22 in the South to $7.75 in the Northeast. Wages as a percent of contract costs varied from just above 27 percent in the South to slightly above 29 percent in the North Central. Although average hourly wage rates in the Northeast were higher than those in the North Central region, wage costs as a percent of total contract costs were lower. Among other factors, this irregular trend could result from regional differences in productivity rates and in relative material costs. (pp. 40-41)

Why could differences in labor productivity account for the fact that an almost 50% difference in wage rates between the South and the Northeast did not result in any difference in labor costs as a percent of total costs? The answer is simple. If labor productivity in the Northeast was 50% greater than labor productivity in the South, either because of better training, better equipment or both, then the higher wage rates of the more productive workers would be offset by that greater labor productivity. Is it reasonable to believe that construction workers in the Northeast in 1972 were roughly 50% more productive than Southern construction workers at the time?

Summary of Steven G. Allen's Work

In 1984, an economist at North Carolina State university, Steven G. Allen, published in The Quarterly Journal of Economics an article entitled "Unionized Construction Workers Are More Productive".[3] Professor Allen summarizes his study as follows:

> Apprenticeship training and hiring halls probably raise union productivity [compared to nonunion workers] while jurisdictional disputes and restrictive work rules lower it. Using Brown and Medoff's methodology, union productivity measured by value added per employee is 44 to 53 percent higher than nonunion. The estimate declines to 17 to 22 percent when estimates of interarea construction price differences are used to deflate value added. (p. 251)

In other words, prior to adjusting for differences in regional cost-of-living and differences in regional construction material costs, union construction labor in the 1970s, the period of Allen's study, was roughly 50% more productive than nonunion labor. The wage rates and material costs in the BLS study were not altered to factor in the effect of differences in regional cost-of-living. Thus, the BLS study is quite consistent with Allen's work and their conclusions are similar. Wage rate differences of 50% across regions with differences in productivity and cost-of-living may not alter labor costs as a percent of total costs. Within a region such as New Mexico or the Intermountain west, where the cost-of-living and the material costs of construction is similar, 20 percent differences in wage rates in construction can be offset by differences in productivity between union and nonunion labor.

In a subsequent paper also published in the *Quarterly Journal of Economics*, Allen comes up with slightly different conclusions. In "Can Union Labor Ever Cost Less?" Allen concludes:

> ...union contractors have greater economies of scale. This gives them a cost advantage in large commercial office buildings, but in school and hospital construction, nonunion contractors have lower costs at all output levels. Despite the cost differences, profits for nonunion contractors in school and hospital construction are no higher than those for union contractors because the burden of higher union costs is shifted to the buyer.[4]

In other words, based on a study of 57 union built elementary and secondary schools and 11 nonunion built elementary and secondary schools, Allen concludes in his second article that the union built schools cost more and that the union contractor did not absorb those added costs. Rather those added higher costs were passed on to the school boards and tax payers who paid for that construction.

I emphasize Allen's result because it is not consistent with the data I have analyzed for New Mexico and eight other Intermountain or Southwestern states from the early 1990s. The differences in my results which I present below compared to Allen's may be due to 1) differences in time, Allen's data are from the early 1970s, 2) differences in region, Allen does not indicate what region of the country his school data are drawn from while my results are specific to nine states, 3) effects of mixing elementary, middle and high schools together--Allen does not break out school types while I do; or 4) differences in sample size. Allen is comparing 57 union built schools with 11 nonunion built schools while I compare 223 schools built in prevailing wage law states with 109 schools built in non-prevailing wage law states.

As I will point out below, the results of the this study are that square foot cost of school construction in the selected states are, if anything, lower in the states with prevailing wage laws compared to those without prevailing wage laws. Obviously, not all schools in states with prevailing wage laws in this region are built

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[3] *Quarterly Journal of Economics*, May, 1984, pp. 251 to 274. *The Quarterly Journal of Economics* is the second oldest economics journal in the United States and is published by Harvard University. It is considered one of the premier journals in economics.

[4] Steven G. Allen, "Can Union Labor Ever Cost Less?" *Quarterly Journal of Economics*, May, 1987, pp. 347 to 373.

by union contractors and not all schools in states without prevailing wage laws are built by nonunion contractors. Allen does not break his analysis down along the dimension of legal regulations. For the purpose of analyzing the advisability and usefulness of prevailing wage law regulations, it is more useful to break construction projects out by whether they were built under these regulations or not rather than whether they were built union or nonunion. Nonetheless, it is appropriate to address the question of differences between union and nonunion contractors as this issue underlies much of the debate surrounding prevailing wage laws.

V. Why Union Contractors Train More

The Case of Utah's Prevailing Wage Law Repeal[5]

When Utah repealed its state prevailing wage law in 1981, training for construction, both in union apprenticeships and through vocational schools declined in Utah. Union apprenticeships are tied to the availability of union jobs. For example, unionized plumbers and pipe fitters in Utah, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, historically have attempted to maintain apprenticeship rates at between 10 and 15 percent of the number of union journeymen plumbers in the state (fig. 14.3). As employment boomed in the 1970s, however, the union could not meet the demand for journeymen from the unionized contractors. Consequently, the union increased apprenticeship rates to a peak of 25 percent in 1975. The boom persisted, but the backlog had been remedied. So the union lowered its apprenticeship rate back to normal ranges by 1978. Employment during the construction boom peaked in 1979 and membership in the plumbers and pipe fitters' union peaked in 1981. With the repeal of the Utah prevailing wage law, the union dropped its apprenticeship rate to 10 percent, a historical low. Union membership fell slightly in 1982 and then began a steeper decline in 1983. Faced with these sustained declines in membership, the union cut its apprenticeship rate to historical lows in 1986 and thereafter. Unions hit harder by declines in membership have scaled back their apprenticeship programs further. The carpenters' union, Utah locals 184 and 1498 of the United Brotherhood of Carpenters and Joiners of America, which graduated seventy in a class in 1977, graduated five in 1992 (Hansen, Paul. Weber Basin Job Corps Carpenters Union Instructor, personal interview, Sept. 2, 1993). The Utah International Union of Bricklayers and Allied Craftsmen suspended its apprenticeship program altogether.

The decline in union apprenticeship training in Utah has not been offset by a rise in other sources of training. Because the repeal of Utah's prevailing wage law was motivated by a desire to limit state expenditures, state legislators were not eager to raise funding for state-sponsored vocational training. Delmar Stevens, who has taught building trades construction at Salt Lake Community College since 1971, chronicles the decline in enrollment.

> I started at the college in 1971. We went about two or three years and then the enrollment just really started to grow. [When I started we had] probably about 45 students with the first year and second year programs. Then about 1973 or 74 it really started to grow. It jumped up to 200 students and then the crunch came in the last part of the 70s and early 80s it just dropped back to 30 or 40 students. Right now we let in anybody who can walk or crawl. We'll probably graduate 6 or 7 this year (Personal interview, September 14, 1993).

Although the number of vocational graduates in construction grew in the 1970s, the construction labor force grew more rapidly. Thus, while the 1970s was the heyday of vocational training at Salt Lake Community College, vocational graduates as a percentage of the construction labor force had already begun to decline.

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[5] The next two subsections of this report are drawn from Hamid Azari, Anne Yeagle and Peter Philips, "The Effects of the Repeal of Utah's Prevailing Wage Law on the Construction Labor Market" in Sheldon Friedman, et al., *Restoring the Promise of American Labor Law*, Cornell University, ILR Press, 1994, pp. 207-22.

Stevens argues that the decline in enrollment is driven by a lack of demand for training. "The staff is hanging on by their fingernails because there's not enough students that want to get into the program." He adds that many of his graduates do not stay in construction: "They get out, and they find out that they don't want to work in the cold in the winter and they want to get into something more secure, something that's got benefits." Construction has always required workers to work in the cold, but the loss of benefits and security has occurred since 1980 along with stagnating employment, declining rate of unionization, and falling relative wages.

Stevens also argues that the decline in construction training is a function of shifting government priorities in education:

> I can't speak for the school—I don't want to get in trouble that way—but we do have more general ed classes feeding the University [than in the past] and the vocational programs are really suffering. You look at Weber State. They used to have vocational programs and with academic drift, they don't have any vocational programs anymore.

Tom Lewis, director of the plumber and pipe fitters' union apprenticeship program, agrees with Stevens that there is an institutional tendency to move away from vocational education.

> We used to have a pretty good relationship with the community colleges. The reason we bought our own building and moved out here [away from Salt Lake Community College] is that you have an administrator of a vocational school and they don't want to remain the administrator of a vocational school. They move to an applied technology center, then they're a community college, and then they're a university. I started my apprenticeship at Weber Vocational Center which is now Weber State University. Vocational training seems to get set aside as this evolution happens and we eventually just get moved out the back door(Personal interview, Sept.3,1993).

The steady decline in vocational training as a percentage of the construction labor force through good times and bad supports the notion that the state has simply tried to get out of the business of vocational training in construction. The fall in union membership and wages has made construction a less attractive career. At the same time, unions are less able to train construction workers. As unions are weakened and schools drift toward academic offerings, the capacity to respond smoothly to an upsurge in construction jobs is undercut. And federally sponsored Job Corps vocational training is not in a position to fill in the gap.

Federal revenues pay for Job Corps training in Utah at both the Weber Basin and Clearfield centers. Federal funding in real terms for these centers has not expanded, but the Weber Basin Job Corps Center, which draws predominately from the Utah population, has significantly contracted its construction worker training throughout the 1980s. This center committed itself to changing from an all-male student population in 1980 to 50 percent female by 1990. To accommodate this switch, training for traditionally male occupations such as construction have been scaled back to accommodate new offerings in traditionally female occupations, such as office management and clerical work. Cement masonry and heavy-equipment training have been eliminated, and instruction in carpentry, painting, and brick laying has been cut in half.

The Clearfield Center has graduated approximately one hundred construction trainees per year since the early 1970s. Fewer Clearfield graduates go into the Utah labor market compared with Weber Basin because most of Clearfield's students are from out of state. On the whole, perhaps 10 percent of Clearfield's graduates go into the Utah labor market, but this percentage rises during periods of local labor shortage. It is estimated, however, that at most only 25 percent of Clearfield's graduates will stay in Utah (Hill, Merle. Vocational Education Manager, Clearfield Job Corps, personal interview, Sept. 9, 1993).

Even without union pressure, a skill shortage in Utah construction may raise wages and induce a new generation of young people to enter vocational training. When that happens, however, high-quality training programs, which take time to create, may not be in place to meet that demand, which will add an additional lag to the natural time it takes to train a skilled laborer.

Why the Nonunion Sector Did Not Make Up for the Loss of Union Training

The market has not successfully made up for the decline in union and state-sponsored training. At the national level, the nonunion Association of Building Contractors (ABC) has attempted to replicate the union system of bargaining for hourly contributions to a training fund. It is difficult, however, to induce ABC's member contractors to include general training costs in their bids. Each contractor fears his competitors will not include training costs. Thus, in an attempt to be low-cost bidder, ABC contractors often refrain from including training costs despite the ABC's initiative. Consequently, very little ABC training has occurred in Utah.

Nonunion apprenticeship programs operate, however, in the licensed trades of electricians and plumbers. In 1992, there were 846 nonunion licensed apprentice electricians in Utah and 2,068 nonunion journeymen. Thus, there are 4 apprentices for every 10 journeymen in the nonunion sector. In contrast, there were 123 apprentices and 607 journeymen in the union sector in 1992 or 2 apprentices for every 10 journeymen. In the nonunion sector, apprentices begin at around $6 per hour with no benefits. Over a four-year period, the state mandates that their wage rise to 80 percent of a journeyman's pay. In the union sector, apprentices begin at $7 per hour with an additional $3 in benefits. Their wages rise to $14 per hour plus $3 in benefits over a five-year period (Leroy, Julie. Assistant Business Manager, IBEW Local 354, Sept.25, 1993). Nonunion apprentices are sponsored by a particular contractor that oversees their on-the-job training, and these apprentices also take classwork at a participating community college. Union apprentices work under the direction of an apprenticeship coordinator, rotate among employers for on-the-job training, and take classes at community colleges and union apprenticeship centers. Roughly 90 to 95 percent of the union apprentices complete their programs and graduate to journeymen status, while only 15 to 20 percent of the nonunion apprentices graduate (Dean, Frank. Home Builders Institute Electrical Instructor, Clearfield Job Corps, Sept. 9, 1993). Given these rates, in four years, out of 846 nonunion apprentices, we should expect 125 to 170 journeymen to be graduated. In five years in the union sector, out of 123 apprentices, 110 to 115 apprentices would graduate to journeymen electrician. Thus, while the nonunion sector accounts for more than 85 percent of all electrician apprentices, it accounts for about 60 percent of journeymen graduates. Economic theory is consistent with this pattern wherein nonunion apprentices are paid less and graduate at a lower rate than union apprentices.

Economic theory posits that in the absence of marketwide institutions or government subsidies, individual workers will have to pay for their own on-the-job training when the skills learned are general to an industry and not specific and unique to the activities of a particular firm. The worker-learner pays for training by accepting a wage that is lower than the value to the firm of that worker's marginal product. By working for less than what the worker is worth to the employer, the worker pays the employer for on-the-job training. That beginning nonunion electrical apprentices earn $6 per hour while union apprentices earn $10 per hour (including benefits) is consistent with the theoretical proposition that nonunion apprentices pay for their own training by taking a discounted wage below their marginal value to the contractor.

Because the employer does not pay for nonunion training, the theory suggests that the employer has no stake in the worker's training. Consequently, if the worker leaves, the employer does not lose any investment in the worker's human capital. Thus, the employer will tolerate high levels of turnover. Because the worker is receiving less than what the worker can earn in other jobs with no on-the-job training, the worker may be tempted to exit jobs with training when current personal budget needs become pressing. So, on both the employer side and the worker side, turnover is tolerated in the nonunion sector. This is consistent with the higher turnover rates among nonunion apprentices, but other factors also contribute to the 15 to 95 percent differential in nonunion to union graduation rates.

Because the nonunion employer prices new hands at discounted wages that shield the employer from investing in the human capital of the new workers, the employer does not screen new workers extensively to forestall subsequent turnover. Failure to preselect new workers for aptitudes and attitudes consistent with a long-term attachment to construction work adds to the turnover among nonunion construction apprentices. In contrast, the joint apprenticeship boards of unions and union contractors do considerable preselection for both aptitude and attitude before letting a candidate into an apprenticeship program. This is because both the union

contractors and unions will invest in the union apprentices' training. Not wanting to lose their up-front investment, they seek to eliminate exit once the apprenticeship is begun.

In the nonunion sector, workers may also leave apprenticeships if it becomes apparent that the employer offering training at a discounted wage is not delivering on that training promise to train. Because employers are able to discount wages of apprentices below their current worth to the employer, it is tempting to engage in bait-and-switch tactics whereby training is promised but not delivered. By saving on training costs, the employer can earn an additional profit from employing green hands at discounted wages. In the union sector, because employers and union journeymen invest in the training of the apprentices, bait-and-switch tactics are less attractive. Because the apprentices' wage is not discounted as much below what they could earn elsewhere, the apprentices are not as tempted to leave. Thus, economic theory predicts the observed pattern whereby the nonunion sector must begin training five apprentices to graduate one journeyman while the ratio in the union sector is close to one to one.

The General Pattern of Training in Construction

In basic terms, nonunion contractors have difficulty training because one, the relationship between the contractor and the construction worker is often brief. This leads to a free-rider problem. Why should I train you when you are likely to go down the road and work for my competitor. I would just be helping him out and not myself. Two, without an apprenticeship coordinator there is no one policing the training to insure that on-the-job training takes place and is of decent quality. Thus, some contractors are tempted into bait-and-switch strategies where they promise an apprenticeship experience but deliver only the job experiences of a helper. The apprentice spends his or her time holding the dumb end of a measuring tape. The result of these two market failures, the free-rider and bait-and-switch phenomena lead to lower numbers of apprentices in the nonunion sector and lower rates of graduation into journeyman status. Data from the U.S. Bureau of Apprenticeship Training illustrate these effects.

Table 2 shows data for the entering class of construction apprentices in 1989. The data exclude California, New York, Delaware and Hawaii . These states currently do not report into the U.S. Bureau of Apprenticeship Training data base. For the remaining states, basically three out of every four construction apprentices enrolled into a jointly managed union-contractor apprenticeship programs despite the fact that union contractors account for less than half of all construction workers.

Table 2: Apprentices Enrolled in 1989 by Union and Nonunion Sectors and Craft

Apprenticeship in Construction The Class of 1989			
(1)	(2)	(3)	(4)
	Entering Apprentices		
	Total	% Union	% Nonunion
Electrician	7,245	58.4%	41.6%
Carpenter	4,752	88.8%	11.2%
Plumber/Pipefitter	4,467	65.6%	34.4%
Sheet Metal	1,856	74.0%	26.0%
Structural Steel	1,234	97.4%	2.6%
Roofer	1,162	88.0%	12.1%
Painter	972	90.6%	9.4%
Bricklayer	830	90.0%	10.0%
Operating Engineer	729	87.9%	12.1%
Other	3,675	78.5%	21.5%
All trades	**26,922**	**74.8%**	**25.2%**

Table 3 shows that the graduation rates are very different in the union and nonunion sectors of construction. By 1995, six years after enrollment, 55.8% of the apprentices in joint union-management programs had turned out as journeymen. In contrast, among the smaller number of nonunion apprentices only 28.7% turned out as journeymen by 1995. The lower number of apprentices in the nonunion sector despite the fact that the nonunion sector employs more workers is an example of the problem of free-rider market failures. The lower graduation rate among the nonunion apprentices reflects the problem of bait-and-switch. Together these problems feed on each other.

Table 3: Graduation Rates for the Entering Class of 1989 by Sector and Craft

Apprenticeship in Construction The Class of 1989		
(1)	(5)	(6)
	% of Each Group Graduating	
	Union	Non-union
Electrician	69.0%	29.5%
Carpenter	44.8%	29.5%
Plumber/Pipefitter	61.5%	26.0%
Sheet Metal	67.4%	43.6%
Structural Steel	56.2%	9.4%
Roofer	29.2%	17.9%
Painter	39.9%	18.7%
Bricklayer	49.9%	48.2%
Operating Engineer	53.8%	6.8%
Other	57.3%	25.7%
All trades	**55.8%**	**28.7%**

Table 4 shows the combined effects of free rider and bait-and-switch problems. The higher ratio of apprentices to journeymen in the union sector combines with the higher graduation rate in the union sector resulting in union contractors accounting for 85% of all the new journeymen coming from the entering class of 1989.

Table 4: The Share of All New Journeymen Coming from the Entering Class of 1989

Apprenticeship in Construction The Class of 1989		
(1)	(7)	(8)
	Share of All Graduates	
	Union	Nonunion
Electrician	76.7%	23.3%
Carpenter	92.3%	7.7%
Plumber/Pipefitter	81.8%	18.2%
Sheet Metal	81.5%	18.5%
Structural Steel	99.6%	0.4%
Roofer	92.3%	7.7%
Painter	95.4%	4.6%
Bricklayer	90.3%	9.7%
Operating Engineer	98.3%	1.7%
Other	89.1%	10.9%
All trades	85.2%	14.8%

Not all good construction workers learned their trade through formal apprenticeship. Not all union construction workers come from formal apprenticeship. Not all union apprenticeship graduates stay within the union sector of construction. However, the fact that almost nine out of every ten journeymen coming out of formal, monitored, planned and supervised apprenticeships come out of union apprenticeships means that union construction contractors are more likely to have a core of well trained craft workers. This allows these contractors to confidently invest in larger or more specialized machinery that require greater skill. This allows those contractors to employ capital intensive and human capital intensive technologies where wage rates can be higher without necessarily raising unit costs.

VI. An Analysis of Square Foot Public Construction Costs in Nine Southwestern and Intermountain States

The F.W. Dodge Corporation collects data on the accepted bid price or start cost of construction projects across all states and in both the public and private sector. Dodge does this as an information service to contractors bidding on construction jobs. From these data, I have selected five types of new structures built for non-federal public entities for analysis. These structures are elementary schools, middle schools, high schools, offices and warehouses. I limited my analysis to new construction in order to bring my

comparisons as closely as possible to similar construction projects.[6] Renovations have more widely varying characteristics. (For instance a new boiler put into an elementary school will have a much higher square foot cost than would the installation of a portable class room.) I looked at construction that began sometime between July 1, 1992 to July 1, 1994. I translated all accepted bid prices into 1994 dollars using the consumer price index.

I selected construction in nine western states. These states include five states with state prevailing wage laws regulating wage rates on public construction and four states free from these regulations on state and local public construction. The states selected were Utah which does not have a state prevailing wage law and New Mexico which does have such a law. Plus I selected all surrounding states that either border New Mexico or border Utah or both. Based on this criterion, the five selected states with prevailing wage laws are 1) New Mexico, 2) Texas, 3) Oklahoma[7], 4) Wyoming and Nevada. The four states in which contractors were free from state prevailing wage regulations in my selected group are Arizona, Utah, Colorado and Idaho. With the exception of Nevada where the two main cities, Las Vegas and Reno tend to have cost-of-living characteristics similar to California, the states in this selected group tend to have similar cost-of-living characteristics.

Table 5: The Distribution of Construction by Type within the Selected Nine States

New State Construction 1992-94 in 9 States

Structure Type	Count	Column %
OFFICES	43	10.90%
WAREHOUSES	20	5.10%
ELEMENTARY SCHOOLS	175	44.30%
MIDDLE SCHOOLS	104	26.30%
HIGH SCHOOLS	53	13.40%

In the nine selected states, during the years 1992 to 1994, elementary schools accounted for the largest single type of new non-federal public construction.

Table 5 shows the distribution of construction projects across the five selected types. Elementary schools are the most common while warehouses are the least common. In order to make statistically meaningful comparisons between the average square foot public construction costs in states with and without state prevailing wage laws it is necessary to have a sufficient number observations. Thus, results for elementary schools are most reliable and results for warehouses are least reliable.

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[6] I excluded from my sample any project that reported square foot costs less than $20 or over $500. In unreported statistical analyses, I included these outliers. The conclusions of this report are not substantially altered by the exclusion of these cases.

[7] In October, 1995, Oklahoma's state supreme court declared Oklahoma's law unconstitutional. It is no longer in effect. However, during the period under study, Oklahoma had a prevailing wage law regulating state public works.

Table 6 shows the breakdown of construction sites by type of structure grouped by states with and without state prevailing wage laws. The distribution of structure types is basically the same in the five states with prevailing wage laws compared to the four states without such laws. Elementary schools are most common and public warehouses are least common. More construction in the selected structure types took place in the five states with prevailing wage laws compared to the four states without such laws. In general, there are sufficient numbers of sites by type in each group of states to make meaningful comparisons with the possible exception of warehouses where there were only 12 built in states with prevailing wage laws and 8 built in states without prevailing wage laws. In contrast, 116 elementary schools were built in states with prevailing wage laws and 59 in states without prevailing wage laws. This is clearly enough observations to overcome the random effects of special aspects on any one particular job site that might raise or lower square foot construction costs.

Table 6: Distribution of New Construction by Type and Prevailing Wage Law Status

	Status of State Prevailing Wage Law			
	Has P.W. Law		No P.W. Law	
	Count	Column %	Count	Column %
Structure Type				
OFFICES	23	8.90%	20	14.60%
WAREHOUSES	12	4.70%	8	5.80%
ELEMENTARY SCHOOLS	116	45.00%	59	43.10%
MIDDLE SCHOOLS	76	29.50%	28	20.40%
HIGH SCHOOLS	31	12.00%	22	16.10%

More new public construction took place in the five states with state prevailing wage laws compared to the four states without prevailing wages laws during the period under study. However, the distribution of types of structures was similar in the two groups of states.

Table 7 shows Texas (a state with a prevailing wage law) accounts for the most construction projects of any of the nine selected states. Arizona (a state without a prevailing wage law) is second while Wyoming provides the least number of construction sites to analyze. New Mexico built 24 new public structures of the types under analysis during the time period under analysis. Of these 24, 14 were elementary schools. This is a sufficient number to make comparisons using New Mexico alone compared to other states. (These structures are listed in Appendix A.)

Table 7: Distribution of New Construction by Type and State

Number of New State and Local Construction Projects by State									
State	AZ	CO	ID	NM	NV	OK	TX	UT	WY
OFFICES	6	4	5	4	2	1	13	5	3
WAREHOUSES	1	6	1	0	0	0	12	0	0
ELEMENTARY	24	14	8	14	10	12	79	13	1
MIDDLE SCHOOLS	9	6	7	4	5	8	58	6	1
HIGH SCHOOLS	10	2	5	2	5	3	21	5	0
Total	***50***	***32***	***26***	***24***	***22***	***24***	***183***	***29***	***5***

Texas accounts for the largest amount of new construction projects. Arizona is a distant second. Wyoming accounts for the fewest projects.

Table 8 presents data on average square foot cost of construction in 1994 dollars broken down by structure type for the selected four states that do not apply prevailing wage regulations to state and local public works. In addition to average (or mean) square foot costs, Table 4 shows the number of new structures built, the minimum square foot cost on the least costly of these structures and the maximum square foot cost on the most costly of these structures.

In each state, elementary schools were the most common structure built. Average square foot costs ranged from a low of $60 per square foot for 8 elementary schools in Idaho to $80 per square foot for 14 elementary schools in Colorado. In terms of individual schools, one elementary school in Arizona and one in Idaho were built for $46 per square foot while at the other extreme, one elementary school in Arizona was built at the cost of $155 per square foot. These cost variations in elementary school construction may have to do with urban versus rural settings, differences in installed equipment, the size of the school or other factors. In comparing square foot construction costs across states with and without prevailing wage laws, my analysis assumes that with increased sample size the effects of these special factors driving costs up or down will offset each other in state averages. This is more likely to be true as the sample size rises.

In Table 9 the same square foot construction costs are presented for states with prevailing wage laws. Again, elementary schools are the most commonly found type of new public structure in each state. The average square foot cost ranges from a low of $49 per square foot for 8 elementary schools in Oklahoma to a high of $96 per square foot for 10 elementary schools in Nevada. The 14 elementary schools in New Mexico averaged $66 per square foot with the cheapest coming in at $35 per square foot and the most expensive at $87.[8] Oklahoma had the single cheapest elementary school built at $27 per square foot while Texas had one elementary school cost $368 per square foot. The difference in these very cheap and very expensive projects are probably due primarily to distinct differences in specifications of the buildings. However, when the expensive Texas school is averaged in with the 78 other elementary schools built in that state, its effect on the statewide average is minimal.

[8] The cheapest New Mexico elementary school project involved portable metal classroom buildings and the most expensive was the building of Chaparral Elementary School in Santa Fe. In comparing construction costs, one tries to compare apples to apples. Elementary schools as a building type are relatively homogeneous. However, as the example of portable classrooms suggests, even within the category of elementary schools/new construction there can be considerable differences in building design driving square foot cost differences. Similarly, it may be that Santa Fe is a more expensive region within New Mexico. This is why more observations lead to better comparisons of averages as the atypical project or the atypical area gets swamped by a larger number of more typical projects and more representative areas within a state.

Table 8: Square Foot Construction Costs in States without Prevailing Wage Laws

Arizona	Count	Mean	Minimum	Maximum
Structure Type				
OFFICES	6	$100	$64	$179
WAREHOUSES	1	$65	$65	$65
ELEMENTARY	24	$72	$46	$155
MIDDLE SCHOOLS	9	$77	$53	$100
HIGH SCHOOLS	10	$86	$69	$104

Colorado	Count	Mean	Minimum	Maximum
Structure Type				
OFFICES	4	$108	$62	$168
WAREHOUSES	6	$106	$21	$297
ELEMENTARY	14	$80	$61	$95
MIDDLE SCHOOLS	6	$79	$41	$130
HIGH SCHOOLS	2	$107	$96	$118

Idaho	Count	Mean	Minimum	Maximum
Structure Type				
OFFICES	5	$96	$44	$174
WAREHOUSES	1	$65	$65	$65
ELEMENTARY	8	$60	$46	$71
MIDDLE SCHOOLS	7	$62	$53	$78
HIGH SCHOOLS	5	$77	$59	$106

Utah	Count	Mean	Minimum	Maximum
Structure Type				
OFFICES	5	$71	$34	$121
WAREHOUSES	-	-	-	-
ELEMENTARY	13	$72	$53	$98
MIDDLE SCHOOLS	6	$91	$59	$205
HIGH SCHOOLS	5	$65	$50	$86

Average square foot cost of construction by structure type in four states without state prevailing wages laws by structure type. Also lowest and highest cost projects for each structure type by state.

Table 9: Square Foot Construction Costs in States with Prevailing Wage Laws

New Mexico	Count	Mean	Minimum	Maximum
Structure Type				
OFFICES	4	$76	$64	$95
WAREHOUSES	-	-	-	-
ELEMENTARY SCHOOLS	14	$66	$35	$87
MIDDLE SCHOOLS	4	$71	$58	$85
HIGH SCHOOLS	2	$105	$92	$117

Nevada	Count	Mean	Minimum	Maximum
Structure Type				
OFFICES	$2	$127	$85	$170
WAREHOUSES	-	-	-	-
ELEMENTARY SCHOOLS	10	$96	$67	$146
MIDDLE SCHOOLS	5	$99	$75	$110
HIGH SCHOOLS	5	$101	$79	$115

Oklahoma	Count	Mean	Minimum	Maximum
Structure Type				
OFFICES	1	$119	$119	$119
WAREHOUSES	-	-	-	-
ELEMENTARY SCHOOLS	12	$49	$27	$70
MIDDLE SCHOOLS	8	$49	$38	$71
HIGH SCHOOLS	3	$49	$48	$50

Texas	Count	Mean	Minimum	Maximum
Structure Type				
OFFICES	13	$90	$25	$191
WAREHOUSES	12	$61	$22	$178
ELEMENTARY SCHOOLS	79	$67	$34	$368
MIDDLE SCHOOLS	58	$66	$30	$199
HIGH SCHOOLS	21	$63	$39	$90

Wyoming	Count	Mean	Minimum	Maximum
Structure Type				
OFFICES	3	$112	$96	$142
WAREHOUSES	-	-	-	-
ELEMENTARY SCHOOLS	1	$69	$69	$69
MIDDLE SCHOOLS	1	$39	$39	$39
HIGH SCHOOLS	-	-	-	-

Average square foot cost of construction by structure type in five states with state prevailing wages laws by structure type. Also lowest and highest cost projects for each structure type by state.

Table 10: Comparing Average Square Foot Cost of New Public Construction by Type and Prevailing Wage Law Status

Status of State Prevailing Wage Law (All 9 States)	Has P.W. Law		No P.W. Law	
	Count	Mean	Count	Mean
Structure Type				
OFFICES	23	$95	20	$93
WAREHOUSES	12	$61	8	$96
ELEMENTARY SCHOOLS	116	$67	59	$73
MIDDLE SCHOOLS	76	$66	28	$77
HIGH SCHOOLS	31	$70	22	$81

Square foot construction costs on public projects are not higher in states with prevailing wage laws compared to states without prevailing wage laws.

Table 10 presents the key results from the F.W. Dodge data. Let us focus on elementary schools first because this is the largest group. Average square foot new construction costs are $67 in the five Intermountain and southwestern states with prevailing wage laws and $73 per square foot in the four Intermountain and southwestern states without prevailing wage laws. The sample sizes are large and statistical tests show that this difference of $6 per square foot is real.[9] Referring back to Tables 4 and 5 one can compare New Mexico to the group of states without prevailing wage laws. The average square foot cost for building 14 elementary schools in New Mexico was $66 compared to an average of $73 for 59 schools in the group of states without prevailing wage laws. Comparing New Mexico with Colorado, Utah and Arizona, the three non-prevailing wage law states bordering New Mexico yields similar results. In Utah, 13 elementary schools were built at an average square foot cost of $72. In Arizona, 24 elementary schools were newly built at an average square foot cost of $72, and in Colorado, 14 elementary schools were built at a cost of $80 per square foot. These compare with New Mexico's 14 schools built at a cost of $67 per square foot. Of the four states without prevailing wage laws, only Idaho had a lower average than New Mexico. Idaho built 8 elementary schools at a cost of $60 per square foot.

These data do not support the proposition that eliminating prevailing wage laws are likely to lower public elementary school construction costs in a measurable way. Because the sample size for elementary schools is the largest, this is the single most reliable conclusion from the Dodge data.

Table 10 also shows that the square foot construction cost of middle schools and high schools are lower in the five states with prevailing wage laws compared to the four states without these laws. The 76 middle schools built in prevailing wage law states cost an average of $66 per square foot while the 28 middle schools built in the four states without prevailing wage laws cost an average of $77 per square foot. In the case of high schools, the contrast is similar. In states with prevailing wage laws, square foot costs for 31 schools were $70 while in states without prevailing wage laws it was $81 for 22 schools. However, this last result disappears when Texas is removed from the group of states that have prevailing wage laws. The sample of high schools in the remaining four states with prevailing wage laws falls from 31 to 10 and the square foot costs rises to $86. Removing Texas lowers the sample sizes for elementary schools in the remaining prevailing wage law states from 116 to 37 and middle schools from 76 to 18. However, the basic results in these two cases are unaltered. Square foot construction costs are still, on average, lower in the remaining four states with prevailing wage laws compared to the four states without prevailing wage laws.

[9] A two-tailed t-test shows that these are statistically different numbers at the 5% level of significance.

The sample sizes for middle schools and high schools in New Mexico are low. New Mexico built only four new middle schools and two new high schools during the period under study. The four New Mexican middle schools cost on average $71 per square foot. This compares with square foot costs for middle schools in the four states without prevailing wage laws of $77 in Arizona (9 schools), $79 in Colorado (6 schools), $62 in Idaho (7 schools) and $91 in Utah (6 schools).

The two New Mexican high schools cost $105 per square foot (one at $92 and the other at $117). This compares with square foot costs of high schools in the four states without prevailing wage laws of $86 in Arizona (10 schools), $107 in Colorado (2 schools), $77 in Idaho (schools) and $65 in Utah (5 schools). Thus, there is some suggestion that in contrast to elementary schools and middle schools, high school construction in New Mexico might cost more than in surrounding states with state prevailing wage laws. But this conclusion would be premature. The New Mexico sample is small (two schools) and is in line with the more expensive schools built in each of the states without prevailing wage laws. The high-end costs were $104 per square foot in Arizona, $118 in Colorado, $106 in Idaho and $86 in Utah. The small New Mexican sample may simply only include two more richly designed high schools. Basically, as sample sizes fall, conclusions drawn from comparing averages must become more tentative.

The cost of office buildings (Table 6) were basically the same in states with and without prevailing wage laws. The cost of constructing 23 new state office buildings in states with prevailing wage laws was $95 per square foot while the 20 new office buildings in states without prevailing wage laws cost $93 per square foot. When Texas is eliminated from the sample of five states with prevailing wage laws, the sample size falls to 10 and the average square foot cost rises to $101. However, from a statistical standpoint, there is no significant difference between the averages of $101 and $93.[10]

New Mexico built 4 public office buildings during this period with a square foot cost of $76. Contrasting this $76 square foot cost to the four states without state prevailing wage laws—Arizona built 6 office buildings at an average cost of $100 per square foot; Colorado built 4 public office buildings as an average square foot cost of $108; Idaho built 5 public office buildings at a square foot cost of $96 and Utah built 5 public office buildings at a square foot cost of $71.

Texas was the only prevailing wage law state to build public warehouses during the time period under study. Texas built 12 warehouses at an average square foot cost of $61 while in the group of states without prevailing wage laws, Arizona, Colorado and Idaho together built 8 warehouses at a square foot cost of $96. (Utah did not build a public warehouse during this period.)

In summary, start cost data from the F.W. Dodge Corporation do not support the notion that square foot construction costs on state and local construction will be cheaper in the absence of state prevailing wage laws. In the largest and perhaps the most homogeneous sample of public construction, elementary schools, if anything, square foot construction costs are cheaper in Intermountain and southwestern states with prevailing wage laws compared to those without these laws. This conclusion holds when comparing New Mexico to the surrounding states without prevailing wage laws. Even though sample sizes decrease, the general conclusion that construction costs for middle schools and high schools are, if anything, lower in states with prevailing wage laws compared to those without prevailing wage laws continues to hold. This is also true for New Mexico compared to surrounding states without prevailing wage laws in the case of middle schools. However, in the case of two high schools built in New Mexico, their costs were on the high range of square foot costs in surrounding states with no state prevailing wage laws. This may simply be due to the specific design of these two schools. Sample sizes for office buildings and warehouses are smaller than those for schools, particularly if Texas is excluded from the group of states with prevailing wage laws. In these small sample cases, one cannot conclude that construction costs are any different in Intermountain and southwestern states with or without prevailing wage laws.

[10] A t-test indicates that these means are not significantly different at a 5% level. What this means is that given the small sample sizes and the wide variation of square foot cost within each sample, one cannot conclude that the average differences are the result of anything other than randomness.

Table 11: Excluding Texas and Comparing Average Square Foot Cost of New Public Construction by Type and Prevailing Wage Law Status

Status of State Prevailing Wage Law (Only 8 States) (Excludes Texas)	Has P.W. Law		No P.W. Law	
	Count	Mean	Count	Mean
Structure Type				
OFFICES	10	$101	20	$93
WAREHOUSES	-	-	8	$96
ELEMENTARY SCHOOLS	37	$69	59	$73
MIDDLE SCHOOLS	18	$67	28	$77
HIGH SCHOOLS	10	$86	22	$81

Excluding Texas from the group of states with prevailing wage laws does not alter the general conclusion that public construction costs are not higher in states with prevailing wage laws compared to states without prevailing wage laws.

VII. Conclusions

There are no previous published studies that analyze the relationship between state prevailing wage laws and public school construction costs. Steven Allen's study of union and nonunion contractors in the early 1970s found that while union workers were 20% to 50% more productive than nonunion workers, nonunion contractors were the low-cost contractors in public school construction. Allen's study was limited to 57 union-built and 11 nonunion-built schools. Consequently, he had to collapse together elementary and secondary school buildings and include various regions of the country. The U.S. Bureau of Labor Statistics found that in the early 1970s labor costs as a percent of total costs in school construction did not vary widely by region despite wage rate variations of 50%. The BLS attributed this to differences in regional labor productivity and construction material costs.

Azari, Yeagle and Philips show that in the case of Utah, the repeal of the state prevailing wage law in 1981 corresponded to a rapid decline in apprenticeship training in that state, a decline that was not compensated by any increase in job corps or community college training. Bureau of Apprenticeship Training data for the 1990s show that 85% of all apprenticeship-trained construction journeymen come out of jointly sponsored union-management apprenticeship programs. The reasons that nonunion construction contractors are less likely to train are associated with market failures tied to the problems of free-riding contractors waiting for others to train and bait-and-switch contractors offering training but only providing helper experiences on-the-job. Collectively bargained contracts calling for jointly managed apprenticeship programs provides the policing mechanism to overcome these market failures. Thus, regulations that discourage collective bargaining in construction also discourage formal apprenticeship training in construction. The resulting lower productivity helps account for the fact that lower wage rates in construction do not necessarily lead to lower construction costs.

In the case of the nine southwestern and Intermountain states selected for this cost study, Table 10 shows the basic result. The average square foot construction costs for 116 elementary schools built in five states with prevailing wage laws was $67 while for 59 elementary schools built in four states without prevailing wage laws the cost was $73 per square foot. For 76 middle schools built in the states with prevailing wage laws, the average square foot cost was $66 while in the states without prevailing wage laws the cost was $77 per square foot. For 31 high schools built in the five states with prevailing wage laws, the square foot cost

was $70 while in the four states without state prevailing wage laws the cost was $81. The difference in all of these averages was statistically significant.

When New Mexico's 14 newly built elementary schools was compared to elementary schools in the four surrounding states without prevailing wage laws, the average New Mexico square foot cost of $66 was lower than the square foot elementary school cost in Arizona ($72), Colorado ($80) and Utah ($72) but higher than in Idaho ($60). During the time period selected for the study (fiscal years 1992-94) New Mexico built on 4 new middle schools and 2 new high schools. Thus, the average costs for these schools is more sensitive to the effect of small numbers. Nonetheless, the average New Mexico square foot cost for middle schools ($71) was lower than that for Arizona ($77), Colorado ($79) and Utah ($91) while higher than Idaho ($62). In the case of two high schools in New Mexico, the square foot construction cost was $105. This compare with $86 for 10 high schools in Arizona, $107 for 2 high schools in Colorado, $77 for 5 high schools in Idaho and $65 for 5 high schools in Utah. The smaller number of high schools built compared to middle schools and elementary schools make this comparison more sensitive to the effects of small numbers on averages.

Similar small number problems exist for offices and warehouses. During the time period under study, New Mexico built four public office buildings and no warehouses. The average square foot cost for public office buildings in New Mexico was $76. This compares to an average of $93 for 20 public office buildings built in the four surrounding states without prevailing wage laws.

The basic conclusion of this study is that in the case of New Mexico there is no strong evidence to suggest that the repeal of the state's prevailing wage law would save substantial costs in the construction of public schools. This is especially true in the long run. The reason higher wage rates for construction workers do not necessarily lead to higher construction costs is because those higher wage rate appear to be offset by higher labor productivity. In the short run, lower wage rates might not lead to lower productivity simply because trained construction workers might be forced to accept those lower wage rates. However, in the long run, a migration of trained workers out of construction and a decline in the training of new construction workers would lead to lower productivity canceling out any savings from lower wage rates.

Appendix A: New Mexico Data Used in Study

City	Project Description	Structure Type	Project Value	Square Feet	Sq. Ft. Cost	Sq. Ft. Cost 1994 $
SANTA FE	SCHOOL ADMINISTRATION OFFICE(ADD/REMOD/DEMOLITION)	Office	$1,290,600	14,000	$92	$95
ALBUQUERQUE	OFFICE BUILDING	Office	$4,000,000	65,000	$62	$64
ALBUQUERQUE	STATE BAR CENTER PROJECT (OFFICE BUILDING)	Office	$1,800,000	28,000	$64	$66
SOCORRO	EMRTC COMPLEX (OFFICE/LABORATORY/SHOP)(3 BLDGS)(PRE ENGR)	Office	$3,405,596	43,000	$79	$79
ALBUQUERQUE	TOMASITA ELEMENTARY SCHOOL	Elementary	$2,899,900	48,000	$60	$64
SANTA FE	CHAPARRAL ELEMENTARY SCHOOL 12	Elementary	$2,117,922	26,000	$81	$87
PORTALES	PORTALES ELEMENTARY SCHOOL (9212)	Elementary	$3,698,921	59,000	$63	$67
ZUNI	A:SHIWI ELEMENTARY SCHOOL (PH	Elementary	$1,177,080	17,450	$67	$72
ALBUQUERQUE	PAJARITO ELEMENTARY SCHOOL CORE FACILITY	Elementary	$1,287,426	21,000	$61	$65
TOME	TOME ELEMENTARY SCHOOL (PH 2)(	Elementary	$800,000	11,000	$73	$77
ARTESIA	YESO ELEMENTARY SCHOOL (24 CLASSROOM) (944)	Elementary	$3,924,500	51,500	$76	$76
LOS LUNAS	LOS LUNAS ELEMENTARY SCHOOL	Elementary	$2,311,000	42,500	$54	$56
RUIDOSO	RUIDOSO ELEMENTARY SCHOOL	Elementary	$1,879,700	32,000	$59	$61
ALBUQUERQUE	1993 PORTABLE METAL CLASSROOM BLDGS (120 UNITS) (93112)	Elementary	$3,611,080	108,000	$33	$35
LOVING	LOVING ELEMENTARY SCHOOL (NEW)(PH 1) (A9315)	Elementary	$2,000,000	33,000	$61	$61
LAS CRUCES	ELEMENTARY SCHOOL (B9325)	Elementary	$3,257,687	53,768	$61	$61
MORIARTY	MORIARTY ELEMENTARY SCHOOL(PH 2)(23 CLSRMS)	Elementary	$1,741,351	27,000	$64	$67
GALLUP	EAST ELEMENTARY SCHOOL (PH 1)	Elementary	$2,410,000	29,700	$81	$81
SANTA FE	NEW MID SCHOOL	Middle	$7,696,771	94,000	$82	$85
BELEN	BELEN JUNIOR HIGH SCHOOL (PH 2	Middle	$1,504,850	27,116	$56	$59
FARMINGTON	FARMINGTON JR HIGH SCHOOL	Middle	$5,655,423	100,000	$57	$58
AZTEC	KOOGLER MIDDLE SCHOOL (8 CLASS	Middle	$829,616	10,940	$76	$81
LAS CRUCES	ONATE HIGH SCHOOL (B91.04)	High	$19,768,874	180,000	$110	$117
ALBUQUERQUE	LA CUEVA HIGH SCHOOL (PH 3)	High	$2,606,500	30,000	$87	$92

Do Lower Prevailing Wages Reduce Public Construction Costs?

Howard Wial

Briefing Paper 99/2

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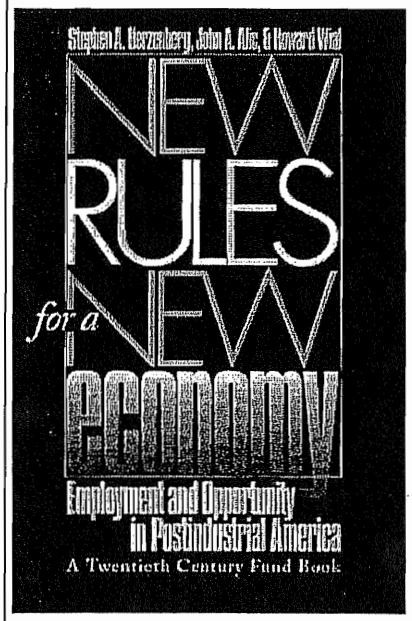

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Overview

Pennsylvania law requires construction contractors working on publicly funded construction or renovation projects to pay workers at a minimum the "prevailing wages and benefits" in their respective trades in the geographical area in which the work is performed. In 1997, the Pennsylvania Department of Labor and Industry (DLI) implemented a change in its method of determining prevailing wage and benefit rates resulting in a reduction in the legally required prevailing rates in many construction trades in much of the state. (Although the Pennsylvania Commonwealth Court ruled them illegal on January 11, 1999, the prevailing wage and benefit rates DLI implemented were in place for more than a year.)

Opponents of prevailing wage laws often argue that repealing or weakening these laws will lower the cost of public construction projects because such action will reduce the wages and benefits of construction workers employed on public projects. Data on Pennsylvania public school construction projects during the period in which lower prevailing rates were in effect do not support this claim.

- Data on public school construction costs show no strong evidence that Pennsylvania's lower prevailing wages and benefits reduced construction costs charged by contractors performing public works.
- Studies from other states show no statistically significant relationship between the existence of prevailing minimum wage and benefit laws and the cost of school construction.
- Lower prevailing minimum wages paid to workers have no measurable impact on public construction costs partly because wage declines lead to offsetting declines in productivity.
- Real savings in public construction costs are more likely to come from investments in worker training, which can make workers more productive, thereby lowering costs without cutting wages.

By threatening the construction industry's skill base, lowering prevailing minimum wages and benefits moves Pennsylvania's construction industry in the opposite of the direction in which it needs to move to reduce construction costs over the long term.

Pennsylvania's Prevailing Wage Law

Since 1961, Pennsylvania has required construction contractors who work on publicly funded projects (such as public schools, government buildings, and highways) to pay construction workers at least the prevailing wages and benefits for their respective trades in the area in which the work is performed. This prevailing minimum wage requirement exists, in one form or another, in many states and at the federal level as well. The purpose of the requirement was to prevent building contractors from using out-of-state or out-of-town workers to undercut the local economy and wage base.

Since 1979, nine states have repealed their prevailing wage laws.[1] Opponents of prevailing wage laws believed that the laws kept construction workers' wages and benefits artificially high because the prevailing minimum wages set under the laws were often the hourly wages paid to unionized workers, which are generally higher than nonunion workers' hourly wages. If wage and benefit rates were no longer propped up by law, prevailing minimum wage opponents argued, wages would fall to their "natural" market levels yielding lower construction costs and saving taxpayers money.

Pennsylvania's prevailing wage law has not been repealed. However, the Pennsylvania Department of Labor and Industry (DLI) recently weakened the law's effect by changing its method of determining prevailing rates. (The prevailing wage statute gives DLI the responsibility for determining the prevailing wage and benefit rates in each trade or craft.) Before February 27, 1997, DLI set the prevailing wage and benefit rates by accepting submissions of wage and benefit information from any interested party, including building contractors and trade unions. It then declared the prevailing rates to be the hourly wage and benefit rates that were most frequently paid to workers. While the wage and benefit rates of nonunion workers often vary from job to job, person to person, and employer to employer, rates in the unionized sector are generally unform in an area for each specific trade. For this reason, the prevailing wage and benefit rate was usually the collectively bargained wage and benefit rate.

In June 1996, DLI decided to set prevailing wage and benefit rates in a different way. Instead of relying on submissions from interested parties as contemplated by the statute, DLI contracted with the Pennsylvania State Data Center to conduct a statewide survey of construction workers' wages. The survey covered the period from January 1995 through May 1996. It was sent to building contractors, although certain contractors and certain types of construction projects were excluded. Using the survey results, DLI would declare the prevailing wage and benefit rate in a particular trade and county to be the wage and benefit rate paid to a majority of workers in that trade and county based upon DLI's criteria for the determination of majority status. If no single wage and/or benefit rate was paid to a majority of workers, DLI would declare the prevailing wage to be the average wage and benefit rate of all survey responses. The new method of setting the prevailing wage and benefit rates went into effect February 27, 1997, but was the subject of a legal challenge which stayed its implementation or use from April 8, 1997, until August 13, 1997, when the stay was lifted.

In many trades and counties where a large share of construction workers were covered by a collective bargaining agreement, the prevailing wage and benefit rates were the same under the new method as under the old one. But in trades and counties with a lower union presence or a low survey response rate for unionized projects, the new method usually resulted in a decline in the prevailing minimum wage and benefit rate because that wage and benefit rate was no longer the collectively bargained rate.

The Effect of Lower Prevailing Wages and Benefits on Construction Costs

Opponents of prevailing wage laws would expect Pennsylvania's public construction costs to have declined after the impact of collective bargaining agreements on prevailing wages and benefits was weakened. To find out whether such expectations are warranted, we can look at evidence on school construction costs in Pennsylvania during the two-year period from October 1996 through October 1998. If lower prevailing wage and benefit rates reduced construction costs to public bodies, then the average cost per square foot for public school construction projects would be expected to have been lower after August 1997 than it was in the earlier part of the two-year period.[2]

Table 1 shows the average cost per square foot for school construction projects for which contracts were awarded in the months before and after the wage-determination method was changed.[3] The table shows the average cost for eight groups of Pennsylvania counties. Each group of counties is characterized by the number of building trades or crafts (out of ten) in which the new prevailing wage and benefit rates were the collectively bargained wage. (There are no before-and-after data for groups of counties in which the new prevailing wage and benefit rates were the collectively bargained rate in one or six trades, so those county groups are excluded from the table.)

Table 1.
Average Cost Per Square Foot* for School Construction Projects in Pennsylvania, October 1996-October 1998, Before and After Prevailing Wage Determination Method Was Changed

Number of Trades, in County Group, in Which New Prevailing Wage Was the Collectively Bargained Wage**	Average Cost Per Square Foot Before Prevailing Wage Determined Method Was Changed (October 1996 - August 1997)	Average Cost Per Square Foot After Prevailing Wage Determination Method Was Changed (September 1997 - October 1998)	Percentage Change in Average Cost Per Square Foot
0	$ 61.50	$ 97.33	+58%
2	37.06	77.31	+109
3	125.43	59.28	- 53
4	110.00	238.00	+116
5	80.25	113.90	+ 42
7	116.71	160.95	+ 38
8	113.35	159.40	+ 41
9	151.19	73.61	- 51
10	101.12	108.13	+ 7

*Average cost per square foot is the ratio of total costs of all construction projects in a county group to total square feet covered by those projects.
**Each county was classified according to the number of trades in which the new prevailing wage was the collectively bargained wage. The counties were then grouped together according to this number. For example, "2" indicates that the data pertain to all counties in which the new prevailing wage was the collectively bargained wage in two trades.

The table shows that average construction costs per square foot declined only in counties where either three or nine trades had their new prevailing wage rates set equal to the collectively bargained wage. In all other county groups, average costs rose after the new wage-determination method went into effect.

Table 1 also provides data on which county groupings saw the largest declines or smallest increases in average cost per square foot. Proponents of weakening prevailing wage laws would expect construction costs to fall most (or increase least) in the counties in which very few trades had their prevailing wage and benefit rates set by collective bargaining after the change in the prevailing wage determination method. These proponents would therefore expect the top rows of the last column of Table 1 to be more negative (or less positive) than the bottom few rows. In fact, the data shows the opposite of what would be expected if lowering prevailing wage and benefit rates reduced construction costs: while the trend is erratic, the top rows of the last column of Table 1 tend to be higher than the bottom rows.

Of course, the projects included in Table 1 differ in terms of many other things that may affect their costs, not just whether their contracts were awarded before or after the change in the method of determining the prevailing wage rate. For example, they differ by the number of square feet in the project, the cost of living in the relevant county, the type of school, and the particular month in which the contract was awarded. A statistical technique known as multiple regression makes it possible to separate the influence of the prevailing wage rate change on construction costs from other influences on those costs. Multiple regression analysis of Pennsylvania school construction data shows no across-the-board decline in costs after the prevailing wage law's determination methods were changed.[4]

Studies of prevailing wage laws in other states have also produced no strong evidence that these laws have any impact on construction costs.

- A study of 15 Great Plains states showed that the average cost per square foot of building new schools did not differ significantly between states that had prevailing wage laws and states that did not.[5]

- A comparison of school construction costs between prevailing wage and non-prevailing wage states in the Mountain West and Southwest found that average costs per square foot were actually lower in states with prevailing wage laws.[6]

- A multiple regression study of school construction costs in Maryland and other mid-Atlantic states found that prevailing wage laws have no measurable impact on costs.[7]

The most cited statistical study that produced a contrary result, a multiple regression analysis of the impact of the federal prevailing wage law (the Davis-Bacon Act) on construction costs in non-metropolitan areas of the U.S., was flawed by its deliberate exclusion of publicly funded projects that were not subject to the requirements of the federal law.[8] The study thus compared public

projects subject to the federal prevailing wage law with private projects. Because many publicly funded projects (such as highways, public transportation systems, and prisons) have no private counterparts, however, it is impossible to hold constant the characteristics of the project when comparing public and private projects. Therefore, it is impossible to attribute public-private cost differences to the public sector's prevailing wage and benefit rate requirement.

The recent experience of two Pennsylvania school districts shows that even increases in legally mandated prevailing wage and benefit rates do not necessarily increase public construction costs. In March 1999, after two months of legal uncertainty about required prevailing wage levels, DLI began issuing prevailing wage rates that were higher than the 1998 rates. The Blue Mountain School District, in Schuylkill County, was planning to renovate its high school. In April 1999, the school district's construction manager estimated that construction costs would increase by about $670,000 as a result of the higher prevailing wage and benefit rates.[9] But when bids for the project were opened on May 6, the low bids, which were expected to be about $15.1 million, came in at only about $13.8 million, almost 9 percent below the anticipated level.[10] And in April, bids for a middle school construction project in Tamaqua, which used the same prevailing wage and benefit rates as the Blue Mountain bids, also came in under budget estimates.[11]

Why Do Lower Prevailing Wages and Benefits Have No Measurable Effects on Construction Costs?

Many people, without examining the evidence, might expect the lowering of Pennsylvania's prevailing minimum wages and benefits to reduce construction workers'compensation and, with it, construction costs. But this would be true only if construction workers' productivity did not change when workers' wages fell. When workers become less productive, construction costs rise. If the decline in wages causes productivity to drop, the effect of the productivity decline (to raise costs) works against the effect of the wage decline (to lower costs). If the two effects cancel each other out, the prevailing wage change will have no effect on construction costs. If the productivity decline outweighs the wage decline, costs will actually rise.

There are several reasons to expect construction industry productivity to decline substantially when the prevailing wage rate is lowered. Large wage cuts demoralize workers and encourage skilled and experienced workers to travel to higher wages areas or leave the industry altogether. Over a longer period of time, lower wages threaten the continued existence of construction apprenticeship programs (most of which are established through collective bargaining and administered jointly by union and employer representatives).[12] Apprenticeships, which usually last

four or five years, give workers a broad set of skills within their respective trades. If construction workers' wages are too low and workers are unlikely to spend entire careers in the construction industry, costly apprenticeships no longer make economic sense for workers or employers. As apprenticeships decline, the construction industry loses its base of skilled workers. As a result, productivity declines. Individual employers are unwilling to pick up the slack and train workers themselves because they know that any worker they train can easily go to work for a competitor. Moreover, nonunion employers have rarely been able to create or sustain apprenticeship programs that are comparable in scope to the collectively bargained programs.

In other states, eliminating prevailing wage laws has driven down wages and reduced investment in apprenticeship training. Between 1973 and 1990, the number of construction apprentices declined by an average of 53 percent in Great Plains states that repealed their prevailing wage laws or never had such laws. In Great Plains states that kept their prevailing wage laws, the number of apprentices fell by only 27 percent during the same period.[13]

Conclusion

For the period in which they existed, Pennsylvania's lower prevailing wage and benefit requirements had no measurable impact on construction costs in the state. If the lower prevailing wage and benefit* rates were intended to save taxpayers money, they failed to achieve that goal. Real savings in public construction costs are more likely to come from investments in worker training, which can make workers more productive, thereby lowering costs without cutting wages. By threatening the construction industry's skill base, lower prevailing rates move Pennsylvania's construction industry in the opposite of the direction in which it needs to go to reduce construction costs over the long term.

KEYSTONE RESEARCH CENTER

FOOTNOTES

[1] Peter Philips, *Kansas and Prevailing Wage Legislation*, study prepared for Kansas Senate Labor and Industries Committee, February 20, 1988, p. 14. The prevailing wage law in one additional state, Oklahoma, was judicially overturned.

[2] The data analyzed are from the F.W. Dodge Company and include information on the bid price at the start of the project, the structure type, project location, project scale, and technical characteristics such as number of stories and type of frame. The Dodge data also distinguish between public, private, and federal projects.

[3] The data include six private school construction projects and 70 public school projects. The inclusion of this small number of private schools, which are not covered by the prevailing wage law, makes little difference to the analysis. In addition, the prevailing wage law may have an indirect effect on wages paid to workers on private construction projects if public construction projects account for a large share of all construction industry employment in a trade and locality.

[4] The multiple regression analysis included all Pennsylvania school construction projects for which contracts were awarded between October 1996 and October 1998, except for those in counties where either one or six trades' new prevailing wages were equal to the collectively bargained wage. (The latter projects were excluded from the regression analysis, as they were excluded from Table 1, because there were no before-and-after data.)The regression related the logarithm of the total cost of each project to a measure of the cost of living in the project's county, the time when the project was built (measured in months after October 1996), the type of project (addition, addition/alternation, alteration, alteration/renovation, new construction, unknown/new, or unknown), the number of square feet, the type of school (public or private, and elementary, middle, or high school), and whether the project was built after August 1997 in each county group. The regression results showed that, after controlling for other influences on construction costs, costs went up in some county groups and down in others after the prevailing-wage change took effect. (In which groups costs increased and in which they decreased depended on the precise statistical specification used.) However, none of these cost increases or decreases was statistically significant at the 5 percent level except, in one specification, for a decline in costs in the nine-collective-agreement county group.

[5] Philips, *Kansas and Prevailing Wage Legislation*, pp. 18-21.

[6] Peter Philips, *Summary of New Mexico Study of School Construction Costs*, University of Utah, Department of Economics, no date.

[7] Mark Prus, *Prevailing Wage Laws and School Construction Costs: An Analysis of Public School Construction in Maryland and the Mid-Atlantic States*, study prepared for Prince Georges County (Maryland) Council, January 1999.

[8] Martha Norby Fraundorf, John P. Farrell, and Robert Mason, *Effect of the Davis-Bacon Act on Construction Costs in Non-Metropolitan Areas of the United States*, Oregon State University, Department of Economics, January 1982.

[9] Mary Ellen Maher-Harkins, "Prevailing Wage Debate Hits County; Blue Mountain Sees Project Cost Rise," *Schuylkill Online*, April 27, 1999, www.pottsville.com/pub/1999/Apr/27/D977592.htm

[10] Mary Ellen Maher-Harkins, "Blue Mountain Bids Come In Low; School District May Save More Than $1 Million in Construction Costs," *Schuylkill Online*, May 7, 1999, www.pottsville.com/pub/1999/May/7/E2374.htm

[11] Maher-Harkins, "Prevailing Wage Debate Hits County."

[12] In Pennsylvania during the 1990-95 period, labor-management apprenticeship programs operated jointly by unions and construction contractor associations accounted for 72 percent of new entrants into apprenticeship programs (and a higher share of those graduating from apprenticeships). U.S. Department of Labor, Bureau of Apprenticeship and Training, data provided by Cihan Bilginsoy of the University of Utah. During this period, unions represented about 22 percent of construction workers (Barry T. Hirsch and David A. Macpherson, *Union Memberships and Earnings Data Book* (Washington, D.C.: Bureau of National Affairs), various years.) Therefore, Pennsylvania unionized construction firms did about 9 times as much apprenticeship training relative to their employment as did non-union firms.

[13] Philips, *Kansas and Prevailing Wage Legislation*, pp. 35-36.

Exhibit E

SixTen and Associates
Mandate Reimbursement Services

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February 14, 2003

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 01-TC-28
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

I have received the comments of the State Building and Construction Trades Council of California, AFL-CIO (""SBCTC") dated January 15, 2003, but mailed to me January 20, 2003, to which I now respond on behalf of the test claimant.

Although none of the objections generated by "SBCTC" are included in the statutory exceptions set forth in Government Code Section 17556, the objections stated additionally fail for the following reasons:

A. The Comments of the "SBCTC" are Incompetent and Should be Excluded.

Test claimant objects to the Comments of the "SBCTC", in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information and belief."

The "SBCTC" comments do not comply with this essential requirement.

B. There is No Authority in the Commission Regulations for an Appearance.

While the Commission has often been generous in allowing almost anyone or any entity to participate in the test claim process, the test claimant feels compelled to point out, for the record, the limitations of Commission rules regarding interested parties.

The rules of the Commission pertaining to test claims is found in Chapter 2.5 of Title 2 of the California Code of Regulations. Section 1183.02(a) requires the Commission to send a copy of any test claim to the Department of Finance, Office of the State Controller, any affected state agency, and any known interested parties.

Section 1181.1(a) defines "affected state agency" as a state department or agency that is responsible, in whole or in part, for implementation, enforcement, or administration of any statute(s) or executive orders(s) that is the subject of the test claim. Obviously, "SBCTC" is not an "affected state agency".

Section 1181.1(j) defines "interested party" as a local agency or school district; an organization or association representing local agencies or school districts; or a person authorized to represent a local agency or school district, having an interest in a specific claim. "SBCTC" is not an "interested party".

Section 1183.02(b) allows the Department of Finance, Office of the State Controller, and any affected state agency (note that "known interested parties" are not included) the opportunity to review and provide written response, opposition, or recommendations concerning the test claim. The rules of the Commission do not provide for any other person or entity to provide written response, opposition or recommendations. There is no authority in the Commission regulations for an appearance by the "SBCTC".

C. The "SBCTC" Lacks Standing to Appear as Amicus Curiae

If the Commission were to seek guidance from its judicial counterparts, the rules for the filing of amicus curiae briefs are found in California Rules of Court. The 2002 version (in effect at the time of the test claim filing and when responses were due) for the Supreme Court were found in Rule 29.3, subdivision (c), first paragraph:

> "A brief of amicus curiae... may be filed on permission first obtained...(T)o obtain permission, the applicant shall file with the clerk...a signed request...stating the nature of the applicant's interest and setting forth facts or questions of law that have not adequately been presented by the

parties and their relevancy to the disposition of the case..."[1]

The Court of Appeal version of the rule was found in Rule 13, subdivision (b):

> "(1) Any person...may...file an application for permission..to file an amicus curiae brief...(2) (T)he application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter..."[2]

The Rules of Court were amended, effective January 1, 2003. The rules for the Supreme Court are now found in Rule 29.1, subdivision (f):

> "...(3) The application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter..."[3]

The rules for the Courts of Appeal are now found in Rule 13, subdivision (c):

> "...(2) The application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter..."[4]

Either version and both courts require two things: (1) that the applicant have an interest in the proceeding and (2) that the amicus curiae brief will assist the court in deciding the matter, presumably by presenting information not adequately presented by the parties. The "SBCTC" fails in both requirements.

1. The "SBCTC" has no real interest in the pending test claim.

The "SBCTC" attempts to file a response as *Amicus Curiae on behalf of* "a federation of labor organizations comprising about 200 local unions and 20 district councils that collectively represent about 350,000 men and women working in the construction trades

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[1] The full text of Rule 29.3 (2002) is attached hereto as Exhibit 1.

[2] The full text of Rule 13 (2002) is attached hereto as Exhibit 2.

[3] The full text of Rule 29.1 (2003) is attached hereto as Exhibit 3.

[4] The full text of Rule 13 (2003) is attached hereto as Exhibit 4

in California" who have a "significant interest in the protections provided by the prevailing wage law".[5]

As important as its services may be to its constituency, "SBCTC" has no genuine interest in the outcome of this test claim. The main thrust of its argument is found on page 2 of its proffered response:

> "*First,* the central "mandate" imposed by the prevailing wage law is the requirement that private contractors and subcontractors on public work must pay prevailing wages to their employees. This is a labor standards requirement imposed on private employers, not local agencies. If the wages are not paid, the private employer, not the local agency, is liable for back wages and penalties. To be sure, there is an argument that if private contractors have higher labor costs, they may seek to pass some of those costs on to their customers. The California Constitution, however, does not entitle local agencies to reimbursement for the possible "pass-through" costs of labor standards legislation - even if such costs exist."[6]

Therefore, the "Argument" section of its comments expresses concerns about "raising school construction costs"[7], "higher prices"[8] and "recent studies by economists".[9] Because the test claimant is not seeking mandated reimbursement for higher construction costs, the concerns of "SBCTC" are unfounded. "SBCTC" has no genuine interest in the outcome of this test claim.

2. The Proposed Amicus Curiae Brief Will Not Assist the Commission.

The balance of the comments of the "SBCTC" are significantly similar to the comments of the Department of Industrial Relations. The comments of the "SBCTC" offer nothing that is not covered by the DIR response. In fact, the comments of the "SBCTC"

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[5] "SBCTC" Request for Leave to File Response, page 1

[6] "SBCTC" comments, page 2, introduction

[7] "SBCTC" comments, page 4

[8] "SBCTC" comments, page 5

[9] "SBCTC" comments, page 5

incorporate some of the DIR arguments.[10] Perhaps the interests of the "SBCTC" and the DIR are identical in this matter. It appears the "SBCTC" was already aware of the content of the DIR response, even though both responses bear the same date.

Therefore, the request of "SBCTC" to file *amicus curiae* comments should be denied because the duplicative arguments will not assist the Commission. The "SBCTC" brief does not present any information not already presented to the Commission by DIR.

D. The Expansion of Public Works Defeats all other Arguments.

The scope of the definition of "public works projects" has increased since 1975. Section 2 of the Test Claim details those changes.[11]

These additions or expansions to the definition of "public works" include: Chapter 1084/76 (adding section 1720.3 to include hauling refuse from public works), Chapter 962/80 (amending section 1720.2 to include works built based upon plans, specifications or criteria furnished by a school district for later lease to the school district), Chapter 278/89 (the new inclusion in section 1720 of "transportation projects"), Chapter 861/00 (amending section 1720 to include work performed during the design and preconstruction phases of a project, including inspection and land surveying work), Chapter 938/80 (the amendment of section 1720 to include installation work) and Title 8, CCR Section 16001 (to include residential housing for students and faculty). The test claim proves that each of these new facets of construction have, since 1975, for the first time, been included in the definition of "public works". All of the public work requirements of the Labor Code, for the first time, are applicable to these segments of public works and therefore are new programs for which school districts are entitled to reimbursement of costs incurred.

The duties claimed in the test claim are preceded by the statement[12] that "When contracting with third parties for "public works" as an awarding party for projects pursuant to Labor Code sections 1720, 1720.2 and 1720.3 and Title 8, California Code of Regulations Sections 16000 and 16001, school districts, county offices of education and community colleges are required to (duties listed). Thus, if any one of the definition

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[10] "As the Department of Industrial Relations points out..." "SBCTC" comments, page 18.

[11] Test Claim, pages 27 through 33

[12] Test Claim, page 129

expansions or additions is valid, the test claim is valid. School districts must comply with the administrative and compliance duties of all laws pertaining to public works on these new projects, whereas, prior to 1975, they did not.

In responding to these facts, the "SBCTC" merely incorporates the argument of the DIR on this issue, that is:

> "As the Department of Industrial Relations points out in its response...(T)he alleged changes in the definition of "public work"...were not post-1975 substantive changes in the law; they codified administrative interpretations of the pre-1975 law".[13]

The DIR rebuttal relies heavily upon the Director's "interpretations" of former Section 1720 which would preclude claiming statutory expansions of the definition of "public works".[14] The DIR relies on an internal, non-published inter-office memo, dated February 7, 1977, as a source of the law. Even if this in-house, unpublished, memo could be elevated to some sort of official directive, it would then be a post 1975 "executive order" subject to reimbursement.

E. The Changes in State Law are Mandatory

A substantial balance of the comments of the "SBCTC" argue that many of the duties are optional and, therefore, not a mandate subject to reimbursement.[15] For example, five of those duties are the result of duties imposed by Labor Compliance Programs enacted by Chapter 1224/89 and found in Labor Code Sections 1771.5 and 1771.6.

School districts do have a choice: they have the choice of complying with the older provisions of the prevailing wage laws or of complying with the new LCP provisions. They have no discretion to act or not to act, they are required to comply with one or the other.

The "shall" versus "may" legal compulsion argument is not solely determinative of this issue. The California Supreme Court has held that the determination of whether a

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[13] "SBCTC" comments, page 18

[14] The DIR refers to Exhibit D, attached to the Declaration of Anthony Mischel. This memo is not even credible hearsay. To rely upon this memo is not appropriate.

[15] See: "SBCTC" comments to duties 3, 4, 5, 11, 12, 17 and 19

program is truly voluntary depends upon (1) the nature and purpose of the program, (2) whether the program's design evidences an intent to coerce, (3) the penalties assessed for non-participation, and (4) the legal and other practical consequences of non participation. City of Sacramento v. State of California (1990) 50 Cal.3d 51, 76. The concept of state mandates would include situations where a local school district has no reasonable alternative to the state scheme or no true choice but to participate in it.

In the instant case, school districts are faced with the choice of accepting one program or the other. They do not have the choice of doing neither. Presumably, school districts will choose the program that has the most benefits and the least disadvantages. Doing the best thing for the district is a "choice" where the school district has no reasonable alternative. It must do what is best for the district, and if a LCP program is best for the district, it is practically compelled to make that choice.

F. The Cited Changes in the Law Mandate New Programs

Another substantial portion of the "SBCTC" comments argues that the new duties are "far less onerous" than the duties required prior to enactment.[16] The fallacy of this argument, of course, is that the law does not speak in terms of "onerous", it speaks in term of "new programs" ***or*** "higher levels of service":

> "Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Government Code Section 17514

Thus, it is clear that a new mandate can be based on either a new program or a higher level of service. "SBCTC" does not address the "new program" issue. For example, prior to January 1, 1975, Labor Code section 1726 only required school districts to "take cognizance" of violations, whereas, Chapter 954/00 amended the section to now require school districts to report suspected violations to the Labor Commissioner and, if it withholds payments based upon its own investigation, the due process portions of section 1771.6 also apply, clearly a "new program". For example, prior to January 1, 1975, section 1727 only required school districts to withhold and retain amounts forfeited pursuant to contract stipulations, whereas Chapter 954/00 now requires school districts

[16] See: "SBCTC" comments to duties 1, 2, 15, 16 and 18

to withhold and retain amounts pursuant to Civil Wage and Penalty Assessments and also requires, for the first time, the retention of money withheld by a contractor from a sub-contractor. Again, clearly a "new program". Without reciting each and every such example, Section B of the test claim sets forth detailed citations of how new laws have created "new programs". Thus the "less onerous" argument of the "SBCTC" is totally irrelevant to the law of mandate reimbursement.

G. Other Arguments of the "SBCTC" are not Well Founded.

In response to duty number 7, the "SBCTC" argues that it is the Labor Commission which keeps the list of barred contractors, not awarding bodies. Labor Code section 1777.1, subdivision (d) requires the Labor Commissioner to periodically publish a list of ineligible contractors and to distribute that list to awarding parties. Obviously, school districts must maintain those publications so that they do not award public works contracts to ineligible contractors. To argue that awarding bodies are not required to keep those publications is not well founded.

In response to duties numbered 10 and 21, the "SBCTC" argues that the contractors, themselves, may redact their own payroll records. Labor Code section requires contractors and subcontractors to keep accurate payroll records. Subdivision (b) requires these records to be certified and made available to employees, awarding bodies and other named agencies, and the public. However, the public shall not have direct access through the contractor, but only through awarding bodies or other named agencies. Subdivision (d) requires that a contractor file a certified copy with the entity which requested them on behalf of the public. Subdivision (d) says nothing about redaction. Subdivision (e) requires that any copies made available to the public by an awarding body or other named agency "shall be marked or obliterated to prevent disclosure of an individual's name, address and social security number. It is clear that it is the awarding body or other named agency which receives certified copies from the contractor and then it is the awarding body or other named agency that redacts them prior to delivery to the public. To argue that contractors shall redact their own certified copies is not well founded.

In response to duty number 13, the "SBCTC" argues that Labor Code section 1726 does not impose a new mandate, rather the mere "ability" to report violations. Prior to 1975, Section 1726 required school districts to "take cognizance of violations" and Section 1727 required school districts to withhold amounts forfeited pursuant to stipulations in the contract. Chapter 954/00/3 amended Section 1726 to add the words "and shall promptly report any suspected violations to the Labor Commissioner." To argue that the amendment merely gives school districts the "ability" to report violations is not well founded.

Labor Code Section 1771.2, added by Chapter 804/2001, allows a joint labor-management committee to bring an action in any court of competent jurisdiction against an employer that fails to pay the prevailing wage to its employees. In response to duty number 20, the "SBCTC" argues that nothing in the section "or in any other statute or regulation makes a local agency party" to the lawsuit. California Code of Civil Procedure Section 389[17] provides that a person shall be joined in an action if (1) in his absence complete relief cannot be accorded among those already parties or (2) if he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may impair or impede his ability to protect that interest or leave any of the persons already parties subject to multiple or inconsistent obligations by reason of his claimed interest. And, if he has not been so joined, the court shall order that he be made a party. In the instant situation, the awarding party is a party to the

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[17] California Code of Civil Procedure Section 389, as last amended by Chapter 244, Statutes of 1971, Section 15:

"(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

(b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.

(c) A complaint or cross-complaint shall state the names, if known to the pleader, of any persons as described in paragraph (1) or (2) of subdivision (a) who are not joined, and the reasons why they are not joined.

(d) Nothing in this section affects the law applicable to class actions."

contract, it is the beneficiary of any surety bond, it holds the funds withheld, and is required to pay out the funds in accordance with the court's instructions. To argue that no statute makes a school district a necessary party to litigation involving its own public works contracts is not well founded.

H. Conclusion

At a matter of procedure, the comments of the "SBCTC" should be disregarded for its failure to comply with Section 1183.02(d) of the Commission rules governing responses. Secondly, the Commission Rules do not grant authority for an appearance by "SBCTC". Thirdly, the "SBCTC" lacks standing to appear as an amicus curiae as it has no real interest in the test claim and it offers nothing new which would assist the Commission in the determination of this test claim.

As a matter of law, the expansion of the definition of "Public Works" defeats every argument made by "SBCTC" and a private, in-house, DIR memo does not defeat this conclusion. The changes in the law are mandatory as school districts have no reasonable alternative or no true choice not to participate. The fact that some duties are not as "onerous" as others does not avoid the conclusion that they are new programs. Other arguments to the contrary are factually and legally not well founded.

Therefore, test claimant asks the Commission to deny, as unnecessary, the application of "SBCTC" to file an amicus curiae brief.

CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

EXHIBIT 1
CRC RULE 29.3 (2002)

RULE 29.3. BRIEFS ON THE MERITS IN THE SUPREME COURT

(a) [**As matter of right**] After the filing of an order granting review, the petitioner shall serve and file in the Supreme Court the number of copies required by rule 44(b)(1)(ii) of either (1) the brief filed in the Court of Appeal and a notice of intention to rely on that brief, within 15 days after the filing of the order; or (2) a new brief on the merits, within 30 days after the filing of the order.

After the filing of the petitioner's notice of intention to rely on the brief filed in the Court of Appeal or new brief on the merits, or the expiration of time for filing a new brief, the opposing party shall serve and file in the Supreme Court the number of copies required by rule 44(b)(1)(ii) of either (1) the brief filed in the Court of Appeal and a notice of intention to rely on that brief, within 15 days after the filing of the petitioner's notice or brief, or expiration of the time for it; or (2) a new brief on the merits, within 30 days after the filing of the petitioner's notice or brief, or expiration of the time for it.

Within 20 days after the filing of an opposing party's brief, the petitioner may file a reply brief.

The Supreme Court may, by order, designate which party is deemed to be the petitioner or otherwise direct the order in which briefs are to be filed.

When a party desires to present new authorities, newly enacted legislation, or other intervening matters, not available in time to have been included in the party's brief on the merits, the party may serve and file a supplemental brief no later than 10 days before oral argument. A supplemental brief shall be confined to the new matter and shall not exceed 10 pages.

The times stated in this rule may be extended only by order of the Chief Justice under rule 45, and not by stipulation.

(b) [**On request**] The Supreme Court may request additional briefs on all or any issues, whether or not the parties have filed new briefs.

(c) [**Amicus curiae briefs**] A brief of amicus curiae in the Supreme Court on the merits of an action or proceeding may be filed on permission first obtained from the Chief Justice. To obtain permission, the applicant shall file with the clerk of the Supreme Court a signed request, accompanied by the proposed brief stating the nature of the applicant's interest and setting forth facts or questions of law that have not adequately been presented by the parties and their relevancy to the disposition of the case. The request and proposed brief must be received by the court no later than 30 days after all briefs, other than supplemental briefs, that the parties are entitled to file pursuant to this rule either have been filed or can no longer be filed within the time limits prescribed by subdivision (a). The Chief Justice may grant leave for later filing if the applicant presents specific and compelling reasons for the delay.

The Attorney General may file an amicus curiae brief without obtaining the Chief Justice's permission, unless the Attorney General is presenting the brief on behalf of another state officer or agency. The Attorney General shall file the brief within the time provided above for receipt of a request for permission to file an amicus curiae brief. The brief shall contain the information required in a request for permission to file an amicus curiae brief.

Before any amicus curiae brief is filed, it shall be served on all parties. The cover of the brief shall identify the party–if any–the brief supports.

Any party may file an answer within 20 days after an amicus curiae brief is filed. Before any answer is filed it shall be served on all parties and the amicus curiae

(d) [**Form and content**] The briefs provided for this rule shall conform, as nearly as possible, to the requirements of rule 14. Unless otherwise ordered, the petitioner's and opposing party's briefs on the merits shall not exceed 50 pages, and a petitioner's reply brief shall not exceed 15 pages, excluding tables, indices, and the quotation of issues required by this rule.

The petitioner's brief on the merits, at the beginning of the body, shall quote any order of the Supreme Court specifying the issues or, in the absence of an order specifying the issues, quote the statement of issues included in the petition for review and any additional issues stated in the answer to the petition. Unless otherwise ordered, briefs on the merits shall be confined to those issues, and issues fairly included in them.

EXHIBIT 2
CRC RULE 13 (2002)

PART III. BRIEFS IN THE COURT OF APPEAL

Part III was adopted, eff. Jan. 1, 2002.

Former Part III, "Briefs", adopted, eff. July 1, 1943, consisting of Rules 13 to 18, was repealed, eff. Jan. 1, 2002.

RULE 13. BRIEFS BY PARTIES AND AMICI CURIAE

(a) Parties' briefs

(1) Each appellant must serve and file an appellant's opening brief.

(2) Each respondent must serve and file a respondent's brief.

(3) Each appellant may serve and file a reply brief.

(4) No other brief may be filed except with permission of the presiding justice, unless it qualifies under (b)(6) or under rule 29.4(f) after the Supreme Court transfers a cause to a Court of Appeal.

(5) Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal.

(b) Amicus curiae briefs

(1) Any person or entity may serve and file an application for permission of the presiding justice to file an amicus curiae brief.

(2) The application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter.

(3) The proposed brief must be served and must accompany the application, and may be combined with it.

(4) The covers of the application and proposed brief must identify the party the applicant supports, if any.

(5) If the court grants the application, any party may file an answer within the time the court specifies. It must be served on all parties and the amicus curiae.

(6) The Attorney General may file an amicus curiae brief without the presiding justice's permission, unless the brief is submitted on behalf of another state officer or agency. The Attorney General must serve and file the brief within 14 days after the last respondent's brief is filed, and must provide the information required by (2) and comply with (4). Any party may serve and file an answer within 14 days after the brief is filed.

EXHIBIT 3
CRC RULE 29.1 (2003)

RULE 29.1. BRIEFS BY PARTIES AND AMICI CURIAE; JUDICIAL NOTICE

(a) Parties' briefs; time to file

(1) Within 30 days after the Supreme Court files the order of review, the petitioner must serve and file in that court either an opening brief on the merits or the brief it filed in the Court of Appeal.

(2) Within 30 days after the petitioner files its brief or the time to do so expires, the opposing party must serve and file either an answer brief on the merits or the brief it filed in the Court of Appeal.

(3) The petitioner may file a reply brief on the merits or the reply brief it filed in the Court of Appeal. A reply brief must be served and filed within 20 days after the opposing party files its brief.

(4) A party filing a brief it filed in the Court of Appeal must attach to the cover a notice of its intent to rely on the brief in the Supreme Court.

(5) The time to serve and file a brief may not be extended by stipulation but only by order of the Chief Justice under rule 45.

(6) The court may designate which party is deemed the petitioner or otherwise direct the sequence in which the parties must file their briefs.

(b) Form and content

(1) Briefs filed under this rule must comply with the relevant provisions of rule 14.

(2) The body of the petitioner's brief on the merits must begin by quoting either:

(A) any order specifying the issues to be briefed or, if none,

(B) the statement of issues in the petition for review and, if any, in the answer.

(3) Unless the court orders otherwise, briefs on the merits must be limited to the issues stated in (2) and any issues fairly included in them.

(c) Length

(1) If produced on a computer, a brief on the merits must not exceed 14,000 words and a reply brief on the merits must not exceed 4,200 words. Such a brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief.

(2) If typewritten, a brief on the merits must not exceed 50 pages and a reply brief must not exceed 15 pages.

(3) The tables, a certificate under (1), and any quotation of issues required by (b)(2) are excluded from the limits stated in (1) and (2).

(4) On application and for good cause, the Chief Justice may permit a longer brief.

(d) Supplemental briefs

(1) A party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits.

(2) A supplemental brief must not exceed 2,800 words if produced on a computer or 10 pages if typewritten, and must be served and filed no later than 10 days before oral argument.

(e) Briefs on the court's request

The court may request additional briefs on any or all issues, whether or not the parties have filed briefs on the merits.

(f) Amicus curiae briefs

(1) After the court orders review, any person or entity may serve and file an application for permission of the Chief Justice to file an amicus curiae brief.

(2) The application must be filed no later than 30 days after all briefs that the parties may file under this rule–other than supplemental briefs–have been filed or were required to be filed. The Chief Justice may allow later filing if the applicant shows specific and compelling reasons for the delay.

(3) The application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter.

(4) The proposed brief must be served. It must accompany the application and may be combined with it.

(5) The covers of the application and proposed brief must identify the party the applicant supports, if any.

(6) If the court grants the application, any party may file an answer within 20 days after the amicus curiae brief is filed. It must be served on all pa and the amicus curiae.

(7) The Attorney General may file an an curiae brief without the Chief Justice's permi unless the brief is submitted on behalf of anc state officer or agency. The Attorney General serve and file the brief within the time specified i and must provide the information required by (3) comply with (5). Any answer must comply with

(g) Judicial notice

To obtain judicial notice by the Supreme Court u Evidence Code section 459, a party must comply rule 22(a).

(Adopted, eff. Jan. 1, 2003.)

EXHIBIT 4
CRC RULE 13 (2003)

Former Part III, "Briefs", adopted, eff. July 1, 1943, consisting of Rules 13 to 18, was repealed, eff. Jan. 1, 2002.

RULE 13. BRIEFS BY PARTIES AND AMICI CURIAE

ı) Parties' briefs

(1) Each appellant must serve and file an appel-ınt's opening brief.

(2) Each respondent must serve and file a respon-ent's brief.

(3) Each appellant may serve and file a reply brief.

(4) No other brief may be filed except with the ermission of the presiding justice, unless it qualifies nder (b) or (c)(6).

(5) Instead of filing a brief, or as part of its brief, a arty may join in or adopt by reference all or part of a rief in the same or a related appeal.

b) Supplemental briefs after remand or transfer n Supreme Court

(1) Within 15 days after finality of a Supreme ourt decision remanding or order transferring a ause to a Court of Appeal for further proceedings, ny party may serve and file a supplemental opening rief in the Court of Appeal. Within 15 days after uch a brief is filed, any opposing party may serve and ile a supplemental responding brief.

(2) Supplemental briefs must be limited to matters rising after the previous Court of Appeal decision in he cause, unless the presiding justice permits briefing n other matters.

(3) Supplemental briefs may not be filed if the revious decision of the Court of Appeal was a denial f a petition for a writ within its original jurisdiction ithout issuance of an alternative writ or order to how cause.

c) Amicus curiae briefs

(1) Any person or entity may serve and file an pplication for permission of the presiding justice to ile an amicus curiae brief.

(2) The application must state the applicant's in-erest and explain how the proposed amicus curiae rief will assist the court in deciding the matter.

(3) The proposed brief must be served and must ccompany the application, and may be combined ith it.

(4) The covers of the application and proposed rief must identify the party the applicant supports, if ny.

(5) If the court grants the application, any party nay file an answer within the time the court specifies. t must be served on all parties and the amicus curiae.

(6) The Attorney General may file an amicus uriae brief without the presiding justice's permission, nless the brief is submitted on behalf of another tate officer or agency. The Attorney General must erve and file the brief within 14 days after the last espondent's brief is filed, and must provide the nformation required by (2) and comply with (4). Any party may serve and file an answer within 14 days after the brief is filed.

Original List Date: 07/08/2002 **Mailing Information** Other

Last Updated: 08/15/2002

List Print Date: 11/06/2002

Claim Number: 01-TC-28

Issue: Prevailing Wage Rate

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TO ALL PARTIES AND INTERESTED PARTIES: Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Mandate Reimbursement Services

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February 14, 2003

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 01-TC-28
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

I have received the comments of the Department of Industrial Relations ("DIR") dated January 15, 2002 (sic) to which I now respond on behalf of the test claimant.

Although none of the objections generated by DIR are included in the statutory exceptions set forth in Government Code Section 17556, the objections stated additionally fail for the following reasons:

A. The Comments of the DIR are Incompetent and Should be Excluded

Test claimant objects to the Comments of the DIR, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information and belief."

The DIR comments do not comply with this essential requirement.

B. The Objections Stated are Flawed, Both Legally and Factually[1]

At page 25 of its comments, the DIR states that the Test Claim fails for one or more of three reasons:

1. The alleged change in state law is not a new program or increased level of service;

2. The alleged change in law simply does not exist; or

3. The alleged changes in state law are discretionary.

1. The cited changes of law do mandate a new program or increased level of service.

In support of its first argument, the DIR argues that the requirements stated "do not uniquely affect governmental entities" for the reason that the "claims are mandates for private parties who deal with local agencies, not for local agencies themselves".[2] The DIF goes on to conclude:

> "The effect of the Director's coverage determinations...is on private parties directly...The alleged increased cost is that prevailing wages have to be paid. Payment of prevailing wages, however, is uniquely a responsibility of private parties, as local agencies are never subject to pay their own employees prevailing wages...Therefore, any public works changes affect primarily the private parties who hire workers, not local agencies...Even if there were an increased cost of construction...the cost of the increase is not borne directly by the local agencies..."[3]

---

[1] The Comments of the DIR at page 4, footnote 4, refers to the "current state of the law" as the "2002 version" of the law. Its synopsis, at page 7, also refers to the law "as of 2002". These statements are correct if interpreted to mean "as of December 31, 2002", as none of the 2002 legislation, e.g., Chapters 28, 868, 892, 1048 and 1124 are included in the test claim. These amendments and additions to the prevailing wage law will need to be addressed by an amendment to the test claim to be filed at a later date.

[2] DIR Comments, page 25

[3] DIR Comments, pages 26-27

This argument misconstrues the object of this test claim. Test claimant does not allege or seek reimbursement for any increased cost of construction. Test claimant seeks reimbursement only for the additional administrative duties and compliance requirements contained in the test claim legislation.

2. The cited changes of law mandate new programs

In support of its second argument (the alleged change in law simply does not exist), DIR argues that some duties are not changes in state law because "local agencies have less (sic) responsibilities than before January 1, 1975".[4] However, the law does not speak in terms of "responsibilities", it speaks in term of "new programs" ***or*** "higher levels of service":

> "Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." Government Code Section 17514

Thus, the costs mandated by the state can be based on either a new program or a higher level of service. DIR does not address the "new program" issue.

School districts have new contractor oversight duties. For example, prior to January 1, 1975, Labor Code section 1726 only required school districts to "take cognizance" of violations, whereas, Chapter 954/00 amended the section to now require school districts to report suspected violations to the Labor Commissioner and, if it withholds payments based upon its own investigation, the due process portions of section 1771.6 also apply, clearly a "new program". For example, prior to January 1, 1975, section 1727 only required school districts to withhold and retain amounts forfeited pursuant to contract stipulations, whereas Chapter 954/00 now requires school districts to withhold amounts required by Civil Wage and Penalty Assessments and also requires, for the first time, the retention of money withheld by a contractor from a sub-contractor. Again, clearly a "new program". Without reciting each and every such example, Section B of the test claim sets forth detailed citations of how new laws have created "new programs".

The "fewer responsibilities" argument of the DIR is totally irrelevant to the law of

[4] DIR Comments, page 27

mandate reimbursement. Until repealed by Chapter 216, Statutes of 1993, Government Code Sections 17620 through 17626, provided for "cost savings claims" which allowed state agencies to file for cost recoveries when mandates were reduced or eliminated after 1975. These statutory provisions were implemented by Title 2, California Code of Regulations, Section 1186 (copy attached as Exhibit 1) which was repealed on July 23, 1996. To my knowledge, no such claim was ever filed.

The scope of the definition of "public works projects" has increased since 1975. The test claim sets forth the changes required by Chapter 1084/76 (adding section 1720.3 to include hauling refuse from public works), Chapter 962/80 (amending section 1720.2 to include works built based upon plans, specifications or criteria furnished by a school district for later lease to the school district), 278/89 (the new inclusion in section 1720 of "transportation projects"), Chapter 861/00 (amending section 1720 to include work performed during the design and preconstruction phases of a project, including inspection and land surveying work), Chapter 938/80 (the amendment of section 1720 to include installation work) and Title 8, CCR Section 16001 (to include residential housing for students and faculty). The test claim proves that each of these new facets of construction have, since 1975, for the first time, been included in "public works". All of the public work requirements of the Labor Code, for the first time, are applicable to these segments of public works and therefore are new programs for which school districts are entitled to reimbursement.

The DIR rebuttal relies heavily upon the Director's "interpretations" of former Section 1720 which would preclude claiming statutory expansions of the definition of "public works".[5] The DIR relies on an internal, non-published inter-office memo, dated February 7, 1977, as a source of the law. Even if this in-house, unpublished, memo could be elevated to some sort of official directive, it would then be a post 1975 "executive order" subject to reimbursement.

3. The changes in state law are mandatory.

The third summary point made by the DIR is that "some" of the changes are not mandatory, arguing that school districts must be under a "compulsion" to act before a new duty can be reimbursable. As an example, the DIR cites the Labor Compliance Programs enacted by Chapter 1224/89 and found in Labor Code Sections 1771.5 and 1771.6.

---

[5] The DIR refers to Exhibit D, attached to the Declaration of Anthony Mischel. This memo is not even credible hearsay. To rely upon this memo is not appropriate.

School districts do have a choice: they have the choice of complying with the other provisions of the prevailing wage laws or of complying with the new LCP provisions. They have no discretion to act or not to act, they are required to comply with one or the other.

The "shall" versus "may" legal compulsion arguments are not solely determinative. The California Supreme Court has held that the determination of whether a program is truly voluntary depends upon (1) the nature and purpose of the program, (2) whether the program's design evidences an intent to coerce, (3) the penalties assessed for non-participation, and (4) the legal and other practical consequences of non participation. City of Sacramento v. State of California (1990) 50 Cal.3d 51, 76. The concept would include situations where a local school district has no reasonable alternative to the state scheme or no true choice but to participate in it.

In the instant case, school districts are faced with the choice of accepting one program or the other. They do not have the choice of doing neither. Presumably, school districts will choose the program that has the most benefits and the least disadvantages. Doing the best thing for the district is a situation where the school district has no reasonable alternative. It must do what is best for the district, and if a LCP program is best for the district, it is practically compelled to make that choice.

C. Conclusion

The DIR concludes with a statement that "all of the Test Claims fail for one or more of three reasons".[6] The test claim itself, and its detailed analysis of the changes in the Public Works laws, continues to stand on its own.

1. None of the objections of the DIR are included in the statutory exceptions set forth in Government Code Section 17556.

2. This test claim documents the addition of new duties. The fact that some of these new duties are less burdensome than before, does not disqualify them as new.

3. This test claim documents the expansion of the definition of "public works' to include, for the first time, work performed during the design and preconstruction phases of construction, inspection and land surveying work, installation projects, district leased projects built with district plans, the hauling of refuse, and the construction of school dormitories. As to these new activities, all of the procedural requirements of public

[6] DIR comments, page 25

works projects are new mandates. Private unpublished inter-office memos do not change that fact.

4. The requirements of the test claim legislation are not discretionary.

5. Notwithstanding, the response of the DIR should be ignored as legally incompetent for its failure to comply with Section 1183.02 of Title 5, California Code of Regulations.

CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

Exhibit 1

(b) A parameters and guidelines amendment filed after the initial claiming deadline must be submitted on or before November 30 following a fiscal year in order to establish eligiblility for reimbursement for that fiscal year.

(c) An approved change to the Claiming Instructions brought about by the Commission's review shall be subject to the following schedule:

(1) A request for review filed before the deadline for initial claims as specified in the Claiming Instructions shall apply to all years eligible for reimbursement as defined in the original Parameters and Guidelines.

(2) A request for review filed after the initial claiming deadline must be submitted on or before November 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year.

NOTE: Authority cited: Sections 17527, 17551, 17553, 17557, 17571 and 17621, Government Code. Reference: Sections 17553 and 17557, Government Code.

HISTORY:

1. New section filed 12-1-87; operative 12-31-87 (Register 87, No. 49).

Article 6. Cost Savings Claims

1186. Filing of Cost Savings Claims.

(a) In order to obtain a determination that a statute or executive order has resulted in cost savings, a state agency must file a cost savings claim.

(b) The commission may accept more than one savings claim on a statute or executive order if the claims involve different issues. The claim filing date shall be the postmark date, or in its absence, the date received by the commission.

(c) All savings claims or amendments thereto shall contain the following:

(1) A copy of the statute(s) or executive order(s) alleged to contain a cost savings. The specific sections of the chaptered bill or executive order alleged to contain a cost savings must be identified.

(2) Identification of constitutional provisions, federal statutes or regulations and/or court decisions that impact the alleged savings.

(3) A detailed narrative which describes the savings. This is to include a description of what was required under prior law and what the new mandate or executive order requires, and how any savings are realized.

(4) If the narrative describing an alleged savings involves more than discussion of statutes, or regulations or legal argument and utilizes assertions or representations of fact, such assertions or representations must be supported by testimonial or documentary evidence which shall be submitted with the claim. All documentary evidence must be authenticated by declarations under penalty of perjury signed by persons who are authorized or competent to do so and be based upon the declarant's personal knowledge.

(5) A statement of actual or estimated savings which result from the mandate, identified by function and by fiscal year.

(d) Savings claims will be considered incomplete if any of the required elements or documents are illegible or missing. Incomplete savings claims shall be returned. If a completed savings claim is not received by the commission within 120 calendar days from the date that the claim was returned by the commission, the original incomplete claim filing date may be disallowed, and a new savings claim or claims could be accepted on the same statute or executive order.

NOTE: Authority and reference cited: Sections 17620–17625, Government Code.

HISTORY:

1. Editorial correction of printing error of subsection (c) (4) (Register 86, No. 12).

Commission on State Mandates

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Claim Number: 01-TC-28

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Exhibit F

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DEPARTMENT OF JUSTICE

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February 18, 2003

By Personal Delivery

Ms. Paula Higashi
Executive Officer
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: *Prevailing Wage Rate*, 01-TC-28
Clovis Unified School District, Claimant

Dear Ms. Higashi:

I have enclosed for filing the Department of Finance's Response to Claim. Please return a filed/endorsed copy to this office.

Thank you for your attention and consideration of this matter.

Sincerely,

Jessica L. Taylor

JESSICA L. TAYLOR
Legal Secretary to
RAMON DE LA GUARDIA
Deputy Attorney General

For BILL LOCKYER
Attorney General

RMD:jt

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Attorneys for Department of Finance

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of:	No. 01-TC-28
Clovis Unified School District	Prevailing Wage Rate
	DEPARTMENT OF FINANCE RESPONSE TO CLAIM
	Labor Code Section 1720 et al. Public Contract Code Section 22022 Title 8, CCR, Section 16000 et al. Statutes of 2001, Chapter 938 et al.

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TABLE OF CONTENTS
Continued

INTRODUCTION

The Clovis School District ("Clovis" or "Claimant") has filed this test claim on behalf of itself and other school districts, county boards of education and community college districts for the costs of enforcing the Prevailing Wage Law[1/] ("PWL") on public works projects. Clovis has specified 21 separate claims involving numerous statutes and regulations with little or no discussion justifying the assertion that these state requirements constitute a state mandate.

The unstated rationale of the Test Claim is that any change in the PWL constitutes a state mandate. Of course that is not the law. There must be either a new program or a higher level of service required for an existing program to constitute a state mandate. And there is no mandate for discretionary activities.

STANDARD OF REVIEW

Article XIII B, section 6 of the California Constitution states, "whenever the Legislature or any state agency *mandates* a new program or higher level of service on any local government, the state shall provide a subvention of funds." (Emphasis added.) This provision was specifically intended to prevent the state from forcing programs on local government that require them to spend their tax revenues.[2/] To implement article XIII B, section 6, the Legislature enacted Government Code section 17500 et seq. Government Code section 17514 defines "costs mandated by the state" as "any increased costs which a local agency or school district is *required* to incur . . . as a result of any statute . . . which *mandates* a new program or higher level of

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1 The Prevailing Wage Law is found at Chapter 1 of Part 7, Division 2 of the Labor Code commencing with section 1720.

2 *County of Fresno v. State of California* (1991) 53 Cal. 3d 482, 487.

service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." (Emphasis added.) "Mandates" as used in article XIII B, section 6 has been defined to mean "orders" or "commands."[3/] If the test claim legislation does not mandate the school district to perform a task, then compliance is within the discretion of the school district and a state-mandated program does not exist. The state has no duty under article XIII B, section 6 to reimburse the school district for costs of programs or services incurred as a result of the exercise of local discretion or choice.[4/]

To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect before the enactment of the test claim legislation.[5/]

RESPONSES TO INDIVIDUAL CLAIMS

Obtaining Prevailing Wage Rates

Labor Code Section 1773 requires agencies awarding any contract for a public work, or otherwise undertaking any public work, to obtain the applicable prevailing wage rate from the Director of Industrial Relations ("DIR"). California Code of Regulations, title 8, section 16202 requires agencies awarding public works contracts ("awarding bodies") to request DIR to make a special determination of the prevailing wage of an occupation or craft not covered by a general

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3 *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App. 3d 155, 174.

4 *City of Merced v. State of California* (1984) 153 Cal.App. 3d 777, 783.

5 To assist the Commission in reviewing this claim, the Department of Finance has prepared a chart comparing the present day provisions with their 1975 counterparts. This chart is attached as Exhibit 1.

determination. Section 16204, subdivision (a)(5) declares it is the responsibility of the awarding body to determine that the correct determination is used. Clovis contends these requirements are state mandates.[6] These provisions are not mandates because they do not impose new programs or higher levels of service.

In 1975, Section 1773 required awarding agencies to do their own prevailing wage determinations.[7] The current requirement that awarding bodies obtain prevailing wage determinations from DIR represents a reduction in the level of service required of awarding bodies. The prevailing wage determination provisions of Section 1773 and of Regulations 16202 and 16204 are not new programs and do not impose higher levels of service on awarding bodies. On the contrary, they relieve awarding bodies of their prior obligation to determine prevailing wage rates.

Requesting Coverage Determination from DIR

California Code of Regulations, title 8, section 16001, subdivision (a)(1), permits any interested person to request DIR to determine if a specific project or type of work to be performed on a project is subject to the PWL. Subdivision (a)(2) of section 16001, provides that an awarding body may file documents or comments on the requested determination.[8] Clovis

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6 Claims number 1 and 2 at page 129.

7 See Statutes 1971, Chapter 785, section 1.

8 California Code of Regulations, title 8, section 16001 provides in part:

> (a) General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771.

contends this constitutes a mandate.[9] Section 16001 does not mandate new programs or higher levels of service because its provisions do not require any action from awarding bodies. Their participation in these special determinations is purely discretionary. Furthermore, Labor Code section 1773.4 has provided for awarding bodies to participate in reviews of rate determination proceedings.[10] Thus, there is no higher level of service required and no mandate.

Reviews of Wage Rate Determinations

California Code of Regulations, title 8, section 16302 provides that interested persons

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> (1) Any interested party enumerated in Section 16000 of these regulations may file with the Director of Industrial Relations or the Director's duly authorized representative, as set forth in Section 16301 of these regulations, a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code. If such a request is filed by any party other than the awarding body, a copy of the request must be served upon the awarding body, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, when it is filed with the Director.
>
> (2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, any documents, arguments, or authorities it wishes to have considered in the coverage determination process. . ." (Emphasis added.)

9 See Claim number 3 at page 129.

10 See Labor Code section 1773.4. See Statutes 1969, chapter 1706, page 671, section 1.

"may" petition for review of a wage rate determination.[11] Clovis asserts this is a state mandate.[12] This regulation permits an awarding body to seek review of a rate determination, it does not require awarding bodies to seek review of a wage determination. Because of the permissive nature of the regulation, there is no mandate.

Appeals of Incorrect Wage Rate Determinations

Labor Code section 1773.4 provides that any interested person may appeal a wage determination to DIR. California Code of Regulations, title 8, section 16002.5, subdivision (a), permits interested persons to appeal incorrect wage rate determinations.[13] There is no mandate

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11 Title 8 California Code of Regulations section 16302 provides in part:

> Those interested parties enumerated in Section 1773.4 of the Labor Code, and defined in Section 16000 of these regulations, may file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids . . . ." (Emphasis added.)

12 Claim number 4 at pages 129-130.

13 Title 8 California Code of Regulations section 16002.5 provides:

> (a) Those interested parties enumerated in Section 16000 of these regulations may appeal to the Director of Industrial Relations or the Director's duly authorized representative as set forth in Section 16301 of these regulations a determination of coverage under the public works laws (Labor Code Section 1720 et seq.) regarding either a specific project or type of work under Section 16001(a) of these regulations. Such notice of appeal must be served within 30 days of the issuance of the coverage determination. The party appealing the determination must, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, give written notification to the awarding body and any other identifiable parties.

because there is no new program and because awarding districts are not mandated to file appeals. The provisions of Labor Code section 1773.4 permitting appeals by interested parties have existed since 1969.[14] Furthermore, the provisions of both the statute and the regulation are permissive and mandate no action by the awarding body.

Providing Notice of Prevailing Wages in Bid Requests

Labor Code section 1773.2 provides that awarding bodies must either publish prevailing wage rates in their call for bids or inform prospective bidders that the prevailing wage rates are on file and available for inspection at the office of the awarding body. If an awarding body chooses to employ the option of having the wages on file, it must also post the wages at the job site. Clovis contends this is a mandate.[15]

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(b) The notice of appeal shall state the full factual and legal grounds upon which the determination is appealed, and whether a hearing is desired. The decision to hold a hearing is within the Director's sole discretion. The Director may appoint a hearing officer to conduct the hearing and propose a decision on the appeal. The Director shall make the final decision on the appeal.

(c) The authority of the Director to determine coverage of projects under the prevailing wage laws is quasi-legislative, and a final determination on any appeal is subject to judicial review pursuant to the Code of Civil Procedure, Section 1085.

14 Statutes 1969, chapter 699, section 2.

15 See claim number 6 at page 130.

Section 1773.2 was enacted in 1971 and amended in 1974[16], 1977[17] and 1992.[18]

The 1974 amendment provided that if agencies chose to keep prevailing wages on file rather than to publish them in a newspaper of general circulation, then the agency was required to post the wage rates at the job site.[19] The 1977 amendment eliminated the requirement of publishing the prevailing wages in a newspaper of general circulation.

Since the requirements of Section 1773.2 are the result of a legislative mandate enacted prior to January 1, 1975, by definition, they are not mandates.[20]

Recording Names of Ineligible Contractors and Subcontractors

Labor Code section 1777.1 bars contractors and subcontractors who have violated the PWL from bidding or working on public works contracts. Section 1777.1, subdivision (d), requires the Labor Commissioner to publish and distribute to awarding bodies the names of these

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16 Statutes 1974, chapter 876, section 1.

17 Statutes 1977, chapter 423, section 1.

18 Statutes 1992, chapter 1342, section 8 (SB 222).

19 Amended in 1974, Section 1773.2 provided in pertinent part:

> In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy of the prevailing rate of per diem wages on file at its principal office, in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year, and in such event, the awarding body shall cause a copy thereof to be posted at each job site.

20 California Constitution, article XIIIB, section 6, subdivision (c).

debarred contractors.[21] Clovis contends this is a mandate for awarding bodies to maintain lists of debarred contractors.[22]

While the specific act of receiving the names of debarred contractors may be new, Labor Code section 1726 has always required awarding bodies to "take cognizance" of PWL violations in the course of the execution of a contract.[23] The provision of the names of debarred contractors to awarding bodies merely facilitates them in learning of any potential violations of debarment provisions of the PWL. Furthermore, since the names of debarred contractors are available on the Internet [24], it is doubtful that awarding bodies even need to record these names or, at the least, that Section 1777.1 requires a higher level of service from awarding bodies. Receiving the names of debarred contractors in the mail or checking the DIR webpage to review the names of debarred contractors are de minis activities that do not meet the threshold of a higher level of service.[25]

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21 Clovis also cites California Code of Regulations, title 8, section 16800 through 16802 in this claim. (See Claim No. 7 at page 130.) However, these regulations do not have any requirements regarding the recording of the name of debarred contractors.

22 See claim number 7 at page 130.

23 This requirement has existed since at least 1937. See Statutes 1937, chapter 90, page 241, section 1.

24 See DIR comments at page 13.

25 Presently there are only 17 firms listed on the DIR list (See Attachment B to Anthony Mishel's Declaration.)

Providing the Division of Apprenticeship Standards with Copies of Public Works Contracts

Labor Code section 1773.5[26] requires an awarding body to provide the Division of Apprenticeship Standards with a copy of any public works contract it awards. This is not a new requirement. It was originally contained in former Labor Code section 3098 which was first enacted in 1972 and amended in 1974.[27] Section 1773.5 is merely a reenacted and renumbered[28] version of former Section 3098.

Since the Division of Apprenticeship Standards notification requirement is the result of legislation enacted prior to January 1, 1975, by definition it does not constitute a state mandate.[29] The repeal and re-enactment of the statute containing the notification requirement does not transform this requirement into a mandate.

Inspecting and Auditing Payroll Records

Labor Code section 1776 requires contractors to maintain certified payroll records and make them available for inspections.[30] Clovis allege Section 1776 requires awarding bodies to inspect or audit certified payroll records. There is no basis for this claim because Section 1776 does not require local agencies to inspect or audit certified payroll records.

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26 This statute is misidentified in the claim as Labor Code section 1777.3 in claim number 8 at page 130.

27 See Statutes 1972, chapter 1399, section 2; Statutes 1974, chapter 1095, section 1.

28 The renumbering legislation is found at Statutes 1978, chapter 1249, section 6.

29 California Constitution, Article XIIIB, section 6, subdivision (c).

30 See claim number 9 at pages 130-131.

Responding to Requests To Review Payroll Records

Clovis contends that its duties with respect to providing copies of certified payroll records are a state mandate.[31] Labor Code section 1776 requires contractors to keep accurate payroll records. Section 1776, subdivision (b)(3) allows the public to review and obtain these records. However, the public must request records either through DIR or through the awarding body. Section 1776, subdivision (e), requires either DIR or the awarding body to remove confidential personal information before releasing the records to the public. Section 1776, subdivision (b)(3) requires the requesting party to reimburse the awarding body for the cost of preparing records. Section 1776, subdivision (i), directs DIR to establish reasonable fees for the costs of reproducing records.

Labor Code section 1776 was first enacted in 1937. The version of Section 1776 operative in 1975 was enacted in 1949.[32] This former version provided for no public inspection. In 1976, Section 1776 was amended to provide for public inspection of payroll records.[33] While the requirement for public inspection was introduced after 1975[34], the Legislature expressly

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31 See claim number 10 at page 131.

32 See Statutes 1949, chapter 127, section 7.

33 Statutes 1976, chapter 599, p. 1442.

34 The requirement that public records be redacted to remove confidential personal information precedes 1975. The Constitutional right of privacy was adopted in 1974. (See Cal.Const., Art. 1, § 1.) The Public Records Act, enacted in 1968 contains an exemption for records whose release would constitute an unwarranted invasion of privacy. (Gov. Code § 6254 (c).) It has long been the rule "[W]here nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required to serve the objective of the PRA to make public records available for public inspection and copying unless a particular statute makes them exempt." (*Northern Cal. Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, 124.)

found no reimbursement was required because it provided "self-financing" authority for complying with the statutory provisions.[35] Furthermore, DIR regulation 16402 provides for awarding agencies to be reimbursed for the cost of providing copies of certified payroll records.[36] Therefore, there is no basis for finding a mandate because districts have the ability to collect fees for their costs and the legislation had provisions for districts to recover their costs.[37] (Gov. Code § 17556 (d) and (e).)

Participation In a Labor Compliance Program

Clovis contends that its participation in a labor compliance program is a state mandate.[38] Labor Code section 1771.5 permits awarding bodies to "elect to initiate and enforce a labor compliance program ("LCP"). The decision to initiate a LCP is discretionary. The statutory inducements to initiate an LCP are a larger exemption of programs from the PWL and the ability

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35 Statutes 1976, chapter 599, section 2.

36 California Code of Regulations, title 8, section 16402 provides:

> The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs.

37 There is no allegation that the reimbursements rates in the DIR regulation are insufficient to cover the costs of copying and producing copies of certified payroll records. But if the rates were insufficient, the appropriate remedy would be for Clovis to petition DIR to raise the reimbursement rates, not for the Commission to find a mandate.

38 Claim number 11 at pages 131-132.

to deposit fines, penalties and forfeitures into the local agency's treasury.[39] Since participation in LCPs is voluntary, there is no mandate.[40]

Furthermore, according to DIR, Clovis has not elected to initiate a LCP.[41] This is significant for two reasons. First, it means Clovis has no standing to claim LCP costs. Second, it shows that participation is truly voluntary.

Notice of Withholding Contract Payments for Prevailing Wage Law Violations

Labor Code section 1771.6 requires awarding bodies that enforce the PWL "in accordance with Section 1726 or 1771.5" to provide notice to specified entities when it withholds contract payments because of PWL violations. Clovis claims these notice requirements constitute a mandate.[42] There is no mandate because the PWL has always required an awarding agency to take cognizance of violations of the PWL and because awarding agencies have the discretion either to enforce the PWL or to refer suspected violations to DIR.

Labor Code section 1726 (As amended by Stats. 2000 Ch. 954 § 3) currently provides:

> The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner. If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed.

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39 See DIR Brief at page 15.

40 *City of Merced v. State of California*, *supra*, 153 Cal.App. 3d at 783.

41 See DIR Brief, footnote 18 at page 15.)

42 See claim number 12 at pages 132-133.

The requirement that an awarding body "take cognizance" of violations has existed since at least 1931.[43] Section 1726 does not require an awarding body initiate its own investigation of PWL violations and to withhold contract funds. Initiating an investigation and withholding funds is a discretionary, as opposed to a mandated, action. Hence, because Section 1726 does not create a new program or higher level or service and because undertaking an investigation is a discretionary act, Section 1726 does not create a state mandate.

The notice provisions of Section 1771.6 also apply to enforcement actions undertaken pursuant to Section 1771.5, the LCP statute. However, as previously stated, an awarding body is not required to participate in an LCP. This is voluntary and discretionary decision. Hence, there is no mandate for these voluntary enforcement actions.

Cost Associated with Reporting Suspected PWL Violations

Labor Code section 1726 requires awarding bodies to "take cognizance" of suspect violations of the PWL and to report suspected violations to the Labor Commissioner. Clovis contends that the need to report suspected PWL violations is a mandate.[44] There is no mandate because these responsibilities are neither a new program nor a higher level of service.

Section 1726 has required awarding agencies to "take cognizance" of violations of the PWL since it was first enacted in 1931.[45] Formerly, pursuant to Labor Code section 1727, either the awarding body or the Division of Labor Standards Enforcement investigated alleged

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43 See Statutes 1931, chapter 1144, section 1, at page 2430.

44 Claim number 13 at page 133.

45 See Statutes 1931, chapter 1144, section 1, page 2430.

violations of the PWL.[46] While Section 1726 still requires awarding bodies to "take cognizance" of PWL violations, as of July 1, 2001, awarding bodies are no longer responsible for enforcing violations of the PWL.[47] Thus, the only means of enforcing violations known only to awarding bodies is to inform the responsible agency of the suspected violation. The specific statutory reporting requirement was added in exchange for the reduction in awarding agency responsibility and workload.[48] This minor duty to report new suspected violations to the Labor Commissioner is neither a new program, nor is it a higher level of service. Since the Legislature has relieved awarding bodies of the responsibility for enforcing the PWL, the savings they achieve from the elimination of their enforcement responsibility more than offsets the minimal costs of reporting violations.[49]

Costs Associated with Withholding Contract Payments When District's Own Investigation Reveals Contract Violation

Labor Code section 1726 provides that if an awarding body conducts its own investigation and determines that a violation of the PWL has occurred and that if it withholds funds, the awarding body must comply with the requirements of Labor Code section 1777.6. Clovis seeks reimbursement for costs associated with this type of withholding.[50]

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46 See Statutes 1945, chapter 1431, page 2692, section 50; Statutes 1992, chapter 1342, page 6601, section 1.

47 Labor Code section 1727, as amended in Statutes 2000, chapter 954 (A.B. 1646), section 4, operative July 1, 2001.

48 DIR Brief at page 16, item 13.

49 Cf. Government Code section 17556, subdivision (e).

50 See Clovis claim number 14 at page 133.

There are two reasons why this withholding provision does not constitute a mandate. First, an awarding body is not required to investigate PWL violations. They are only required to "take cognizance" of violations and refer the matter to the Division of Labor Standards Enforcement for investigation.[51] Second, there is no higher level of service in withholding payments. Labor Code section1727 has required awarding bodies to withhold funds from contractors who violated the PWL since 1945.[52]

Withholding Pursuant to Wage and Penalty Assessments

Labor Code section 1727 provides in part:

> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

Clovis contends Section 1727 creates a state mandate and that it is entitled to the costs associated with withholding funds to satisfy the Labor Commissioner's civil wage and penalty assessment[53] and for the costs associated with withholding these funds until the awarding body receives a final order that is no longer subject to judicial review.[54]

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51 This claim assumes that withholding payments results in additional costs to the awarding district. However, DIR's brief indicates that District's may prefer to withhold disputed funds rather than turn them over to the general funds. (See DIR brief at p. 15.)

52 See Statutes 1945, chapter 1431, section 50.

53 See Claim number 15 at page 133.

54 See Claim number 16 at page 133.

But, as noted above, since 1937 Labor Code section 1727 has required awarding bodies to withhold forfeited funds from contractors. The version of Section 1727 operative in 1975 contained the same responsibility on awarding bodies to withhold. It provided:

> Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain there from all amounts which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body.[55/]

The responsibility to withhold funds is not a new program or a higher level of service but has always been integral to enforcing the PWL. The requirement that funds be retained until receipt of a final order is merely a clarification of the law and not a higher level of service.

Costs Associated with Participation In Administrative and Judicial Review of Enforcement Orders

Labor Code section 1742 provides contractors and subcontractors with an administrative remedy for the review of a PWL civil wage and penalty assessment. Clovis contends the requirements of Section 1742 and the notice requirements of Regulation 17220[56/] constitute a reimbursable state mandate.[57/] However, as DIR notes in its brief[58/], these statutory provisions do

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55 See Statutes 1945, chapter 1431, section 50.

56 Regulation 17220 requires that service of a notice of withholding payments or a notice of assessing penalties be made by first class mail on the contractor and subcontractor and by first class and any bonding company and any Surety issuing a bond.

57 Claim number 17 at pages 133-134.

58 DIR Brief at pages 17-19.

not require any participation of awarding agencies unless they elect to become an LCP. Awarding bodies are no longer required to enforce the PWL are no longer even nominal parties to the proceedings.[59] If an awarding body has any costs associated with PWL due process proceedings, it is only because the awarding body has elected either to become an LCP or to voluntarily intervene pursuant to Labor Code section 1742.[60] In either case, there is no mandate when participation is voluntary.[61]

The same analysis applies to Clovis' claim for reimbursement for the costs of participating in judicial review of administrative proceedings.[62] The obvious corollary of the voluntary nature of an awarding body's participation in administrative proceedings is that its participation in any judicial review of the administrative proceedings is also voluntary.

Since Section 1742 and Regulation 17220 do not require a higher level of service from districts, but actually relieve the districts of even nominal participation in review of enforcement proceedings, they clearly do not create a state mandate.

Participation In PWL Settlement Conferences

Clovis contends the State has mandated it to "grant and participate in settlement meetings requested by contractors or subcontractors in an attempt to settle any disputed issue before

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59 See Title 8, California Code of Regulations, section 17202, subdivision (j), which defines "party" for purposes of the administrative proceedings as the enforcing agency, the affected contractor or an interested person who intervenes.

60 According to DIR, with the exception of agencies which have elected to act an LCP, no local agency has participated in enforcement proceeding since the effective date of Section 1742. (DIR Brief, at p. 18; Mischel Decl., ¶ 4.)

61 *City of Merced v. State of California, supra,* 153 Cal. App. 3d at 783.

62 See Claim number 18 at page 134.

formal hearing procedures." This mandate is allegedly pursuant to Section1742.1 and Regulation 16413.[63]

The first paragraph of Labor Code section 1742.1, subdivision (b) provides that if a timely request is made, the Labor Commissioner must afford a contractor or subcontractor an informal settlement conference. The statute does not mention awarding bodies and do not require them to participate in these settlement conferences.[64]

Section 1742.1 also requires awarding bodies who provided notice of a withholding pursuant to Labor Code section 1771.6 to conduct informal settlement conferences. However, the notice requirements of Section 1771.6 only apply when an awarding body either elects, pursuant to Section 1726, to undertake its own investigation of a violation, or elects, pursuant to Section 1771.5, to initiate and enforce a LCP. In either case, the involvement of an awarding body in enforcement activities is voluntary and not mandated. Accordingly there is not state mandate to awarding bodies to participate in settlement conferences.[65]

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63 See claim 19 at page 134.

64 The provisions of Section 1742.1 applicable to the Labor Commissioner provide:

> (b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. . . ."

65 In claim number 19, Clovis refers to California Code of Regulations, title 8, section 16413. There is no explanation for this reference. Whatever Petitioner's intent, Regulation 16413 makes no mention of settlement conferences and without further exposition, DOF cannot respond to this bare citation.

Participation, as Necessary Party, in Actions Brought Against Employers by Joint Labor-Management Committees

Labor Code section 1771.2[66] authorizes a joint labor management committee to sue an employer for a violation of the PWL. Clovis contends that because an awarding body is a necessary party, Section 1771.2 creates a state mandate.[67] Clovis does not explain why the awarding body is a necessary party. Indeed Section 1771.2 does not mention awarding bodies and does not require the participation of an awarding body in this litigation. Thus, there is no basis for finding that Section 1771.2 creates a state mandate.

Providing Payroll Records To Joint Labor Management Committees

Section 1776, subdivision (e), provides in part:

> Any copy of records made available for inspection by, or furnished to, a joint labor-management committee . . . shall be marked or obliterated only to prevent disclosure of an individual's name and social security number. A joint labor management committee may maintain an action in a court of competent jurisdiction against an employer who fails to comply with Section 1774. The court may award restitution to an employee for unpaid wages and may award the joint labor management committee reasonable attorney's fee and costs incurred in maintaining the action . . . . (Emphasis added.)

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66 Labor Code section 1771.2 provides:

A joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) may bring an action in any court of competent jurisdiction against an employer that fails to pay the prevailing wage to its employees, as required by this article. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs.

67 See claim number 20 at pages 134-135.

Clovis contends these disclosure provisions constitute a reimbursable mandate. With the exception of a slight variation in the obliteration provisions, this claim is no different than Claim 10. There is no mandate because the Legislature has provided awarding bodies a self financing means for to recover the costs of copying and redacting records.[68]

Statutory Changes Clovis Mentions But Does Not Expressly Claim Constitute Mandates

Clovis cites several changes in the PWL but does not expressly claim these changes constitute a mandate. DOF submits that Clovis' failure to argue that these statutory changes constitute a mandate and its failure to cite authority for this proposition constitute a waiver of any claim that they resulted in a mandate and the Commission should dismiss them without further consideration.[69]

However, DOF further submits, these claims can be denied on the merits for the following reasons.

Applying the PWL to Projects Build For the Use of Awarding Bodies

Clovis cites Labor Code section 1720.2 in Exhibit 1 of the Test Claim but does not claim this section creates a mandate. Section 1720.2 specifies that work performed pursuant to a private contract is a "public work" for PWL purposes if (1) the construction contract is between private persons; (2) the construction is on privately owned property and, at completion of construction, over 51 per cent of the assignable square feet will be leased to a state or political

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68 See Labor Code section 1776; California Code of Regulations, title 8, section 16402.

69 See *People v. Stanley* (1995) 10 Cal. 4th 764, 793; *Atchley v. City of Fresno* (1984) 151 Cal. App. 3d 635, 647.

subdivision, and (3) either the lease assignment was entered into before the construction contract or the construction work is according to plans and specifications of the public entity and the public entity lease is signed during or at the completion of construction.

Prior to 1975, the definition of a public work included situations where a local agency did not pay for construction of property it was going to lease if certain criteria were met. Under Labor Code section 1720.2, a construction project was also a public work if, 1) the construction was between private parties (no local agency involvement), 2) the property was owned privately but after construction at least 50% of the assignable space would be leased by a local agency, and 3) the lease was entered into prior to the construction contract. Section 1720.2 was amended in 1980 but the amendment appears to have merely clarified the law.[70] In any event, as DIR notes Section 1720.2 only applies to private parties and requires no service from awarding bodies.[71]

Application of PWL to Trash Haulers

Clovis cites Labor Code section 1720.3 which was amended in 1999 to apply the PWL to hauling trash from a public works project.[72] Once again, the intent of Clovis is not clear for it does not mention Section 1720.3 in the claim portion of its filing.

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70 Statutes 1980, chapter 962, section 1.

71 DIR observes that any increase in costs is indirect and amicus State Buildings and Trade Council submits that the PWL does not increase costs to local bodies.

72 Statutes 1999, chapter 220, section 3.

However, Section 1720.3 does not create a mandate because it does not require a higher level of service from awarding bodies and does not create a new program. Furthermore, as DIR notes, there is an additional reason why this is not a mandate. The statute creates a new crime.[73/]

Applying The PWL to Design and Preconstruction Work

In 2000, the Legislature amended Labor Code section 1720 to state that the PWL applies to design and preconstruction work including but not limited to surveying and inspection work.[74/] Clovis cites these changes but does not claim they created a mandate. DIR has provided the Commission with an account showing that these changes merely codified DIR interpretations of the PWL.[75/] Whatever Clovis intends, this amendments to Section 1720 did not create a mandate because it created no new program and imposed no higher level of service on awarding bodies.

Applying The PWL to Landscape Maintenance, Installation and Land Surveying Work

Clovis cites the DIR regulation[76/] dealing with the application of the PWL to landscape maintenance and land surveying work. Clovis also cites changes in Labor Code section 1720 which include installation work in the definition of public works. However, Clovis has not claimed that these changes created a state mandate.

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73 See DIR Brief at page 20; Government Code section 17556, subdivision (g); Statutes 1999, chapter 220, section 3.

74 Statutes 2000, chapter 881.

75 See DIR Brief at pages 20-21.

76 California Code of Regulations, title 8, section 16001, subdivision (c) and (f).

Whatever Clovis intends, DIR's Brief establishes that landscape maintenance, installation work and the land surveying work specified in the DIR regulation have always been covered by the PWL.[77] Furthermore, these provisions create no new program and impose no higher level of service on awarding bodies.

Application of the PWL to Certain Residential Facilities

Clovis cites the DIR regulation defining certain types of residential construction as public works.[78] However, Clovis does not claim that this creates a state mandate. DIR has established that the regulation does not create a new program or higher level of service and that residential construction paid for in whole or part with public funds has always been considered a public work.[79]

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77 See DIR Brief at pages 21-23; Labor Code Section 1771; *Franklin v. City of Riverside* (1962) 58 Cal. 2d 114.

78 See California Code of Regulations, title 8, section 16001, subdivision (d).

79 DIR Brief at page 23.

CONCLUSION

In Light of the foregoing, DOF submits the claim should be denied in its entirety.

Dated: Feb. 18, 2003

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: **Prevailing Wage Rate, 01-TC-28**

I declare that I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause: my business address is 1300 I Street, Sacramento, California 95814. I am readily familiar with the business practice, at my place of business, for the collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the postal service in the ordinary course of business on the same day on which it is placed for mailing.

On February 18, 2003, I served the following document:

Department of Finance Response to Claim

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at, California, addressed as shown below:

See Attached Mailing List

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on February 18, 2003, at Sacramento, California.

Jessica L Taylor

Jessica Taylor

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EXHIBIT 1

LABOR CODE

LABOR CODE SECTION	TEXT OF STATUTE IN EFFECT IN 1975	TEXT OF STATUTE IN EFFECT IN 2002
1726	The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract. **[Enacted 1937]**	The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner. If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed. **[Amended Stats. 2000 Ch. 954 § 3]**

1727	Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body. **[Enacted 1937; Amended Stats. 1945 Ch. 1431 § 50]**	(a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review. (b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body.
1727		These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review. **[Amended Stats. 2000 Ch. 954 § 4]**

1742		(a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final. (b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial hearing officer possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor. The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

		Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time. The director shall adopt regulations setting forth procedures for hearings under this subdivision. (c) An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. (d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the

1742		filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order. (e) A judgment entered pursuant to this section shall bear the same rate of interest. and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section. (f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner. (g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5. (h) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date. **[Added Stats. 2000 Ch. 954 § 10]**
1742.1		(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated

1742.1		damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter. (b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No

		evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting. This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date. **[Added Stats. 2000 Ch. 954 § 12]**
1771.2		A joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) may bring an action in any court of competent jurisdiction against an employer that fails to pay the prevailing wage to its employees, as required by this article. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs. **[Added Stats. 2001 Ch. 804 § 1]**

1771.5		(a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body. (b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements: (1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter. (2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract. (3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury. (4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter. (5) The awarding body shall withhold contract payments when payroll records are delinquent or

1771.5		(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred. **[Added Stats. 1989 Ch. 1224 § 2; amended Stats. 1999 Ch. 83 § 132]**
1771.6		(a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments. The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on a bond, if their identities are known to the awarding body. (b) The withholding of contract payments in accordance with Section 1726 or 1771.5 shall be reviewable under Section 1742 in the same manner as if the notice of the withholding was a civil penalty order of the Labor Commissioner under this chapter. If review is requested, the Labor Commissioner may intervene to represent the awarding body.

1771.6		(c) Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the awarding body shall not disburse any contract payments withheld. (d) From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers. (e) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the awarding body that has enforced this chapter pursuant to Section 1771.5. **[Added Stats. 2000 Ch. 954 § 16; former 1771.6 added Stats. 1989 Ch. 1224 § 3, repealed Stats. 2000 Ch. 954 § 15]**
1773	The body awarding any contract for public work, or otherwise undertaking any public work, shall ascertain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project. In determining such rates, the awarding body shall	The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director of Industrial Relations. The holidays upon which those rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the applicable collective bargaining agreement. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code.

1773	ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been pre-determined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the awarding body shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work. If the awarding body determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the awarding body may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the awarding body determines that another rate should be adopted. **[Enacted 1937; Amended Stats. 1971 Ch. 785 § 1]**	In determining the rates, the Director of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and the rates that may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved. The rate fixed for each craft, classification, or type of work shall be not less than the prevailing rate paid in the craft, classification, or type of work. If the director determines that the rate of prevailing wage for any craft, classification, or type of worker is the rate established by a collective bargaining agreement, the director may adopt that rate by reference as provided for in the collective bargaining agreement and that determination shall be effective for the life of the agreement or until the director determines that another rate should be adopted. **[Amended Stats. 1999 Ch. 30 § 1]**
1773.1	Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works. For the purpose of determining such per diem wages	(a)Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other

1773.1	for contracts entered into with the state, the representative of any craft, classification, or type of workman needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. **[Added Stats. 1959 Ch. 2173 § 1; Amended Stats. 1969 Ch. 1502 § 1]**	statute applicable to public works. (b) Employer payments include all of the following: (1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program. (2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected. (3) Payments to the California Apprenticeship Council pursuant to Section 1777.5. (c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing. (d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur: (1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer. (2) The higher rate of payments is required by a project labor agreement. (3) The payments are made to the California

1773.1		(4) The director determines that annualization would not serve the purposes of this chapter. (e)For the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved. The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date. Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed. The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct. **[Amended Stats. 2000 Ch. 954 § 18]**

1773.2	The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract.	The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract. In lieu of specifying the rate of wages in the call for bids, and in
1773.2	In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy of the prevailing rate of per diem wages on file at its principal office, in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year, and in such event, the awarding body shall cause a copy thereof to be posted at each job site. **[Added Stats. 1971 Ch. 785 § 2; Amended Stats. 1974 Ch. 876 § 1]**	the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site. **[Amended Stats. 1992 Ch. 1342 § 8]**

1773.3	An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards. **[Added Stats. 1972 Ch. 1399 § 2 as § 3098; Amended Stats. 1974 Ch. 1095 § 1]**	An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards. **[Amended Stats. 1978 Ch. 1249 § 6, renumbered from section 3098 to section 1773.3]**

1773.4	Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties. Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general	Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties. Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general prevailing rates of per diem wages pursuant to this section.

1773.4	prevailing rates of per diem wages pursuant to this section. **[Added Stats. 1953 Ch. 1706 § 4.5; Amended Stats. 1968 Ch. 699 § 2; Amended Stats. 1969 Ch. 301 § 1]**	Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract. **[Amended Stats. 1969 Ch. 301 § 1]**
1773.5	The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out the prevailing wage provisions of this article. **[Added Stats. 1953 Ch. 1706 § 5]**	The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter. **[Amended Stats. 1989 Ch. 1224 § 5]**
1773.6	Where the body awarding the contract or authorizing the public work is the State Department of Public Works, the Department of General Services, or the State Department of Water Resources or any division thereof, it shall file, quarterly, its determination of general prevailing rates of per diem wages for those localities in which public work is to be performed, in the office of the Director of Industrial Relations, commencing not later than January 10, 1954. Such determination shall be final except as hereinafter provided. If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall immediately notify the awarding body of such change and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any	If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published. **[Amended Stats. 1976 Ch. 281 § 6]**

1773.6	contract for which the notice to bidders has been published. **[Amended Stats. 1963 Ch. 1786 § 68]**	
1773.7	The provisions of Sections 1773.4 and 1773.5 shall not apply to the State Department of Public Works, the Department of General Services, or the State Department of Water Resources or any division thereof. **[Added Stats. 1953 Ch. 1706 § 7;Amended Stats. 1957 Ch. 1932 § 487; Amended Stats. 1963 Ch. 1786 § 69; Repealed Stats. 1976 Ch. 281 § 7]**	The provisions of Section 11250 of the Government Code shall not be applicable to Sections 1773, 1773.4, and 1773.6. **[Added Stats. 1976 Ch. 281 § 8]**
1773.9		(a) The Director of Industrial Relations shall use the methodology set forth in subdivision (b) to determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed. (b) The general prevailing rate of per diem wages includes all of the following: (1) The basic hourly wage rate being paid to a majority of workers engaged in the particular craft, classification, or type of work within the locality and in the nearest labor market area, if a majority of the workers is paid at a single rate. If no single rate is being paid to a majority of the workers, then the single rate being paid to the greatest number of workers, or modal rate, is prevailing. If a modal rate cannot be determined, then the director shall establish an alternative rate, consistent with the methodology for determining the modal rate, by considering the appropriate collective bargaining agreements, federal rates, rates in the nearest labor market area, or other data such as wage survey data.

1773.9		(2) Other employer payments included in per diem wages pursuant to Section 1773.1 and as included as part of the total hourly wage rate from which the basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, the director shall establish a prevailing employer payment rate by the same procedure set forth in paragraph (1). (3) The rate for holiday and overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, the rate for holidays and overtime work, if any, included with the prevailing basic hourly rate of pay shall be prevailing. (c) If the director determines that the general prevailing rate of per diem wages is the rate established by a collective bargaining agreement, and that the collective bargaining agreement contains definite and predetermined changes during its term that will affect the rate adopted, the director shall incorporate those changes into the determination. Predetermined changes that are rescinded prior to their effective date shall not be enforced. **[Added Stats. 1999 Ch. 30 § 4]**

1776 (1st of two)		(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following: (1) The information contained in the payroll record is true and correct. (2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project. (b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis: (1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request. (2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations. (3) A certified copy of all payroll records enumerated

		However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor. (c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division. (d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request. (e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor

		obliterated only to prevent disclosure of an individual's name and social security number. A joint labor management committee may maintain an action in a court of competent jurisdiction against an employer who fails to comply with Section 1774. The court may award restitution to an employee for unpaid wages and may award the joint labor management committee reasonable attorney's fee and costs incurred in maintaining the action. An action under this subdivision may not be based on the employer's misclassification of the craft of a worker on its certified payroll records. Nothing in this subdivision limits any other available remedies for a violation of this chapter. (f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address. (g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not

		due to the failure of a subcontractor to comply with this section. (h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. (i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section. **(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.** **[Added Stats. 1997 Ch. 757 § 4; Amended Stats. 2001 Ch. 804 § 2; repealed January 1, 2003]**

1776 (2nd of two)	Every contractor and subcontractor shall keep an accurate record showing the name, occupation, and the actual per diem wages paid to each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the body awarding the contract and to the Division of Labor Law Enforcement. **[Enacted 1937; Amended Stats. 1949 Ch. 127 § 7]**	(a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. (b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis: (1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request. (2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations. (3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the

		which the request was made. The public shall not be given access to the records at the principal office of the contractor. (c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division. (d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request. (e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's social security number. (f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a

		subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. (h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor. (i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section. **(j) This section shall become operative January 1, 2003.** **[Amended Stats. 1976 Ch. 599 § 1; repealed Stats. 1978 Ch. 1249 § 3; added Stats. 1978 Ch. 1249 § 4; Amended Stats. 1983 Ch. 681 § 1; Amended Stats. 1992 Ch. 1342 § 10 and in 1993, 1997, 1998 and Stats.**

1777.1		(a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has any interest is ineligible for a period of not less than one year or more than three years to do either of the following: (1) Bid on or be awarded a contract for a public works project. (2) Perform work as a subcontractor on a public works project. (b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has any interest is ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following: (1) Bid on or be awarded a contract for a public works project. (2) Perform work as a subcontractor on a public works project. (c) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its

		shall publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project pursuant to this chapter. The list shall contain the name of the contractor, the Contractor's State License Board license number of the contractor, and the effective period of debarment of the contractor. The commissioner shall also place advertisements in construction industry publications targeted to the contractors and subcontractors, chosen by the commissioner, that state the effective period of the debarment and the reason for debarment. The advertisements shall appear one time for each debarment of a contractor in each publication chosen by the commissioner. The debarred contractor or subcontractor shall be liable to the commissioner for the reasonable cost of the advertisements, not to exceed five thousand dollars ($5,000). The amount paid to the commissioner for the advertisements shall be credited against the contractor's or subcontractor's obligation to pay civil fines or penalties for the same willful violation of this chapter. (e) For purposes of this section, "contractor or subcontractor" means a firm, corporation, partnership, or association and its responsible managing officer, as well as any supervisors, managers, and officers found by the Labor Commissioner to be personally and substantially responsible for the willful violation of this chapter. (f) For the purposes of this section, the term "any interest" means an interest in the entity bidding or performing work on the public works project, whether as

		but is not limited to, all instances where the debarred contractor or subcontractor receives payments, whether cash or any other form of compensation, from any entity bidding or performing work on the public works project, or enters into any contracts or agreements with the entity bidding or performing work on the public works project for services performed or to be performed for contracts that have been or will be assigned or sublet, or for vehicles, tools, equipment, or supplies that have been or will be sold, rented, or leased during the period from the initiation of the debarment proceedings until the end of the term of the debarment period. "Any interest" does not include shares held in a publicly traded corporation if the shares were not received as compensation after the initiation of debarment from an entity bidding or performing work on a public works project. (g) For the purposes of this section, the term "entity" is defined as a company, limited liability company, association, partnership, sole proprietorship, limited liability partnership, corporation, business trust, or organization. (h) The Labor Commissioner shall adopt rules and regulations for the administration and enforcement of this section. **[Added Stats. 1989 Ch. 1224 § 10; amended Stats. 1998 Ch. 443 § 1; amended Stats. 2000 Ch. 970 § 1]**

SixTen and Associates
Mandate Reimbursement Services

EXHIBIT G

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March 17, 2003

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 01-TC-28
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

I have received the Response of the Department of Finance ("DOF") dated February 18, 2003, authored by the Attorney General of the State of California, to which I now respond on behalf of the test claimant.

Although none of the objections generated by DOF are included in the statutory exceptions set forth in Government Code Section 17556, the objections stated additionally fail for the following reasons:

A. The Response of the DOF is Incompetent and Should be Excluded

Test claimant objects to the Response of the DOF, in total, as being legally incompetent and move that it be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information and belief."

The DOF Response does not comply with this essential requirement.

B. Changes in Definition Result in Mandated Activities

DOF, at page 20 of its Response argues:

> "Clovis cites several changes in the PWL but does not expressly claim these changes constitute a mandate. DOF submits that Clovis' failure to argue that these statutory changes constitute a mandate and its failure to cite authority for this proposition constitute a waiver of any claim that they resulted in a mandate and the Commission should dismiss them without further consideration."

Then, at pages 20 through 23, DOG discusses those changes in the PWL.

The test claim, in Section 2, Part "A", at pages 27 through 33 sets forth, in detail, changes in the definition of "public works" after 1974. These changes include:

1. Chapter 962, Statutes of 1980, Section 1, amended Labor Code Section 1720.2 to define "public works" to include, for the first time, construction work performed according to plans, specifications, or criteria furnished by the state or political subdivision, and a lease agreement between the lessor and state or political subdivision is entered into during, or upon completion of the construction work.

2. Chapter 278, Statutes of 1989, Section 1, amended Labor Code Section 1720 to include, for the first time, in the definition of "public works", public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

3. Chapter 220, Statutes of 1999, Section 1, amended Labor Code Section 1720.3 to define "public works" to now include, for the first time "political subdivisions of the state" when hauling refuse from a public works site to an outside location.

4. Chapter 881, Statutes of 2000, Section 1, amended Section 1720 subdivision (a) to expand the definition of "public works" to include, for the first time, "work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work".

5. Chapter 938, Statutes of 2001, Section 2, amended Labor Code Section 1720 subdivision (a) to expand the definition of "public works" to include,

for the first time, "installation" work done under a public works contract.

Each of these statements in the test claim is followed by a sentence to the effect that "therefore, for the first time, awarding parties must comply with laws pertaining to public works" when (new activity is described).

The "new duties" section of the test claim starts at page 129, where the list of duties is preceded by the paragraph:

> "When contracting with third parties for "public works" as an awarding body for projects pursuant to Labor Code sections 1720, 1720.2 and 1720.3 and Title 8, California Code of Regulations Sections 16000 and 16001, school districts, county offices of education and community colleges are required to:"

It is quite clear then, that the test claim describes, in detail, the changes in the scope of "public works" brought about by post-1974 changes in Labor Code Sections 1720, 1720.2 and 1720.3. Then, the test claims goes on to state that, when contracting with third parties for public works pursuant to Labor Code Sections 1720, 1720.2 and 1720.3, it is required to perform the duties thereafter described.

There is another consequence of the changes in the law not addressed by DOF. There have been five expansions of the definition of a "public work" after 1974, therefore those expanded segments of public works, for the first time, are subject to all prevailing wage laws, both before and after January 1, 1975, whether the performance of those duties is by complying with the general prevailing wage laws, or by way of a Labor Compliance Program.

The DOF response also alleges, as a matter of law, that the test claimant's "failure to argue" the statutory changes is "a waiver of any claim." Typically, the party asserting conclusions of law cite supporting code or case law. Since waivers are not part of the Government Code pertaining to the mandate process, and the commission has excluded itself from most of the provisions of the Administrative Procedures Act, the DOF's assertion of waiver is without legal basis here.

The Response of the DOF in this regard is both factually and legally incorrect.

3. Clovis has Standing to File the Test Claim

DOF next argues, at page 12 of its Response that "...according to DIR, Clovis has not elected to initiate a LCP. This is significant for two reasons. First It means Clovis has

no standing to claim LCP costs. Second, it shows that participation is truly voluntary."

The Government Code defines a "test claim" as "the first claim...filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state".[1] There is no statutory requirement that the test claimant, itself, be burdened with those costs.

Secondly, the nature of a test claim is that the test claimant is alleging costs for itself and for all others similarly situated:

> "This test claim alleges mandated costs subject to reimbursement by the state for school districts, county offices of education, and community college districts to comply with laws pertaining to "public works".[2]

The DOF recognizes the representative capacity of a test claimant:

> "The Clovis School District ("Clovis" or "Claimant") has filed this test claim on behalf of itself and other school districts, county boards of education and community college districts for the costs of enforcing the Prevailing Wage Law ("PWL) on public works projects."[3]

The DOF argument that this fact shows that an LCP (Labor Compliance Program) is truly voluntary actually shows the fallacy of the argument.

Labor Compliance Programs were enacted by Chapter 1224, Statutes of 1989, and are found in Labor Code Sections 1771.5 and 1771.6. Under the law, school districts do have a choice: they have the choice of complying with the general provisions of the prevailing wage laws or of complying with the LCP provisions. They have no discretion to act or not to act, they are required to comply with one or the other. They do not have the choice of doing neither.

Clovis may not have elected to operate an LCP program, but other districts represented by it may have, and Clovis may elect to do so in future years.

---

[1] Government Code Section 17521

[2] Test claim, page 3, lines 20-22

[3] DOF Response, page 1

Therefore, in its representative capacity, test claimant has complied with Government Code Section 17521 by "alleging that a particular statute or executive order imposes costs mandated by the state" In its representative capacity, the test claimant has standing to allege these costs and, by declaration, has sworn that it has or may incur costs mandated by the statutes and code sections cited in excess of $1,000, annually.

4. The DOF Response Presents no other new arguments.

The Director of Industrial Relations ("DIR") and the State Building and Construction Trades Council of California, AFL-CIO, ("SBCTC") have already filed comments with the Commission and the Test Claimant has responded to both, individually, on February 14, 2003. Other than as set forth above, the DOF has presented no new arguments. Therefore, test claimant rebuts the balance of the DOF Response by reference to those prior responses dated February 14, 2003 and by incorporating them here by reference in reply to the Response of the DOF dated February 18, 2003.

CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

Original List Date: 7/8/2002
Last Updated: 8/15/2002
List Print Date: 01/15/2003
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Mr. Keith B. Petersen SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	**Claimant Representative** Tel: Fax:	 (858) 514-8605 (858) 514-8645
Mr. Gerald Shelton California Department of Education (E-08) Fiscal and Administrative Services Division 1430 N Street, Suite 2213 Sacramento, CA 95814	Tel: Fax:	(916) 445-0554 (916) 327-8306
Mr. Gary J. O'Mara Department of Industrial Relations Office of the Director 455 Golden Gate Avenue, Tenth Floor San Francisco, CA 94102	Tel: Fax:	(415) 703-4240 (415) 703-5058

STATE OF CALIFORNIA GRAY DAVIS

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director-Legal Unit
?0 W. Fourth St, Suite 600
.os Angeles, CA 90013

Tel: (213) 576-7725
Fax: (213) 576-7735

EXHIBIT H

March 28, 2003

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Ste. 300
Sacramento, CA 95814

Re: Test Claim 01-TC-28
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

Test Claimants have objected to the Department's submission because it did not include a certification as required by your rules. Enclosed please find that certification. I would note that the rule Test Claimants rely on requires that the certification be in the form of a declaration. Cal. Code Regs., tit. 2, §1183(e)(6). The California Code of Civil Procedure § 2015 defines a declaration under penalty of perjury and requires the inclusion of the location where the declaration was signed. I note that Test Claimants' declaration do not meet this requirement.

We are not raising this somewhat technical issue at this time as a defect to the Test Claim itself. However, should an issue arise as to whether DIR has met the technical requirements of section 1183(e)(6), we will retain the right to raise Test Claimants' error at a later date.

Yours truly,

Anthony Mischel
Attorney at Law

AM/jr

Enc.

CERTIFICATION OF COUNSEL

I certify by my signature below, under penalty of perjury, that the statements made in the Department of Industrial Relations's Response to Commission On State Mandates Concerning Petition on Prevailing Wages are true and correct and complete to the best of my own personal knowledge or information and belief.

Executed this 28th day of March 2003, at Los Angeles, California.

Anthony Mischel

PROOF OF SERVICE

Case Name: Clovis Unified School District
Test Claim 01-TC-28

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 320 W. 4th Street, Ste. 600, Los Angeles, California 90013. On March 28, 2003, I served the within document(s):

Certification; Declaration of Counsel-Anthony Mischel

XX by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Los Angeles, California addressed as set forth below.

☐ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

☐ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

Mr. Paul Minney **Spector, Middleton, Young & Minney, LLP** **7 Park Center Drive** **Sacramento, CA 92586**	**Ms. Sandy Reynolds** **Reynolds Consulting Group** **P.O. Box 987** **Sun City, CA 92586**
Executive Director **State Board of Education (E-08)** **721 Capitol Mall, Room 558** **Sacramento, CA 95814**	**Mr. Bill McGuire** **Clovis Unified School District** **1450 Herndon** **Clovis, CA 93611**
Mr. Steve Shields **Shields Consulting Group** **1536 36th Street** **Sacramento, CA 95816**	**Ms. Beth Hunter** **Centration, Inc.** **8316 Red Oak Street, Ste. 101** **Rancho Cucamonga, CA 91730**
Dr. Carol Berg **Education Mandated Cost Network** **1121 L Street, Ste. 1060** **Sacramento, CA 95814**	**Mr. Keith Gmeinder** **Department of Finance (A-15)** **915 L Street, 8th Floor** **Sacramento, CA 95814**

Mr. Michael Havey **State Controller's Office (B-08)** **Division of Accounting & Reporting** **3301 C Street, Suite 500** **Sacramento, CA 95816**	**Mr. Steve Smith** **Mandated Cost Systems, Inc.** **11130 Sun Center Drive, Suite100** **Rancho Cordova, CA 95670**
Mr. Keith B. Petersen **SixTen & Associates** **5252 Balboa Avenue, Ste. 807** **San Diego, CA 92117**	**Mr. Gerald Shelton** **California Dept. of Education (E-08)** **Fiscal and Administrative Services Division** **1430 N Street, Ste. 2213** **Sacramento, CA 95814**
Mr. Gary O'Mara **DIR-OD Legal** **P.O. Box 420603** **San Francisco, CA 94102**	

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 28, 2003, at Los Angeles, California.

Judy Rosado

Judy Rosado

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 2 (1/91)

FIRST AMENDMENT TO TEST CLAIM FORM

For Official Use Only

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COMMISSION ON STATE MANDATES

EXHIBIT I

Claim No. 01-TC-28 (First Amendment)

Local Agency or School District Submitting Claim

CLOVIS UNIFIED SCHOOL DISTRICT

Contact Person	Telephone Number
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Claimant Address

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Representative Organization to be Notified

Dr. Carol Berg, Consultant, Education Mandated Cost Network c/o School Services of California 1121 L Street, Suite 1060 Sacramento, CA 95814	Voice: 916-446-7517 Fax: 916-446-2011

This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable.

FIRST AMENDMENT TO TEST CLAIM FILING
PREVAILING WAGE RATE

See: Attached

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative	Telephone No.
William McGuire Associate Superintendent	Tel. (559) 327-9110 Fax. (559) 327-9129

Signature of Authorized Representative	Date
X Bill McGuire	July 21, 2003

Claim Prepared By:
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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

FIRST AMENDMENT TO THE	)	
Test Claim of:	)	No. CSM. ____-TC-____
	)	
	)	**Chapter 868, Statutes of 2002**
	)	Chapter 938, Statutes of 2001
Clovis Unified School District	)	Chapter 804, Statutes of 2001
	)	Chapter 954, Statutes of 2000
	)	Chapter 920, Statutes of 2000
	)	Chapter 881, Statutes of 2000
	)	Chapter 875, Statutes of 2000
	)	Chapter 135, Statutes of 2000
	)	Chapter 903, Statutes of 1999
	)	Chapter 220, Statutes of 1999
	)	Chapter 83, Statutes of 1999
	)	Chapter 30, Statutes of 1999
	)	Chapter 485, Statutes of 1998
	)	Chapter 443, Statutes of 1998
	)	Chapter 757, Statutes of 1997
	)	Chapter 17, Statutes of 1997
Test Claimant	)	Chapter 589, Statutes of 1993
	)	Chapter 1342, Statutes of 1992
	)	Chapter 913, Statutes of 1992
	)	(Continued on Next Page)
	)	
	)	Prevailing Wage Rate
	)	
	)	**FIRST AMENDMENT TO THE**
	)	TEST CLAIM FILING
	)	

Attachment to Form CSM 2 (1/91)
First Amendment to Test Claim
Prevailing Wage Rate

.pter 868, Statutes of 2002
Chapter 938, Statutes of 2001
Chapter 804, Statutes of 2001
Chapter 954, Statutes of 2000
Chapter 920, Statutes of 2000
Chapter 881, Statutes of 2000
Chapter 875, Statutes of 2000
Chapter 135, Statutes of 2000
Chapter 903, Statutes of 1999
Chapter 220, Statutes of 1999
Chapter 83, Statutes of 1999
Chapter 30, Statutes of 1999
Chapter 485, Statutes of 1998
Chapter 443, Statutes of 1998
Chapter 757, Statutes of 1997
Chapter 17, Statutes of 1997
Chapter 589, Statutes of 1993
Chapter 1342, Statutes of 1992
Chapter 913, Statutes of 1992
Chapter 1224, Statutes of 1989
Chapter 278, Statutes of 1989
Chapter 160, Statutes of 1988
Chapter 1054, Statutes of 1983
Chapter 681, Statutes of 1983
Chapter 449, Statutes of 1981
Chapter 992, Statutes of 1980
Chapter 962, Statutes of 1980
Chapter 373, Statutes of 1979
Chapter 1249, Statutes of 1978
Chapter 423, Statutes of 1977
Chapter 1179, Statutes of 1976
Chapter 1174, Statutes of 1976
Chapter 861, Statutes of 1976
Chapter 599, Statutes of 1976
Chapter 538, Statutes of 1976
Chapter 281, Statutes of 1976

Labor Code Sections

?0	1741	1771.5,	1773.3	1777.6
1720.2	1742	1771.6	1773.5	1777.7
1720.3	1742.1	**1771.7**	1773.6	1812
1726	1743	1772	1775	1813
1727	1750	1773	1776	1861
1733	1770	1773.1	1777.1	
1735	1771	1773.2	1777.5	

_ _ ɔlic Contract Code Section 22002

Title 8, California Code of Regulations

Section 16000
Sections 16001 through 16003
Sections 16100 through 16102
Sections 16200 through 16206
...ions 16300 through 16304
Sections 16400 through 16403
Sections 16410 through 16414
Section 16425
Sections 16426 through 16428
Sections 16429 through 16432
Section 16433
Sections 16436 through 16439
Section 16500
Sections 16800 through 16802
Sections 17201 through 17212
Sections 17220 through 17229
Sections 17230 through 17237
Sections 17240 through 17253
Sections 17260 through 17264

School Facility Program
Substantial Progress and Expenditure
Audit Guide May 2003
Prepared by the Office of
Public School Construction

Antioch Unified School District
Labor Compliance Program
January 17, 2003

AB 1506 Labor Compliance
Program Guidebook - February 2003
Prepared by the Division of
Labor Standards Enforcement

)	Chapter 1224, Statutes of 1989
)	Chapter 278, Statutes of 1989
)	Chapter 160, Statutes of 1988
)	Chapter 1054, Statutes of 1983
)	Chapter 681, Statutes of 1983
)	Chapter 449, Statutes of 1981
)	Chapter 992, Statutes of 1980
)	Chapter 962, Statutes of 1980
)	Chapter 373, Statutes of 1979
)	Chapter 1249, Statutes of 1978
)	Chapter 423, Statutes of 1977
)	Chapter 1179, Statutes of 1976
)	Chapter 1174, Statutes of 1976
)	Chapter 861, Statutes of 1976
)	Chapter 599, Statutes of 1976
)	Chapter 538, Statutes of 1976
)	Chapter 281, Statutes of 1976
)	
)	Labor Code Sections 1720,
)	1720.2, 1720.3, 1726, 1727,
)	1733, 1735, 1741, 1742, 1742.1,
)	1743, 1750, 1770, 1771, 1771.5,
)	1771.6, **1771.7,** 1772, 1773, 1773.1,
)	1773.2, 1773.3, 1773.5, 1773.6, 1775,
)	1776, 1777.1, 1777.5, 1777.6,
)	1777.7, 1812, 1813, 1861
)	
)	Public Contract Code Section 22002
)	
)	Title 8, California Code of Regulations
)	Section 16000
)	Sections 16001 through 16003
)	Sections 16100 through 16102
)	Sections 16200 through 16206
)	Sections 16300 through 16304
)	Sections 16400 through 16403
)	Sections 16410 through 16414
)	Section 16425
)	Sections 16426 through 16428
)	Sections 16429 through 16432
)	Section 16433
)	(Continued on Next Page)

)	Sections 16436 through 16439
)	Section 16500
)	Sections 16800 through 16802
)	Sections 17201 through 17212
)	Sections 17220 through 17229
)	Sections 17230 through 17237
)	Sections 17240 through 17253
)	Sections 17260 through 17264
)	
)	**School Facility Program**
)	**Substantial Progress and Expenditure**
)	**Audit Guide May 2003**
)	**Prepared by the Office of**
)	**Public School Construction**
)	
)	**AB 1506 Labor Compliance**
)	**Program Guidebook - February 2003**
)	**Prepared by the Division of**
)	**Labor Standards Enforcement**
)	
)	**Antioch Unified School District**
)	**Labor Compliance Program**
)	**January 17, 2003**
)	

I. ORIGINAL AND AMENDED TEST CLAIM

The original test claim filed by Clovis Unified School District was received by the Commission on State Mandates on June 28, 2002 and assigned case number CSM 01-TC-28. The purpose of this First Amendment to the Test Claim is to add a statute enacted in 2002 and Executive Orders published since the original test claim was filed.

Part II (Legislative History of the Claim), Section 2 (Legal Requirements After December 31, 1974), Part A (Definition of Public Works) is amended to add the following allegations:

Chapter 868, Statutes of 2002, Section 2, added Labor Code Section 1771.7[1] which

[1] Labor Code Section 1771.7, added by Chapter 868, Statutes of 2002, Section 2:

"(a) An awarding body that chooses to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004 for a public works project, shall initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program, as described in subdivision (b) of Section 1771.5, with respect to that public works project.

(b) This section shall apply to public works that commence on or after April 1, 2003. For purposes of this subdivision, work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work, does not constitute the commencement of a public work.

(c) (1) For purposes of this section, if any campus of the California State University chooses to use the funds described in subdivision (a), then the "awarding body" is the Chancellor of the California State University. For purposes of this subdivision, if the chancellor is required by subdivision (a) to initiate and enforce, or to contract with a third party to initiate and enforce, the labor compliance program described in that subdivision, then in addition to the requirements imposed upon an awarding body by subdivision (b) of Section 1771.5, the Chancellor of the California State University shall review the payroll records described in paragraphs (3) and (4) of subdivision (b) of Section 1771.5 on at least a monthly basis to ensure the awarding body's compliance with the labor compliance program.

(2) For purposes of this subdivision, if an awarding body described in subdivision (a) is the University of California or any campus of that university, and that awarding body is required by subdivision (a) to initiate and enforce, or to contract with a third party to initiate and enforce, the labor compliance program described in that subdivision, then in addition to the requirements imposed upon an awarding body by subdivision (b) of Section 1771.5, the payroll records described in paragraphs (3) and (4) of subdivision (b) of Section 1771.5 shall be reviewed on at least a monthly basis to ensure the awarding body's compliance with the labor compliance program.

(d) (1) An awarding body described in subdivision (a) shall make a written finding that the awarding body has initiated and enforced, or has contracted with a third party to initiate and enforce, the labor compliance program described in subdivision (a).

(2) (A) If an awarding body described in subdivision (a) is a school district, the governing body of that district shall transmit to the State Allocation Board, in the manner determined by that board, a copy of the

requires an awarding party which uses funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004 for a public works project, to initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program (LCP), as described in subdivision (b) of Section 1771.5, with respect to that public works project. Subdivision (b) provides that, for purposes of this subdivision, work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work, does not

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finding described in paragraph (1).

(B) The State Allocation Board may not release the funds described in subdivision (a) to an awarding body that is a school district until the State Allocation Board has received the written finding described in paragraph (1).

(C) If the State Allocation Board conducts a postaward audit procedure with respect to an award of the funds described in subdivision (a) to an awarding body that is a school district, the State Allocation Board shall verify, in the manner determined by that board, that the school district has complied with the requirements of this subdivision.

(3) If an awarding body described in subdivision (a) is a community college district, the Chancellor of the California State University, or the office of the President of the University of California or any campus of the University of California, that awarding body shall transmit, in the manner determined by the Director of the Department of Industrial Relations, a copy of the finding described in paragraph (1) to the director of that department, or the director of any successor agency that is responsible for the oversight of employee wage and employee work hours laws.

(e) Notwithstanding Section 17070.63 of the Education Code, for purposes of this act, the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the labor compliance program."

constitute the commencement of a public work.

Part II (Legislative History of the Claim), Section 2 (Legal Requirements After December 31, 1974), Part C (Wages - Prevailing Wage Rates) is amended to add the following allegations:

New Labor Code Section 1771.7, subdivision (b), provides that the section shall apply to public works that commence on or after April 1, 2003.

Subdivision (d)(1) requires school districts to make a written finding that they have initiated and enforced, or have contracted with a third party to initiate and enforce, a labor compliance program. Subdivision (d)(2)(A) requires the governing body of a school district to transmit to the State Allocation Board, in the manner determined by that board, a copy of its finding that it has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program. Subdivision (d)(2)(B) provides that the State Allocation Board may not release any funds to a school district until the Board has received the written finding described in Subdivision (d)(1).

Subdivision (d)(2)(C) provides that, if the State Allocation Board conducts a postaward audit procedure with respect to an award of the funds described in subdivision (a) to an awarding body that is a school district, the State Allocation Board shall verify, in the manner determined by that board, that the school district has complied with the requirements of the subdivision. The Office of Public School Construction (OPSC), on behalf of the State Allocation Board, has published and promulgated a document entitled "School Facility Program - Substantial Progress and Expenditure Audit Guide - May

2003" (hereinafter "Audit Guide"), a copy of which is attached hereto as Exhibit 9 and is incorporated herein by reference.

Subdivision (d)(3) requires each community college district to additionally transmit, in the manner determined by the Director of the Department of Industrial Relations, a copy of the finding that it has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program, to the director of that department, or the director of any successor agency that is responsible for the oversight of employee wage and employee work hours laws.

Section 3.9 of the Audit Guide (at page 11 thereof) regulates school facility projects subject to AB 1506[2]. Under Section 3.9, at the time of an OPSC audit, districts must submit:

(1) A copy of the Department of Industrial Relations approved Labor Compliance Program to which the project(s) conformed.

(2) If applicable, a copy of the third party provider contract.

Under Section 3.9, at the time of an OPSC audit, districts must also be prepared to submit, upon request, the following:

(1) All bid invitations and contracts that must contain language alluding to Labor Code Sections 170 (sic - 1770) through 1780 compliance and verification.

(2) Evidence that a pre-job conference was conducted with the contractor and

[2] AB 1506 was chaptered as Chapter 868, Statutes of 2002. Section 2 of that chaptered bill enacted Labor Code Section 1771.7.

subcontractor and that the district enforced the requirements as set forth in Labor Code Sections 1770 through 1780.

(3) Evidence of weekly submittals of certified copies of payroll records for all contractors and subcontractors.

Under the test claim legislation, Section 1771.7 requires a district to either contract with an outside entity, or use its employees, to implement the Labor Compliance Program. Under Section 3.9 of the Audit Guide, if a district elects to use its own employees, it must meet the requirements of the law and the contract and, in the State Facility Program audit, provide the following:

(1) The name of the district employee performing the Labor Compliance Program duties.

(2) The salary and benefits of the employee including transportation costs.

(3) A specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

Chapter 868, Statutes of 2002, Section 3 (uncodified), provides that the act shall not become operative unless at least one of the following conditions is met:

(1) The Kindergarten-University Public Education Facilities Bond Act of 2002 is approved by the voters at the November 5, 2002, statewide general election.

(2) The Kindergarten-University Public Education Facilities Bond Act of 2004 is approved by the voters at the March 2004, statewide direct primary election.

(3) The Kindergarten-University Public Education Facilities Bond Act of 2004 is

approved by the voters at the November 2004, statewide general election. The section became operative when the voters approved The Kindergarten-University Public Education Facilities Bond Act at the November 2002, statewide general election.

By letter dated January 31, 2003, the Department of Industrial Relations contacted all school districts and enclosed an AB 1506 Labor Compliance Program Guidebook (hereinafter, the "Program Guidebook") developed by private and public sector experts in school facilities construction from California school districts, the Office of Public School Construction of the California Department of General Services, the Coalition for Adequate School Housing, labor compliance program consultants and the Department of Industrial Relations. Copies of the letter and program guidebook are attached hereto as Exhibit 10 and are incorporated herein by reference. The guidebook contains, in Appendix 1, a suggested application format to be used when applying for approval of a district's labor compliance program. DIR encourages districts to complete the form and to adopt the labor compliance program manual of the Antioch Unified School District, also enclosed. A copy of the Labor Compliance Program Manual of the Antioch Unified School District is attached hereto as Exhibit 11 and is incorporated herein by reference.

Chapter 2 of the "Program Guidebook" (commencing at page 4) sets forth mandatory requirements for approval of a labor compliance program (hereinafter, "LCP"). To be approved, a section 1771.7 "LCP" must include the following:

1. All bid invitations and public works contracts issued by the district shall contain appropriate language about the requirements of the public works chapter

of the California Labor Code, comprising labor code sections 1720-1861.

2. A pre-job conference shall be conducted with the contractor or subcontractors to discuss federal and state labor law requirements applicable to the contract.

3. Project contractors and subcontractors shall maintain and furnish to the "LCP", at a designated time, a certified copy of each weekly payroll with a statement of compliance signed under penalty of perjury.

4. The "LCP" shall review and, if appropriate, audit payroll records to verify compliance with the public works chapter of the labor code.

5. The "LCP" shall require the district to withhold contract payments when payroll records are delinquent or inadequate.

6. The "LCP" shall require the district to withhold contract payments equal to the amount of underpayment and applicable penalties when the "LCP" establishes that underpayment occurred after an investigation.

"LCP" officials are to complete the Appendix 1 application, adopt and attach the model program (The Antioch Plan), and send it to the director of the California Department of Industrial Relations ("DIR"), along with the items set forth above from Chapter 2.

Chapter 3 of the "Program Guidebook" (commencing at page 5), affirms that an awarding body of a DIR-certified "LCP" may withhold contract payments for certain violations of the labor code and collect penalties against a contractor when it is established through an investigation that there has been an underpayment of wages.

The awarding body may also withhold contract payments when payroll records are delinquent or inadequate.

Chapter 4 of the "Program Guidebook" (commencing at page 6) sets forth how an "LCP" shall enforce the law:

A. Conducting investigations by:

1. Monitoring certified payroll records (CPRs), investigating complaints from workers, and monitoring agencies and contractors.

2. Preparing audits and findings.

B. Obtaining approval of recommended forfeitures from the labor commissioner.

C. Issuing and serving notices of withholding of contract payments (NWCPs).

D. Defending NWCPs in administrative review proceedings and in court.

E. Collecting and disbursing wages and penalties.

A form titled Notice of Withholding of Contract Payments (NWCP) is attached to the "Program Guidebook" in Appendix 2 and is to be completed by the "LCP" and served on the contractor, any affected subcontractor, and any bonding company issuing a bond securing payment of wages of the public works project when the "LCP" determines that it will withhold contract payments for alleged violations.

A form titled Notice of Transmittal is attached to the "Program Guidebook" in Appendix 3 and must be completed and timely mailed by the "LCP" to the DIR to notify the DIR of its statutory obligation to begin the administrative review process and provide

a contractor requesting review a hearing.

A form titled Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742(b) is attached to the "Program Guidebook" in Appendix 4 and is to be completed by the "LCP" and mailed to the party requesting review once that the request has been received by the "LCP". The form satisfies the statutory duty of the "LCP" to let the contractor and subcontractor know what materials are contained in the "LCP's" investigative file and support the issuance of the assessment; and advises the contractor and/or subcontractor that the materials will be made available.

Chapter 5 of the "Program Guidebook" (commencing at page 8) sets forth labor compliance program components. A description of the requirements prior to construction includes: advertising for the bid/construction contract, the pre-job conference, necessary payroll records, a program for the orderly review of payroll records and for audits, a prescribed routine for withholding penalties, forfeitures and underpayment of wages, a provision that contract payments will not be made when payroll records are delinquent or inadequate, maintaining a copy of the Public Works Contract Award Form (DAS 140) in the project file, and requiring proof of general liability and workers' compensation insurance as part of the permanent project file. Documentation required during construction include: certified payroll records being submitted at the times designated in the contract or within 10 days of any request by the awarding body, Statements of Employer Payment (PW26), payroll rate verifications, job site monitoring (including both workforce documentation and random onsite inspections), and close-out documentation

(including final payroll and final release of funds).

Chapter 6 sets forth specifics for labor compliance investigations:

1. The "LCP" must investigate worker complaints of underpayment of prevailing wage rates. The major components and tasks related to this responsibility are as follows:

(a) Gathering supporting documents from all available sources and analyzing them for authenticity.

(b) Conducting a complete certified payroll record and/or project audit. This includes reviewing the CPRs for errors, inconsistencies, discrepancies, falsification, misclassification, under-reporting, and any other omissions that render the records inaccurate when by comparing the inspector of records daily log with all available records.

2. On an as-needed basis according to the circumstances and issues that may arise:

(a) Calculating back wages and penalties.

(b) Reviewing findings with the contractor/subcontractor.

(c) Writing a complete summary of investigation with a statement of findings and recommended action for submission to the Department of Industrial Relations' Division of Labor Standards Enforcement for approval of withholdings.

(d) Conducting settlement negotiations.

(e) Testifying on behalf of the school district in appeal hearings and in litigation.

(f) Attending pre-bid and job-start meetings and monitor active construction projects.

(g) Interviewing workers to validate complaints.

Chapter 9 of the "Program Guidebook" (commencing at page 16) sets forth guidelines for audits, investigative and enforcement responsibilities. Audits can be conducted on a random or as-needed basis. Audits should be a comparison of certified payroll records to source documents such as front and back copies of canceled checks, time cards, copies of pay check stubs, payroll registers, personnel sign in sheets, daily logs and any other document which authenticates or corroborates that which has been reported. Investigative activities are the duties and tasks engaged in to verify the payment of prevailing wage rates upon receipt of a complaint or in conducting an audit of records. Before filing a Notice of Withholding of Contract Payments, an LCP must demonstrate that a thorough and objective investigation took place. Enforcement responsibility is the assessment of penalties and the withholding of back wages owed to workers. The Chapter also sets forth an outline of critical steps for document collection to be routinely applied in every prevailing wage violation case and particularly for those cases that lead to the filing of a Notice of Withholding of Contract Payments.

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Part III (Statement of the Claim), Section 1 (Costs Mandated by the State), (commencing at page 128) is amended and augmented as follows:

PART III. STATEMENT OF THE CLAIM

SECTION 1. COSTS MANDATED BY THE STATE

The Statutes, Labor and Public Contract Code Sections, ~~and~~ California Code of Regulations and Executive Orders referenced in this test claim result in school districts incurring costs mandated by the state, as defined in Government Code Section 17514[3], by creating new state-mandated duties related to the uniquely governmental function of providing public services and for public works.

The new duties mandated by the state upon school districts, county offices of education and community college districts require state reimbursement of the direct and indirect costs of labor, materials and supplies, data processing services and software, contracted services and consultants, equipment and capital assets, staff and student training and travel to implement the following activities:

1) No modification required.

2) No modification required.

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[3]Government Code Section 17514, added by Chapter 1459, Statutes of 1984, Section 1:

> " 'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

3) No modification required.

4) No modification required.

5) No modification required.

6) No modification required.

7) No modification required.

8) No modification required.

9) No modification required.

10) No modification required.

10.2 Pursuant to Labor Code Sections 1771.5 and 1771.7, paying the reasonable fees of a third party when contracting with that third party to initiate and enforce a Labor Compliance Program.

10.3) To oversee compliance with all of the requirements of Labor Code Sections 1771.5 and 1771.7 (for works commencing or after April 1, 2003), Title 8, California Code of Regulations, Section 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook" when contracting with a third party to initiate and enforce a Labor Compliance Program. This may include, but is not necessarily limited to, the withholding of contract payments and collecting and disbursing penalties and wages at the direction of the third party LCP.

10.4) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (a), when seeking approval of an LCP, submitting evidence of

its ability to operate its LCP and offering information on the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notices to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

10.5) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (b), completing a request for approval deemed by the Director to be deficient, or making other corrections as required, and resubmitting the request for approval of a Labor Compliance Program.

10.6) Pursuant to Title 8, California Code of Regulations, Section16426, subdivision (c), submitting a request for an extension of an LCP at least 30 days prior to the anniversary date of the initial approval.

10.7) Pursuant to Labor Code Section 1771.7, subdivision (d)(1), making a written finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5. Pursuant to subdivision (d)(2)(A), transmitting to the State Allocation Board, in the manner determined by that board, a copy of the finding that it has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5.

10.8) Pursuant to Labor Code Section 1771.7, subdivision (d)(3), for community colleges to transmit, in the manner determined by the Director of the Department of Industrial Relations, a copy of the finding that it has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5, to the director of that department, or the director of any successor agency that is responsible for the oversight of employee wage and employee work hours laws.

11) To comply with all of the requirements of a Labor Compliance Program when initiated and enforced by the district, pursuant to Labor Code

Sections 1771.5 or 1771.7 (for works commencing or after April 1, 2003), Title 8, California Code of Regulations, Sections 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook". These requirements include:

a) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of the prevailing wage laws comprising labor code sections 1720 through 1861;

b) A prejob conference shall be conducted with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract;

c) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury;

d) The district shall review, and, if appropriate, audit payroll records to verify compliance with prevailing wage laws. Pursuant to the "Program Guidebook", Chapter 4 Parts (A) and (B), these investigations shall be conducted by monitoring certified payroll records (CPRs), investigating complaints from workers, and monitoring agencies and contractors. Upon the conclusion of the audit, preparing audits and findings and obtaining the approval of recommended forfeitures from the labor commissioner.

e) The district shall withhold contract payments when payroll records are delinquent or inadequate; and

f) The district shall withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred. Pursuant to Chapter 3 of the "Program Guidebook", contract payments shall also be withheld when payroll records are delinquent or inadequate.

g Pursuant to Chapter 4 of the "Program Guidebook", serving on the contractor, any affected subcontractor, and any bonding company issuing a bond securing the payment of wages, a Notice of Withholding of Contract Payments (NWCR) using the form attached in the Guidebook in Appendix 2.

h) Pursuant to Chapter 4 of the "Program Guidebook", mailing a notice to the DIR on a form titled Notice of Transmittal as found in Appendix 3 in the Guidebook.

i) Pursuant to Chapter 4 of the "Program Guidebook", when a party requests review, mailing a form entitled "Notice of Opportunity to Review Evidence" as found in Appendix 4, in the Guidebook.

12) To provide contractors and subcontractors, bonding companies and sureties with Notice of Withholding of Contract Payments, using the form found in Appendix 2 of the "Program Guidebook", when minimum wage law

violations are discovered by the district, pursuant to Labor Code Section 1771.6 and Title 8, California Code of Regulations, Section 17220. The notice shall be in writing and include the following information:

a) A description of the nature of the violation and basis for the notice.

b) The amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code Section 1742.1 using the form attached to the "Program Guidebook" as Appendix 4.

c) The name and address of the office to whom a Request for Review may be sent.

d) Information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments.

e) Notice of Opportunity to request a settlement meeting under Section 17221.

f) A statement appearing in bold or another type of face, that makes it stand out from other text, to the effect that failure to submit a timely request for review will result in a final order binding on the

contractor and subcontractor, and on the bonding company.

Completing and mailing a Notice of Transmittal, as found in Appendix 3 of the "Program Guidebook", to the DIR to begin the administrative review process.

12.1) Pursuant to Chapter 4, paragraph iv(D) of the "Program Guidebook" and Labor Code Sections 1742 and 1743, defending Notices to Withhold Contract Payments in administrative review proceedings and in court.

12.2) Pursuant to Chapter 6 of the "Program Guidebook", when investigating worker complaints of underpayment of prevailing wage rates:

(a) Gathering supporting documents from all available sources and analyzing them for authenticity.

(b) Conducting a complete certified payroll record and/or project audit. This includes reviewing the CPRs for errors, inconsistencies, discrepancies, falsification, misclassification, under-reporting, and any other omissions that render the records inaccurate where needed by comparing the inspector of records daily log with all available records.

12.3 Pursuant to Chapter 6 of the "Program Guidebook", conducting investigations on an as-needed basis by:

(a) Calculating back wages and penalties.

(b) Reviewing findings with the contractor/subcontractor.

(c) Writing a complete summary of the investigation with a statement of

findings and recommended action for submission to the Department of Industrial Relations' Division of Labor Standards Enforcement for approval of withholdings.

(d) Conducting settlement negotiations.

(e) Testifying on behalf of the school district in appeal hearings and in litigation.

(f) Attending pre-bid and job-start meetings and monitoring active construction projects.

(g) Interviewing workers to validate complaints.

12.4) Pursuant to Chapter 9 of the "Program Guidebook", conducting audits on a random or as-needed basis to include: comparing certified payroll records to source documents such as front and back copies of canceled checks, time cards, copies of pay check stubs, payroll registers, personnel sign in sheets, daily logs and any other document which authenticates or corroborates that which has been reported.

12.5) Pursuant to Chapter 9 of the "Program Guidebook", preparing cases and documentation to include:

(a) Copies of workers' complaints;

(b) Copies of all correspondence to the contractor;

(c) Certified payroll records;

(d) Inspector's daily log;

(e) Correct prevailing wage determination and applicable increases;

(f) Scope of work for trade classifications used;

(g) Tabulation of bids;

(h) Notice to proceed;

(i) Notice of Completion (if applicable);

(j) Surety company information;

(k) Contractor's previous record of violations (if applicable);

(l) The Notice of Withholding of Contract Payments (if applicable);

(m) Release of Notice of Withholding of Contract Payments (if applicable); and

(o) Memo(s) to file

12.6) Subdivision (d)(2)(C) of Labor Code of Section 1771.7 provides that the State Allocation Board may conduct a postaward audit procedure with respect to an award of funds to a school district. Pursuant to Section 3.9 of the Audit Guide, in the event of such an audit, submitting:

(1) A copy of the Department of Industrial Relations approved Labor Compliance Program to which the project(s) conformed.

(2) If applicable, a copy of the third party provider contract.

Pursuant to Section 3.9, at the time of an OPSC audit, districts must also be prepared to submit, upon request, the following:

(1) All bid invitations and contracts that must contain language alluding

to Labor Code Sections 1770 through 1780 compliance and verification.

(2) Evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set forth in Labor Code Sections 1770 through 1780.

(3) Evidence of weekly submittals of certified copies of payrolls for all contractors and subcontractors.

Pursuant to Section 3.9, if a district elects to use its own employees for its LCP, it must also provide the following:

(1) The name of the district employee performing the Labor Compliance Program duties.

(2) The salary and benefits of the employee including transportation costs.

(3) A specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

13) No modification required.

14) No modification required.

15) No modification required.

16) No modification required.

17) No modification required.

18) No modification required.

19) No modification required.

20) No modification required.

21) No modification required.

Part III (Statement of the Claim), Section 3 (Funding Provided for the Mandated Program), is amended to add the following allegations:

Subdivision (e) of new Labor Code Section 1771.7 provides that, notwithstanding Section 17070.63 of the Education Code, for purposes of the act, the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of a labor compliance program. To the extent that funds are appropriated, allocated and received, and relevant to the costs mandated by the state subject to reimbursement, they would reduce the amount of reimbursable costs occasioned by Section 1771.7 and the Executive Orders cited herein.

Part IV (Additional Claim Requirements) is amended as follows:

PART IV. ADDITIONAL CLAIM REQUIREMENTS

The following elements of this claim are provided pursuant to Section 1183, Title 2, California Code of Regulations:

Exhibit 1: No modification required

Exhibit 2: No modification required

Exhibit 3: No modification required

Exhibit 4: No modification required

Exhibit 5: No modification required

Exhibit 6: Second Declaration of William McGuire

Exhibit 7: Second Declaration of Thomas J. Donner

Exhibit 8: Copy of Additional Statute Cited
Chapter 868, Statutes of 2002

Exhibit 9: Copy of Additional Code Section Cited
Labor Code Section 1771.7

Exhibit 10: School Facility Program
Substantial Progress and Expenditure
Audit Guide May 2003
Prepared by the Office of
Public School Construction

Exhibit 11: AB 1506 Labor Compliance Program Guidebook - February 2003
Prepared by the Division of Labor Standards Enforcement

Exhibit 12: Antioch Unified School District
Labor Compliance Program - January 17, 2003

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PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on July 21, 2003, at Clovis, California by:

William McGuire
Associate Superintendent
Clovis Unified School District

Voice: (559) 327-9115
Fax: (559) 327-9059

PART VI. APPOINTMENT OF REPRESENTATIVE

Clovis Unified School District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.

William McGuire
Associate Superintendent

7/24/2003
Date

EXHIBIT 6
SECOND DECLARATION OF WILLIAM McGUIRE

SECOND DECLARATION OF WILLIAM McGUIRE

Clovis Unified School District

First Amendment to
Test Claim of Clovis Unified School District

COSM No. _____

Chapter 868, Statutes of 2002
Chapter 938, Statutes of 2001
Chapter 804, Statutes of 2001
Chapter 954, Statutes of 2000
Chapter 920, Statutes of 2000
Chapter 881, Statutes of 2000
Chapter 875, Statutes of 2000
Chapter 135, Statutes of 2000
Chapter 903, Statutes of 1999
Chapter 220, Statutes of 1999
Chapter 83, Statutes of 1999
Chapter 30, Statutes of 1999
Chapter 485, Statutes of 1998
Chapter 443, Statutes of 1998
Chapter 757, Statutes of 1997
Chapter 17, Statutes of 1997
Chapter 589, Statutes of 1993
Chapter 1342, Statutes of 1992
Chapter 913, Statutes of 1992
Chapter 1224, Statutes of 1989
Chapter 278, Statutes of 1989
Chapter 160, Statutes of 1988
Chapter 1054, Statutes of 1983
Chapter 681, Statutes of 1983
Chapter 449, Statutes of 1981
Chapter 992, Statutes of 1980
Chapter 962, Statutes of 1980
Chapter 373, Statutes of 1979
Chapter 1249, Statutes of 1978
Chapter 423, Statutes of 1977
Chapter 1179, Statutes of 1976
Chapter 1174, Statutes of 1976
Chapter 861, Statutes of 1976
Chapter 599, Statutes of 1976
Chapter 538, Statutes of 1976
Chapter 281, Statutes of 1976

Labor Code Section 1720
Labor Code Section 1720.2
Labor Code Section 1720.3
Labor Code Section 1726
Labor Code Section 1727
Labor Code Section 1733
Labor Code Section 1735
Labor Code Section 1741
Labor Code Section 1742
Labor Code Section 1742.1
Labor Code Section 1743
Labor Code Section 1750
Labor Code Section 1770
Labor Code Section 1771
Labor Code Section 1771.5
Labor Code Section 1771.6
Labor Code Section 1771.7
Labor Code Section 1772
Labor Code Section 1773
Labor Code Section 1773.1
Labor Code Section 1773.2
Labor Code Section 1773.3
Labor Code Section 1773.5
Labor Code Section 1773.6
Labor Code Section 1775
Labor Code Section 1776
Labor Code Section 1777.1
Labor Code Section 1777.5
Labor Code Section 1777.6
Labor Code Section 1777.7
Labor Code Section 1812
Labor Code Section 1813
Labor Code Section 1861

Public Contract Code Section 22002

Title 8, California Code of Regulations
Section 16000
Sections 16001 through 16003
Sections 16100 through 16102
Sections 16200 through 16206
Sections 16300 through 16304
Sections 16400 through 16403
Sections 16410 through 16414
Section 16425
Sections 16426 through 16428
Sections 16429 through 16432
Sections 16433
Sections 16434 through 16439
Section 16500
Sections 16800 through 16802
Sections 17201 through 17212
Sections 17220 through 17229
Sections 17230 through 17237
Sections 17240 through 17253
Sections 17260 through 17264

First Amendment To
Prevailing Wage Rates

I, William McGuire, Associate Superintendent, Business Services, Clovis Unified School District, refer to my declaration (submitted as Bill McGuire) dated June 24, 2002 filed with test claim 01-TC-28, and incorporate it herein by reference. In addition, I make the following second declaration and statement.

In my capacity as Associate Superintendent Business Services, I am responsible for the award and implementation of public works contracts. I am familiar with the provisions and requirements of the Labor and Public Contract Code Sections and the Title 8 California Code of Regulations enumerated above. I am also familiar with the provisions and requirements of the following three new executive orders:

School Facility Program
Substantial Progress and Expenditure
Audit Guide May 2003
Prepared by the Office of
Public School Construction

AB 1506 Labor Compliance Program Guidebook - February 2003
Prepared by the Division of Labor Standards Enforcement

Antioch Unified School District
Labor Compliance Program - January 17, 2003

These new statutes, code sections and executive orders require the Clovis Unified School District to:

A) Pursuant to Labor Code Sections 1771.5 and 1771.7, paying the reasonable fees of a third party when contracting with that third party to initiate and enforce a Labor Compliance Program.

B) To oversee compliance with all of the requirements of Labor Code Sections 1771.5 and 1771.7 (for works commencing or after April 1, 2003), Title 8, California Code of Regulations, Section 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook" when contracting with a third party to initiate and enforce a Labor Compliance Program. This may include, but is not necessarily limited to, the withholding of contract payments and collecting and disbursing penalties and wages at the direction of the third party LCP.

C) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (a), when seeking approval of an LCP, submitting evidence of the district's ability to operate an LCP.

D) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (b), completing a request for approval deemed by the Director to be deficient, or making other corrections as required, and resubmitting the request for approval

of a Labor Compliance Program.

E) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (c), submitting a request for an extension of an LCP at least 30 days prior to the anniversary date of the initial approval.

F) Pursuant to Labor Code Section 1771.7, subdivision (d)(1), making a written finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5.

G) Pursuant to Labor Code Section 1771.7, subdivision (d)(2)(A), transmitting to the State Allocation Board, in the manner determined by that board, a copy of the finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5.

H) (Intentionally Omitted)

I) Pursuant to Labor Code Section 1771.7 (for works commencing on or after April 1, 2003), Title 8, California Code of Regulations, Section 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook", complying with all of the requirements of a Labor Compliance Program, when initiated and enforced by the district.

J) Pursuant to the "Program Guidebook", Chapter 4 Parts (A) and (B), reviewing and, if appropriate, auditing payroll records to verify compliance with prevailing

wage laws by monitoring certified payroll records (CPRs), investigating complaints from workers, and monitoring agencies and contractors. Upon the conclusion of the audit, preparing audits and findings and obtaining the approval of recommended forfeitures from the labor commissioner.

K) Pursuant to the "Program Guidebook", Chapter 3, withholding contract payments when payroll records are delinquent or inadequate; and withholding contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred.

L) Pursuant to Chapter 4 of the "Program Guidebook", serving on the contractor, any affected subcontractor, and any bonding company issuing a bond securing the payment of wages, a Notice of Withholding of Contract Payments (NWCR) using the form attached in the Guidebook as Appendix 2.

M) Pursuant to Chapter 4 of the "Program Guidebook", when mailing an NWCR, also mailing a notice to the DIR on a form titled Notice of Transmittal as found in the Guidebook as Appendix 3.

N) Pursuant to Chapter 4 of the "Program Guidebook", when a party requests a review after receiving an NWCR, mailing a form entitled "Notice of Opportunity to Review Evidence" as found in the Guidebook as Appendix 4.

O) Pursuant to Chapter 4, paragraph iv (D) of the "Program Guidebook", defending Notices to withhold Contract Payments in administrative review proceedings and in court.

P) Pursuant to Chapter 6 of the "Program Guidebook", investigating worker complaints of underpayment of prevailing wage rates.

Q) Pursuant to Chapter 6 of the "Program Guidebook", conducting investigations on an as-needed basis.

R) Pursuant to Chapter 9 of the "Program Guidebook", conducting audits on a random or as-needed basis.

S) Pursuant to Chapter 9 of the "Program Guidebook", preparing cases and documenting files.

T) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, submitting a copy of the Department of Industrial Relations approved Labor Compliance Program to which the project(s) conformed or, if applicable, a copy of the third party provider contract.

U) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, upon request, submitting all bid invitations and contracts that must contain language alluding to Labor Code Sections 1770 through 1780 compliance and verification; evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set forth in Labor Code Sections 1770 through 1780; and evidence of weekly submittals of certified copies of payrolls for all contractors and subcontractors.

V) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, when a district uses its own employees for an LCP, providing the name of the

district employee(s) performing the Labor Compliance Program duties; the salary and benefits of the employee, including transportation costs, and a specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

To the extent that Clovis Unified School District commences a public works project subject to Labor Code Section 1771.7, it is estimated that Clovis Unified School District will incur in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and, where so stated, I declare that I believe them to be true.

EXECUTED this 21 day of July, 2003, at Clovis, California.

William McGuire
Associate Superintendent, Business Services
Clovis Unified School District

EXHIBIT 7
SECOND DECLARATION OF THOMAS J. DONNER

SECOND DECLARATION OF THOMAS J. DONNER

SANTA MONICA COMMUNITY COLLEGE DISTRICT

First Amendment to
Test Claim of Clovis Unified School District

COSM No. _____

Chapter 868, Statutes of 2002
Chapter 938, Statutes of 2001
Chapter 804, Statutes of 2001
Chapter 954, Statutes of 2000
Chapter 920, Statutes of 2000
Chapter 881, Statutes of 2000
Chapter 875, Statutes of 2000
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Labor Code Section 1777.1
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Labor Code Section 1777.7
Labor Code Section 1812
Labor Code Section 1813
Labor Code Section 1861

Public Contract Code Section 22002

Title 8, California Code of Regulations
Section 16000
Sections 16001 through 16003
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Sections 16200 through 16206
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Sections 16434 through 16439
Section 16500
Sections 16800 through 16802
Sections 17201 through 17212
Sections 17220 through 17229
Sections 17230 through 17237
Sections 17240 through 17253
Sections 17260 through 17264

First Amendment To
Prevailing Wage Rates

I, Thomas J. Donner, Executive Vice President, Business and Administration, Santa Monica Community College District, refer to my declaration dated June 24, 2002 filed with test claim 01-TC-28, and incorporate it herein by reference. In addition, I make the following second declaration and statement.

In my capacity as Executive Vice President, Business and Administration, I am responsible for the award and implementation of public works contracts. I am familiar with the provisions and requirements of the Labor and Public Contract Code Sections and the Title 8 California Code of Regulations enumerated above. I am also familiar with the provisions and requirements of the following three new executive orders:

School Facility Program
Substantial Progress and Expenditure
Audit Guide May 2003
Prepared by the Office of
Public School Construction

AB 1506 Labor Compliance Program Guidebook - February 2003
Prepared by the Division of Labor Standards Enforcement

Antioch Unified School District
Labor Compliance Program - January 17, 2003

These new statutes, code sections and executive orders require the Santa Monica Community College District to:

A) Pursuant to Labor Code Sections 1771.5 and 1771.7, paying the reasonable fees of a third party when contracting with that third party to initiate and enforce a Labor Compliance Program.

B) To oversee compliance with all of the requirements of Labor Code Sections 1771.5 and 1771.7 (for works commencing or after April 1, 2003), Title 8, California Code of Regulations, Section 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook" when contracting with a third party to initiate and enforce a Labor Compliance Program. This may include, but is not necessarily limited to, the withholding of contract payments and collecting and disbursing penalties and wages at the direction of the third party LCP.

C) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (a), when seeking approval of an LCP, submitting evidence of the district's ability to operate an LCP.

D) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (b), completing a request for approval deemed by the Director to be deficient, or making other corrections as required, and resubmitting the request for approval

of a Labor Compliance Program.

E) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (c), submitting a request for an extension of an LCP at least 30 days prior to the anniversary date of the initial approval.

F) Pursuant to Labor Code Section 1771.7, subdivision (d)(1), making a written finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5.

G) Pursuant to Labor Code Section 1771.7, subdivision (d)(2)(A), transmitting to the State Allocation Board, in the manner determined by that board, a copy of the finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5.

H) Pursuant to Labor Code Section 1771.7, subdivision (d)(3), for community college districts to additionally transmit to, and in the manner determined by, the Director of the Department of Industrial Relations, a copy of the finding that it has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5.

I) Pursuant to Labor Code Section 1771.7 (for works commencing on or after April 1, 2003), Title 8, California Code of Regulations, Section 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook", complying with all of the

requirements of a Labor Compliance Program, when initiated and enforced by the district.

J) Pursuant to the "Program Guidebook", Chapter 4 Parts (A) and (B), reviewing and, if appropriate, auditing payroll records to verify compliance with prevailing wage laws by monitoring certified payroll records (CPRs), investigating complaints from workers, and monitoring agencies and contractors. Upon the conclusion of the audit, preparing audits and findings and obtaining the approval of recommended forfeitures from the labor commissioner.

K) Pursuant to the "Program Guidebook", Chapter 3, withholding contract payments when payroll records are delinquent or inadequate; and withholding contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred.

L) Pursuant to Chapter 4 of the "Program Guidebook", serving on the contractor, any affected subcontractor, and any bonding company issuing a bond securing the payment of wages, a Notice of Withholding of Contract Payments (NWCR) using the form attached in the Guidebook as Appendix 2.

M) Pursuant to Chapter 4 of the "Program Guidebook", when mailing an NWCR, also mailing a notice to the DIR on a form titled Notice of Transmittal as found in the Guidebook as Appendix 3.

N) Pursuant to Chapter 4 of the "Program Guidebook", when a party requests a review after receiving an NWCR, mailing a form entitled "Notice of Opportunity to

Review Evidence" as found in the Guidebook as Appendix 4.

O) Pursuant to Chapter 4, paragraph iv (D) of the "Program Guidebook", defending Notices to withhold Contract Payments in administrative review proceedings and in court.

P) Pursuant to Chapter 6 of the "Program Guidebook", investigating worker complaints of underpayment of prevailing wage rates.

Q) Pursuant to Chapter 6 of the "Program Guidebook", conducting investigations on an as-needed basis.

R) Pursuant to Chapter 9 of the "Program Guidebook", conducting audits on a random or as-needed basis.

S) Pursuant to Chapter 9 of the "Program Guidebook", preparing cases and documenting files.

T) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, submitting a copy of the Department of Industrial Relations approved Labor Compliance Program to which the project(s) conformed or, if applicable, a copy of the third party provider contract.

U) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, upon request, submitting all bid invitations and contracts that must contain language alluding to Labor Code Sections 1770 through 1780 compliance and verification; evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as

set forth in Labor Code Sections 1770 through 1780; and evidence of weekly submittals of certified copies of payrolls for all contractors and subcontractors.

V) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, when a district uses its own employees for an LCP, providing the name of the district employee(s) performing the Labor Compliance Program duties; the salary and benefits of the employee, including transportation costs, and a specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

To the extent that Santa Monica Community College District commences a public works project subject to Labor Code Section 1771.7, it is estimated that the district will incur, in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and, where so stated, I declare that I believe them to be true.

EXECUTED this 23 day of July, 2003, at Santa Monica, California.

Thomas J. Donner
Executive Vice President Business and Administration
Santa Monica Community College District

EXHIBIT 8
COPY OF ADDITIONAL STATUTE CITED
CHAPTER 868, STAUTES OF 2002

SCHOOLS AND SCHOOL DISTRICTS—PUBLIC WORKS PROJECTS—WAGES

CHAPTER 868

A.B. No. 1506

AN ACT to add Section 1771.7 to the Labor Code, relating to public works.

[Filed with Secretary of State September 26, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1506, Wesson. Public works.

Existing law generally requires the payment of the general prevailing rate of per diem wages for public works projects costing over $1,000, unless the awarding body elects to initiate and enforce a labor compliance program, as defined, for every public works project under the authority of that awarding body.

This bill would require an awarding body that chooses to use funds from either the Kindergarten–University Public Education Facilities Bond Act of 2002 or the Kindergarten–University Public Education Facilities Bond Act of 2004 for a public works project to initiate and enforce, or contract with a 3rd party to initiate and enforce, a labor compliance program for that public works project. The bill would provide that the labor compliance law applies to a public works project that commences, as provided, on or after April 1, 2003.

This bill would also provide that, if any campus of the California State University chooses to use these funds and is required to implement a labor compliance program as provided, the "awarding body" for the purposes of this bill is the Chancellor of the California State University, in which case the Chancellor of the California State University would be required to review certain payroll records on at least a monthly basis, as provided. This bill would also require the review of similar payroll records on at least a monthly basis if any campus of the University of California is required to implement a labor compliance program under the bill. This bill would also require awarding bodies to make a written finding that the body has compiled with this bill, and require the State Allocation Board or the Director of the Department of Industrial Relations, as applicable, to verify that this written finding has been made.

This bill would not become operative unless either the Kindergarten–University Public Education Facilities Bond Act of 2002 or the Kindergarten–University Public Education Facilities Bond Act of 2004 is approved by the voters.

This bill would also state legislative findings and declarations regarding the bill's intent.

The people of the State of California do enact as follows:

SECTION 1. In enacting this act, the Legislature finds and declares all of the following:

(a) Payment of the prevailing rate of per diem wages to workers employed on public works is necessary to attract the most skilled workers for the project and to ensure that work of the highest quality is performed on these projects.

(b) Public works projects should never undermine the wage base in a community and requiring that workers on public works projects be paid the prevailing rate of per diem wages ensures that the wage base is not lowered.

(c) It is a matter of statewide concern that every school district in California pay the prevailing rate of per diem wages to workers employed on public works undertaken by those school districts.

(d) Therefore, it is the intent of the Legislature in enacting this act that every school district in California pay the prevailing rate of per diem wages to workers employed on public works undertaken by these school districts.

(e) It is the further intent of the Legislature to preserve the constitutional autonomy of the University of California, as described in Section 9 of Article IX of the California Constitution, by providing that this act apply to that university only to the extent that the university chooses to use the funds described in this act.

SEC. 2. Section 1771.7 is added to the Labor Code, to read:

1771.7. (a) An awarding body that chooses to use funds derived from either the Kindergarten–University Public Education Facilities Bond Act of 2002 or the Kindergarten–University Public Education Facilities Bond Act of 2004 for a public works project, shall initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program, as described in subdivision (b) of Section 1771.5, with respect to that public works project.

(b) This section shall apply to public works that commence on or after April 1, 2003. For purposes of this subdivision, work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work, does not constitute the commencement of a public work.

(c)(1) For purposes of this section, if any campus of the California State University chooses to use the funds described in subdivision (a), then the "awarding body" is the Chancellor of the California State University. For purposes of this subdivision, if the chancellor is required by subdivision (a) to initiate and enforce, or to contract with a third party to initiate and enforce, the labor compliance program described in that subdivision, then in addition to the requirements imposed upon an awarding body by subdivision (b) of Section 1771.5, the Chancellor of the California State University shall review the payroll records described in paragraphs (3) and (4) of subdivision (b) of Section 1771.5 on at least a monthly basis to ensure the awarding body's compliance with the labor compliance program.

(2) For purposes of this subdivision, if an awarding body described in subdivision (a) is the University of California or any campus of that university, and that awarding body is required by subdivision (a) to initiate and enforce, or to contract with a third party to initiate and enforce, the labor compliance program described in that subdivision, then in addition to the requirements imposed upon an awarding body by subdivision (b) of Section 1771.5, the payroll records described in paragraphs (3) and (4) of subdivision (b) of Section 1771.5 shall be reviewed on at least a monthly basis to ensure the awarding body's compliance with the labor compliance program.

(d)(1) An awarding body described in subdivision (a) shall make a written finding that the awarding body has initiated and enforced, or has contracted with a third party to initiate and enforce, the labor compliance program described in subdivision (a).

(2)(A) If an awarding body described in subdivision (a) is a school district, the governing body of that district shall transmit to the State Allocation Board, in the manner determined by that board, a copy of the finding described in paragraph (1).

(B) The State Allocation Board may not release the funds described in subdivision (a) to an awarding body that is a school district until the State Allocation Board has received the written finding described in paragraph (1).

(C) If the State Allocation Board conducts a postaward audit procedure with respect to an award of the funds described in subdivision (a) to an awarding body that is a school district, the State Allocation Board shall verify, in the manner determined by that board, that the school district has complied with the requirements of this subdivision.

(3) If an awarding body described in subdivision (a) is a community college district, the Chancellor of the California State University, or the office of the President of the University of California or any campus of the University of California, that awarding body shall transmit, in the manner determined by the Director of the Department of Industrial Relations, a copy of the finding described in paragraph (1) to the director of that department, or the director of any successor agency that is responsible for the oversight of employee wage and employee work hours laws.

(e) Notwithstanding Section 17070.63 of the Education Code, for purposes of this act, the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the labor compliance program.

SEC. 3. This act shall not become operative unless at least one of the following conditions is met:

(a) The Kindergarten–University Public Education Facilities Bond Act of 2002 is approved by the voters at the November 5, 2002, statewide general election.

(b) The Kindergarten–University Public Education Facilities Bond Act of 2004 is approved by the voters at the March 2004, statewide direct primary election.

(c) The Kindergarten–University Public Education Facilities Bond Act of 2004 is approved by the voters at the November 2004, statewide general election.

EXHIBIT 9
ADDITIONAL CODE SECTION CITED
LABOR CODE SECTION 1771.7

§ 1771.7. **Awarding body choosing to use funds derived from Kindergarten–University Public Education Facilities Bond Act for public works project; initiating and enforcing labor compliance program**

Section operative dependent on passage of Kindergarten–University Public Education Facilities Bond Act of 2002 (general election), of 2004 (primary election), or of 2004 (general election) pursuant to § 3 of Stats.2002, c. 868 (A.B.1506); see preface for election results (for electronic publications, see General Materials).

(a) An awarding body that chooses to use funds derived from either the Kindergarten–University Public Education Facilities Bond Act of 2002[1] or the Kindergarten–University Public Education Facilities Bond Act of 2004[2] for a public works project, shall initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program, as described in subdivision (b) of Section 1771.5, with

(b) This section shall apply to public works that commence on or after April 1, 2003. For purposes of this subdivision, work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work, does not constitute the commencement of a public work.

(c)(1) For purposes of this section, if any campus of the California State University chooses to use the funds described in subdivision (a), then the "awarding body" is the Chancellor of the California State University. For purposes of this subdivision, if the chancellor is required by subdivision (a) to initiate and enforce, or to contract with a third party to initiate and enforce, the labor compliance program described in that subdivision, then in addition to the requirements imposed upon an awarding body by subdivision (b) of Section 1771.5, the Chancellor of the California State University shall review the payroll records described in paragraphs (3) and (4) of subdivision (b) of Section 1771.5 on at least a monthly basis to ensure the awarding body's compliance with the labor compliance program.

(2) For purposes of this subdivision, if an awarding body described in subdivision (a) is the University of California or any campus of that university, and that awarding body is required by subdivision (a) to initiate and enforce, or to contract with a third party to initiate and enforce, the labor compliance program described in that subdivision, then in addition to the requirements imposed upon an awarding body by subdivision (b) of Section 1771.5, the payroll records described in paragraphs (3) and (4) of subdivision (b) of Section 1771.5 shall be reviewed on at least a monthly basis to ensure the awarding body's compliance with the labor compliance program.

(d)(1) An awarding body described in subdivision (a) shall make a written finding that the awarding body has initiated and enforced, or has contracted with a third party to initiate and enforce, the labor compliance program described in subdivision (a).

(2)(A) If an awarding body described in subdivision (a) is a school district, the governing body of that district shall transmit to the State Allocation Board, in the manner determined by that board, a copy of the finding described in paragraph (1).

(B) The State Allocation Board may not release the funds described in subdivision (a) to an awarding body that is a school district until the State Allocation Board has received the written finding described in paragraph (1).

(C) If the State Allocation Board conducts a postaward audit procedure with respect to an award of the funds described in subdivision (a) to an awarding body that is a school district, the State Allocation Board shall verify, in the manner determined by that board, that the school district has complied with the requirements of this subdivision.

(3) If an awarding body described in subdivision (a) is a community college district, the Chancellor of the California State University, or the office of the President of the University of California or any campus of the University of California, that awarding body shall transmit, in the manner determined by the Director of the Department of Industrial Relations, a copy of the finding described in paragraph (1) to the director of that department, or the director of any successor agency that is responsible for the oversight of employee wage and employee work hours laws.

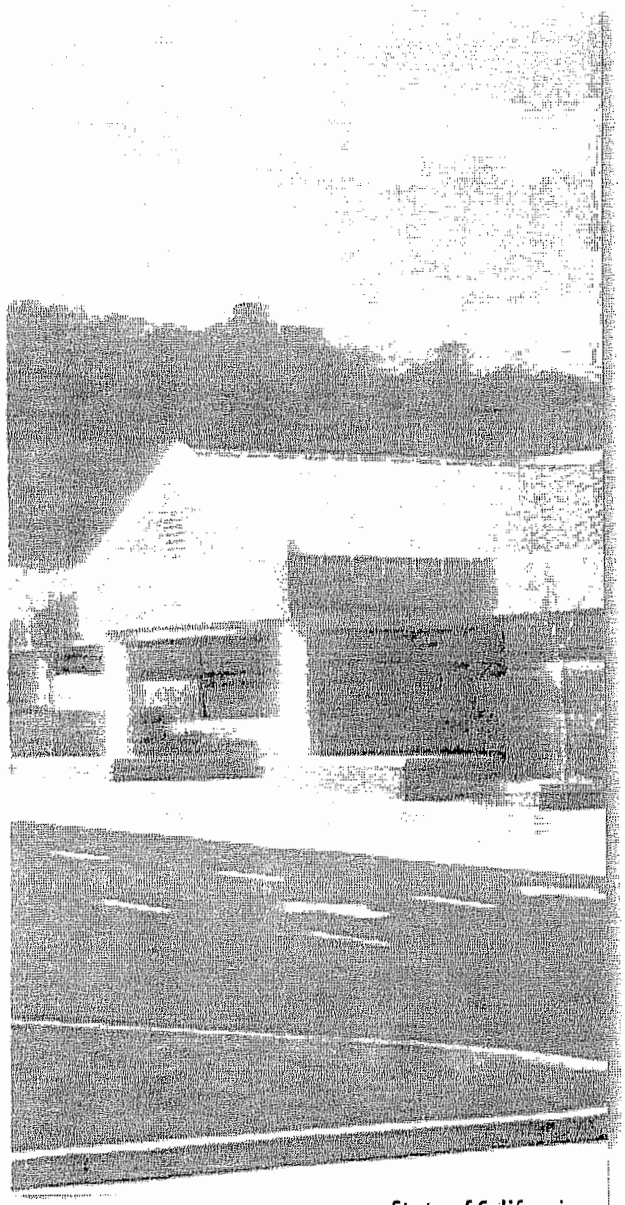
(e) Notwithstanding Section 17070.63 of the Education Code, for purposes of this act, the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the labor compliance program.

(Added by Stats.2002, c. 868 (A.B.1506), § 2.)

1 Education Code § 100600 et seq.

2 Education Code § 100800 et seq.

EXHIBIT 10
SCHOOL FACILITY PROGRAM
AUDIT GUIDE - MAY 2003



School Facility Program

Substantial Progress and Expenditure Audit Guide

May 2003

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Section 1 Reporting Requirements and SFP Audit Overview

1.1 OVERVIEW

These progress and expenditure reporting guidelines were developed by the Office of Public School Construction (OPSC) to assist school districts in meeting program reporting requirements for the School Facilities Program (SFP). Under the Leroy F. Greene School Facilities Act of 1998, the State Allocation Board (SAB) is given the authority to audit expenditure reports and district records in order to assure funds received under this act are expended in accordance with program requirements (as specified in Education Code 17076.10). The OPSC, as the SAB's administrative arm, is charged with conducting SFP progress and expenditure audits. The OPSC's oversight responsibilities focus on verifying a project funded through the SFP progresses in a timely manner, applicable state laws were followed, and expenditures made by school districts comply with the Education Code Sections 17072.35 and 17074.25 and Regulation Sections 1859.77.2 (New Construction) and 1859.79.2 (Modernization).

School districts are advised they will be required to submit two types of reports after receiving SFP funds: a Substantial Progress Checklist (SPC) and Expenditure Reports (Regulation Section 1859.104). It should be noted that certain projects may require evidence of progress at more than one point in the project's life cycle. This occurs when a project receives separate design and/or separate site funding prior to receiving full project funding. Each phase of funding generates a separate requirement to submit evidence of progress within 18 months from the date the related funds were released (Environmental Hardship funding requires evidence within 12 months of the State apportionment). An *Expenditure Report* (Form SAB 50-06) and Detailed Listing of Project Expenditures are due one year from the date any funds were released to the district, or upon completion of the project, whichever occurs first. Subsequent expenditure reports are due annually until the project is complete, at which time the district shall submit a final expenditure report.

SFP Regulation Sections 1859.105, 1859.105.1 and 1859.106 specify that OPSC audit staff review substantial progress documentation and expenditure reports submitted by participating districts. All projects will be monitored by the audit staff for timely submittal of substantial progress and expenditure reports. When the SPC or Expenditure Report is submitted, a project will be audited to verify compliance with requirements set forth in Regulation Sections 1859.105 and 1859.106. Furthermore, all Environmental Hardship projects will be reviewed to assure the district has made progress in acquiring the site in accordance with Regulation Section 1859.105.1 (see Section 2.2 – Progress Review for more information).

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Section 2 Substantial Progress Audit

2.1 SUBSTANTIAL PROGRESS AUDIT REPORTING REQUIREMENTS

As stated in the preceding Overview, the specific type of substantial progress evidence required for a project and the timeline for submitting that evidence is determined by the phase of funding the project received. Certain projects may require evidence of progress at more than one point in their life cycle. This occurs when projects have received separate design or site monies prior to receiving full project (adjusted grant) funding. The specific requirements for each funding phase are summarized in the following table:

Substantial Progress Timelines and Required Evidence

Funding Phase	Due Date for Submitting Evidence of Progress	Specific Type(s) of Evidence Required
Separate Design (Financial Hardship project only)	18 months from date of Fund Release	One of the following: • Submittal of a complete adjusted Grant funding Application package (including Form SAB 50-04) to the Office of Public School Construction (OPSC). • Submittal of a district certification that complete plans and specifications have been submitted to the Division of the State Architect (DSA). • Submittal of a complete Separate Site funding application package (including Form SAB 50-04) to the OPSC (Regulation Section 1859.75.1). Or: • Submittal of a narrative of evidence, satisfactory to the State Allocation Board (SAB) detailing why complete plans have not been submitted to the DSA.
Separate Site (Financial Hardship project only)	18 months from date of Fund Release[1]	Submittal of a progress checklist (or narrative) certifying that all of the following have been achieved: • Obtained the final site appraisal. • Completed all California Environmental Quality Act (CEQA) requirements. • Obtained final California Department of Education (CDE) site approval. • Obtained final escrow instructions or evidence the district has filed condemnation proceedings and intends to request an order of possession of the site. Or: • Submittal of a narrative of evidence, satisfactory to the SAB, detailing the circumstances (beyond district control) that precluded progress from being achieved. (For separate site funding applications submitted after September 30, 2003)
Separate Site (Environmental Hardship project only)	12 months from the apportionment date, or anniversary of conversion from Separate Site Financial Hardship, and on each subsequent anniversary if necessary.	Submittal of one of the following: • A progress checklist (or narrative satisfying the same criteria set forth for Separate Site (Financial Hardship) funding. • A request for an extension (which is supported in written letters of concurrence from the Department of Toxic Substances Control and the CDE). • Other reasonable evidence of effort the district has made to acquire the site (Regulation Section 1859.75.1).
Adjusted Grant	18 months from the date of the Fund Release[2]	Submittal of a progress checklist (or narrative) certifying one of the following: • 75 percent of site development work necessary prior to construction is complete. • 90 percent of the work in the plans and specifications is under contract. • 50 percent of the work in the plans and specifications is complete (Regulation Section 1859.105(a). Or: • Submittal of a narrative of evidence, satisfactory to the SAB, detailing the circumstances (beyond district control) that precluded progress from being achieved.

[1] If toxic substance issues are delaying site preparation progress, the district may convert the site apportionment to an environmental hardship apportionment. Environmental hardship projects may request annual extensions with appropriate substantiation.

[2] The progress reporting requirement for adjusted grant funding can be suspended if one of the following occur before the reporting deadline:

The district submits a Notice of Completion for the project. If more than one construction contractor is involved in the project, a Notice of Completion is required for each construction contract.

The district submits an *Expenditure Report* (Form SAB 50-06), which shows that the project is at lease 90 percent complete.

If a district receives Separate Design, Separate Site, and Adjusted Grant apportionments, it will be required to submit evidence of progress for each of these types of funding. For each type, the school district will receive up to two substantial progress reminder letters. For all SFP apportionments, except Separate Site apportionments for Environmental Hardships, school districts will receive the letters at 12 and 15-month intervals after the related funds have been released. For Environmental Hardship projects, the OPSC will send the letters at 8 and 10-month intervals after funds have been apportioned. Each reminder letter will have an attached Substantial Progress Checklist (SPC).

Submitting a complete and acceptable SPC will fulfill the requirement to submit a narrative of evidence (progress report), as required in Regulation Section 1859.104.

Districts may submit a narrative in the form of a letter, but are encouraged to use the SPC to help insure completeness and accuracy. In cases where a funding application serves as evidence of progress, no narrative is required, but a SPC may still be submitted as a mechanism to alert the OPSC audit staff that the funding application has been submitted.

2.2 PROGRESS REVIEW

Within 60 days of receiving a timely SPC (or narrative), the OPSC is required to review the evidence submitted. The district will be notified if OPSC staff intends to recommend to the SAB that the evidence does not demonstrate substantial progress. If the OPSC does not respond to the district within the 60-day timeline, substantial progress will be considered to be approved. The OPSC may elect to perform an in-depth progress review on certain projects. In such cases, additional documentation will be requested to substantiate certifications made on an SPC (or narrative). The documentation that may be required is summarized in the following table:

Additional Substantial Progress Evidence for In-Depth Reviews

Type of Funding Received	Additional Documentation That May Be Requested
Separate Design (Financial Hardship)	• DSA notice of receipt of plans or printout of project tracking screen from the DSA website (in cases where the district has certified DSA submittal on the SPC).
Separate Site (Financial Hardship)	• Final site appraisal letters. • Documentation of CEQA compliance (State clearinghouse approval letter, Negative Declaration, Categorical Exemption, etc.). • Final escrow documents. • Copy of final CDE site approval letter.
Separate Site (Environmental Hardship)	• Same evidence requested for Separate Site Financial Hardship. • Copies of letters from CDE and DTSC confirming that the district is making reasonable progress towards acquiring a site.
Adjusted Grant	• Copies of construction contracts. • Copies of progress billings, certificate/application for payment with attached Continuation sheet. • Cost estimate.

2.3 SUBSTANTIAL PROGRESS AUDIT RESPONSE

If it has been determined through the Substantial Progress Audit that no substantial progress has been made, or the district has neglected to submit a progress report, the audit staff will take the following actions (per Regulation Section 1859.105):

- A letter will be sent to the district within 60 days of receipt of the district's SPC (or narrative), or within 60 days of the substantial progress deadline if no SPC has been received, informing the district that the SAB's substantial progress requirement has not been met.
- The letter will request final expenditure reports (Form SAB 50-06 and Detailed Listing of Project Expenditures) and supporting contracts, agreements, warrants, and invoices from the district. The request will stipulate that this documentation will be due within 60 days.

If the district has not failed substantial progress, but still wishes to close the project (i.e. rescind or reduce to costs incurred), it may request this in writing. The OPSC will respond with a letter requesting that the district submit the final expenditure reports and supporting invoices within 60 days.

When a finding of no substantial progress is made, and the district reports project expenditures within the specified 60 days, an expenditure audit will be performed and the project will be closed to costs incurred. If the district does not submit a final expenditure report within 60 days, but previously submitted a Form SAB 50-06 and Detailed Listing of Project Expenditures, the project will be closed to costs incurred based on the expenditure report(s) on file. If the district does not submit a final expenditure report within 60 days and no previous expenditure reports were filed, the project will be rescinded and all funds previously released to the district, plus any interest accrued on the State's funds, must be returned to the State (Regulation Section 1859.104(c)). The district must submit a warrant for any amount due within 60 days of the project being reduced to costs incurred, or the amount due will be collected through a school fund apportionment offset. Once the closeout and collection process is complete, the appropriate number of pupils will be added back to the district's baseline eligibility.

Rescinded projects will have the entire pupil count that was previously deducted and assigned to the project, returned to the district's baseline eligibility. When projects are reduced to costs incurred, the per pupil grants not utilized in the amount reported on the expenditure reports will be returned to the district's baseline eligibility. To determine the number of students to be returned to the district's baseline eligibility, the project's total grant amount (district and State share), excluding site acquisition costs, will be divided by the number of students applied towards the project to obtain a dollar amount applied to each student. The amount reported by the district on the expenditure reports, excluding costs funded from a site acquisition apportionment, will be divided by the dollar amount applied to each student to produce the number of students assigned to the project. The difference between the pupils originally assigned to the project less the number of students assigned to the eligible expenditures when the project is reduced to costs incurred is the number of pupils added back to the district's baseline eligibility. Please see example below:

Project Totals:

Total Grant Amount (district and State share): $208,000.00
Number of Pupils Assigned: 40
Total Reported on Expenditure Reports: $65,000.00

Calculations:

Total Grant Amount *divided by* Number of Pupils Assigned *equals* Grant Amount per Pupil:

$$\frac{\$208,000.00}{40 \text{ Pupils}} = \$5,200.00 \text{ per Pupil}$$

$$\frac{\$65,000.00}{\$5,200.00 \text{ per Pupil}} = 12.50 \text{ Pupils;}$$ however, pupils applied to a project must be rounded to the appropriate whole number (13 in this example).

40 – 13 = 27 Pupils added back to district's baseline eligibility

Section 3 Expenditure Audit

3.1 EXPENDITURE AUDIT REPORTING REQUIREMENTS – GENERAL

School districts are required to submit an *Expenditure Report* (Form SAB 50-06 and a Detailed Listing of Project Expenditures) one year after receiving the initial fund release for the project. Subsequent expenditure reports are due annually until the project is complete (Regulation Section 1859.104(a)).

Ten months after issuing a project's initial fund release, audit staff will notify the district in writing that an expenditure report is due and must be submitted within one year of the project's initial fund release date. If the district has not submitted an expenditure report within the one-year time period, the audit staff will notify the district it must submit a Form SAB 50-06 and Detailed Listing of Project Expenditures within 60 days. If the district does not submit the Form SAB 50-06 and Detailed Listing of Project Expenditures, the audit staff will prepare a board item to advise the SAB the district has not complied with Regulation Section 1859.104.

If the district has complied with the expenditure reporting requirements, the audit staff will track fund release dates and district expenditure report dates to determine when the project is ready for the Final Expenditure Audit. The project is placed on the expenditure audit workload list when it is complete. A project is ready for audit review when one of the following occurs:

- The final Form SAB 50-06 indicating 100% of the project is complete and the Detailed Listing of Project Expenditures are submitted by the district; or
- Three years for an elementary school (grades K–6) project, or four years for a middle school (grades 7–8) or high school (grades 9–12) project, have elapsed since the date of the final fund release pursuant to Regulation Section 1859.104(a)(1)(B).

The OPSC has two years from the 100 percent complete report submittal date, or three or four years (as applicable) after the final fund release date to commence the final expenditure audit. Once the district is notified an expenditure audit is started, the audit staff has six months to complete the audit, unless additional information requested from the district has not been received. If the audit staff does not begin the final expenditure audit within two years of receiving the final expenditure report, or if the final expenditure audit is not completed within six months from the date the district was notified, no expenditure audit will be performed and all expenditures reported shall be deemed appropriate (see Regulation Section 1859.106).

3.1.1 Expenditure Audit Reporting Requirements – Specific Guidelines

When a school district submits the required Form SAB 50-06 and a Detailed Listing of Project Expenditures, it is important for the district to have all information as correct and accurate as possible. Specifically, the Form SAB 50-06 should reflect the sum of the State's share of the grant, the district's share of the grant, any interest earned, less project expenditures. Project savings will be recognized if project expenditures are less than the State's share of the grant, plus district's share of the grant, plus interest earned, less total project expenditures (see Section 3.12 – Project Savings for more details on audit of project savings). If there are multiple Forms SAB 50-06 reported for a project, the most current Form SAB 50-06 must include all expenditures reported previously, plus expenditures incurred in the current reporting period.

The Detailed Listing of Project Expenditures should reflect all expenditures by warrant numbers, warrant dates, warrant payees, warrant amounts, and specific descriptions of the expenditures, as required on the Form SAB 50-06. The description of expenditures must be as detailed as possible in order for the audit staff to verify all project expenditures are applicable to the project and the expenditures have been applied to their proper cost categories. This will assist the audit staff to expedite the audit of the project.

3.2 PRELIMINARY EXPENDITURE AUDIT

All Expenditure Reports will be subject to an initial expenditure audit prior to 100 percent completion which consists of a review of the Form SAB 50-06 and Detailed Listing of Project Expenditures to assure:

- The form is filled out correctly (i.e. form signed by the district representative; correct application number).
- The "percent completed" box is filled in.
- There is a date construction actually began.
- The Notice of Completion of project is provided (if applicable).
- Each project cost reported includes the warrant date, vendor name, warrant number, warrant amount and a brief description for each expenditure.

If the *Expenditure Report* (Form SAB 50-06 and Detailed Listing of Project expenditures) are filled out correctly and reported expenditures appear to be eligible for State funding, the project will be tracked until 100 percent completion. If the expenditures reported do not agree with the supporting documentation or if the expenditures are considered ineligible, the audit staff may conduct a more thorough in-depth review of the project. The audit staff will notify the district if either the Form SAB 50-06 or Detailed Listing of Project Expenditures is unacceptable or incomplete.

3.3 EXPENDITURE AUDIT

An expenditure audit will be performed on all complete projects. The audit consists of verifying the amount reported on the Form SAB 50-06 and that it agrees with the expenditures reported on the Detailed Listing of Project Expenditures. A verification will be made of the amounts reported for the district's share, State's share, interest earned, etc. If the project attained any savings, interest reported for the project will be verified, through a certification made by the county office, to properly calculate the savings amount.

The Detailed Listing of Project Expenditures will be verified to assure costs are categorized correctly based on the description/purpose. The expenditures reported for each project category are compared to historic averages to identify possible problem areas. If the expenditures fall outside the expected parameters, additional documentation will be requested from the district to verify that the expenditures were not reported in error. The district will have thirty days to submit the requested documentation. If no documentation is submitted, or the documentation submitted does not explain the anomaly, the project may convert to an in-depth expenditure audit. If the submitted documentation is reviewed and the expenditures are found to be appropriate, there will be no audit adjustment (see Sections 3.10, 3.10.1, and 3.10.2 for more detail on eligible and ineligible SFP expenditures).

3.4 IN-DEPTH FINAL EXPENDITURE AUDIT

Some projects will be selected for an In-Depth Final Expenditure Audit, which consists of a more detailed examination of the expenditures reported on the Form SAB 50-06 and Detailed Listing of Project Expenditures, as well as verification of the certifications made by the district on the Forms SAB 50-04, 50-05, 50-07, 50-08, and 50-09. Districts that are unable to substantiate program certifications may be subject to material inaccuracy penalties prescribed in Regulation Section 1859.104.1. The project audit will be accomplished by requiring districts to submit documentation as appropriate, such as, but not limited to, specific warrants, contracts and/or agreements related to construction, inspection, construction tests, and architectural services, or other supporting documentation substantiating certifications made on the Forms SAB 50-04 and 50-05. The audit staff has the discretion to perform on-site Expenditure Audits and Post-Occupancy Audits in order to verify district's claims. See sections 3.10, 3.10.1 and 3.10.2 for more detail on eligible and ineligible SFP expenditures.

Modernization projects will be reviewed to assure modernization funds are not being used to increase the new building area except in the case of replacement area of like kind, or if required by the federal Americans with Disabilities Act (ADA), or by the DSA handicapped access requirements. Modernization projects will also be reviewed to assure modernization funds are not being used for site costs, with the exception of replacement, repair or additions to existing site development. Also, the audit review will establish that the removal of hazardous or solid waste costs, established by the DTSC, did not exceed 10 percent of the combined adjusted grant and the district matching share

for the project. If the modernization funding grant was used to modernize leased facilities, the audit review will verify that funds were used only for work on facilities owned by another school district or county office of education. 50-year-old modernization projects will be audited using the standards for regular modernization projects, with the exception that utility costs may be deemed allowable. Utility costs for water, sewage, gas, electric, and communication systems may be allowed as prescribed in Regulation Section 1859.78.7.

New Construction projects will be reviewed to ensure the number of classrooms in the project was not decreased. New Construction projects will also be reviewed to determine whether the district increased the number of classrooms by more than 150 percent of the original pupils assigned to the project. If the district spent beyond the total grant amount, the pupils above the 150 percent threshold will be reduced from the district's new construction eligibility baseline.

Post-occupancy reviews will be performed in conjunction with the Division of the State Architect and California Department of Education to verify the district performed the work as requested in the Application for Funding (Form SAB 50-04). For New Construction projects, the number of classrooms built will be compared to the number of classrooms requested on the Form SAB 50-04. If the project is a Use of Grants project, verification of the type of project constructed will be made, including identifying the use of any savings achieved on the project. For modernization projects, the architect's cost estimate will be reviewed and compared to the actual work done in the modernization of particular facilities.

In addition, the audit staff will verify the following specific certifications made by the district on the Forms SAB 50-04 and 50-05:

- The district's applicable matching share was deposited in the County School Facility Fund.
- The district deposited at least 3 percent of its unrestricted General Fund (of which an amount equal to ½ percent of this amount can be the district's contribution to its deferred maintenance fund) into the Routine Restricted Maintenance Account (Education Code Section 17070.75(b)).
- The district competitively bid the construction contracts.
- The district met all relevant Disabled Veteran Business Enterprise (DVBE) requirements.
- The district used the Qualifications Appraisal standards, as outlined in Government Contract, Code Section 4526, when contracting with the architect, engineers, site surveyors, etc.
- The State's prevailing wage requirements were met.
- The district complied with the State's Public Contract Code requirements governing Force Account labor.

3.5 IN-DEPTH FINAL EXPENDITURE AUDIT FOR SITE PURCHASES

New construction projects may be eligible for site acquisition funds under the SFP. For projects receiving funds for a site purchase, audit review will include the verification and examination of site expenditures and a determination if the site grant was appropriate and met provisions set forth in Regulation Sections 1859.74, 1859.74.1, and if applicable, 1859.74.2 and 1859.75.1. Projects initially approved under the LPP for planning and/or site and later converted to SFP projects will be audited using the SFP guidelines.

Districts will be eligible for approved hazardous material removal work and associated DTSC oversight fees up to 50 percent of the appraised as a clean site value of the property (see regulation section 1859.74.2, 1859.74.3, 1859.74.4, and 1859.75.1).

For all sites requiring DTSC review, the audit staff will obtain invoices from the district in order to verify the costs reported for the Response Action (RA). The Phase One Environmental Site Assessment and Preliminary Environmental Assessment costs are distinct from the RA costs, and are not considered part of the project's 50 percent "cap" established by the SAB for site cleanup. The expenditure audit may result in an increase/decrease of the additional grant amount for hazardous material removal, remediation costs, and DTSC oversight fees pursuant to Regulation Section 1859.106.

In order to verify compliance with the requirements of the Toxics Regulations and to assure all costs reported for this grant were indeed for hazardous waste removal, the audit staff will obtain invoices from the district for all costs reported for any Additional Grants for Hazardous Waste Removal. Additionally, for both Hazardous Waste Removal and Environmental Hardship Grants, the audit staff will verify that all fees and cleanup costs are related to the site for which the expenditures are being reviewed.

Relocation assistance expenditures will also be audited based on criteria set forth in Title 25, California Code of Regulations Section 6000, et seq. Additional documentation such as contracts, invoices, appraisal reports, court documents, legal contracts, legal billings, etc., will be requested from the district and a thorough review of these expenditures will be performed. The relocation expenditures are approvable if they are reasonable and necessary for purchasing fixtures and equipment, personal property, new machinery/equipment and the installation of improvements at the replacement residence or business location of the displaced tenants and/or property owners as stated in Regulation Section 1859.74(a)(1) (see Sections 3.10, 3.10.1, and 3.10.2 for more detail).

For projects which did not proceed to the adjusted grant phase within 18 months of the fund release date for Separate Site (12 months from the apportionment date for Environmental Hardship, unless time extensions were approved by the SAB), an item will be presented at the next available SAB meeting to advise the SAB the district did not request an adjusted grant for the project.

3.6 JOINT-USE PROJECT AUDIT

The type of joint-use project will differentiate the appropriate audit criteria used. For a Type 1 and 2 Joint-Use projects, the audit staff will verify that contracts were executed after April 29, 2002 and that the project was approved by the DSA and CDE. Type 1 projects may only be approved as facilities used to improve academic achievement, provide teacher education, and childcare facilities. Type 2 projects may only be approved for a multipurpose room, gymnasium, childcare facility, or library. The audit staff will also verify that Utility costs, Service Site Costs, and Offsite costs, if applicable, are part of the new construction project and not the Joint-Use project (see Regulation Sections 1859.122 and 1859.122.1).

For a Type 3 Joint-Use project, the audit staff will verify that the contract was executed after April 29, 2002, the project was approved by the DSA and CDE, and that the preliminary plans were complete and approved by the CDE when the project application was submitted. A Type 3 Joint-Use project may only be approved to improve pupil academic achievement, provide teacher education, multipurpose room, gymnasium; library, or childcare facility. The audit staff will authorize site support and utility costs for these types of stand-alone projects. However, off-site costs will be disallowed for this type of project.

The agreements between the district and the Joint-Use partner(s) will be verified to ensure that the agreement has at least the following Provisions:

- Shared responsibility between the Joint-Use partners and school district involved (does not include the SAB).
- Shared responsibility for funding of the operational costs of the project after the project is complete.
- Specifying the responsibilities regarding the operation and staffing of the project.
- Identify specific criteria to ensure the safety of the pupils during regularly scheduled school hours.
- Specifying the Joint-Use facility will be made available for at least 20 hours per week.

If the project is a type 1 or 2 joint-use project, the district has the same timeframe as that of a regular SFP project to meet the substantial progress requirements (see Section 2.1). If a type 3 joint-use project, the district has one year to submit DSA and CDE approved plans and DSA approved specifications to the OPSC, otherwise the project will be rescinded. If this one year requirement is met, the type 3 project will be subject to the 18 month substantial progress requirement.

The audit also verifies that any expenditures above the State and joint-use partner's matching share was funded by the joint-use partner(s) applicant school district. Districts must ensure that if the district combines the Joint-Use project with a regular SFP expenditure project, all costs are pro-rated between the various projects.

A verification will be made to ensure that any funds used by the Joint-use partner to match the State's funds would not have otherwise been available to the district (see Regulation Section 1859.127).

3.7 CRITICALLY OVERCROWDED SCHOOLS

If the district receives an advanced site and design apportionment, and if the district does not convert to a SFP project within the 4 years given to the district to submit a Form SAB 50-04, or 5 years if the district is granted a 12 month time extension to submit a Form SAB 50-04, the project will be rescinded or closed to costs incurred. If the district does not convert to a SFP project, expenditure reports must be submitted to close the project to costs incurred. If no expenditure reports are submitted, the Critically Overcrowded School (COS) project will be rescinded and all State funds, plus interest accrued, will be reimbursed to the State. When expenditure reports are submitted, the COS project will be reduced to costs incurred.

When a COS project converts to a SFP project, it will be subject to all SFP progress and auditing standards. A substantial progress report will be required at 18 months from the date the SFP funds were released. Annual expenditure reports will be required beginning one year from the date of the first fund release until the project is complete. The project is also considered complete when 3 years elapse from the date of the final fund release for an elementary project, or 4 years for a middle or high school project, at which time final expenditure reports must be submitted. Once complete, the project will be audited using the SFP expenditure audit criteria.

3.8 CHARTER SCHOOLS

Similar to a COS project, when a Charter School project converts to a SFP project, it will be subject to all SFP progress and auditing standards. A substantial progress report will be required at 18 months from the date the SFP fund release was made. Annual expenditure reports will be required beginning one year from the date of the first fund release until the project is complete. The project is also considered complete when 3 years elapse from the date of the final fund release for an elementary project, or 4 years for a middle or high school project, at which time final expenditure reports must be submitted. Once complete, the project will be audited using the SFP expenditure audit criteria (see requirements in Article 14 of the regulations).

3.9 LABOR COMPLIANCE

For SFP projects subject to AB 1506, the district must submit at the time of the OPSC audit the following:

- Copy of the Department of Industrial Relations approved Labor Compliance Program (LCP) to which the project(s) conformed.
- If applicable, a copy of the third party provider contract.

The district must also be prepared to submit upon OPSC request, the following:

- All bid invitation and contracts that must contain language alluding to Labor Code Section 170 through 1780 compliance and verification.
- Evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set in Labor Code Section 1770 through 1780.
- Evidence of weekly submittals of certified copies of payroll for all contractors and subcontractors.

Labor Code Section 1771.7 provides that a district may elect to contract with an outside entity, or use its own employees to implement and administer the LCP. If the district intends to use its employees, it must meet the requirements as detailed in the Public Contract Code and account for, in the SFP audit, the following:

- The name of the district employee performing the LCP duties.
- The salary and benefits of the employee including transportation costs.
- A specific breakdown of hours spent by project subject to the LCP requirements.

3.10 ALLOWABLE EXPENDITURES UNDER THE SFP – GENERAL

The statutory language governing the SFP apportionments is very broad in scope for both new construction and modernization projects. Statutory language for new construction, such as "a grant for new construction may be used for any and all costs to adequately house new pupils...", and for SFP modernization, such as "a modernization apportionment may be used for an improvement to extend the useful life of or to enhance the physical environment of the school...," indicate there is a lack of defined cost allowances when determining eligibility of some project expenditures. This section, Section 3.10.1, and Section 3.10.2 will offer guidelines for determination of eligible expenditures. As a general rule, any project cost will be allowed, with limitations in some cases, which can reasonably be attributed to the project in accordance with applicable regulations and law.

Education Code Section 17072.35 provides direction relative to what new construction grants may be used for:

"A grant for new construction may be used for any and all costs necessary to adequately house new pupils in any approved project, and those costs may only include the cost of design, engineering, testing, inspection, plan checking, construction management, site acquisition and development, demolition, construction, acquisition and installation of portable classrooms, landscaping, necessary utility costs, utility connections and other fees, equipment including telecommunication equipment to increase school security, furnishings, and the upgrading of electrical systems or the wiring or cabling of classrooms in order to accommodate educational technology. A grant for new construction may also be used to acquire an existing government or privately owned building, or a privately financed school building, and for the necessary costs of converting the government or privately owned building for public school use."

Other pertinent regulations contained in Article 8 (of the SFP regulations) provide further information relative to appropriate uses of SFP new construction funding which should be referred to during the course of a final expenditure audit.

Education Code Section 17074.25 provides guidelines relative to eligible SFP modernization expenditures and states:

"A modernization apportionment may be used for an improvement to extend the useful life of, or to enhance the physical environment of, the school. The improvement may only include the cost of design, engineering, testing, inspection, plan checking, construction management, demolition, construction, the replacement of portable classrooms, necessary utility costs, utility connection and other fees, the purchase and installation of air-conditioning equipment and insulation materials and related costs, furniture and equipment, including telecommunication equipment to increase school security, fire safety improvements, playground safety improvements, the identification, assessment, or abatement of hazardous asbestos, seismic safety improvements, and the upgrading of electrical systems or the wiring or cabling of classrooms in order to accommodate educational technology. A modernization grant may not be used for costs associated with acquisition and development of real estate or for routine maintenance and repair."

Education Code Section 17074.10(d) also specifies the Legislature did not intend modernization funding be used on administrative and overhead costs.

Other regulations contained in Article 8, New Construction and Modernization Grant Determinations), provides further information relative to appropriate uses of SFP modernization funding that will be referred to during the course of a final expenditure audit.

3.10.1 Allowable Expenditures under the SFP – Specific Guidelines

Districts are advised the SFP does not have set fee schedules or allowances for the categorized project expenditures. The SFP, with few exceptions, has no limitations on the fees associated with architects or construction managers, etc. However, the districts are responsible for completing the project as certified on the Application for Funding (SAB 50-04). Furthermore, there are no set allowances for project components other than those noted below.

The following general guidelines shall be utilized in reviewing an SFP new construction or modernization project (assumes it is a non-financial hardship project). With some exceptions, as noted, allowable project expenditures are as follow:

▸ SFP Allowable Expenditures

1) **Site Costs (not applicable to modernization):**
   A) Purchase Price of Property – An allowable expenditure provided the site was not previously funded under the Lease-Purchase Program, and the expenditure reported is the lesser of the appraised value (submitted within six month of a complete SFP funding application) or actual purchase price. The costs for toxics cleanup and removal, as well as DTSC oversight fees associated with the cleanup are allowable expenditures. Excess DTSC costs and costs for Hazardous Waste Removal beyond the 50 percent of the appraised value cap are not allowable costs and must be funded by the district; no additional apportionments will be made to fund these costs.
   B) Appraisal Fees
   C) Escrow Fees
   D) Survey Costs
   E) DTSC Phase One Environmental Assessment Fees, Response Action costs, and Preliminary Endangerment Assessment Fees
   F) Relocation Assistance – Allowable expenditures as long as expenditures conform to Title 25, California Code of Regulations, Section 6000, et. seq. Any reasonable and necessary relocation costs for purchasing fixtures and equipment, personal property, new machinery/equipment and the installation of any improvements at the replacement residence or business location may be included as eligible relocation expenditures. Specifically, these costs include: rental assistance; last resort housing costs; down-payment assistance; any costs the district is required to pay through a court finding such as goodwill, cost of land, etc.; moving expenses; "in-lieu" of business expenses; business moving costs; furniture and equipment costs if the business is unable to relocate; and reasonable relocation consultant fees.
   G) Development of Phase One Environmental Assessment and Preliminary Endangerment Assessments
   H) Legal Fees Associated with Securing a Site

2) **Planning Costs**
   A) Architect's Fee for Plans
   B) DSA Plan Check Fee
   C) CDE Plan Check Fee
   D) Energy Analysis Fee
   E) Preliminary Site Tests
   F) Consultant Fees – Allowable expenditure, as long as expenditures are related to the project.
   G) Advertising for Construction Bids
   H) School District "third party provider" or own forces labor compliance program costs.

3) **Construction Costs**
   A) Utility Services (see Regulation Section 1859.76(c) for more information). 50-year-old Modernization projects are also eligible to receive funding for utility costs (see Regulation Section 1859.78.7).
   B) Off-Site Development (see Regulation Section 1859.76(b) for more information).
   C) Service Site Development (see Regulation Section 1859.76(a) for more information).
   D) General Site Development
   E) Building Construction
   F) Modernization Costs – Allowable expenditures including the following, but subject to the limitations in Section 3.10.2 – Ineligible SFP Expenditures, items C through F:
      1) Any new building area included in a modernization project which replaces "like kind" area.
      2) New site development expenditures for replacement, repair or additions to existing site development work.
      3) Removal of hazardous waste the DTSC has declared safe which does not exceed ten percent of the total modernization project cost.
   G) Construction Management Fees
   H) Demolition Costs – Allowable expenditure if the cost is attributable to replacement of "like kind" building area for modernization projects (see Regulation Section 1859.79.2(a)), no cost limitations for new construction projects.
   I) Force Account Labor – Allowable if it complies with the Public Contract Code and is specific to the project (note: may also be a planning cost).
   J) Interim Housing – Allowable expenditures with no cost limitations for modernization projects. Also eligible for new construction projects that are additions to an existing site where classrooms temporarily are inaccessible or unsafe to house students.
   K) Unconventional Energy
   L) Construction Tests
   M) Inspections
   N) Furniture and Equipment
   O) Construction Supervision/Security
   P) Legal Costs – Allowable if directly attributable to project.
   Q) Energy Conservation Costs.
   R) Joint-Use project expenditures, see the following table:

EXHIBIT 11
AB 1506 LABOR COMPLIANCE PROGRAM
GUIDEBOOK - FEBRUARY 2003

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
Office of the Director
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102
Tel: (415) 703-5050 Fax: (415) 703-5059/8

MAILING ADDRESS:
P. O. Box 420603
San Francisco, CA 94142-0603

January 31, 2003

Dear Superintendent,

Newly enacted section 1771.7 of the California Labor Code requires school districts (so-called awarding bodies) undertaking construction projects using funds from the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004 to initiate a specified labor compliance program (LCP) and ensure that workers employed by contractors on the projects are paid according to minimum labor standards.

This packet serves as notification of the new requirement and provides information and tools to help you comply with the new law and find technical assistance if your district needs it.

We want to make sure school district construction moves as efficiently as possible because it has assumed a larger role beyond the already significant one of providing California's children a decent education.

Enclosed you will find a program guidebook developed by private and public sector experts in school facilities construction from California school districts, the Office of Public School Construction of the California Department of General Services, the Coalition for Adequate School Housing, labor compliance program consultants and the Department of Industrial Relations. This guidebook can be used to help earn your LCP approval in a convenient manner. Here's how:

Please notice the guidebook contains a suggested application format under Appendix 1 for approval of your LCP. I encourage you to complete this form, and to consider adopting the labor compliance program contained in the enclosed LCP manual from the Antioch Unified School District. The AUSD's program has been recently approved. I believe its LCP manual could be a model for other districts because it contains the most up-to-date information about compliance with labor standards on public works projects. Please send that manual along with information requested in the application to the director of the Department of Industrial Relations. The address is contained in the application.

If you have further questions, please check the Department of Industrial Relations Web site at http://www.dir.ca.gov/lcp.html and then scroll down the middle column to view model programs established by the Los Angeles Unified School District, San Diego Unified School District and again, the Antioch Unified School District. The Department of General Services posts more information on its Web site at http://www.schoolconstruction.dgs.ca.gov/ for public schools. Also please check Department of General Services Office of Public School Construction http://www.opsc.dgs.ca.gov/.

If you need immediate information, call Troy Fernandez at (415) 703-5070. For your convenience, the Department of Industrial Relations has established a special unit to help with labor compliance programs for public school districts.

Thank you in advance for your cooperation. We look forward to not only making sure these projects are completed in a timely and lawful fashion, but also to making your life easier.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director
Enclosures

AB 1506
Labor Compliance Program Guidebook

February 2003

Table of contents

These materials are intended to educate and assist those seeking approval of a labor compliance program. This information is not intended to replace the technical details in the labor code or California Code of Regulations. Please visit the Department of Industrial Relations' Web site (www.dir.ca.gov) for information about the laws and regulations governing this process.

Chapter 1
Introduction to Assembly Bill 1506, Statutes of 2002, enacted as labor code section 1771.7

Introduction

For more than 60 years, the California Labor Code has required that workers employed by contractors or subcontractors in the execution of public work contracts must be paid the state-determined prevailing wage. The public works chapter of the labor code, comprised of labor code sections 1720 through 1861, details the prevailing wage system, explaining who the law protects, what contractors must do to comply with the law, what constitutes the prevailing wage, how it is determined, and how the prevailing wage requirements are enforced. The labor code sections are supplemented by regulations published as Title 8 of the California Code of Regulations cited as 8 CCR 16000 et seq. Over the years, a body of law has developed containing interpretations of the statutes and the regulations. That body of law is in published decisions of state and federal courts and in certain administrative decisions designated as precedential.

The Division of Labor Standards Enforcement (DLSE), a part of the California Department of Industrial Relations (DIR), is the government agency primarily responsible for the enforcement of prevailing wage requirements on California public works projects. Since 1989, the Legislature has provided a statutory mechanism permitting political subdivisions of the state which award public works contracts (awarding bodies) to initiate and enforce their own labor compliance programs (LCPs) in conjunction with the DIR and the DLSE. The DIR director has the authority to grant or revoke approval of LCPs, and monitors the performance of LCPs in enforcing the prevailing wage system. The DLSE, through the Office of the Labor Commissioner, approves on a case-by-case basis the amounts of unpaid penalty and wage money assessed by LCPs against their public works contractors who have failed to comply with the prevailing wage laws. An approved LCP has a legal duty to the director to enforce prevailing wage requirements "in a manner consistent with the practice of DLSE." (8 CCR 16434)

With the enactment of labor code section 1771.7 (AB 1506) the Legislature is now requiring certain awarding bodies to initiate and enforce their own LCPs (or contract with a third party LCP) as a precondition to using funds from the Kindergarten-University Public Education Facilities Bond Act of 2002 (or 2004) for a public works project.

This guidebook was prepared by the DLSE and knowledgeable individuals in the private and pubic sector with a wide range of experience in school district issues, construction projects, public works and labor compliance. This guidebook is intended to facilitate requests to the DIR director from awarding bodies seeking approval of their own LCPs to conform to the requirements of labor code section 1771.7.

This guidebook is not intended to be used as a substitute for the full text of statutes and regulations which comprise the prevailing wage system, or the continually developing body of law which prevailing wage enforcement has generated over the past six decades and will continue to generate in the future. Rather, this information should be viewed as a framework for implementation of an effective LCP designed to enforce prevailing wage requirements consistent with the practice of DLSE.

Chapter 2
Mandatory requirements for approval of a labor compliance program

Mandatory requirements

To be approved, a section 1771.7 labor compliance program must include the following:

1. All bid invitations and public works contracts issued by the district shall contain appropriate language about the requirements of the public works chapter of the California Labor Code, comprised of labor code sections 1720-1861.

2. A pre-job conference shall be conducted with the contractor or subcontractors to discuss federal and state labor law requirements applicable to the contract.

3. Project contractors and subcontractors shall maintain and furnish to the LCP, at a designated time, a certified copy of each weekly payroll with a statement of compliance signed under penalty of perjury.

4. The LCP shall review and, if appropriate, audit payroll records to verify compliance with the public works chapter of the labor code.

5. The LCP shall require the district to withhold contract payments when payroll records are delinquent or inadequate.

6. The LCP shall require the district to withhold contract payments equal to the amount of underpayment and applicable penalties when the LCP establishes that underpayment occurred through an investigation.

LCP approval process

Attached in Appendix 1 is a recommended application form to be mailed to the director of the California Department of Industrial Relations (DIR). The form was developed to allow the director to determine whether the district seeking approval has the ability to operate its LCP in compliance with the requirements of Labor Code Section 1771.5(b). It also is a convenient way for LCPs to receive approval from the director. LCP officials only need to complete the application, adopt and attach the model program plan currently enclosed in this packet, and send it to the director.

The process of approving labor compliance programs is authorized and regulated by Title 8 of the California Code of Regulations, sections 16425-16439. Request for approval is a two-step process that includes initial approval for up to one year and then final approval.

Submissions to the California Department of Industrial Relations (DIR) will be accepted by the director of the Department of Industrial Relations and subsequently forwarded to the Division of Labor Standards Enforcement (DLSE) for review. The DLSE, under the leadership of the state labor commissioner, enforces labor laws that range from prevailing wage issues and labor standards to laws that govern the payment of wages.

The director will record the date of submission for approval and may take up to 30 days for review prior to determining if the proposal will be initially approved or denied. The director will inform the awarding body or third party administrator of the effective date of an approved LCP.

If denied, the director will inform the awarding body of the reasons for denial.

Chapter 3
Benefits of a labor compliance program

A comprehensive labor compliance program may result in the following:

Competitive bidding process integrity
When a comprehensive labor compliance program (LCP) is initiated and enforced, it prevents underbidding by contractors, or contractors who utilize subcontractors and who do not pay prevailing wages. Awarding bodies benefit from receiving a higher number of qualified bidders.

Regeneration of funds to the community
Ensuring that prevailing wage is paid to the workers employed on the project benefits the entire community by the regeneration of project funds back to the community.

Better labor relations
A strong labor compliance program is a sound approach to the promotion of responsible working conditions. Cooperation and communication among all constituencies interested in school construction offer the best long-term prospects for a sustained, positive labor and management relationship.

Successful contracts
Under an LCP, awarding bodies audit and enforce their contracts with contractors and subcontractors. This enables better scrutiny of construction projects, which helps to ensure the terms of the contract coincide with the awarding bodies' specifications.

Ability to hold penalties and contract payment
For a DIR-certified LCP, an awarding body may withhold contract payments for certain violations of the labor code and collect penalties against a contractor when it is established through an investigation that there has been an underpayment of wages. The awarding body also may withhold contract payments when payroll records are delinquent or inadequate.

Chapter 4
The prevailing wage law – an overview for labor compliance programs

An overview for labor compliance programs

I. Who does the law protect?
   - A. All workers employed on public works (labor code section 1771)
     (includes employees, independent contractors, partners, sole proprietors, owner-operators)
   - B. Public workers defined
     1. Labor code sections 1720-1720.3
     2. Precedential public works decisions
   - C. Limited exemptions
     1. Work carried out by a public agency "with its own forces" (labor code section 1771)
     2. Certain janitorial services/guards (8 CCR 16000)

II. What must public works contractors do to comply with the law?
   - A. Maintain and furnish records (labor code section 1776)
   - B. Pay the prevailing rate to all workers (labor code sections 1771, 1774 AND 1813)
   - C. Comply with apprenticeship requirements (labor code section 1777.5)

III. What is the prevailing wage rate?
   - A. Published prevailing wage determinations
   - B. Process by which prevailing wage rates are established (labor code sections 1773.1 and 1773.9; 8 CCR 16200-16300)

IV. How does an LCP enforce the law?
   - A. Conduct investigations
     1. Monitor certified payroll records (CPRs), investigate complaints from workers, monitor agencies and contractors
     2. Prepare audits and findings
   - B. Obtain approval of recommended forfeitures from labor commissioner (8 CCR 16436-16437)
   - C. Issue and serve notices of withholding of contract payments (NWCPs) (labor code section 1771.6)
   - D. Defend NWCPs in administrative review proceedings and in court (labor code sections 1742-1743)
   - E. Collect and disburse wages and penalties (labor code section 1743)

Note: All of the citations to the labor code sections and the California Code of Regulations (CCR) noted above are available by accessing the California Department of Industrial Relations home page (www.dir.ca.gov) and links to that page. The Web site also includes the precedential public works decisions referenced in the above outline at IB(2), and the prevailing wage determinations referenced at IIIA.

Outline explanation

The preceding outline was originally created as part of a training class for DLSE staff responsible for enforcing the prevailing wage law on public works projects. As a practical matter, the most important section of the outline for LCPs to consider is section IV, dealing with an LCP's enforcement duties. Later chapters of this guidebook provide practical advice on how to conduct investigations, but LCP officials also

must become familiar with three forms which the DLSE has specifically developed for LCPs to utilize after an investigation has been completed and after the LCP has obtained case-by-case approval from the labor commissioner to withhold unpaid wages and penalties from a public works contractor. The three forms are attached as Appendices 2, 3 and 4 at the end of this guidebook.

Appendix 2, containing the form titled Notice of Withholding of Contract Payments (NWCP), is to be completed by the LCP and served on the contractor, any affected subcontractor, and any bonding company issuing a bond securing payment of wages on the public works project. On page 2 of the NWCP, the contractor and subcontractor are advised of their right to obtain review of the LCP's monetary assessment by filing a written request for review at the address designated by the LCP in the space provided. The LCP should insert in this space the identity and address of the individual the LCP has assigned the tasks of receiving requests for review and, in turn, providing the party requesting review with the notices they are entitled to under the law. On page 3 of the NWCP, the contractor and subcontractor are advised of their opportunity to informally settle any dispute they may have with the LCP's monetary assessment. Again, the LCP should designate in the space provided the identity and address of the individual the contractor should mail their written requests to for a settlement opportunity. This individual may or may not be the same individual the LCP chooses to receive the written requests for review.

In the DLSE's experience, nearly all contractors and subcontractors will request at least a settlement meeting, and will likely request formal review once an NWCP has been served upon them. If there is no request for formal review, the assessment becomes a final order and the withheld funds can be disbursed.

As mentioned above, the LCP's receipt of a written request for review triggers an obligation on the part of the LCP to complete and mail the two other forms attached as Appendix 3 and Appendix 4.

Appendix 3 is a Notice of Transmittal that must be completed and timely mailed by the LCP to the Department of Industrial Relations at the address indicated. Under the NWCP administrative review process in the labor code, once the contractor or subcontractor has requested review of the NWCP, it is the task of the DIR to provide the contractor a hearing with a presiding hearing officer. Consequently, the Notice of Transmittal is the tool utilized by the LCP to notify the DIR of its statutory obligation to begin the administrative review process and provide the contractor requesting review a hearing.

Appendix 4 is another notice the LCP must complete and mail to the party requesting review once that request has been received by the LCP. This form, a Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742(b), simply satisfies the LCP's statutory obligation to let the contractor and subcontractor know the materials contained in the LCP's investigative file which support the LCP's issuance of the assessment will be made available.

LCP staff involved in the administrative review process, as well as the attorney or law firm representing the LCP, should become familiar with the prevailing wage hearing regulations at 8 CCR 17201-17270. These regulations also are available via links at www.dir.ca.gov. Briefly, the regulations comprise the rules that must be followed by LCPs and contractors throughout the administrative review process, beginning with service of the NWCP and ending with a final decision under the review system. The regulations are extremely detailed, but are helpful in understanding the review process.

Chapter 5
Labor compliance program components

Labor compliance program requirements prior to construction

Advertisement for bid/construction contract
The call for bids and the contract or purchase order must contain language appropriate to the requirements of prevailing wage law as contained in labor code sections 1771, 1775, 1777.5, 1813 and 1815. The first advertisement date of the project determines the applicable prevailing wages.

Pre-job conference
This meeting is to be held by the district before commencement of the work for contractors and subcontractors with accepted bids. The district representative at the meeting must be prepared to discuss and answer questions about requirements and procedures, including record keeping, wage determinations, apprenticeship requirements and required form filing. Information on paying training fees and giving notice to use registered apprentices should also be given out at the pre-construction meeting. Labor code sections 1777.5 and 1777.6 contain the instructions for hiring apprentices and the ratios to journey persons. A checklist showing which federal and state labor law requirements were discussed shall be kept for each conference. A sample checklist can be found in Appendix 6.

Payroll records
There must be a requirement in the program that certified payroll records be kept by the contractor in accordance with labor code section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body.

Review
There must be a program for orderly review of payroll records and, if necessary, for audits to verify compliance with the statutory requirements.

Withholdings
There must be a prescribed routine for withholding penalties, forfeitures and underpayment of wages for prevailing wage violations.

Delinquency
All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

Public works contract award form
The Public Works Contract Award Form (DAS 140) must be filled out by contractors and subcontractors with the appropriate apprenticeship box checked and sent to the appropriate local apprenticeship committee within five days of signing the contract. The district must have a copy of this form in the project file. A copy of this form can be printed from http://www.dir.ca.gov/DAS/DASForm140.pdf.

Proof of general liability and workers' compensation insurance
The district must require appropriate evidence of required insurance. The evidence should be a part of the

permanent project file.

Documentation and forms required during construction

Payroll records

Each contractor and subcontractor is required by labor code section 1776 to keep and maintain certified payroll reports.

All certified payroll reports are to be submitted to the district for review during the course of the contract and furnished to the district at times designated in the contract or within 10 days of the request by the awarding body. The certified payroll reporting form (A-1-131) can be obtained from any office of the Department of Industrial Relations' Division of Labor Standards Enforcement (DLSE) or downloaded from the Web site at http://www.dir.ca.gov/dlse/publicWorksPayrollInstructions.htm. If the contractor uses his/her own form, it must contain the following information:

- Employee full name, address and social security number.
- Work classification.
- Amount paid per hour. If payments are made to any third party trust, funds or plans for health and welfare, pension or vacation trusts, as part of the employer's prevailing wage obligation, then those payments should be indicated on the payroll report. The basic wage rate paid per hour plus the amounts contributed per hour for benefits, including training fund contributions, must at least equal the total prevailing rate required for that classification.
- Daily regular, overtime and holiday hours and weekly totals.
- Gross/net wages paid for this project/all projects.
- Contractor's full name and address.
- Project name and location.
- Dates of the payroll.
- Certification statement signed by a person with the authority to represent the company. This statement must declare under penalty of perjury that 1) the information contained in the payroll record is true and correct and 2) the employer has complied with the requirements of labor code sections 1771, 1811 and 1815 for any work performed by his or her employees on the public works project.

It is important that each contractor write "final" on the last submitted payroll for the project.

The contractor must complete a non-performance report for each week in which no work is performed. All days worked on a project must be accounted for, including Saturdays, Sundays and holidays.

Statement of employer payments

The form, Statement of Employer Payments (PW 26), must be completed by each contractor and subcontractor who pays benefits to a third party trust, plan or fund for health and welfare benefits, vacation funds, or makes pension contributions. It must contain the fund or trust name, address, administrator, and amount per hour contributed and frequency of contributions for each classification of worker. Training fund contributions must be reported on this form. A copy of the form can be downloaded from http://www.dir.ca.gov/dlse/DLSEForm-PW26.pdf.

Payroll rate verification
The district must acquire and review new prevailing wage rates at least twice yearly through the Department of Industrial Relations' Division of Labor Statistics and Research or from the Web site at http://www.dir.ca.gov/DLSR/statistics_research.html. Payrolls should be checked to make sure the new rates are in effect for each trade. New determinations are published in February and again in August. The rates go into effect the day after the expiration date on the determination.

Job site monitoring

Workforce documentation
The district must keep a daily record of all workers at the job site. Job classifications should be included. The district may also request that the inspector of record (IOR) include this information in the daily report form.

All prime contractors should be required to submit a prime contractors daily superintendent report with workers and their classifications listed on site for the day.

Random onsite inspections
Onsite, random inspections must be conducted on a regular basis to observe, interview workers and check hourly wage and classifications.

Close-out documentation and procedures

Final payroll
The district must verify project payrolls have been submitted by each prime contractor or subcontractor. The final payroll from each must be marked "final" by the contractor.

Final release of funds
Prior to final release of the funds, the payroll monitor for the district and the contract administrator review the log to verify all documentation has been received.

- In addition to monitoring all certified payroll records provided by the contractors, the LCP must investigate worker complaints of underpayment of prevailing wage rates. The major components and tasks related to this responsibility are as follows:

    - Gather supporting documents from all available sources and analyze for authenticity.
    - Conduct a complete certified payroll record (CPR) and/or project audit. Review CPRs for errors, inconsistencies, discrepancies, falsification, misclassification, under-reporting, and any other omissions that render the records inaccurate where needed by comparing the inspector of records daily log with all available records.

- On an as-needed basis according to the circumstances and issues that may arrive:

    - Calculate back wages and penalties using the proper wage determinations and trade classifications pursuant to the Department of Industrial Relations' Division of Labor Statistics and Research (DLSR) directives and records.
    - Review findings with contractor/subcontractor.
    - Write a complete summary of investigation with a statement of finding and recommended action for submission to the Department of Industrial Relations' Division of Labor Standards Enforcement for approval of withholdings.
    - Conduct settlement negotiations.
    - Testify on behalf of the school district in appeal hearings and in litigation.
    - Attend pre-bid and job-start meetings and monitor active construction projects.
    - Interview workers to validate complaints.

Chapter 7
Guidelines for prevailing wages

Labor code section 1771 requires that workers receive the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and the general prevailing rate of per diem wages for holiday and overtime work.

Prevailing wage rate determinations

The law requires that workers on a publicly-funded project must be paid the prevailing wage of the area in which the project is located. Prevailing wage rates are established by the director of the Department of Industrial Relations by various methods, and these rates are made available to the district, contractors, workers and the general public by the department's Division of Labor Statistics and Research (DLSR) or on their Web site at http://www.dir.ca.gov/DLSR/statistics_research.html. The rates are published twice each year as prevailing wage determinations. Some trades are issued regionally (northern or southern California) and other subtrades are issued by county in which the project is located.

Each wage determination for each classification of worker will indicate the basic wage rate and fringe benefit amounts which equal the total required wage for each classification of worker for straight time and overtime work.

If you need help with a special or unknown classification, you can submit a written request to the DLSR and they will make a determination.

The contractor is obligated to pay the full prevailing rate of per diem wages. He/she, however, may take credit for amounts up to the total of fringe benefit amounts listed as prevailing in the determination. The credit may be taken only for amounts which are actual payments as defined under the Employer Payments Section CCR 16000(1)-(3). If the total of employer payments for the fringe benefits listed is less than the aggregate amount in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken as a credit towards the hourly wage required to be paid.

The determinations indicate the amount required for straight-time work, overtime, holiday, and Saturday and Sunday work. There may be special requirements for the payment of overtime and Saturday/Sunday work, and these requirements will be indicated by footnotes. These footnotes should be examined carefully.

There are separate determinations issued for apprentices on public works. These footnotes should also be examined carefully.

Each wage determination will indicate when the determination will expire and whether the rate will increase during the project. A single asterisk after the expiration date indicates the rate is good for the life of the project.

A double asterisk after the expiration date indicates the rate for work performed after the expiration date has been determined. If work extends past that date, the new rate must be paid and should be incorporated in contracts entered into at the time of bid. Contact DLSR to obtain any predetermined increases.

Overtime
Work performed by employees on public works in excess of eight hours per day and 40 hours per week must be paid for at not less than one-and-one-half times the basic rate of pay (labor code section 1815). Each wage determination will specify the wage rate required for overtime pay. Failure to pay the required rate will subject the contractor to a penalty of $25 per worker per violation (labor code section 1813).

Holidays
Work performed on certain holidays may require the payment of overtime or double time. A list of designated holidays for each craft or classification of labor can be found on the Division of Labor Statistics and Research (DLSR) Web site at http://www.dir.ca.gov/DLSR/statistics_research.html. Each wage determination will specify the appropriate wage rate for holiday work.

Saturday/Sunday work
Most classifications of workers require the payment of overtime or double time for work performed on Saturdays and Sundays. Each wage determination will specify the required wage rate for this work. Pay attention to any footnotes that may contain exceptions or special requirements.

Travel/subsistence payments
Because the law requires that workers receive the general prevailing rate of per diem as part of the contractor's prevailing wage obligation, there may be a requirement to pay travel/subsistence. Many classifications require the payment of mileage or subsistence for traveling certain distances. These requirements are contained in the collective bargaining agreement on file with DLSR for each craft/classification of worker. You can download those requirements from the DLSR Web site at http://www.dir.ca.gov/DLSR/statistics_research.html.

Owner, operator, partners
The law prescribes that workers on a public works project receive prevailing wages. Owners, partners, owner-operators or officers of corporations performing labor on a prevailing wage project must be paid prevailing wage rates.

Chapter 8
Contractor's responsibility for certified payroll

The district must make sure contractors on the project are aware of their responsibilities to pay prevailing wages. This is done through the language in the general conditions of the bidding documents, the contract language and the pre-job meeting.

A partial list of the requirements follows:

- The contract executed between the prime contractor and the subcontractor for the performance of work on the public works project contains provisions of labor code sections 1771, 1775, 1777.5, 1813 and 1815.
- The prime contractor must monitor the specified determination rate of hourly wages paid by the subcontractor to employees by reviewing the payroll records of each subcontractor.
- Upon becoming aware of the failure of any subcontractor to pay workers the specified per diem wages, the prime contractor must halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project to cover the wage deficiency and;
- Before making final payment to the subcontractor for work performed on the public works project, the prime contractor must obtain an affidavit, signed under penalty of perjury, from the subcontractor, stating that he/she has paid the specified, determined prevailing wage rate of per hour wages to employees.
- The contractor must complete a non-performance report form when required. This form is completed when no work is performed on the project for a period of time. On the form the contractor states there was no payroll for a specific time period. All days for a project must be accounted for, including Saturdays, Sundays and holidays.
- Complete the Statement of Employer Payments. This form can be downloaded from http://www.dir.ca.gov/dlse/DLSEForm-PW26.pdf. It must be submitted at the time of bid acceptance. The prime contractor must inform the awarding body of any fringe benefit amounts paid on behalf of workers.
- In February and in August of each year during the project, verify changes in wage rates for the trade or classification used on the project. Send in a new statement of employer payments reflecting the changes in wages and/or fringes or training fees. It should be dated accordingly.

Contractor's responsibilities to apprentices

In addition to the items above, there are additional requirements of the contractor regarding the use of apprentices (sections 1777.5 and 1777.6 of the California Labor Code):

- Notify the local apprenticeship committee of the award of a contract by submitting a copy of a Division of Apprenticeship Standards (DAS 140) form for the trades involved. A copy of this form can be printed from http://www.dir.ca.gov/DAS/DASForm140.pdf.
- Request the dispatch of apprentices.

- Only employ apprentices who have a written apprenticeship agreement registered with the state, (DAS). Apprentices must be employed according to the ratio set by the apprenticeship program standards, but not less than a 1-to-5 hour ratio, measured against the number of journey person hours worked by the contractor for that particular trade. This rule applies to all apprenticeable trades, in accordance with the rules and regulation of the California Apprenticeship Council (CAC).
- Pay the apprentices the correct wages and benefits.
- Pay to either an apprenticeship committee approved by the DAS or the CAC the apprenticeship fees listed on the wage rate determination for each hour of work for all journey persons and apprentices of that craft on the project.

Penalties

Failure to pay prevailing wages to every worker on the project may result in the contractor being prohibited from bidding on public works projects for three years. In addition, wages not paid become forfeitures and can be collected from the contractor. Fines of up to $50 per day can also be assessed. The penalties are severe and range from misdemeanors to felonies (labor code sections 1777.5-1777). Although the fundamental obligation to pay prevailing wage rates rests with the contractor, ensuring payment also is important to the district.

Failure to pay required overtime wages will result in the assessment of $25 per worker per violation.

It is against the law for an employer or other person to accept any compensation from workers on a prevailing wage project. Anyone found guilty of accepting fees, bribes or any other form of compensation or kickbacks from a worker on a prevailing wage project is guilty of a felony. Any person or company that attempts to charge a fee for registration or information about public works employment is guilty of a misdemeanor.

Chapter 9
Audit, investigative and enforcement responsibilities

Introduction

Audit, investigative and enforcement responsibilities are the most challenging aspects of operating a labor compliance program. If these responsibilities are approached objectively and consistently, however, the challenges are far less daunting.

Audits should be conducted on a random or as-needed basis. An audit is the comparison of certified payroll records (CPRs) to records or documents maintained independent of CPRs or those records used to gather the information contained in CPRs. These are usually referred to as source documents and include but are not limited to front and back copies of cancelled checks, time cards, copies of pay check stubs, payroll registers, personnel sign in sheets, daily logs and any other document which authenticates or corroborates that which has been reported.

Investigative activities are the duties and tasks engaged in to verify the payment of prevailing wage rates upon receipt of a complaint or in conducting an audit of records. Prior to filing a Notice of Withholding of Contract Payments (see Appendix 2), a school district must demonstrate a thorough and objective investigation took place.

Consequently, all activities aimed at verifying a complaint or the accuracy of records must be documented and maintained in the event of an appeal or litigation.

Enforcement responsibility is extended to agencies by the Division of Labor Standards Enforcement (DLSE) that operate an LCP according to labor code section 1771.5. Enforcement encompasses activities that result in compliance with requirements to pay prevailing wage rates on public works projects. The most common aspect of enforcement is the assessment of penalties and the withholding of back wages owed to workers. It is of utmost importance to develop a fair and objective philosophy and criteria for enforcement and then consistently apply this criterion to each case. The most effective criteria for enforcement are simple written statements with the consequences of the failure to comply clearly stated.

Below is an outline of critical steps for document collection, which should be routinely applied in every prevailing wage violation case and particularly for those cases that lead to the filing of a Notice of Withholding of Contract Payments (see Appendix 2).

Case preparation and documentation guidelines

- Copy of worker complaint
  - Notes from worker interview.
  - Calendar of dates and hours worked.
  - Copies of check stubs or other form of proof of underpayment.
  - Document all attempts to authenticate the complaint.
  - Other supporting documentation where necessary.

- Copy of all correspondence to contractor
  - Job-start meeting checklist.
  - Initial notification of complaint.
  - Invitation to review the preliminary findings.

- Request for additional documentation such as canceled checks, check stubs, time cards, cash receipts, ledgers, etc.
- Log of all calls to contractor with notes about the content of discussion.

- Certified payroll records
  - For the period of time covered in the complaint and the corresponding audit.

- Inspector's daily log
  - Or another detailed record of work performed by date and the numbers of workers on project.
  - For the period of time covered in the complaint.

- Correct prevailing wage determination and applicable increases
  - For each classification appearing in the audit.

- Scope of work for trade classifications used
  - From Division Labor Statistics and Research (DLSR).

- Tabulation of bids
  - Advertisement date(s).
  - List of subcontractors.
  - Contract award amounts.
  - Description of project.

- Notice to proceed
  - Official project start and completion dates.
  - Duration of project.

- Notice of completion (if applicable)
  - With date stamp showing when it was recorded.
  - Any withholding or action must take place within 180 days from the date of recording.
  - Another 180 days is granted beyond this date if funds are still available in contract.

- Surety company information
  - The surety is entitled to receive a copy of any action taken or Notice of Withholding of Contract Payments filed.

- Contractor's previous record of violations (if applicable)
  - Formal actions and withholdings.
  - Informal actions and withholdings.

- The Notice of Withholding of Contract Payments (if applicable)
  - Always attach a copy of the audit spreadsheet.

- Release of Notice of Withholding of Contract Payments (if applicable)
  - Returns withheld funds.
  - Filed when a case is settled in whole or part.

- Filed when it is determined the violation did not occur.

- Memo to file
  - Explains circumstances and reasons for case closure without action.
  - Provides explanation and reasons for settlement and spells any agreements reached with contractor or other parties.

Chapter 10
Contact and resource information

Department Of Industrial Relations

For labor compliance program information when you have a question on the components of a LCP:

Troy Fernandez (415) 703-5070

Debbie Jimenez (415) 703-4810
E-mail info@dir.ca.gov

Requests for information are encouraged to be in writing or faxed to:

Department of Industrial Relations
Division of Labor Standards Enforcement
Labor compliance programs
Attn: Debbie Jimenez
455 Golden Gate Avenue, 9th floor
San Francisco, CA 94102
Fax: (415) 703-4807
Art Lujan, labor commissioner, contact: Debbie Jimenez (415) 703-4810

For California labor compliance program information when you have a question on the components of a LCP or on the labor code:

Division of Labor Standards Enforcement
Susan Nakagama, regional manager (562) 499-6308
Lauro Cons, senior deputy (213) 897-4231
Tom Fredericks, attorney (562) 590-5461
Contact: Lisa Cervantes (562) 499-6311

When you have questions about classifications and scope of work:

Division of Labor Statistics and Research
Headquarters and library address:
455 Golden Gate Avenue, 8th floor
San Francisco, CA 94102
(415) 703-4780
http://www.dir.ca.gov/DLSR/statistics_research.html

When you have questions about prevailing wage determinations or special determinations for a specific project:

Division of Labor Statistics and Research
Headquarters and library address:
455 Golden Gate Avenue, 8th floor
San Francisco, CA 94102
http://www.dir.ca.gov/DLSR/statistics_research.html

Mailing address:
Department of Industrial Relations
Division of Labor Statistics and Research
PO Box 420603
San Francisco, CA 94142
(415) 703-4780
Hotline: (415) 703-4774

Fax: (415) 703-4771

When you need to verify the status of an individual apprentice or an apprenticeship program:

Division of Apprenticeship Standards
455 Golden Gate Avenue, 8th floor
San Francisco, CA 94102
(415) 703-4920
Fax: (415) 703-5477

Helpful Web sites
California Apprenticeship Council, www.dir.ca.gov/CAC/cac.html
Department of General Services Office of Public School Construction, www.opsc.dgs.ca.gov.
Department of Industrial Relations, www.dir.ca.gov
Division of Labor Statistics and Research, www.dir.ca.gov/DLSR/statistics_research.html
Division of Labor Standards Enforcement, www.dir.ca.gov/DLSE/dlse.html
Division of Apprenticeship Standards, www.dir.ca.gov/DAS/das.html
Northern California basic trade journeyperson rates, http://www.dir.ca.gov/DLSR/PWD/index.htm

Forms
- Notice of Withholding of Contract Payments (Appendix 1)
- Notice of Transmittal (Appendix 2)
- Notice of Opportunity to Review Evidence (Appendix 3)
- Public Works Contract Award Form DAS 140, http://www.dir.ca.gov/DAS/DASForm140.pdf
- Certified Payroll Reporting Form A-1-131, http://www.dir.ca.gov/dlse/publicWorksPayrollInstructions.htm
- Statement of Employer Payments of PW 26, http://www.dir.ca.gov/dlse/DLSEForm-PW26.pdf
- California Apprenticeship Council 2 Training Fund Contributions, http://www.dir.ca.gov/DAS/DASCAC2.pdf

Law codes
Law codes must be obtained from the Internet or the Department of Industrial Relations.
California Code of Regulations, http://ccr.oal.ca.gov/
Relevant code sections:
Division 1. Department of Industrial Relations
Chapter 8. Office of the Director
Subchapter 4. Awarding Body Labor Compliance Programs
- Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs (Section 16425)
- Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director (Section 16426–16428)
- Article 3. Notice and Components of LCP (Section 16429–16432)
- Article 5. Enforcement (Section 16434–16439)
- Article 6. Severability (Section 16500)
- Article 8. Debarment (Section 16800–16802)
- Appendix A, Appendix B and Appendix C

California Labor Code, www.leginfo.ca.gov
Relevant code section
Labor Code Section 1771.5 – Labor Compliance Programs

Appendix 1

Recommended format of application to director for initial approval of labor compliance program (labor code section 1771.7)

Entity/Awarding Body Seeking Approval:

_____

Name

_____

Address

Entity's/Awarding Body's Contact Person:

_____

Name

_____

Address

_____

Phone

_____

Fax

_____

E-Mail

A. Identify the two or more individuals employed by the entity/awarding body who will be primarily responsible for enforcing the Labor Compliance Program:

1._____

Name

_____

Title

Experience/training on public works/labor compliance issues:

_____

_____

_____

_____

_____

_____

_____

(Attach additional sheets, if necessary.)

2._____

Name

_____

Title

Experience/training on public works/labor compliance issues:

_____

_____

_____

_____

_____

_____

_____

(Attach additional sheets, if necessary.)

B. List all other staff who will be involved in LCP functions:

Name	Title
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

(Attach additional sheets, if necessary.)

C. State the average number of public work projects the entity/awarding body annually administers:

_____

D. State whether the proposed LCP is a joint or cooperative venture among awarding bodies, and, if so, how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved:

_____
_____
_____
_____
_____
_____

(Attach additional sheets, if necessary.)

E. Describe the entity's/awarding body's record of taking cognizance of Labor Code violations in the preceding five years, including any withholding of funds from public works contractors:

_____
_____
_____
_____
_____
_____
_____

(Attach additional sheets, if necessary.)

F. Identify the attorney or law firm available to provide legal support for the LCP, including handling of the LCP's responsibilities during the administrative review process set forth in Labor Code Section 1771.6.

_____

Attorney/Law Firm Name

_____

Address

_____

Contact Person & Phone Number

G. Attach to the application a proposed manual outlining the responsibilities and procedures of the LCP.

H. Identify the method by which the LCP will notify the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d):

_____
_____
_____
_____
_____
_____

(Attach additional sheets, if necessary.)

DATED:_____

_____

Entity/Awarding Body Representative

Mail this form, with enclosures, to:

Office of the Director
DEPARTMENT OF INDUSTRIAL RELATIONS
455 Golden Gate Avenue, Suite 10616
San Francisco, CA 94102

Appendix 2

Labor Compliance Program _____ _____ _____ _____ Phone: Fax:	(SEAL)
Date:	In Reply Refer to Case No.:

Notice of Withholding of Contract Payments

Awarding Body	Work Performed in County of
Project Name	Project No.
Prime Contractor	
Subcontractor	

After an investigation concerning the payment of wages to workers employed in the execution of the contract for the above-named public works project, the Labor Compliance Program for _____ _____ (A Labor Compliance Program) has determined that violations of the California Labor Code have been committed by the contractor and/or subcontractor identified above. In accordance with Labor Code sections 1771.5 and 1771.6, the Labor Compliance Program hereby issues this Notice of Withholding of Contract Payments.

The nature of the violations of the Labor Code and the basis for the assessment are as follows:

_____

_____

_____

_____

The Labor Compliance Program has determined that the total amount of wages due is: $_____

The Labor Compliance Program has determined that the total amount of penalties assessed under Labor Code sections 1775 and 1813 is: $_____

The Labor Compliance Program has determined that the amount of penalties assessed under Labor Code section 1776 is: $_____

LABOR COMPLIANCE PROGRAM

_____

By:_____

Notice of Right to Obtain Review - Formal Hearing

In accordance with Labor Code sections 1742 and 1771.6, an affected contractor or subcontractor may obtain review of this Notice of Withholding of Contract Payments by transmitting a written request to the office of the Labor Compliance Program that appears below within 60 days after service of the notice. **To obtain a hearing, a written Request for Review must be transmitted to the following address:**

Labor Compliance Program

_____

Review Office-Notice of Withholding of Contract Payments

_____

_____

A **Request for Review** either shall clearly identify the Notice of Withholding of Contract Payments from which review is sought, including the date of the notice, or it shall include a copy of the notice as an attachment, and shall also set forth the basis upon which the notice is being contested. In accordance with Labor Code section 1742, the contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Compliance Program at the hearing within 20 days of the Labor Compliance Program's receipt of the written **Request for Review**.

Failure by a contractor or subcontractor to submit a timely Request for Review will result in a final order which shall be binding on the contractor and subcontractor, and which shall also be binding, with respect to the amount due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. Labor Code section 1743.

In accordance with Labor Code section 1742(d), a certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the State against the person assessed in the amount shown on the certified order.

(continued on next page)

Opportunity for Settlement Meeting

In accordance with Labor Code Section 1742.1 (b), the Labor Compliance Program shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of this Notice of Withholding of Contract Payments, afford the contractor or subcontractor the opportunity to meet with the Labor Compliance Program's designee **to attempt to settle a dispute regarding the notice**. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking a hearing as set forth above under the heading Notice of Right to Obtain Review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. This opportunity to timely request an informal settlement meeting is **in addition** to the right to obtain a formal hearing, and a settlement meeting may be requested even if a written **Request for Review** has already been made. Requesting a settlement meeting, however, does not extend the 60-day period during which a formal hearing may be requested.

A written request to meet with the Labor Compliance Program's designee to attempt to settle a dispute regarding this notice must be transmitted to _____ at the following address:

_____

_____

_____

Liquidated Damages

In accordance with Labor Code section 1742.1, after 60 days following the service of this Notice of Withholding of Contract Payments, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof that still remain unpaid. If the notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the Director of the Department of Industrial Relations that he or she had substantial grounds for believing the assessment or notice to be an error, the Director shall waive payment of the liquidated damages.

The Amount of Liquidated Damages Available Under this Notice is $_____.

Distribution:

Prime Contractor
Subcontractor
Surety(s) on Bond

Appendix 3

LABOR COMPLIANCE PROGRAM _____ Review Office - Notice of Withholding of Contract Payments _____ _____ _____ Phone: Fax:	(SEAL)
Date:	In Reply Refer to Case No.:

Notice of Transmittal

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

Enclosed herewith please find a Request for Review, dated _____, postmarked _____, and received by this office on _____.

Also enclosed please find the following:

____ Copy of Notice of Withholding of Contract Payments
____ Copy of Audit Summary

LABOR COMPLIANCE PROGRAM

_____

By:_____

cc: Prime Contractor
Subcontractor
Bonding Company

Please be advised that the Request for Review identified above has been received and transmitted to the address indicated. Please be further advised that the governing procedures applicable to these hearings are set forth at Title 8, California Code of Regulations sections 17201-17270. These hearings are **not** governed by Chapter 5 of the Government Code, commencing with section 11500.

(b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the affected contractor or subcontractor the option at said party's own expense to either (i) obtain copies of all such evidence through a commercial copying service or (ii) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) The Enforcing Agency at its own expense forwards copies of all such evidence to the affected contractor or subcontractor.
(c) The evidence required to be provided under this Rule shall include the identity of witnesses whose testimony the Enforcing Agency intends to present, either in person at the hearing or by declaration or affidavit. This provision shall not be construed as requiring the Enforcing Agency to prepare or provide any separate listing of witnesses whose identities are disclosed within the written materials made available under subpart (a).

(d) The Enforcing Agency shall make evidence available for review as specified in subparts (a) through (c) within 20 days of its receipt of the Request for Review; *provided that*, this deadline may be extended by written request or agreement of the affected contractor or subcontractor. The Enforcing Agency's failure to make evidence available for review as required by Labor Code Section 1742(b) and this Rule, shall preclude the enforcing agency from introducing such evidence in proceedings before the Hearing officer or the Director.

(e) This Rule shall not preclude the Enforcing Agency from relying upon or presenting any evidence first obtained after the initial disclosure of evidence under subparts (a) through (d), *provided that*, such evidence is promptly disclosed to the affected contractor or subcontractor. This Rule also shall not preclude the Enforcing Agency from presenting previously undisclosed evidence to rebut new or collateral claims raised by another party in the proceeding.@

In accordance with the above Rule, please be advised that the Labor Compliance Program's procedure for you to exercise your opportunity to review evidence is as follows:

Within five calendar days of the date of this notice, please transmit the attached Request to Review Evidence to the following address:

_____
_____
_____
_____
_____
Attention:_____

Request to review evidence

To: _____
_____
_____
_____

From:_____
_____
_____
_____

Regarding Notice of Withholding of Contract Payments Dated _____

Our Case No.: _____

The undersigned hereby requests an opportunity to review evidence to be utilized by the Labor Compliance Program at the hearing on the Request for Review.

_____
Phone No.:_____
Fax No.:_____

Appendix 5

Commonly used terms

Awarding body	Owner of project, body awarding contract
CAC	California Apprenticeship Council
CCR	California Code of Regulations
CFR	Code of Federal Regulations
CPR	Certified payroll record
DAS	Division of Apprenticeship Standards
DIR	Department of Industrial Relations
DLSE	Division of Labor Standards Enforcement
DLSR	Division of Labor Statistics & Research
DSA	Department of State Architect
FBS	Fringe benefit statement
IOR	Inspector of Record, DSA assigned building inspector
JATC	Joint apprenticeship training committee
LCP	Labor compliance program
LEA	Local education agency
PW	Public works or prevailing wage, depending on context
PWD	Prevailing wage division
T&M	Time & material

Appendix 6

Checklist of labor law requirements

District labor compliance program
(Pursuant to CCR 16430)

The federal and state labor law requirements applicable to the contract are composed of but not limited to the following:

1. **Payment of prevailing wage rates**
   The contractor to whom the contract is awarded and its subcontractors hired for the public works project are required to pay the specified general prevailing wage rates to all workers employed in the execution of the contract. The contractor's duty to pay prevailing wages under labor code section 1770 et seq., should the project exceed the exemption amounts.

   The contractor is responsible for ascertaining and complying with all current general prevailing wage rates for crafts and any rate changes that occur during the life of the contract. Information on all prevailing wage rates and all rate changes are to be posted at the job site for all workers to view.

2. **Apprentices**
   It is the duty of the contractor and subcontractors to employ registered apprentices on the public works project under labor code section 1777.5.

3. **Penalties**
   There are penalties required for contractor or subcontractor failure to pay prevailing wages (for nonexempt projects) and for failure to employ apprentices including forfeitures and debarment under labor code sections 1775, 1777.7 and 1813.

4. **Certified payroll records**
   Contractors and subcontractors are required to keep accurate payroll records showing the name, address, social security number and work classification of each employee and owner performing work, the straight time and overtime hours worked each day and each week, the fringe benefits, and the actual per diem wage paid to each owner, journeyperson, apprentice worker or other employee hired for the public works project under labor code section 1776.

   Employee payroll records shall be certified and shall be made available for inspection at all reasonable hours at the principal office of the contractor or subcontractor or shall be furnished to any employee, or his/her authorized representative on request, according to labor code section 1776.

   Each contractor and subcontractor shall submit its certified payroll record to the district on a weekly basis. If there was no work performed during a given week, the certified payroll record shall be annotated: "no work" for that week.

   There are penalties required for contractor/subcontractor's failure to maintain and submit copies of certified payroll records on request under labor code section 1776 (g).

5. **Nondiscrimination in employment**
Employment discrimination is prohibited under labor code sections 1735 and 1777.6, the government code, the public contracts code, and Title VII of the Civil Rights Act of 1964, as amended. All contractors and subcontractors are required to implement equal employment opportunity practices for women and minorities as delineated below:

   a. **Equal employment poster**
   The equal employment poster shall be posted at the job site in a conspicuous place, available to employees and applicants for employment and shall remain posted for the duration of the project.

6. **Kickbacks prohibited**
Contractors and subcontractors are prohibited from accepting, taking wages illegally or extracting "kickback" from employee wages under labor code section 1778.

7. **Acceptance of fees prohibited**
Contractors or subcontractors are prohibited from accepting fees for registering any person for public work under labor code section 1779 or for filling work orders on public works contracts pursuant to labor code section 1780.

8. **Listing of subcontractors**
All prime contractors are required to list properly all subcontractors hired to perform work on the public works projects covering more than one-half of 1 percent, according to government code section 4100 et seq.

9. **Proper licensing**
Contractors are required to be licensed properly and to require that all subcontractors be properly licensed. Penalties are required for employing workers while unlicensed under labor code section 1021 and under the California Contractor License Law found at business and professions code section 7000 et seq.

10. **Unfair competition prohibited**
Contractors and subcontractors are prohibited from engaging in unfair competition as specified under business and professions code sections 17200 to 17208.

11. **Workers' compensation insurance**
Labor code section 1861 requires contractors and subcontractors be insured properly for workers' compensation.

12. **OSHA**
Contractors and subcontractors are required to abide by the occupational, safety and health laws and regulations that apply to the particular construction project.

EXHIBIT 12
ANTIOCH UNIFIED SCHOOL DISTRICT
LABOR COMPLIANCE PROGRAM
JANUARY 17, 2003

Antioch Unified School District

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Labor Compliance Program

January 17, 2003

PREPARED BY

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ANTIOCH UNIFIED SCHOOL DISTRICT

LABOR COMPLIANCE PROGRAM
IMPLEMENTATION PLAN & OPERATIONAL MANUAL

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Section I

ANTIOCH UNIFIED SCHOOL DISTRICT

LABOR COMPLIANCE PROGRAM

INTRODUCTION

The Antioch Unified School District institutes this Labor Compliance Program for the purpose of implementing its policy relative to the labor compliance provisions of state and federally funded public works contracts.

This program is applicable to all public works projects which are funded under the Kindergarten-University Public Education Facilities Bond Acts of 2002 or 2004 and which commence construction after April 1, 2003.

California Labor Code Section 1770, et seq., and Education Code Section 17424 require that contractors on public works projects pay their workers based on the prevailing wage rates which are established and issued by the Department of Industrial Relations, Division of Labor Statistics and Research.

California Labor Code Section 1776 requires contractors to keep accurate payroll records of trades workers on all public works projects and to submit copies of certified payroll records upon request.

California Labor Code Section 1777.5 requires contractors to employ registered apprentices on public works projects.

This labor compliance program ("LCP") contains the labor compliance standards required by state and federal laws, regulations, and directives, as well as School District policies and contract provisions, which include, but are not limited to, the following:

1. Contractors' payment of applicable general prevailing wage rates.
2. Contractors' employment of properly registered apprentices.
3. Contractors' providing certified payroll records upon request but not less than weekly.
4. Program's monitoring District construction sites for the verification of proper payments of prevailing wage rates and work classification.
5. Program's conducting pre-job conferences with contractors/subcontractors.
6. Program's withholding contract payments and imposing penalties for noncompliance.
7. Program's preparation and submittal of annual reports.

The Labor Compliance Officer ("LCO") is the School District's representative for enforcement of the LCP.

ANTIOCH UNIFIED SCHOOL DISTRICT

LABOR COMPLIANCE PROGRAM

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ANTIOCH UNIFIED SCHOOL DISTRICT

LABOR COMPLIANCE PROGRAM

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INTRODUCTION

The Antioch Unified School District institutes this Labor Compliance Program ("LCP") for the purpose of implementing its policy relative to the labor compliance provisions of state and federally-funded public works contracts and specifically to comply with the provisions of Labor Code section 1771.7 pertaining to the use of funds derived from either the Kindergarten-University Public Facilities Bond Act of 2002 or the Kindergarten-University Public Facilities Bond Act of 2004. This LCP contains the labor compliance standards required by state and federal laws, regulations, and directives, as well as School District policies and contract provisions.

The California Labor Code Section 1770, et seq., and Education Code Section 39321 require that contractors on public works projects pay their workers based on the prevailing wage rates which are established and issued by the Department of Industrial Relations, Division of Labor Statistics and Research.

In establishing this LCP, the District adheres to the statutory requirements as enunciated in Section 1771.5(b) of the Labor Code. Further, it is the intent of the District to actively enforce this LCP by monitoring District construction sites for the payment of prevailing wage rates, and by requiring contractors and subcontractors having workers on District sites to submit copies of certified payroll records demonstrating their compliance with the payment of prevailing wage rates.

Should applicable sections of the Labor Code or Title 8 of the California Code of Regulations undergo alteration, amendment, or deletion, Antioch Unified School District will modify the affected portions of this program accordingly.

SECTION I
PUBLIC WORKS SUBJECT TO PREVAILING WAGE LAWS

State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720 *et seq.*, and include, but are not limited to, such types of work as construction, alteration, demolition, repair, or maintenance work. The Division of Labor Statistics and Research (DLSR) predetermines the appropriate prevailing wage rates for particular construction trades and crafts by county.

A. Types of Contracts to Which Prevailing Wage Requirements Apply

As provided in Labor Code section 1771.7(a) and (b), an awarding body that chooses to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004 shall initiate and enforce a Labor Compliance Program as described in subdivision (b) of section 1771.5 of the Labor Code with respect to that public works project. Accordingly, upon approval by the Director of the Department of Industrial Relations, this awarding body LCP shall apply to public works using funds derived from those Bond Acts which commence on or after April 1, 2003.

B. Applicable Dates for Enforcement of the LCP

The applicable dates for enforcement of awarding body Labor Compliance Programs is established by Section 16425 of the California Code of Regulations. Contracts are not subject to the jurisdiction of the Labor Compliance Program until after the program has received initial or final approval.

SECTION II
COMPETITIVE BIDDING ON DISTRICT PUBLIC WORKS CONTRACTS

The District publicly advertises upcoming public works projects to be awarded according to a competitive bidding process. All District bid advertisements (or bid invitations) and public works contracts shall contain appropriate language concerning the requirements of the Labor Code.

SECTION III
JOB START MEETING

After the District awards the public works contract, and prior to the commencement of the work, a mandatory Job Start meeting (Pre-Job conference) shall be conducted by the LCO with the contractor and those subcontractors listed in its bid documents.

At that meeting, the LCO will discuss the federal and state labor law requirements applicable to the contract, including prevailing wage requirements, the respective record keeping responsibilities, the requirement for the submittal of certified payroll records to the District, and the prohibition against discrimination in employment.

The LCO will provide the contractor and each subcontractor with a Checklist of Labor Law Requirements (presented as Attachment A to this document) and will discuss in detail the following checklist items:

1. The contractor's duty to pay prevailing wages (Labor Code Section 1770 *et seq.*);

2. The contractor's duty to employ registered apprentices on public works projects (Labor Code Section 1777.5);

3. The penalties for failure to pay prevailing wages and to employ apprentices, including forfeitures and debarment (Labor Code Sections 1775, 1777.7, and 1813);

4. The requirement to maintain and submit copies of certified payroll records to the District, on a weekly basis, as required (Labor Code Section 1776), and penalties for failure to do so (Labor Code Section 1776(g)); The requirement includes and applies to all subcontractors performing work on district projects even if their portion of the work is less than one half of one percent of the total amount of the contract.

5. The prohibition against employment discrimination (Labor Code Sections 1735 and 1777.6; the Government Code; and Title VII of the Civil Rights Act of 1964, as amended);

6. The prohibition against taking or receiving a portion of an employee's wages (Labor Code Section 1778) (kickback);

7. The prohibition against accepting fees for registering any person for public works (Labor Code Section 1779) or for filing work orders on public works (Labor Code Section 1780);

8. The requirement to list all subcontractors that are performing one-half of one percent of the total amount of the contract (Public Contract Code Section 4100 *et seq.*);
9. The requirement to be properly licensed and to require all subcontractors to be properly licensed, and the penalty for employing workers while unlicensed (Labor Code Section 1021 and under California Contractors License Law. Also, see Business and Professions Code Section 7000, et seq;

10. The prohibition against unfair competition (Business and Professions Code Sections 17200-17208);

11. The requirement that the contractor and subcontractor be properly insured for Workers' Compensation (Labor Code Section 1861);

12. The requirement that the contractor abide by the Occupational Safety and Health laws and regulations that apply to the particular public works project.

The contractors and subcontractors present at the Job Start meeting will be given the opportunity to ask questions of the LCO relative to the items contained in the Labor Law Requirements Checklist. The checklist will then be signed by the contractor's representative and the District's LCO, **a representative of each subcontractor**, and the LCO.

At the Job Start meeting, the LCO will provide the contractor with a copy of the District's LCP package which includes: a copy of the approved LCP, the checklist of Labor Law Requirements, applicable Prevailing Wage Rate Determinations, blank certified payroll record forms, fringe benefit statements, State apprenticeship requirements, and a copy of the Labor Code relating to Public Works and Public Agencies (Part 7, Chapter 1, Sections 1720-1861).

It will be the contractor's responsibility to provide copies of the LCP package to all listed subcontractors and to any substituted subcontractors.

SECTION IV
REVIEW OF CERTIFIED PAYROLL RECORDS

A. Certified Payroll Records Required

The contractor and each subcontractor shall maintain payrolls and basic records (timecards, canceled checks, cash receipts, trust fund forms, accounting ledgers, tax forms, superintendent and foreman daily logs, etc.) during the course of the work and shall preserve them for a period of three (3) years thereafter for all trades workers working on District projects which are subject to the LCP. Such records shall include the name, address, and social security number of each worker, his or her classification, a general description of the work each employee performed each day, the rate of pay (including rates of contributions for, or costs assumed to provide fringe benefits), daily and weekly number of hours worked, and actual wages paid.

1. Submittal of Certified Payroll Records

The contractor and each subcontractor shall maintain weekly certified payroll records for submittal to the Antioch Unified School District LCO as required. The contractor shall be responsible for the submittal of payroll records of all its subcontractors. All certified payroll records shall be accompanied by a statement of compliance signed by the contractor or each subcontractor indicating that the payroll records are correct and complete, that the wage rates contained therein are not less than those determined by the Director of the Department of Industrial Relations, and that the classifications set forth for each employee conform with the work performed.

Time cards, front and back copies of cancelled checks, daily logs, employee sign-in sheets and/or any other record maintained for the purposes of reporting payroll may be requested by the Labor Compliance Officer at any time and shall be provided within 10 days following the receipt of the request.

2. Full Accountability

Each individual, laborer or craftsperson working on a public works contract must appear on the payroll. The basic concept is that the employer who pays the trades worker must report that individual on its payroll. This includes individuals working as apprentices in an apprenticeable trade. Owner-operators are to be reported by the contractor employing them, rental equipment operators are to be reported by the rental company paying the workers' wages.

Sole owners and partners who work on a contract must also submit a certified payroll record listing the days and hours worked, and the trade classification descriptive of the work actually done.

The contractor shall provide the records required under this section to the School District within five (5) days of each payday, and available for inspection by the Department of Industrial Relations, and shall permit representatives of each to interview tradesworkers during working hours on the project site.

3. Responsibility for Subcontractors

The contractor shall be responsible for ensuring adherence to labor standards provisions by its subcontractors. Moreover, the prime contractor is responsible for Labor Code violations of its subcontractors in accordance with Labor Code section 1775.

4. Payment to Employees

Employees must be paid unconditionally, and not less often than once each week, the full amounts, that are due and payable for the period covered by the particular payday. Thus, an employer must establish a fixed workweek (Sunday through Saturday, for example) and an established payday (such as every Friday or the preceding day should such payday fall on a holiday). On each and every payday, each worker must be paid all sums due as of the end of the preceding workweek and must be provided with an itemized wage statement.

If an individual is called a subcontractor, whereas, in fact, he/she is merely a journey level mechanic supplying only his/her labor, such an individual would not be deemed a bona fide subcontractor and must be reported on the payroll of the prime contractor as a trades worker. Moreover, any person who does not hold a valid contractor's license cannot be a subcontractor, and anyone hired by that person is the worker or employee of the general contractor for purposes of prevailing wage requirements, certified payroll reporting and workers' compensation laws.

The worker's rate for straight time hours must equal or exceed the rate specified in the contract by reference to the "Prevailing Wage Determinations" for the class of work actually performed. Any work performed on Saturday, Sunday, and/or on a holiday, or portion thereof, must be paid the prevailing rate established for those days regardless of the fixed workweek. The hourly rate for hours worked in excess of 8 hours in a day and 40 hours in a workweek shall be premium pay. All work performed on Saturday, Sunday and holidays shall be paid pursuant to the Prevailing Wage determination.

B. Apprentices

Apprentices shall be permitted to work as such only when they are registered, individually, under a bona fide apprenticeship program registered and approved by the State Division of Apprenticeship Standards. The allowable ratio of apprentices to journeypersons in any craft/classification shall not be greater than the ratio permitted to the contractor as to its entire workforce under the registered program.

Any worker listed on a payroll at an apprentice wage rate who is not registered shall be paid the journey level wage rate determined by the Department of Industrial Relations for the classification of the work he/she actually performed. Pre-apprentice trainees, trainees in non-apprenticeable crafts, and others who are not duly registered will not be permitted on public works projects unless they are paid full prevailing wage rates as journeypersons.

Compliance with California Labor Code Section 1777.5 requires all public works contractors and subcontractors to:

1. Submit contract award information to the apprenticeship committee for each apprenticeable craft or trade in the area of the Project;

2. Request dispatch of apprentices from the applicable Apprenticeship Program(s) and employ apprentices on public works projects in a ratio to journeypersons which in no case shall be less than one (1) hour of apprentice work to each five (5) hours of journeyperson work; and

3. Contribute to the applicable Apprenticeship Program(s) or the California Apprenticeship Council in the amount identified in the prevailing wage rate publication for journeypersons and apprentices. If payments are not made to an Apprenticeship Program, they shall be made to the California Apprenticeship Council, Post Office Box 420603, San Francisco, CA 94142.

If the contractor is registered to train apprentices, it shall furnish written evidence of the registration (i.e., Apprenticeship Agreement or Statement of Registration) of its training program and apprentices, as well as the ratios allowed and the wage rates required to be paid thereunder for the area of construction, prior to using any apprentices in the contract work. It should be noted that a prior approval for a separate project does not confirm approval to train on any project. The contractor/subcontractor must check with the applicable Joint Apprenticeship Committee to verify status.

C. Audit of Certified Payroll Records

Audits shall be conducted by the LCO, and shall also be conducted at the request of the Labor Commissioner to determine whether all tradesworkers on project sites have been paid according to the prevailing wage rates.

The audit record form (presented as Attachment B) demonstrates the sufficient detail that is necessary to verify compliance with Labor Code requirements.

SECTION V
REPORTING OF WILLFUL VIOLATIONS TO THE LABOR COMMISSIONER

If an investigation reveals that a willful violation of the Labor Code has occurred, the LCO will make a written report to the Labor Commissioner which shall include: (1) an audit consisting of a comparison of payroll records to the best available information as to the actual hours worked, (2) the classification of workers employed on the public works contract. Six (6) types of willful violations are reported:

A. Failure to Comply with Prevailing Wage Rate Requirements Failure to comply with prevailing wage rate requirements (as set forth in the Labor Code and District contracts) is determined a willful violation whenever less than the stipulated basic hourly rate is paid to tradesworkers, or if overtime, holiday rates, fringe benefits, and/or employer payments are paid at a rate less than stipulated.

B. Falsification of Payroll Records, Misclassification of Work, and/or Failure to Accurately Report Hours of Work Falsification of payroll records and failure to accurately report hours of work is characterized by deliberate underreporting of hours of work; underreporting the headcount; stating that the proper prevailing wage rate was paid when, in fact, it was not; clearly misclassifying the work performed by the worker; and any other deliberate and/or willful act which results in the falsification or inaccurate reporting of payroll records.

C. Failure to Submit Certified Payroll Records The contractors and subcontractors shall have ten (10) days upon notification by the LCO in which to comply with the requirement of submittal of weekly and/or to correct inaccuracies or omissions that have been detected.

D. For Failure to Pay Fringe Benefits Fringe benefits are defined as the amounts stipulated for employer payments or trust fund contributions and are determined to be part of the required prevailing wage rate. Failure to pay or provide fringe benefits and/or make trust fund contributions on a timely basis is equivalent to payment of less than the stipulated wage rate and shall be reported to the Labor Commissioner as a willful violation, upon completion of an investigation and audit.

E. Failure to Pay the Correct Apprentice Rates and/or Misclassification of Workers as Apprentices Failure to pay the correct apprentice rate or classifying a worker as an apprentice when not properly registered is equivalent to payment of less than the stipulated wage rate and shall be reported to the Labor Commissioner, as a willful violation, upon completion of an investigation and audit.

F. For the taking of Kickbacks Accepting or extracting kickbacks from employee wages under Labor Code Section 1778 constitutes a felony and may be prosecuted by the appropriate enforcement agency.

SECTION VI
ENFORCEMENT ACTION

A. Duty of the Awarding Body

The Antioch Unified School District, as the awarding body having an approved LCP, has a duty to the Director of the Department of Industrial Relations to enforce Labor Code section 1720 *et seq.* and the procedural regulations of the Department of Industrial Relations in a manner consistent with the practice of DLSE and regulations found at Title 8, California Code Regulations, Section 16000 *et seq.*

B. Withholding Contract Payments When Payroll Records are Delinquent or Inadequate

1. "Withhold" means to cease payments by the awarding body, its agents or others who pay on its behalf to the contractor. Where the violation is by a subcontractor, the contractor shall be notified of the nature of the violation and reference made to its rights under Labor Code Section 1729.

   A release bond under Civil Code Section 3196 may not be posted for the release of the funds being withheld for the violation of the prevailing wage law.

2. "Contracts" except as otherwise provided by agreement, means only contracts under a single master contract, or contracts entered into as stages of a single project which may be the subject of withholding, pursuant to the Labor Code, Sections 1720, 1720.2, 1720.3, 1720.4, 1771, and 1771.5;

3. "Delinquent payroll records" means those not submitted on the basis set forth in the District Contract and the LCP;

4. "Inadequate payroll records" are any one of the following:

   a. A record lacking the information required by Labor Code Section 1776;

   b. A record which contains the required information but which is not certified, or certified by someone not an agent of the contractor or subcontractor;

   c. A record remaining uncorrected for one payroll period, after the awarding body has given the contractor notice of inaccuracies detected by audit or record review; provided, however, that prompt correction will stop any duty to withhold if such inaccuracies do not amount to 1 percent of the entire certified weekly payroll in dollar value and do not affect more than half the persons listed as workers employed on that certified weekly payroll, as defined in Labor Code Section 1776 and Title 8 CCR Section 16401. Prompt correction will stop any duty to withhold if such inaccuracies are *de minimus*.

   Pursuant to Labor Code Section 1776, the contractor shall, as a penalty to the School District, forfeit twenty-five dollars ($25) for each calendar day, or portion there of, for each worker, until strict compliance is effectuated.

C. Withholding for Violation for Not Paying the Per Diem Prevailing Wages

1. "Amount equal to the underpayment" is the total of the following determined by payroll review, audit, or admission of the contractor or subcontractor:

   a. The difference between the amounts paid to workers and the correct General Prevailing Wage Rate of Per Diem Wages as defined in Title 8, CCR Section 16000, et seq.;

   b. The difference between the amounts paid to workers and the correct amounts of employer payments, as defined in Title 8 CCR Section 16000 *et seq.* and determined to be part of the prevailing rate costs of contractors due for employment of workers in such craft, classification, or trade in which they were employed and the amounts paid;

   c. Estimated amounts of "illegal taking of wages"; and

   d. Amounts of apprenticeship training contributions paid to neither the program sponsor's training trust nor the California Apprenticeship Council.

2. Provisions relating to the penalties under Labor Code Sections 1775, and 1813:

   a. Pursuant to Labor Code Section 1775, the contractor shall, as a penalty to the School District, forfeit up to fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wages.

   b. Pursuant to Labor Code section 1813, the contractor shall, as a penalty to the School District on whose behalf the contract is awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week.

D. Forfeitures Requiring Approval by the Labor Commissioner

1. "Forfeitures" are the amounts of unpaid penalties and wages assessed by the School District for violations of the prevailing wage laws, whether collected by withholding from the contract amount, by suit under the contract, or both.

2. "Failing to pay the correct rate of prevailing wages" means those public works violations which the Labor Commissioner has exclusive authority to approve before they are recoverable by the Labor Compliance Program, and which are appealable by the contractor before the Director of the Department of Industrial Relations under Labor Code sections 1742 and 1742.1 pursuant to the California Code of Regulations Title 8, Chapter 8, Subchapter 8 (§§ 17201 through 17270). Regardless of what is defined as prevailing "wages in contract terms, noncompliance with the following are considered failures to pay prevailing wages:

   a. Nonpayment of items defined as "Employer Payments" and "General Prevailing Rate of Per Diem Wages" in Title 8 CCR Section 16000 and Labor Code Section 1771.

   b. Failure to provide complete and accurate payroll records, as required by Labor Code Section 1776;

   c. Paying apprentice wages lower than the journey level rate to a worker who is not an apprentice as defined in Labor Code Section 3077, working under an apprentice agreement in a recognized program;

   d. Accepting or extracting kickbacks, in violation of Labor Code Section 1778;

   e. Engaging in prohibited actions related to fees for registration as a public works employee, in violation of Labor Code Section 1779;

   f. Failure to pay overtime for work over 8 hours in any one day or 40 hours in any one week, in violation of Labor Code sections 1813, 1815, or Title 8 CCR section 16200(a)(3)(F).

E. Determination of Amount of Forfeiture by the Labor Commissioner

1. Where the LCO requests a determination of the amount of forfeiture, the request shall include a file or report to the Labor Commissioner which contains at least the following information:

   a. The date that the public work was accepted, and the date that a notice of completion was filed;

   b. Any other deadline which, if missed, would impede collection;

   c. Evidence of violation in narrative form;

   d. Evidence that an "audit" or "investigation" occurred in compliance with Title 8 CCR section 16432;

   e. Evidence that the contractor was given the opportunity to explain why it believes there was no violation; or that any violation was caused by mistake, inadvertence, or neglect before the forfeiture was sent to the Labor Commissioner, and the contractor either did not do so or failed to convince the awarding body of its position;

   f. Where the School District seeks not only amounts of wages but also a penalty as part of the forfeiture, and the contractor has unsuccessfully contended that the cause of violation was a mistake, inadvertence, or neglect, a statement should accompany the proposal for a forfeiture with a recommended penalty amount, pursuant to Labor Code Section 1775;

g. Where the School District seeks only wages or a penalty less than $50 per day as part of the forfeiture, and the contractor has successfully contended that the cause of violation was a mistake, inadvertence, or neglect, then the file should include the evidence as to the contractor's knowledge of its obligation, including the Program's communication to the contractor of the obligation in the bid invitations, at the pre-job conference agenda and records, and any other notice given as part of the contracting process. Included with the file should be a statement similar to that described in subsection (f) above and recommended penalty amounts, pursuant to Labor Code Section 1775;

h. The previous record of the contractor in meeting prevailing wage obligations.

2. The file or report shall be served on the Labor Commissioner not less than 30 days before the final payment or, if that deadline has passed, not less than 180 days following the filing of the notice of completion as long as funds remain in the contract.

3. A copy of the file or report shall be served on the contractor at the same time as it is sent to the Labor Commissioner.

   The School District may exclude from the documents served on the contractor/subcontractor or surety copies of documents secured from these parties during an audit, investigation, or meeting if those documents are clearly referenced in the file or report.

4. The Labor Commissioner shall affirm, reject, or modify the forfeiture in whole or in part as to penalty and/or wages due.

5. The determination of the forfeiture by the Labor Commissioner is effective on the following date for Labor Compliance Programs having **initial approval** pursuant to Section 16426 of the California Code of Regulations: on the date the Labor Commissioner serves by first class mail on the Antioch Unified School District and on the contractor, an endorsed copy of the proposed forfeiture, or a drafted forfeiture statement which sets out the amount of forfeiture approved. Service on the contractor is effective if made on the last address supplied by the contractor in the record.

   The Labor Commissioner's approval, modification, or disapproval of the proposed forfeiture shall be served within 30 days of receipt of the proposed forfeiture.

F. Deposits of Penalties and Forfeitures Withheld

1. Where the involvement of the Labor Commissioner has been limited to a determination of the actual amount of penalty, forfeiture, or underpayment of wages, and the matter has been resolved without litigation by or against the Labor Commissioner, the School District shall deposit penalties and forfeitures into its General Fund.

2. Where collection of fines, penalties, or forfeitures results from court action to which the Labor Commissioner and the Antioch Unified School District are both parties, the fines, penalties, or forfeitures shall be divided between the General Funds of the State and the Antioch Unified School District, as the court may decide.

3. All amounts recovered by suit brought by the Labor Commissioner, and to which the Antioch Unified School District is not a party, shall be deposited in the General Fund of the State of California.

4. All wages and benefits which belong to a worker and are withheld or collected from a contractor or subcontractor, either by withholding or as a result of court action pursuant to Labor Code Section 1775, and which have not been paid to the worker or irrevocably committed on the worker's behalf to a benefits fund, shall be deposited with the Labor Commissioner, who will deal with such wages and benefits in accordance with Labor Code Section 96.7.

G. Debarment Policy

1. It is the policy of the School District that the public works prevailing wage requirements set forth in the California Labor Code, Section 1720-1861, be strictly enforced. In furtherance thereof, construction contractors and subcontractors found to be repeat violators of the California Labor Code shall be referred to the Labor Commissioner for debarment from bidding on or otherwise being awarded any public work contract, within the state of California, for the performance of construction and/or maintenance services for the period not to exceed three (3) years in duration. The duration of the debarment period shall depend upon the nature and severity of the labor code violations and any mitigating and/or aggravating factors, which may be presented at the hearing conducted by the Labor Commissioner for such purpose.

SECTION VII
NOTICE OF WITHHOLDING AND REVIEW THEREOF

A. Notice of Withholding of Contract Payments

After determination of the amount of forfeiture by the Labor Commissioner, the School District shall provide notice of withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments. The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on a bond, if their identities are known to the awarding body. **A copy of the Notice of Withholding of Contract Payments (NWCP) to be utilized by the School District is found as Attachment D to this document.**

B. Review of NWCP

1. An affected contractor or subcontractor may obtain review of a NWCP under this chapter by transmitting a written request to the office of the LCP that appears on the NCWP within 60 days after service of the NWCP. If no hearing is requested within 60 days after service of the NWCP, the NWCP shall become final.

2. Within ten days following the receipt of the request for review, the LCP shall transmit to the Office of the Director-Legal Unit the request for review and copies of the Notice of Withholding of Contract Payments, any audit summary that accompanied the notice, and a proof of service or other documents showing the name and address of any bonding company or surety that secures the payment of the wages covered by the notice. **A copy of the required Notice of Transmittal to be utilized by the School District is found as Attachment E to this document.**

3. Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial hearing officer possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall be an employee of the department, but shall not be an employee of the Division of Labor

Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the LCP at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the LCP subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor. **A copy of a Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742(b) form is found as Attachment F to this document.**

The contractor or subcontractor shall have the burden of proving that the basis for the NWCP is incorrect. The NWCP shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the LCP. Within 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

The director has adopted regulations setting forth procedures for hearings under this subdivision. **The regulations are found as Attachment G to this document.**

4. An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

5. A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

6. A judgment entered pursuant to this procedure shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

7. This procedure shall provide the exclusive method for review of a NWCP by the School District to withhold contract payments pursuant to Section 1771.7.

SECTION VIII
DISTRIBUTION OF FORFEITED SUMS

1. Before making payments to the contractor of money due under a contract for public work, the School District shall withhold and retain therefrom all amounts required to satisfy the NWCP. The amounts required to satisfy the NWCP shall not be disbursed by the School District until receipt of a final order that is no longer subject to judicial review.

2. Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the School District shall not disburse any contract payments withheld.

3. From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers employed on the public works project who are paid less than the prevailing wage rate shall have **PRIORITY** over all Stop Notices filed against the prime contractor.

4. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the School District that has enforced this chapter pursuant to Section 1771.7.

SECTION IX
OUTREACH ACTIVITIES

To ensure the successful implementation of the District's Labor Compliance Program, there shall be several outreach activities initiated and maintained.

A. Providing Information to the Public

The Labor Compliance Officer shall be responsible for communication and outreach activities relative to public information on the District's Labor Compliance Program:

1. Regular presentations to contractors at all District Job Walk Meetings (Pre-Bid conferences) and Job Start Meetings (Pre-Job conferences);

2. Ongoing communication via correspondence and with workers at District job sites when review of the certified payroll records reveals the possibility of prevailing wage violations.

3. Periodic meetings with contractor organizations, prime contractors and subcontractors interested in public works contracting with the District.

B. In-service Management training on the Labor Compliance Program

The Labor Compliance Program shall provide ongoing management in-servicing and workshops for Facilities, Business, Accounting and legal staff relative to the terms, requirements and administration of the Labor Compliance Program.

SECTION X
ANNUAL REPORTS

A. Annual Report on Prevailing Wage Monitoring to the AUSD Superintendent and Board of Education

The LCO will submit to the AUSD Superintendent and Board of Education an annual report on prevailing wage monitoring which will include the following information:

1. Progress report on the LCP.

2. Fiscal year-end summary of:

    a. Monitoring activities
    b. Record keeping activities
    c. Labor Code violations identified and reported to DLSE
    d. Statistical analysis of the prevailing wage violations on District public works projects
    e. Summary of outreach activities

B. Annual Report on the LCP to the Director of the Department of Industrial Relations

The LCO will submit to the Director of the Department of Industrial Relations an annual report on the operation of its LCP within 60 days after the end of its fiscal year, or accompany its request for an extension of initial approval, whichever comes first. The annual report will contain, as a minimum, the following information:

1. Number of public works contracts awarded using Bond Act funds, and their total value;

2. A summary of wages due to workers resulting from failure by contractors to pay prevailing wage rates; the total amount withheld from money due the contractors; and the total amount recovered by action in any court of competent jurisdiction;

3. A summary of penalties and forfeitures imposed and withheld, or recovered in a court of competent jurisdiction; and

4. A special summary of all audits that were conducted upon the request of the Labor Commissioner.

Copies of this report will be distributed to the Director of the Department of Industrial Relations, AUSD Superintendent and the Board of Education.

ATTACHMENT A

ANTIOCH UNIFIED SCHOOL DISTRICT
LABOR COMPLIANCE PROGRAM

CHECKLIST OF LABOR LAW REQUIREMENTS
FOR REVIEW AT JOB START MEETINGS
(In accordance with CCR Section 16430)

The federal and state labor law requirements applicable to the contract are composed of, but not limited to, the following:

1. Payment of Prevailing Wage Rates

   The award of a public works contract requires that all workers employed on the project be paid not less than the specified general prevailing wage rates by the contractor and its subcontractors.

   The contractor is responsible for obtaining and complying with all applicable general prevailing wage rates for tradesworkers and any rate changes, which may occur during the term of the contract. Prevailing wage rates and rate changes are to be posted at the job site for workers to view.

2. Apprentices

   It is the duty of the contractor and subcontractors to employ registered apprentices on public works projects per Labor Code Section 1777.5;

3. Penalties
   Penalties, including forfeitures and debarment, shall be imposed for contractor/subcontractor failure to pay prevailing wages, failure to maintain and submit accurate certified payroll records upon request, failure to employ apprentices, and for failure to pay employees for all hours worked at the correct prevailing wage rate, in accordance with Labor Code Sections 1775, 1776, 1777.7, and 1813.

4. Certified Payroll Records

   Per Labor Code Section 1776, contractors and subcontractors are required to keep accurate payroll records which reflect the name, address, social security number, and work classification of each employee; the straight time and overtime hours worked each day and each week; the fringe benefits; and the actual per diem wages paid to each journeyperson, apprentice, worker, or other employee hired in connection with a public works project.

   Employee payroll records shall be certified and shall be made available for inspection at all reasonable hours at the principal office of the contractor/subcontractor, or shall be furnished to any employee, or to his or her authorized representative on request.

   Contractors and subcontractors shall maintain their certified payrolls on a weekly basis and shall submit said payrolls weekly to the LCO. In the event that there has been no work performed during a given week, the Certified Payroll Record shall be annotated "No Work" for that week.

5. Nondiscrimination in Employment

   Prohibitions against employment discrimination are contained in Labor Code Sections 1735 and 1777.6; the Government Code; the Public Contracts Code; and Title VII of the Civil Rights Act of 1964, as amended. All contractors and subcontractors are required to implement equal employment opportunities as delineated below:

a. Equal Employment Poster

The equal employment poster shall be posted at the job site in a conspicuous place visible to employees and employment applicants for the duration of the project.

b. Records

The contractor and each subcontractor shall maintain accurate records of employment information as required by the Monthly Employment Utilization Report. This report shall specify the ethnicity and gender for each employee in a craft, trade, or classification.

c. Reports

A Monthly Employment Utilization Report for the contractor **and** for each of its subcontractors is required to be completed and submitted via fax to the AUSD Labor Compliance Program Office each month by no later than the fifth day of that month. Reports are to be for the previous month's work and are to be project specific. If no work was performed during that month, the form shall clearly state "No Work."

d. Good Faith Efforts

The contractor, when required, must submit and comply with an Employment Diversity (Affirmative Action) Plan as specified in the contract. The contractor's subcontractors must all comply with the elements contained in this plan. Failure to comply with the Employment Diversity Plan or to demonstrate good faith efforts must be documented by providing clear and complete written information, when requested to do so, of the individual(s) contacted by the contractor in its good faith effort.

6. Kickback Prohibited

Per Labor Code Section 1778, contractors and subcontractors are prohibited from accepting, taking wages illegally, or extracting "kickback" from employee wages;

7. Acceptance of Fees Prohibited

Contractors and subcontractors are prohibited from exacting any type of fee for registering individuals for public work (Labor Code Section 1779); or for filling work orders on public works contracts (Labor Code Section 1780);

8. Listing of Subcontractors

Contractors are required to list all subcontractors hired to perform work on a public works project when that work is equivalent to more than one-half of one percent of the total effort (Government Code Section 4100, et seq.);

9. Proper Licensing

Contractors and subcontractors are required to be properly licensed. Penalties will be imposed for employing workers while unlicensed (Labor Code Section 1021 and Business and Professions Code Section 7000, et seq. under California Contractors License Law);

10. Unfair Competition Prohibited

Contractors and subcontractors are prohibited from engaging in unfair competition (Business and Professions Code Sections 17200-17208);

11. Workers' Compensation Insurance

All contractors and subcontractors are required to be insured against liability for workers' compensation, or to undertake self-insurance in accordance with the provisions of Labor Code Section 3700 (Labor Code Section 1861);

12. OSHA

Contractors and subcontractors are required to comply with the Occupational, Safety and Health laws and regulations applicable to the particular public works project.

In accordance with federal and state laws, and with District policy and contract documents, the undersigned contractor herein certifies that it will comply with the foregoing labor law requirements; and fully understands that failure to comply with these requirements will subject it to the penalties cited herein.

For the Contractor:

_____
Signature Date

For the Antioch Unified School District:

_____
Signature Date

ATTACHMENT B

ANTIOCH UNIFIED SCHOOL DISTRICT
LABOR COMPLIANCE PROGRAM OFFICE

LABOR COMPLIANCE PROGRAM
AUDIT RECORD FORM
(For Use with CCR Section 16432 Audits)

An audit record is sufficiently detailed to "verify compliance with the requirements of Chapter 1, Public Works, Part 7 of Division 2," when the audit record displays that the following procedures have been followed:

1. Audit of the obligation to carry workers' compensation insurance means producing written evidence of a binder issued by the carrier, or telephone or written inquiry to the Workers' Compensation Insurance Rating Bureau;

2. Audit of the obligation to employ and train apprentices means inquiry to the program sponsor for the apprenticeable craft or trade in the area of the public work as to: whether contract award information was received, including an estimate of journeyperson hours to be performed and the number of apprentices to be employed; whether apprentices have been requested, and whether the request has been met; whether the program sponsor knows of any amounts received from the contractor or subcontractor for the training fund or the California Apprenticeship Council; and whether persons listed on the certified payroll in that craft or trade being paid less than the journeyperson rate are apprentices registered with that program and working under apprentice agreements approved by the Division of Apprenticeship Standards;

3. Audit of the obligation to pass through amounts, made part of the bid, for apprenticeship training contributions to either the training trust or the California Apprenticeship Council, means asking for copies of checks remitted, or when the audit occurs more than 30 days after the month in which payroll has been paid, copies of canceled checks remitted;

4. Audit of "illegal taking of wages" means inspection of written authorizations for deductions (as listed in Labor Code Section 224) in the contractor's files and comparison to wage deduction statements furnished to employees (Labor Code Section 226), together with an interview of several employees as to any payments made which are not reflected on the wage deduction statements;

5. Audit of the obligation to keep records of working hours (Title 8 CCR Section 16432), and pay not less than required for hours worked in excess of 8 hours/day and 40 hours/week (Title 8 CCR Section 16200(a)(3)(F), means review and audit of weekly certified payroll records;

6. Audit of the obligation to pay the prevailing per diem wage means review and audit of weekly-certified payroll records for compliance with:

   a. All elements defined as the General Prevailing Rate of Per Diem Wages in Title 8 CCR Section 16000, which were determined to be prevailing in the Director's determination in effect on the date of the call for bids, or as reflected in any subsequent revised determination issued by the Director's office, copies of which are available at the LCO's Office and posted at the public works job site;

   b. All elements defined as Employer Payments to Workers set forth in Title 8 CCR Section 16000, which were determined to be prevailing in the

Director's determination in effect on the date of the call for bids, or as reflected in any subsequent revised determination issued by the Director's office, copies of which are available at the LCO's Office and posted at the public works job site.

ANTIOCH UNIFIED SCHOOL DISTRICT
LABOR COMPLIANCE PROGRAM OFFICE

LABOR COMPLIANCE PROGRAM

NOTICE OF DEADLINES FOR FORFEITURES
(Under CCR Section 16437)

TO: _____ (NAME OF CONTRACTOR)

This document requests the Labor Commissioner of California to approve a forfeiture of money you would otherwise be paid. The Antioch Unified School District Labor Compliance Program Officer is asking the Labor Commissioner of California to agree, in 20 days, that the enclosed Evidence Report and package of materials indicates that you have violated the law.

Your failure to respond to Antioch Unified School District's request that the Labor Commissioner approve a forfeiture, by writing to the Labor Commissioner within 20 days of the date of service (the date of postmark) of this document on you, may lead the Labor Commissioner to affirm the proposed forfeiture and may also end your right to contest those amounts further.

You must serve any written response on the Labor Commissioner and the Antioch Unified School District Labor Compliance Program Officer by return receipt requested/certified mail. If you serve a written explanation, with evidence, as to why the violation did not occur or why the penalties should not be assessed, within the 20-day period, it will be considered.

And

If you change your address, or decide to hire an attorney, it is your responsibility to advise the Antioch Unified School District Labor Compliance Program Officer by certified mail. Otherwise, notices will be served at your last address on file, and deadlines may pass before you receive such notice.

ATTACHMENT D

Labor Compliance Program _____ _____ _____ _____ Phone: Fax:	(SEAL)
Date:	In Reply Refer to Case No.:

Notice of Withholding of Contract Payments

Awarding Body	Work Performed in County of
Project Name	Project No.
Prime Contractor	
Subcontractor	

After an investigation concerning the payment of wages to workers employed in the execution of the contract for the above-named public works project, the Labor Compliance Program for _____ _____ (" Labor Compliance Program") has determined that violations of the California Labor Code have been committed by the contractor and/or subcontractor identified above. In accordance with Labor Code sections 1771.5 and 1771.6, the Labor Compliance Program hereby issues this Notice of Withholding of Contract Payments.

The nature of the violations of the Labor Code and the basis for the assessment are as follows:

_____
_____
_____
_____

The Labor Compliance Program has determined that the total amount of wages due is: $_____

The Labor Compliance Program has determined that the total amount of penalties assessed under Labor Code sections 1775 and 1813 is: $_____

The Labor Compliance Program has determined that the amount of penalties assessed under Labor Code section 1776 is: $_____

LABOR COMPLIANCE PROGRAM

_____

By:_____

Notice of Right to Obtain Review - Formal Hearing

In accordance with Labor Code sections 1742 and 1771.6, an affected contractor or subcontractor may obtain review of this Notice of Withholding of Contract Payments by transmitting a written request to the office of the Labor Compliance Program that appears below within 60 days after service of the notice. **To obtain a hearing, a written Request for Review must be transmitted to the following address:**

Labor Compliance Program

_____

Review Office-Notice of Withholding of Contract Payments

_____

_____

A **Request for Review** either shall clearly identify the Notice of Withholding of Contract Payments from which review is sought, including the date of the notice, or it shall include a copy of the notice as an attachment, and shall also set forth the basis upon which the notice is being contested. In accordance with Labor Code section 1742, the contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Compliance Program at the hearing within 20 days of the Labor Compliance Program's receipt of the written **Request for Review**.

> **Failure by a contractor or subcontractor to submit a timely Request for Review will result in a final order which shall be binding on the contractor and subcontractor, and which shall also be binding, with respect to the amount due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. Labor Code section 1743.**

In accordance with Labor Code section 1742(d), a certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the State against the person assessed in the amount shown on the certified order.

Opportunity for Settlement Meeting

In accordance with Labor Code Section 1742.1 (b), the Labor Compliance Program shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of this Notice of Withholding of Contract Payments, afford the contractor or subcontractor the opportunity to meet with the Labor Compliance Program's designee **to attempt to settle a dispute regarding the notice**. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking a hearing as set forth above under the heading Notice of Right to Obtain Review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. This opportunity to timely request an informal settlement meeting is **in addition** to the right to obtain a formal hearing, and a settlement meeting may be requested even if a written **Request for Review** has already been made. Requesting a settlement meeting, however, does not extend the 60-day period during which a formal hearing may be requested.

A written request to meet with the Labor Compliance Program's designee to attempt to settle a dispute regarding this notice must be transmitted to _____ at the following address:

_____

_____

_____

Liquidated Damages

In accordance with Labor Code section 1742.1, after 60 days following the service of this Notice of Withholding of Contract Payments, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the

payment of wages covered by the notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof that still remain unpaid. If the notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the Director of the Department of Industrial Relations that he or she had substantial grounds for believing the assessment or notice to be an error, the Director shall waive payment of the liquidated damages.

The Amount of Liquidated Damages Available Under this Notice is $_____.

Distribution:

Prime Contractor
Subcontractor
Surety(s) on Bond

LABOR COMPLIANCE PROGRAM _____ Review Office - Notice of Withholding of Contract Payments _____ _____ _____ Phone: Fax:	(SEAL)
Date:	In Reply Refer to Case No.:

Notice of Transmittal

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

Enclosed herewith please find a Request for Review, dated _____, postmarked _____, and received by this office on _____.

Also enclosed please find the following:

____Copy of Notice of Withholding of Contract Payments
____Copy of Audit Summary

LABOR COMPLIANCE PROGRAM

_____

By:_____

cc:Prime Contractor
Subcontractor
Bonding Company

Please be advised that the Request for Review identified above has been received and transmitted to the address indicated. Please be further advised that the governing procedures applicable to these hearings are set forth at Title 8, California Code of Regulations sections 17201-17270. These hearings are **not** governed by Chapter 5 of the Government Code, commencing with section 11500.

ATTACHMENT F

LABOR COMPLIANCE PROGRAM _____ Review Office - Notice of Withholding of Contract Payments _____ _____ _____ Phone: Fax:	(SEAL)
Date:	In Reply Refer to Case No.:

Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742(b)

To:Prime Contractor

_____
_____
_____

Subcontractor

_____
_____
_____

Please be advised that this office has received your **Request for Review**, dated _____, and pertaining to the Notice of Withholding of Contract Payments issued by the Labor Compliance Program in Case No. _____.

In accordance with Labor Code section 1742(b), this notice provides you with an opportunity to review evidence to be utilized by the Labor Compliance Program at the hearing on the Request for Review, and the procedures for reviewing such evidence.

Rule 17224 of the Prevailing Wage Hearing Regulations provides as follows:

> "(a) Within ten (10) days following its receipt of a Request for Review, the Enforcing Agency shall also notify the affected contractor or subcontractor of its opportunity and the procedures for reviewing evidence to be utilized by the Enforcing Agency at the hearing of the Request for Review.

(b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the affected contractor or subcontractor the option at said party's own expense to either (i) obtain copies of all such evidence through a commercial copying service or (ii) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the affected contractor or subcontractor.
(c) The evidence required to be provided under this Rule shall include the identity of witnesses whose testimony the Enforcing Agency intends to present, either in person at the hearing or by declaration or affidavit. This provision shall not be construed as requiring the Enforcing Agency to prepare or provide any separate listing of witnesses whose identities are disclosed within the written materials made available under subpart (a).

(d) The Enforcing Agency shall make evidence available for review as specified in subparts (a) through (c) within 20 days of its receipt of the Request for Review; *provided that*, this deadline may be extended by written request or agreement of the affected contractor or subcontractor. The Enforcing Agency's failure to make evidence available for review as required by Labor Code section 1742(b) and this Rule, shall preclude the enforcing agency from introducing such evidence in proceedings before the Hearing officer or the Director.

(e) This Rule shall not preclude the Enforcing Agency from relying upon or presenting any evidence first obtained after the initial disclosure of evidence under subparts (a) through (d), *provided that*, such evidence is promptly disclosed to the affected contractor or subcontractor. This Rule also shall not preclude the Enforcing Agency from presenting previously undisclosed evidence to rebut new or collateral claims raised by another party in the proceeding."

In accordance with the above Rule, please be advised that the Labor Compliance Program's procedure for you to exercise your opportunity to review evidence is as follows:

Within five calendar days of the date of this notice, please transmit the attached Request to Review Evidence to the following address:

_____
_____
_____
_____
_____
Attention:_____

Request to Review Evidence

To:_____

_____

_____

_____

From:_____

_____

_____

_____

Regarding Notice of Withholding of Contract Payments Dated _____

Our Case No.: _____

The undersigned hereby requests an opportunity to review evidence to be utilized by the Labor Compliance Program at the hearing on the Request for Review.

_____

Phone No.:_____

Fax No.:_____

PREVAILING WAGE HEARING REGULATIONS

CALIFORNIA CODE OF REGULATIONS

TITLE 8, CHAPTER 8, SUBCHAPTER 6

(SECTIONS 17201 through 17270)

CONTENTS

ARTICLE 1. GENERAL

17201. Scope and Application of Rules.

(a) These Rules govern proceedings for review of civil wage and penalty assessments and the withholding of contract payments under Articles 1 and 2 of Division 2, Part 7, Chapter 1 (commencing with section 1720) of the Labor Code, as well as any notice assessing penalties for noncompliance with payroll record obligations under Labor Code section 1776. The provisions of Labor Code section 1742 and these Rules apply to all such assessments and notices served on a contractor or subcontractor on or after July 1, 2001 and provide the exclusive method for an Affected Contractor or Subcontractor to obtain review of any such notice or assessment. These Rules also apply to transitional cases in which notices were served but no court action was filed under Labor Code sections 1731-1733 prior to July 1, 2001, in accordance with Section 17270 (Rule 70) below.

(b) These Rules do not govern debarment proceedings under Labor Code section 1777.1, nor proceedings to review determinations with respect to the violation of apprenticeship obligations under Labor Code sections 1777.5 and 1777.7, nor any criminal prosecution.

(c) These Rules do not preclude any remedies otherwise authorized by law to remedy violations of Division 2, Part 7, Chapter 1 of the Labor Code.

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

NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1742, 1771.5, 1771.6(b), 1773.5, 1776, and 1777.1 – 1777.7, Labor Code; and Stats. 2000, Chapter 954, §1.

17202. Definitions.

For the purpose of these Rules:

(a) "Affected Contractor or Subcontractor" means a contractor or subcontractor (as defined under Labor Code section 1722.1) to whom the Labor Commissioner has issued a civil wage and penalty assessment pursuant to Labor Code section 1741, or to whom an Awarding Body has issued a notice of the withholding of contract payments pursuant to Labor Code section 1771.6, or to whom the Labor Commissioner or the Division of Apprentice Standards has issued a notice assessing penalties for noncompliance with payroll record obligations under Labor Code section 1776;

(b) "Assessment" means a civil wage and penalty assessment issued by the Labor Commissioner or his or her designee pursuant to Labor Code section 1741, and it also includes a notice issued by either the Labor Commissioner or the Division of Apprenticeship Standards pursuant to Labor Code section 1776;

(c) "Awarding Body" means an awarding body or body awarding the contract (as defined in Labor Code section 1722) that exercises enforcement authority under Labor Code section 1726 or 1771.5;

(d) "Department" means the Department of Industrial Relations;

(e) "Director" means the Director of the Department of Industrial Relations;

(f) "Enforcing Agency" means the entity which has issued an Assessment or Notice of Withholding of Contract Payments and with which a Request for Review has been filed; *i.e.*, it refers to the Labor Commissioner when review is sought from an Assessment, the Awarding Body when review is sought from a Notice of Withholding of Contract Payments, and the Division of Apprenticeship Standards when review is sought from a notice issued by that agency that assesses penalties under Labor Code section 1776;

(g) "Hearing Officer" means any person appointed by the Director pursuant to Labor Code section 1742(b) to conduct hearings and other proceedings under Labor Code section 1742 and these Rules;

(h) "Joint Labor-Management Committee" means a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (section 175a of Title 29 of the United States Code).

(i) "Labor Commissioner" means the Chief of the Division of Labor Standards Enforcement and includes his or her designee who has been authorized to carry out the Labor Commissioner's functions under Chapter 1, Part 7 of Division 2 (commencing with section 1720) of the Labor Code;
(j) "Party" means an Affected Contractor or Subcontractor who has requested review of either an Assessment or a Notice of Withholding of Contract Payments, the Enforcing Agency that issued the Assessment or the Notice of Withholding of Contract Payments from which review is sought, and any other Person who has intervened under subparts (a), (b), or (c) of Rule 08 [Section 17208];
(k) "Person" means an individual, partnership, limited liability company, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character;
(l) "Representative" means a person authorized by a Party to represent that Party in a proceeding before a Hearing Officer or the Director, and includes the Labor Commissioner when the Labor Commissioner has intervened to represent the Awarding Body in a review proceeding pursuant to Labor Code section 1771.6(b).
(m) "Rule" refers to a section within this subchapter 6. The Rule number corresponds to the last two digits of the full section number. (For example, Rule 08 is the same as section 17208.)
(n) "Surety" has the meaning set forth in Civil Code section 2787 and refers to the entity that issues the public works bond provided for in Civil Code sections 3247 and 3248 or any other surety bond that guarantees the payment of wages for labor.
(o) "Working Day" means any day that is not a Saturday, Sunday, or State holiday, as determined with reference to Code of Civil Procedure sections 12(a) and 12(b) and Government Code sections 6700 and 6701.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 2787, 3247, and 3248, Civil Code; sections 12a and 12b, Code of Civil Procedure; sections 6700, 6701, 11405.60 and 11405.70, Government Code; sections1720 et seq., 1722, 1722.1, 1726, 1741, 1742, 1742(b), 1771.5, 1771.6, 1771.6(b), and 1776, Labor Code; and 29 U.S.C. §175a.

17203. Computation of Time and Extensions of Time to Respond or Act.
(a) In computing the time within which a right may be exercised or an act is to be performed, the first day shall be excluded and the last day shall be included. If the last day is not a Working Day, the time shall be extended to the next Working Day.
(b) Unless otherwise indicated by proof of service, if the envelope was properly addressed, the mailing date shall be presumed to be: a postmark date imprinted on the envelope by the U.S. Postal Service if first-class postage was prepaid; or the date of delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.
(c) Where service of any notice, decision, pleading or other document is by first class mail, and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed is extended five days if the place of address is within the State of California, and 10 days if the place of address is outside the State of California but within the United States. However, this Rule shall not extend the time within which the Director may reconsider or modify a decision to correct an error (other than a clerical error) under Labor Code section 1742(b).
(d) Where service of any notice, pleading, or other document is made by an authorized method other than first class mailing, extensions of time to respond or act shall be calculated in the same manner as provided under section 1013 of the Code of Civil Procedure, unless a different requirement has been specified by the appointed Hearing Officer or by another provision of these Rules.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1010 through 1013, Code of Civil Procedure; and section 1742(b), Labor Code.

17204. Appointment of Hearing Officers; Delegation of Appointment Authority to Chief Counsel.

(a) Upon receipt of a Request for Review of an Assessment or of a Notice of Withholding of Contract Payments, the Director, acting through the Chief Counsel (*see* subpart (d) below), shall appoint an impartial Hearing Officer to conduct the review proceeding.
(b) The appointed Hearing Officer shall be an attorney employed by the Office of the Director – Legal Unit. However, if no attorney employed by the Office of the Director – Legal Unit is available or qualified to serve in a particular matter, the appointed Hearing Officer may be any attorney or administrative law judge employed by the Department, other than an employee of the Division of Labor Standards Enforcement.
(c) Any person appointed to serve as a Hearing Officer in any matter shall possess at least the minimum qualifications for service as an administrative law judge pursuant to Government Code section 11502(b) and shall be someone who is not precluded from serving under Government Code section 11425.30.
(d) The Director's authority under Labor Code section 1742(b) to appoint an impartial Hearing Officer, is delegated in all cases to the Chief Counsel of the Office of the Director or to the Chief Counsel's designated Assistant or Acting Chief Counsel when the Chief Counsel is unavailable or disqualified from participating in a particular matter. This delegation includes all related authority under Rule 40 [Section 17240] below to appoint a different Hearing Officer to conduct all or any part of a review proceeding as well as the authority to consider and decide or to assign to another Hearing Officer for consideration and decision any motion to disqualify an appointed Hearing Officer.
NOTE: Authority cited: sections 7, 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 11425.30 and 11502(b), Government Code; and sections 7, 55, 59, and 1742(b), Labor Code.

17205. Authority of Hearing Officers.
(a) In any proceeding assigned for hearing and decision under the provisions of Labor Code section 1742, the appointed Hearing Officer shall have full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Director, to hold a prehearing conference, to issue a subpoena and subpoena duces tecum for the attendance of a Person and the production of testimony, books, documents, or other things, to compel the attendance of a Person residing anywhere in the state, to certify official acts, to regulate the course of a hearing, to grant a withdrawal, disposition or amendment, to order a continuance, to approve a stipulation voluntarily entered into by the Parties, to administer oaths and affirmations, to rule on objections, privileges, defenses, and the receipt of relevant and material evidence, to call and examine a Party or witness and introduce into the hearing record documentary or other evidence, to request a Party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding, to extend the submittal date of any proceeding, to exercise such other and additional authority as is delegated to Hearing Officers under these Rules or by an express written delegation by the Director, and to prepare a recommended decision, including a notice of findings, findings, and an order for approval by the Director.
(b) There shall be no right of appeal to or review by the Director of any decision, order, act, or refusal to act by an appointed Hearing Officer other than through the Director's review of the record in issuing or reconsidering a written decision under Rules 60 [Section 17260] and 61 [Section 17261] below.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 11512, Government Code and section 1742(b), Labor Code.

17206. Access to Hearing Records.
(a) Hearing case records shall be available for inspection and copying by the public, to the same extent and subject to the same policies and procedures governing other records maintained by the Department. Hearing case records normally will be available for review in the office of the appointed Hearing Officer; *provided however,* that a case file may be temporarily unavailable when in use by the appointed Hearing Officer or by the Director or his or her designee.
(b) Nothing in this Rule shall authorize the disclosure of any record or exhibit that is required to be kept confidential or is otherwise exempt from disclosure by law or that has been ordered to be kept confidential by an appointed Hearing Officer.

NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 6250 et seq. Government Code and section 1742(b), Labor Code.

17207. Ex Parte Communications.

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

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

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

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

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

(f) To the extent not inconsistent with Labor Code section 1742, the provisions of Article 7 of Chapter 4.5 of Title 2, Division 3, Part 1 (commencing with section 11430.10) of the Government Code governing ex parte communications in administrative adjudication proceedings shall apply to review proceedings conducted under these Rules.

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

NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 11430.10 through 11430.80, Government Code, and section 1742(b), Labor Code.

17208. Intervention and Participation by other Interested Persons.

(a) The Labor Commissioner may intervene as a matter of right in any review from a Notice of Withholding of Contract Payments, either as the Representative of the Awarding Body or as an interested third Party.

(b) A bonding company and any Surety on a bond that secures the payment of wages covered by the Assessment or Notice of Withholding of Contract Payments shall be permitted to intervene as a matter of right in any pending review filed by the contractor or subcontractor from the Assessment or Withholding of Contract Payments in question; *provided that,* intervention is sought at or before the first prehearing conference held pursuant to Rule 31 [Section 17231] below and within either 30 days after the bonding company or Surety was served with a copy of the Assessment or Notice of Withholding of Contract

Payments or 30 days after the filing of the Request for Review, whichever is later. Thereafter, any request to intervene by such a bonding company or Surety shall be treated as a motion for permissive participation under subpart (~~e~~d) of this Rule. A bonding company or Surety shall have the burden of proof with respect to any claim that it did not receive notice of the Assessment or Notice of Withholding of Contract Payments until after the filing of the Request for Review.
(c) The employee(s), labor union, or Joint Labor-Management Committee who filed the formal complaint which led the Enforcing Agency to issue the Assessment or Notice of Withholding of Contract payments shall be permitted to intervene in a pending review filed by the contractor or subcontractor from the Assessment or Withholding of Contract Payments in question; *provided that,* intervention is sought at or before the first prehearing conference held pursuant to Rule 31 [Section 17231] below and there is no good cause to deny the request. Thereafter, any request to intervene by such employee(s), labor union, or Joint Labor-Management Committee shall be treated as a motion for permissive participation as an interested Person under subpart (d) of this Rule.
(d) Any other Person may move to participate as an interested Person in a proceeding in which that Person claims a substantial interest in the issues or underlying controversy and in which that Person's participation is likely to assist and not hinder or protract the hearing and determination of the case by the Hearing Officer and the Director. Interested Persons who are permitted to participate under this Rule shall *not* be regarded as Parties to the proceeding for any purpose, but may be provided notices and the opportunity to present arguments under such terms as the Hearing Officer deems appropriate.
(e) Rights to intervene or participate as an interested party are only in accordance with this Rule. Intervention or permissive participation under this Rule shall not expand the scope of issues under review nor shall it extend any rights or interests which have been forfeited as a result of an Affected Contractor or Subcontractor's own failure to file a timely Request for Review. The Hearing Officer may impose conditions on an intervener's or other interested Person's participation in the proceeding, including but not limited to those conditions specified in Government Code §11440.50(c).
(f) No Person shall be required to seek intervention in a review proceeding as a condition for pursuing any other remedy available to that Person for the enforcement of the prevailing wage requirements of Division 2, Part 7, Chapter 1 (starting with section 1720) of the Labor Code.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 11440.50(c), Government Code; and sections 1720 et seq., 1741, 1742, and 1771.6, Labor Code.

17209. Representation at Hearing.
(a) A Party may appear in person or through an authorized Representative, who need not be an attorney at law; *however,* a Party shall use the form Authorization for Representation by Non-Attorney [8 CCR 17209(b) (New 1/15/02)] to authorize representation by any non-attorney who is not an owner, officer, or managing agent of that Party.
(b) Upon formal notification that a Party is being represented by a particular individual or firm, service of subsequent notices in the matter shall be made on the Representative, either in addition to or instead of the Party, unless and until such authorization is terminated or withdrawn by further written notice. Service upon an authorized Representative shall be effective for all purposes and shall control the determination of any notice period or the running of any time limit for the performance of any acts, regardless of whether or when such notice may also have been served directly on the represented Party.
(c) An authorized Representative shall be deemed to control all matters respecting the interests of the represented Party in the proceedings.
(d) Parties and their Representatives shall have a continuing duty to keep the appointed Hearing Officer and all other Parties to the proceeding informed of their current address and telephone number.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1742(b), Labor Code.

17210. Proper Method of Service.

(a) Unless a particular method of service is specifically prescribed by statute or these Rules, service may be made by: (1) personal delivery; (2) priority or first class mailing postage prepaid through the U. S. Postal Service; (3) any other means authorized under Code of Civil Procedure section 1013; or (4) if authorized by the Hearing Officer pursuant to Rule 11 [Section 17211] below, by facsimile or other electronic means.
(b) Service is complete at the time of personal delivery or mailing, or at the time of transmission as determined under Rule 11 [Section 17211] below.
(c) Proof of service shall be filed with the document and may be made by: (1) affidavit or declaration of service; (2) written statement endorsed upon the document served and signed by the party making the statement; or (3) copy of letter of transmittal.
(d) Service on a Party who has appeared through an attorney or other Representative shall be made upon such attorney or Representative.
(e) In each proceeding, the Hearing Officer shall maintain an official address record which shall contain the names and addresses of all Parties and their Representatives, agents, or attorneys of record. Any change or substitution in such information must be communicated promptly in writing to the Hearing Officer. The official address record may also include the names and addresses of interested Persons who have been permitted to participate under Rule 08(d) [Section 17208].
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1013, Code of Civil Procedure and section 1742(b), Labor Code.

17211. Filing and Service of Documents by Facsimile or Other Electronic Means.
(a) In individual cases the Hearing Officer may authorize the filing and service of documents by facsimile or by other electronic means, subject to reasonable restrictions on the time of transmission and the page length of any document or group of documents that may be transmitted by facsimile or other electronic means, and subject to any further requirements on the use of cover sheets or the subsequent filing and service of originals or hard copies of documents as the Hearing Officer deems appropriate. Filing and service by facsimile or other electronic means shall not be authorized under terms that substantially disadvantage any Party appearing or participating in the proceeding as a matter of right. A document transmitted by facsimile or other electronic means shall not be considered received until the next Working Day following transmission unless it is transmitted on a Working Day and the entire transmission is completed by no later than 4:00 p.m. Pacific Time.
(b) Filings and service by facsimile or other electronic means shall not authorized or accepted as a substitute for another method of service that is required by statute or these Rules, unless the Party served has expressly waived its right to be served in the required manner.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1742(b), Labor Code.

17212. Administrative Adjudication Bill of Rights.
(a) The provisions of the Administrative Adjudication Bill of Rights found in Article 6 of Chapter 4.5 of Title 2, Division 3, Part 1 (commencing with section 11425.10) of the Government Code shall apply to these review proceedings to the extent not inconsistent with a state or federal statute, a federal regulation, or a court decision which applies specifically to the Department. The enumeration of certain rights in these Rules may expand but shall not be construed as limiting the same or similar provision of the Administrative Adjudication Bill of Rights; nor shall the enumeration of certain rights in these Rules be construed as negating other statutory rights not stated.
(b) Ex parte communications shall be permitted between the appointed Hearing Officer and the Director in accordance with Government Code section 11430.80(b).
(c) The presentation or submission of any written communication by a Party or other interested Person during the course of a review proceeding shall be governed by the requirements of Government Code §11440.60 (b) and (c).

(d) Unless otherwise indicated by express reference within the body of one of these Rules, the provisions of Chapter 5 of Title 2, Division 3, Part 1 (commencing with section 11500) of the Government Code shall *not* apply to these review proceedings.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 11415.20, 11425.10 et seq., and 11430.80(b), Government Code; and section 1742(b), Labor Code.

ARTICLE 2. ASSESSMENT OR NOTICE AND REQUEST FOR REVIEW

17220. Service and Contents of Assessment or Notice of Withholding of Contract Payments.

(a) An Assessment, a Notice of Withholding of Contract Payments, or a notice assessing penalties under Labor Code section 1776 shall be served on the contractor and subcontractor, if applicable, by first class and certified mail pursuant to the requirements of Code of Civil Procedure section 1013. A copy of the notice shall also be served by certified mail on any bonding company issuing a bond that secures the payment of the wages covered by the Assessment or Notice and to any Surety on a bond, if the identities of such companies are known or reasonably ascertainable. The identity of any Surety issuing a bond for the benefit of an Awarding Body as designated obligee, shall be deemed "known or reasonably ascertainable," and the Surety shall be deemed to have received the notice required under this subpart if sent to the address appearing on the face of the bond.
(b) An Assessment or Notice of Withholding of Contract Payments shall be in writing and shall include the following information:

(1) a description of the nature of the violation and basis for the Assessment or Notice; and

(2) the amount of wages, penalties, and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the Enforcing Agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1.

(c) An Assessment or Notice of Withholding of Contract Payments shall also include the following information:

(1) the name and address of the office to whom a Request for Review may be sent;

(2) information on the procedures for obtaining review of the Assessment or Withholding of Contract Payments;

(3) notice of the Opportunity to Request a Settlement Meeting under Rule 21 [Section 17221] below; and

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

> **Failure by a contractor or subcontractor to submit a timely Request for Review will result in a final order which shall be binding on the contractor and subcontractor, and which shall also be binding, with respect to the amount due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. Labor Code section 1743.**

NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1013, Code of Civil Procedure, and sections 1741, 1742, 1743, 1771.6, and 1776, Labor Code.

17221. Opportunity for Early Settlement.

(a) The Affected Contractor or Subcontractor may, within 30 days following the service of an Assessment or Notice of Withholding of Contract Payments, request a meeting with the Enforcing Agency for the purpose of attempting to settle the dispute regarding the Assessment or Notice.
(b) Upon receipt of a timely written request for a settlement meeting, the Enforcing Agency shall afford the Affected Contractor or Subcontractor a reasonable opportunity to meet for such purpose. The

settlement meeting may be held in person or by telephone and shall take place before expiration of the 60-day limit for filing a Request for Review under Rule 22 [Section 17222].
(c) Nothing herein shall preclude the Parties from meeting or attempting to settle a dispute after expiration of the time for making a request or after the filing of a Request for Review.
(d) Neither the making or pendency of a request for a settlement meeting, nor the fact that the Parties have met or have failed or refused to meet as required by this Rule shall serve to extend the time for filing a Request for Review under Rule 22 [Section 17222] below.
(e) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, such a settlement meeting shall be admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, such a settlement meeting, other than a final settlement agreement, shall be admissible or subject to discovery in any administrative or civil proceeding.
NOTE: Authority cited: sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: sections 1742, 1742.1, and 1771.6, Labor Code.

17222. Filing of Request for Review.
(a) Any Request for Review of an Assessment or of a Notice of Withholding of Contract Wages shall be transmitted in writing to the Enforcing Agency within 60 days after service of the Assessment or Notice. Failure to request review within 60 days shall result in the Assessment or the Withholding of Contract Wages becoming final and not subject to further review under these Rules.
(b) A Request for Review shall be transmitted to the office of the Enforcing Agency designated on the Assessment or Notice of Withholding of Contract Payments from which review is sought.
(c) A Request for Review shall be deemed filed on the date of mailing, as determined by the U.S. Postal Service postmark date on the envelope or the overnight carrier's receipt in accordance with Rule 03(b) [Section 17203(b)] above, or on the date of receipt by the designated office of the Enforcing Agency, whichever is earlier.
(d) An additional courtesy copy of the Request for Review may be served on the Department by mailing to the address specified in Rule 23 [Section 17223] below at any time on or after the filing of the Request for Review with the Enforcing Agency. The service of a courtesy copy on the Department shall *not* be effective for invoking the Director's review authority under Labor Code section 1742; however, it may determine the time within which the hearing shall be commenced under Rule 41(a) [Section 17241(a)] below.
(e) A Request for Review either shall clearly identify the Assessment or Notice from which review is sought, including the date of the Assessment or Notice, or it shall include a copy of the Assessment or Notice as an attachment. A Request for Review shall also set forth the basis upon which the Assessment or Notice is being contested. A Request for Review shall be liberally construed in favor of its sufficiency; however, the Hearing Officer may require the Party seeking review to provide a further specification of the issues or claims being contested and a specification of the basis for contesting those matters.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1742, and 1771.6(a), Labor Code.

17223. Transmittal of Request for Review to Department.
Within ten (10) days followings its receipt of a Request for Review, the Enforcing Agency shall transmit to the Office of the Director – Legal Unit, the Request for Review and copies of the Assessment or Notice of Withholding of Contract Wages, any Audit Summary that accompanied the Assessment or Notice, and a Proof of Service or other document showing the name and address of any bonding company or Surety entitled to notice under Rule 20(a) [Section 17220(a)] above. The Enforcing Agency shall transmit these items to the following address.

Department of Industrial Relations
Office of the Director - Legal Unit
Attention: Lead Hearing Officer

P.O. Box 420603
San Francisco, CA 94142-0603

NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1742(a) and 1771.6(a), Labor Code.

17224. Disclosure of Evidence.

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

(b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor or Subcontractor the option, at the Affected Contractor or Subcontractor's own expense, to either (A) obtain copies of all such evidence through a commercial copying service or (B) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the Affected Contractor or Subcontractor.

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

(d) The Enforcing Agency shall make evidence available for review as specified in subparts (a) through (c) within 20 days of its receipt of the Request for Review; *provided that*, this deadline may be extended by written request or agreement of the Affected Contractor or Subcontractor. The Enforcing Agency's failure to make evidence available for review as required by Labor Code section 1742(b) and this Rule, shall preclude the Enforcing Agency from introducing such evidence in proceedings before the Hearing Officer or the Director.

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

NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1742(b) and 1771.6, Labor Code.

17225. Withdrawal of Request for Review; Reinstatement.

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

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

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

NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1742 and 1771.6, Labor Code.

17226. Dismissal or Amendment of Assessment or of Notice of Withholding of Contract Payments.
(a) Upon motion to the appointed Hearing Officer, an Enforcing Agency may dismiss or amend an Assessment or Notice of Withholding of Contract Payments as follows:

(1) An Assessment or Notice of Withholding may be dismissed or amended to eliminate or reduce all or part of any claim for wages, damages, or penalties that has been satisfied or that is not warranted under the facts and circumstances of the case or to conform to an order of the Hearing Officer or the Director.

(2) An Assessment or Notice of Withholding may be amended to eliminate a claim for penalties as to the affected contractor upon a determination that the affected contractor is not liable for same under either Labor Code section 1775(b) [subcontractor's failure to pay prevailing rate] or Labor Code section 1776 (g) [failure to comply with request for certified payroll records].

(3) For good cause, an Assessment or Notice of Withholding of Contract Payments may be amended to revise or increase any claim for wages, damages, or penalties based upon a recomputation or the discovery of new evidence subsequent to the issuance of the original Assessment or Notice.

(b) The Hearing Officer shall grant any motion to dismiss or amend an Assessment or Notice of Withholding downward under subparts (a)(1) or (a)(2) absent a showing that such dismissal or amendment will result in the forfeiture of substantial substantive rights of another Party to the proceeding. The Hearing Officer may grant a motion to amend an Assessment or Notice of Withholding upward under subpart (a)(3) under such terms as are just, including where appropriate the extension of an additional opportunity for early settlement under Rule 21 [Section 17221]. Unless the Hearing Officer determines otherwise, an amended Assessment or Notice of Withholding shall be deemed fully controverted without need for filing an additional or amended Request for Review.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1742, 1771.6, 1775(b), and 1776(g), Labor Code.

17227. Early Disposition of Untimely Assessment, Withholding, or Request for Review.
(a) Upon the application of any Party or upon his or her own motion, the appointed Hearing Officer may issue an Order to Show Cause why an Assessment, a Withholding of Contract Payments, or a Request for Review should not be dismissed as untimely under the relevant statute.
(b) An Order to Show Cause issued under subpart (a) of this Rule shall be served on all Parties who have appeared or been served with any prior notice in the matter and shall provide the Parties with at least 10 days to respond in writing to the Order to Show Cause and an additional 5 days following the service of such responses to reply to any submission by any other Party. Evidence submitted in support or opposition to an Order to Show Cause shall be by affidavit or declaration under penalty of perjury. There shall be no oral hearing on an Order to Show Cause issued under this Rule unless requested by a Party or by the Hearing Officer.
(c) After the time for submitting responses and replies to the Order to Show Cause has passed or after the oral hearing, if any, the Hearing Officer may do one of the following: (1) recommend that the Director issue a decision setting aside the Assessment or Withholding of Contract Payments or dismissing the Request for Review as untimely under the statute; (2) find the Assessment, Withholding, or Request for Review timely and direct that the matter proceed to hearing on the merits; or (3) reserve the timeliness issue for further consideration and determination in connection with the hearing on the merits.
(d) A decision by the Director which sets asides an Assessment or Withholding of Contract Payments or which dismisses a Request for Review as untimely shall be subject to reconsideration and to judicial review in the same manner as any other Final Order or Decision of the Director. A determination by the Hearing Officer that the Assessment, Withholding, or Request for Review was timely or that the timeliness issue should be reserved for further consideration and determination in connection with the hearing on the merits shall *not* be subject to appeal or review except as part of any reconsideration or appeal from the Decision of the Director made after the hearing on the merits.

NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1741, 1742, 1771.5, and 1771.6, Labor Code.

17228. Finality of Assessment or of Withholding of Contract Payments When No Timely Request for Review is Filed; Authority of Awarding Body to Disburse Withheld Funds.
(a) Upon the failure of an Affected Contractor or Subcontractor to file a timely Request for Review under Labor Code section 1742(a) and Rule 22(a) [Section 17222(a)] above, the Assessment or Notice of Withholding of Contract Payments shall become a "final order" as to the Affected Contractor or Subcontractor that the Labor Commissioner may certify and file with the superior court in accordance with Labor Code section 1742(d).
(b) Where an Assessment or Notice of Withholding of Contract Payments has become final as to at least one but not as to every Affected Contractor or Subcontractor, the Awarding Body shall continue to withhold and retain the amounts required to satisfy any wages and penalties at stake in a review proceeding initiated by any other Affected Contractor or Subcontractor until there is a final order in that proceeding that is no longer subject to judicial review.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1727, 1742, and 1771.6, Labor Code.

17229. Finality of Notice of Withholding of Contract Payments; Authority of Awarding Body to Recover Additional Funds.
Where a Notice of Withholding of Contract Payments seeks to recover wages, penalties, or damages in excess of the amounts withheld from available contract payments (*see* Rule 20(b)(2) [Section 17220(b)(2)] above), an Awarding Body may recover any excess amounts that become or remain due when the Notice of Withholding of Contract Payments has become final under Labor Code section 1771.6. To recover the excess amounts, the Awarding Body shall transmit to the Labor Commissioner the Notice together with any decision of the Director or court that has become final and not subject to further review. The Labor Commissioner in turn shall certify and file the final order with the superior court in accordance with Labor Code section 1742(d).
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1742(d), and 1771.6, Labor Code.

ARTICLE 3. PREHEARING PROCEDURES

17230. Scheduling of Hearing; Continuances and Tolling.
(a) The appointed Hearing Officer shall establish the place and time of the hearing on the merits, giving due consideration to the needs of all Parties and the statutory time limits for hearing and deciding the matter. Parties are encouraged to communicate scheduling needs to the Hearing Officer and all other Parties at the earliest opportunity. It shall not be a violation of Rule 07 [Section 17207]'s prohibition on ex parte communications for the Hearing Officer or his or her designee to communicate with Parties individually for purposes of clearing dates and times and proposing locations for the hearing. The Hearing Officer may also conduct a prehearing conference by telephone or any other expeditious means for purposes of establishing the time and place of the hearing.
(b) Once a hearing date is set, a request for a continuance that is not joined in by all other Parties or that is for more than 30 days will not be granted absent a showing of extraordinary circumstances, giving due regard to the potential prejudice to other Parties in the case and other Persons affected by the matter under review. Absent an enforceable waiver (*see* subpart (d) below), no continuance will be granted nor any proceeding otherwise delayed if doing so is likely to prevent the Hearing Officer from commencing the hearing on the matter within the statutory time limit.
(c) A request for a continuance that is for 30 days or less and is joined by all Parties shall be granted upon a showing of good cause. Notwithstanding subpart (b) above, a unilateral request for a continuance made by the Party who filed the Request for Review shall be granted upon a showing of good cause if the

new date for commencing the hearing is no more than 150 days after the date of service of the Assessment or Notice of Withholding of Contract Payments.
(d) If a Party makes or joins in any request that would delay or otherwise extend the time for hearing or deciding a review proceeding beyond any prescribed time limit, such request shall also be deemed a waiver by that Party of that time limit.
(e) The time limits for hearing and deciding a review proceeding shall also be deemed tolled (1) when proceedings are suspended to seek judicial enforcement of a subpoena or other order to compel the attendance, testimony, or production of evidence by a necessary witness; (2) when the proceedings are stayed or enjoined by any court order; (3) between the time that a proceeding is dismissed and then ordered reinstated under Rule 25 [Section 17225] above; (4) upon the order of a court reinstating or requiring rehearing of the merits of a proceeding; or (5) during the pendency of any other cause beyond the Director's direct control (including but not limited to natural disasters, temporary unavailability of a suitable hearing facility, or absence of budget authority) that prevents the Director or any appointed Hearing Officer from carrying out his or her responsibilities under these Rules.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1742(b), Labor Code.

17231. Prehearing Conference.
(a) Upon the application of any Party or upon his or her own motion, the appointed Hearing Officer may conduct a prehearing conference for any purpose that may expedite or assist the preparation of the matter for hearing or the disposition of the Request for Review. The prehearing conference may be conducted by telephone or other means that is convenient to the Hearing Officer and the Parties.
(b) The Hearing Officer shall provide reasonable advance notice of any prehearing conference conducted pursuant to this Rule. The Notice shall advise the Parties of the matters which the Hearing Officer intends to cover in the prehearing conference, but the failure of the Notice to enumerate some matter shall not preclude its discussion or consideration at the conference.
(c) With or without a prehearing conference, the Hearing Officer may issue such procedural Orders as are appropriate for the submission of evidence or briefs and conduct of the hearing, consistent with the substantial rights of the affected Parties.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 11511.5, Government Code, and section 1742(b), Labor Code.

17232. Consolidation and Severance.
(a) The Hearing Officer may consolidate for hearing and decision any number of proceedings where the facts and circumstances are similar and consolidation will result in conservation of time and expense. Where the Hearing Officer proposes to consolidate proceedings on his or her own motion, the Parties shall be given reasonable notice and an opportunity to object before consolidation is ordered.
(b) The Hearing Officer may sever consolidated proceedings for good cause.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 11507.3, Government Code, and section 1742(b), Labor Code.

17233. Prehearing Motions; Cut Off Date.
(a) Any motion made in advance of the hearing on the merits, any opposition thereto, and any further reply shall be in writing and directed to the appointed Hearing Officer. No particular format shall be required; however, the following information shall appear prominently on the first page: (1) the case name (*i.e.*, names of the Parties); (2) any assigned case number; (3) the name of the Hearing Officer to whom the paper is being submitted; (4) the identity of the Party submitting the paper; (5) the nature of the relief sought; and (6) the scheduled date, if any, for the hearing on the merits of the Request for Review. The motion shall also include a Proof of Service, as defined in Rule 10 [Section 17210] above, showing that copies have been served on all other Parties to the proceeding.

(b) Prehearing motions shall be served and filed no later than 20 days prior to the hearing on the merits of the Request for Review. Any opposition shall be served and filed no later than 10 days after service of the motion or at least 7 days prior to the hearing on the merits, whichever is earlier. The Hearing Officer may in his or her discretion decide the motion in writing in advance of the hearing on the merits or reserve the matter for further consideration and determination at the hearing on the merits.
(c) There shall be no right to a separate oral hearing on any prehearing motion, except in those instances in which an oral hearing has been specially requested by a Party or the Hearing Officer *and* in which the enforcement or forfeiture of a fundamental right is at stake. When the Hearing Officer determines that such an oral hearing is necessary or appropriate, it may be conducted by telephone or other manner that is convenient to the Parties.
(d) With the exception of timeliness challenges under Rule 27 [Section 17227], prehearing motions which seek to dispose of a Request for Review or any related claim or defense are disfavored and ordinarily will not be considered prior to the hearing on the merits.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1742(b), Labor Code.

17234. Evidence by Affidavit or Declaration.
(a) At any time 20 or more days prior to commencement of a hearing, a Party may serve upon all other Parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subpart (b). Unless another Party, within 10 days after service of such notice, delivers to the proponent a request to cross-examine the affiant or declarant, the right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified in person. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefor is made as herein provided, the affidavit or declaration may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.
(b) The notice referred to in subpart (a) shall be substantially in the following form with the appropriate information inserted in the places enclosed by brackets:

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

(c) If a timely request is made to cross-examine an affiant or declarant under this Rule, the burden of producing that witness at the hearing shall be upon the proponent of the witness. If the proponent fails to produce the witness, the affidavit or declaration may be introduced in evidence, but shall be given only the same effect as other hearsay evidence under Rule 44 [Section 17244].
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: Rule 1613, California Rules of Court; section 11514, Government Code; and section 1742(b), Labor Code.

17235. Subpoena and Subpoena Duces Tecum.
(a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for the production of documents at any reasonable time and place or at a hearing.
(b) Subpoenas and subpoenas duces tecum shall be issued by the Hearing Officer at the request of a Party, or by the attorney of record for a Party, in accordance with sections 1985 to 1985.6, inclusive, of the Code of Civil Procedure. The burden of serving a subpoena that has been issued by the Hearing Officer shall be upon the Party who requested the subpoena.

(c) Service of subpoenas and subpoenas duces tecum, objections thereto, and mileage and witness fees shall be governed by the provisions of Government Code sections 11450.20 through 11450.40.
(d) Subpoenas and subpoenas duces tecum shall be enforceable through the Contempt and Monetary Sanctions provision set forth in Rule 47 [Section 17247] below. A Party aggrieved by the failure or refusal of any witness to obey a subpoena or subpoena duces tecum shall have the burden of showing to the satisfaction of the Hearing Officer that the subpoena or subpoena duces tecum was properly issued and served and that the testimony or evidence sought was necessary to prove or disprove a significant claim or defense in the proceeding.
NOTE: Authority cited: 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1985 through 1988, Code of Civil Procedure; section 1563, Evidence Code; sections 11450.20 through 11455.30, Government Code; and section 1742(b), Labor Code.

17236. Written Notice to Party in Lieu of Subpoena.
(a) In the case of the production of a Party of record in the proceeding or of a Person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the Party or Person. For purposes of this Rule, a Party of record in the proceeding or Person for whose benefit a proceeding is prosecuted or defended includes an officer, director, or managing agent of any such Party or Person.
(b) Service of written notice to attend under this Rule shall be made in the same manner and subject to the same conditions provided in section 1987 of the Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.
(c) The Hearing Officer shall have authority under Rule 47 [Section 17247] below to sanction a Party who fails or refuses to comply with a written notice to attend that meets the requirements of this Rule and has been timely served in accordance with section 1987 of the Code of Civil Procedure. However, the Hearing Officer may not initiate contempt proceedings against the witness for failing to appear based solely on non-compliance with a written notice to attend served on the Party's attorney. A Party seeking sanctions for another Party's failure or refusal to comply with a written notice to attend shall have the burden of showing to the satisfaction of the Hearing Officer that the written notice to attend was properly issued and timely served and that the testimony or evidence sought was necessary to prove or disprove a significant claim or defense in the proceeding.
NOTE: Authority cited: 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1987, Code of Civil Procedure; sections 11450.50 through 11455.30, Government Code; and section 1742(b), Labor Code.

17237. Depositions and Other Discovery.
(a) There shall be no right to take oral depositions or obtain any other form of discovery that is not expressly authorized under these Rules.
(b) Oral depositions may be conducted only by stipulation of all Parties to the proceedings or by order of the appointed Hearing Officer upon a showing of substantial good cause. Oral depositions will be permitted only for purposes of obtaining the testimony of witnesses who are likely to be unavailable to testify at the hearing.
(c) Nothing in this Rule shall preclude the use of deposition testimony or other evidence obtained in separate proceedings, if such evidence is otherwise relevant and admissible.
NOTE: Authority cited: 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1987, Code of Civil Procedure; sections 11450.50 through 11455.30, Government Code; and section 1742(b), Labor Code.

ARTICLE 4. HEARINGS

17240. Notice of Appointment of Hearing Officer; Objections.

(a) Notice of the Appointment of a Hearing Officer under Rule 04 [Section 17204] above shall be provided to the Parties as soon as practicable and no later than when the matter is noticed for a prehearing conference or hearing.
(b) The Director may appoint a different Hearing Officer to conduct and hear the review or to conduct and dispose of any preliminary or procedural matter in a given case.
(c) A Party wishing to object to the appointment of a particular Hearing Officer, including for any one or more of the grounds specified in sections 11425.30 and 11425.40 of the Government Code or section 1742(b) of the Labor Code, shall within 10 days after receiving notice of the appointment and no later than the start of any hearing on the merits, *whichever is earlier*, file a motion to disqualify the appointed Hearing Officer together with a supporting affidavit or declaration. The motion shall be filed with the Chief Counsel of the Office of the Director at the address indicated in Rule 23 [Section 17223] above. Notwithstanding the foregoing time limits, if a Party subsequently discovers facts constituting grounds for the disqualification of the appointed Hearing Officer, including but not limited to that the Hearing Officer has received a prohibited ex parte communication in the pending case, the motion shall be filed as soon as practicable after the facts constituting grounds for disqualification are discovered.
(d) Upon receipt of a motion to disqualify the appointed Hearing Officer, the Director may: (1) consider and decide the motion or appoint another Hearing Officer to consider and decide the motion, in which case the challenged Hearing Officer shall first be given an opportunity to respond to the motion, but no proceedings shall be conducted by the challenged Hearing Officer until the motion is determined; or (2) appoint another Hearing Officer to hear the Request for Review, in which case the motion shall be deemed moot.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code . Reference: sections 170.3(c)(1), Code of Civil Procedure; sections 11425.30 and 11425.40, Government Code; and section 1742(b), Labor Code.

17241. Time and Place of Hearing.
(a) A hearing on the merits of a timely Request for Review shall be commenced within 90 days after the date it is received by the Office of the Director. The hearing shall be conducted at a suitable location within the county where the appointed Hearing Officer maintains his or her regular office, unless the hearing is moved to a different county in accordance with subpart (b) below.
(b) Upon the agreement of the Parties or upon a showing of good cause by either the Party who filed the Request for Review or the Enforcing Agency, the hearing shall be conducted at a suitable location within either (1) the county where a majority of the subject public works employment was performed, or (2) any other county that is proximate to or convenient for the Parties and necessary witnesses.
(c) A suitable location under this section means one that is open and accessible to members of the public and which includes appropriate facilities for the recording of testimony. Any facility that is regularly used by any state agency or by the Awarding Body for public hearings and that will reasonably accommodate the anticipated number of Parties and witnesses involved in the proceeding, is presumed suitable in the absence of a contrary showing. Parties seeking to change the location of a hearing under subpart (b) shall make reasonable efforts to identify, agree upon, and arrange for the availability of a suitable location within a county specified in subpart (b)(1) or (b)(2).
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 11425.20, Government Code; and section 1742(b), Labor Code.

17242. Open Hearing; Confidential Evidence and Proceedings; and Exclusion of Witnesses.

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

members of the public shall also have a reasonable right of access to the hearing record and any transcript of the proceedings.
(b) Notwithstanding the provisions of subpart (a), the Hearing Officer may order closure of a hearing or make other protective orders to the extent necessary to: (1) preserve the confidentiality of information that is privileged, confidential, or otherwise protected by law; (2) ensure a fair hearing in the circumstances of the particular case; or (3) protect a minor witness or a witness with a developmental disability from intimidation or other harm, taking into account the rights of all persons.
(c) Upon motion of any Party or upon his or her own motion, the Hearing Officer may exclude from the hearing room any witnesses not at the time under examination. However, a Party to the proceeding and the Party's Representative shall not be excluded.
(d) This section does not apply to any prehearing or settlement conference.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 777, Evidence Code, section 11425.20, Government Code, and section 1742(b), Labor Code.

17243. Conduct of Hearing.
(a) Testimony shall be taken only on oath or affirmation under penalty of perjury.
(b) Every Party shall have the right to call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which Party first called the witness to testify; and to rebut any opposing evidence. A Party may be called by an opposing Party and examined as if under cross-examination, whether or not the Party called has testified or intends to testify on his or her own behalf.
(c) The Hearing Officer may call and examine any Party or witness and may on his or her own motion introduce exhibits.
(d) The Hearing Officer shall control the taking of evidence and other course of proceedings in a hearing and shall exercise that control in a manner best suited to ascertain the facts and safeguard the rights of the Parties. Prior to taking evidence, the Hearing Officer shall define the issues and explain the order in which evidence will be presented; *provided that*, for good cause the Hearing Officer later may vary the order of presentation as circumstances warrant.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 11513, Government Code; and section 1742(b), Labor Code.

17244. Evidence Rules; Hearsay.
(a) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.
(b) The rules of privilege shall be recognized to the same extent and applied in the same manner as in the courts of this state.
(c) The Hearing Officer may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.
(d) Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it either would be admissible over objection in a civil action or no Party raises an objection to such use. Unless previously waived, an objection or argument that evidence is insufficient in itself to support a finding because of its hearsay character shall be timely if presented at any time before submission of the case for decision.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 11513, Government Code; and section 1742(b), Labor Code.

17245. Official Notice.

(a) A Hearing Officer may take official notice of (1) the Director's General Prevailing Wage Determinations, the Director's Precedential Coverage Decisions, and wage data, studies, and reports issued by the Division of Labor Statistics and Research; (2) any other generally accepted technical fact within the fields of labor and employment that are regulated by the Director under Divisions 1, 2, and 3 of the Labor Code; and (3) any fact which either must or may be judicially noticed by the courts of this state under Evidence Code sections 451 and 452.
(b) The Parties participating in a hearing shall be informed of those matters as to which official notice is proposed to be taken and given a reasonable opportunity to show why and the extent to which official notice should or should not be taken.
(c) The Hearing Officer or the Director shall state in a decision, order, or on the record the matters as to which official notice has been taken.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 451, 452 and 455, Evidence Code; section 11515, Government Code; and section 1742(b), Labor Code.

17246. Failure to Appear; Relief from Default.
(a) Upon the failure of any Party to appear at a duly noticed hearing, the Hearing Officer may proceed in that Party's absence and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn from an absence of proof by the non-appearing Party.
(b) For good cause and under such terms as are just, the appointed Hearing Officer or the Director may relieve a Party from the effects of any failure to appear and order that a review proceeding be reinstated or reheard. A Party seeking relief from non-appearance shall file a written motion at the earliest opportunity and no later than 10 days following a proceeding of which the Party had actual notice. Such application shall be supported by an affidavit or declaration based on the personal knowledge of the declarant, and copies of the application and any supporting materials shall be served on all other Parties to the proceeding. No application shall be granted unless and until the other Parties have been afforded a reasonable opportunity to make a showing in opposition. An Order reinstating a proceeding or granting a rehearing under this section may be conditioned upon providing reimbursement to the Department and the other Parties for the costs associated with the prior non-appearance.
(c) Notwithstanding any application or showing made under subpart (b) of this Rule, neither the Hearing Officer nor the Director may reinstate any Request for Review where the underlying Assessment or Withholding of Contract Payments has become final and entered as a court judgment.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 473, Code of Civil Procedure; and section 1742(b), Labor Code.

17247. Contempt and Monetary Sanctions.
(a) If any Person in proceedings before an appointed Hearing Officer disobeys or resists any lawful order or refuses, without substantial justification, to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceedings, or violates the prohibition against ex parte communications under Rule 07 [Section 17207] above, the Hearing Officer may do any one or more of the following: (1) certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20; (2) exclude the Person from the hearing room; (3) prohibit the Person from testifying or introducing certain matters in evidence; and/or (4) establish certain facts, claims, or defenses if the Person in contempt is a Party.
(b) Either the appointed Hearing Officer by separate order or the Director in his or her decision may order a Party, the Party's authorized Representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another Party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in section 128.5 of the Code of Civil Procedure. Such order or the denial of such an order shall be subject to judicial review in the same manner as a

decision of the Director on the merits. The order shall be enforceable in the same manner as a money judgment or by the contempt sanction.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 128.5, Code of Civil Procedure; sections 11455.10 through 11455.30, Government Code; and section 1742(b), Labor Code.

17248. Interpreters.
(a) Proceedings shall be conducted in the English language. The notice advising a Party of the hearing date shall also include notice of the Party's right to request an interpreter for a Party or witness who cannot speak or understand English, or who can do so only with difficulty, or who is deaf or hearing impaired as defined under Evidence Code section 754.
(b) A request for an interpreter for a Party or witness shall be submitted as soon as possible after the requesting Party becomes aware of the need for an interpreter and prior to the commencement of the hearing. The request should include information that (1) will enable the Hearing Officer and Department to obtain an interpreter with appropriate skills; and (2) will assist the Hearing Officer in determining whether the Department or the requesting Party should pay for the cost of the interpreter.
(c) Upon receipt of a timely request, the Hearing Officer shall direct the Department to provide an interpreter and shall also decide whether the Department or the requesting Party shall pay the cost of the interpreter, based upon an equitable consideration of all the circumstances, including the requesting Party's ability to pay.
(d) A person is qualified to serve as an interpreter if he or she (1) is on the current State Personnel Board List of Certified Administrative Hearing Interpreters maintained pursuant to Government Code section 11435.25; and (2) has also been examined and determined by the Department to be sufficiently knowledgeable of the terminology and procedures generally used in these proceedings.
(e) In the event that a qualified interpreter under subpart (d) is unavailable or if there are no certified interpreters for the language in which assistance is needed, the Hearing Officer may qualify and appoint another interpreter to serve as needed in a single hearing or case.
(f) Before appointment of an interpreter, the Hearing Officer or a Party may conduct a brief supplemental examination of the prospective interpreter to see if that person has the qualifications necessary to serve as an interpreter, including whether he or she understands terms and procedures generally used in these proceedings, can explain those terms and procedures in English and the other language being used, and can interpret those terms and procedures into the other language. An interpreter shall not have had any prior substantive involvement in the matter under review, and shall disclose to the Hearing Officer and the Parties any actual conflict of interest or appearance of conflict. Any condition that interferes with the objectivity of an interpreter constitutes a conflict of interest. A conflict may exist if an interpreter is an employee of, acquainted with, or related to a Party or witness to the proceeding, or if an interpreter has an interest in the outcome of the proceeding.
(g) The Hearing Officer shall disqualify an interpreter if the interpreter cannot understand and interpret the terms and procedures used in the hearing or prehearing conference, has disclosed privileged or confidential communications, or has engaged in conduct which, in the judgment of the Hearing Officer, creates an appearance of bias, prejudice, or partiality.
(h) Nothing in this section limits any further rights extended by Evidence Code section 754 to a Party or witness who is deaf or hard of hearing.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 754, Evidence Code; sections 11435.05 through 11435.65, and 68560 through 68566, Government Code; and section 1742(b), Labor Code.

17249. Hearing Record; Recording of Testimony and other Proceedings.
(a) The Hearing Officer and the Director shall maintain an official record of all proceedings conducted under these Rules. In the absence of a determination under subpart (b) below, all testimony and other proceedings at any hearing shall be recorded by audiotape. Recorded testimony or other proceedings

need not be transcribed unless requested for purposes of further court review of a decision or order in the same case.
(b) Upon the application of any Party or upon his or her own motion, the Hearing Officer may authorize the use of a certified court reporter, videotape, or other appropriate means to record the testimony and other proceedings. Any application by a Party under this subpart shall be made at a prehearing conference or by prehearing motion filed no later than 10 days prior to the scheduled date of hearing. Upon the granting of any such application, it shall be the responsibility of the Party or Parties who made the application to procure and pay for the services of a qualified person and any additional equipment needed to record the testimony and proceedings by the requested means. Ordinarily the granting of such application will be conditioned on the applicant's paying for certified copies of the transcript for the official record and for the other Parties. The failure of a requesting Party to comply with this requirement shall not be cause for delaying the hearing on the merits, but instead shall result in the proceedings being tape recorded in accordance with subpart (a).
(c) The Parties may, at their own expense, arrange for the recording of testimony and other proceedings through a different means other than the one authorized by the Hearing Officer, *provided that* it does not in any way interfere with the Hearing Officer's control and conduct of the proceedings, and *further provided that*, it shall not be regarded as an official record for any purpose absent a stipulation by all of the Parties or order of the Hearing Officer.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1742(b), Labor Code.

17250. Burdens of Proof on Wages and Penalties.
(a) The Enforcing Agency has the burden of coming forward with evidence that the Affected Contractor or Subcontractor (1) was served with an Assessment or Notice of Withholding of Contract Payments in accordance with Rule 20 [Section 17220]; (2) was provided a reasonable opportunity to review evidence to be utilized at the hearing in accordance with Rule 24 [Section 17224]; and (3) that such evidence provides prima facie support for the Assessment or Withholding of Contract Payments.
(b) If the Enforcing Agency meets its initial burden under (a), the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment or for the Withholding of Contract Payments is incorrect.
(c) With respect to any civil penalty established under Labor Code section 1775, the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.
(d) All burdens of proof and burdens of producing evidence shall be construed in a manner consistent with relevant sections of the Evidence Code, and the quantum of proof required to establish the existence or non-existence of any fact shall be by a preponderance of the evidence, unless a higher standard is prescribed by law.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 500, 502, and 550, Evidence Code; and sections 1742(b) and 1775, Labor Code. .

17251. Liquidated Damages.
(a) With respect to any liquidated damages for which an Affected Contractor, Subcontractor, or Surety on a bond becomes liable under Labor Code section 1742.1, the Enforcing Agency shall have a further burden of coming forward with evidence to show the amount of wages that remained unpaid as of 60 days following the service of the Assessment or Notice of Withholding of Contract Payments. The Affected Contractor or Subcontractor shall have the burden of demonstrating that he or she had substantial grounds for believing the Assessment or Notice to be in error.
(b) To demonstrate "substantial grounds for believing the Assessment or Notice to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment or Notice was in error; (2) that there is an objective basis in law and fact for the claimed

error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment or Notice.
NOTE: Authority cited: 55, 59, 1742(b), and 1773.5, Labor Code. Reference: sections 1742(b), 1742.1, and 1773.5, Labor Code.

17252. Oral Argument and Briefs.
(a) Parties may submit prehearing briefs of reasonable length under such conditions as the appointed Hearing Officer shall prescribe. Parties shall also be permitted to present a closing oral argument of reasonable length at or following the conclusion of the hearing.
(b) There shall be no automatic right to file a post-hearing brief. However, the Hearing Officer may permit the Parties to submit written post-hearing briefs, under such terms as are just. The Hearing Officer shall have discretion to determine, among other things, the length and format of such briefs and whether they will be filed simultaneously or on a staggered (opening, response, and reply) basis.
(c) In addition to or as an alternative to post-hearing briefs, the Hearing Officer may also prepare proposed findings or a tentative decision or may designate a Party to prepare proposed findings and thereafter give the Parties a reasonable opportunity to present arguments in support of or opposition to any proposed findings or tentative decision prior to the issuance of a decision by the Director under Rule 60 [Section 17260] below.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1742(b), Labor Code.

17253. Conclusion of Hearing; Time for Decision.
(a) The hearing shall be deemed concluded and the matter submitted either upon the completion of all testimony and post-hearing arguments or upon the expiration of the last day for filing any post-hearing brief or other authorized submission, whichever is later. Thereafter, the Director shall have 45 days within which to issue a written decision affirming, modifying, or dismissing the Assessment or the Withholding of Contract Wages.
(b) For good cause, the Hearing Officer may vacate the submission and reopen the hearing for the purpose of receiving additional evidence or argument, in which case the time for the Director to issue a written decision shall run from the date of resubmission.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1742(b), Labor Code.

ARTICLE 6. DECISION OF THE DIRECTOR

17260. Decision.
(a) The appointed Hearing Officer shall prepare a recommended decision for the Director's review and approval. The decision shall consist of a notice of findings, findings, and an order, and shall be in writing and include a statement of the factual and legal basis for the decision, consistent with the requirements of Labor Code section 1742 and Government Code section 11425.50.
(b) A recommended decision shall have no status or effect unless and until approved by the Director and issued in accordance with subpart (c) below.
(c) A copy of the decision shall be served by first class mail on all Parties in accordance with the requirements of Code of Civil Procedure section 1013. If a Party has appeared through an authorized Representative, service shall be made on that Party at the last known address on file with the Enforcing Agency in addition to service on the authorized Representative.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1013, Code of Civil Procedure; section 11425.50, Government Code; and section 1742(b), Labor Code. .
17261. Reconsideration.

(a) Upon the application of any Party or upon his or her own motion, the Director may reconsider or modify a decision issued under Rule 60 [Section 17260] above for the purpose of correcting any error therein.
(b) The decision must be reconsidered or modified within 15 days after its date of issuance pursuant to Rule 60(c) [Section 17260(c)]. Thereafter, the decision may not be reconsidered or modified, except that a clerical error may be corrected at any time.
(c) The modified or reconsidered decision shall be served on the Parties in the same manner as a decision issued under Rule 60 [Section 17260].
(d) A Party is not required to apply for reconsideration before seeking judicial review of a decision of the Director. An application for reconsideration made by any Party shall *not* extend the time for seeking judicial review pursuant to Labor Code section 1742(c) unless the Director issues a modified or reconsidered decision within the 15-day time limit prescribed in subpart (b) of this section.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1742, Labor Code.

17262. Final Decision; Time for Seeking Review.
(a) The decision of the Director issued pursuant to Section Rule 60 [Section 17260] above shall be the final decision of the Director from which any Party may seek judicial review pursuant to the provisions of Labor Code section 1742(c) and Code of Civil Procedure section 1094.5; *provided however*, that if the Director has issued a modified decision pursuant to and within the 15-day limit of the Director's reconsideration authority under Section Rule 61 [Section 17261] above and Labor Code section 1742(b), the right of review and time for seeking such review shall extend from the date of service of the modified decision rather than from the original decision.
(b) The modification of a decision to correct a clerical error after expiration of the 15-day time limit on the Director's reconsideration authority shall *not* extend the time for seeking judicial review.
(c) The time for seeking judicial review shall be determined from the date of service of the decision of the Director under Code of Civil Procedure section 1013, including any applicable extension of time provided in that statute.
(d) Any petition seeking judicial review of a decision under these Rules may be served (1) upon the Director by serving the Office of the Director – Legal Unit where the appointed Hearing Officer who conducted the hearing on the merits regularly maintains his or her office; and (2) upon the Labor Commissioner (in cases in which the Labor Commissioner was the Enforcing Agency) by the serving the regular office of the attorney who represented the Labor Commission at the hearing on the merits. The intent of this subpart is to authorize and designate a preferred method for giving the Director and the Labor Commissioner formal notice of a court action seeking review of a decision of the Director under these Rules; it does not preclude the use any other service method authorized by law.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5. Reference: sections 1013 and 1094.5, Code of Civil Procedure; and section 1742, Labor Code.

17263. Preparation of Record for Review.
(a) Upon notice that a Party intends to seek judicial review of a decision of the Director and the payment of any required deposit, the Department, under the direction of the appointed Hearing Officer, shall immediately prepare a hearing record consisting of all exhibits and other papers and a transcript of all testimony which the Party has designated for the inclusion in the record on review.
(b) The Party who has requested the record or any part thereof shall bear the cost of its preparation, including but not necessarily limited to any court reporter transcription fees and reasonable charges for the copying, binding, certification, and mailing of documents. Absent good cause, no record will be released to a Party or filed with a court until adequate funds to cover the cost of preparing the record have been paid by the requesting Party to the Department or to any third party designated to prepare the record. However, upon notice that a Party seeking judicial review has been granted *in forma pauperis* status

under California Rule of Court 985, the Department shall bear the cost of preparing and filing the record where necessary for a proper review of the proceedings.
(c) The pendency of any request for the Department to prepare a hearing record shall *not* extend the time limits for filing a petition for review under Labor Code section 1742(c) and Code of Civil Procedure section 1094.5.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1094.5, Code of Civil Procedure; California Rule of Court 985; section 68511.3, Government Code; and section 1742(c), Labor Code.

17264. Request for Participation by Director in Judicial Review Proceeding.
Although the Director should be named as the Respondent in any action seeking judicial review of a final decision, the Director ordinarily will rely upon the Parties to the hearing (as Petitioner and Real Party in Interest) to litigate the correctness of the final decision in the writ proceeding and on any appeal. The Director may participate actively in proceedings raising issues that specifically concern the Director's authority under the statutes and regulations governing the payment of prevailing wages on public work contracts, or the validity of related laws, regulations, or the Director's decisions as to public works coverage or generally applicable prevailing wage rates. Any Party may request the Director to file a response in the action by including a separate written request with any court pleading being served on the Director in accordance with Rule 62(d) [Section 17262(d)]. Any such separate written request should specify briefly what issues are raised by the petition that extend beyond the facts of the case and warrant the Director's participation.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1094.5, Code of Civil Procedure and section 1742(c), Labor Code.

ARTICLE 7. TRANSITIONAL RULE.

17270. Applicability of these Rules to Notices Issued Between April 1, 2001 and June 30, 2001.
(a) These Rules shall apply to any notice issued by the Labor Commissioner or an Awarding Body with respect to the withholding or forfeiture of contract payments for unpaid wages or penalties under the prevailing wage laws in effect prior to July 1, 2001; *provided that*, the party seeking review has not commenced a civil action with respect to such notice under the provisions of Labor Code sections 1731-1733 [repealed effective July 1, 2001].
(b) An Affected Contractor or Subcontractor may appeal any such notice served between April 1, 2001 and June 30, 2001 by filing a Request for Review with the Enforcing Agency that issued the notice, in the manner and form specified in Rule 22 [Section 17222] above. Any such Request for Review shall be in writing and shall include a statement indicating the date upon which the contractor or subcontractor was served with the notice of withholding or forfeiture.
(c) This Rule shall *not* extend the time available to appeal the notice under the former law. A Request for Review of a notice issued prior to July 1, 2001 must be filed with the Enforcing Agency within ninety (90) days after service of the notice.
(d) A contractor or subcontractor who has sought review of a notice issued prior to July 1, 2001 by filing a court action under the repealed provisions of Labor Code sections 1731-1733 on or after July 1, 2001, shall, if said action would have been timely under those sections, be afforded the opportunity to dismiss the action without prejudice, after entering into a stipulation that the proceeding be transferred to the Director for hearing in accordance with these Rules. The stipulation shall also provide that the time for commencing a hearing under Rule 41 [Section 17241] shall not begin to run until the case has been formally transferred to and received by the Office of the Director.
(e) Any hearing request made pursuant to Labor Code section 1771.7 [repealed effective July 1, 2001] that has not been heard and decided by a Hearing Officer prior to July 1, 2001 shall be handled in accordance with these Rules.
NOTE: Authority cited: sections 55, 59, 1742(b), and 1773.5, Labor Code. Reference: section 1742(b), Labor Code.

ANTIOCH UNIFIED SCHOOL DISTRICT

LABOR COMPLIANCE PROGRAM OFFICE

Implementation Plan

Section III

IMPLEMENTATION PLAN

- Labor Compliance Officer receives construction contract awards/work schedules from the Maintenance & Operations and the Facilities Departments.
- Labor Compliance Officer participates in job-start meeting.
- Labor Compliance Officer provides site monitors with work schedules.
- Site monitors, both District employees and others, conduct interviews and return interview sheets to Labor Compliance Officer.
- Labor Compliance Officer enters information from interviews into database.
- Labor Compliance Officer verifies information from certified payroll records.
- Labor Compliance Officer notifies contractor in writing of any discrepancies with certified payroll records.
- If clarification/correction is not received from the contractor within two weeks, Labor Compliance Officer will commence an investigation.
- Upon completion of the investigation, a report will be sent to the Department of Industrial Relations with recommendations for penalties to be applied to the contractor.
- Labor Compliance Officer prepares and submits public works violation reports to Labor Commissioner as required.
- Labor Compliance Officer receives Monthly Employment Utilization Report from the contractor and its subcontractors; Labor Compliance Officer maintains database of this information for year-end report to the Board of Education.
- Labor Compliance Officer communicates on a regular basis with contractors, workers, building and trade organizations, and other community entities and in-service management to District personnel.
- Labor Compliance Officer prepares and submits annual program reports to the Antioch Unified School District Superintendent, Board of Education, and the Director of the Department of Industrial Relations.
- Labor Compliance Officer manages all facets and is the primary contact for the District's Labor Compliance Program.
- Labor Compliance Officer provides non-District site monitors with site visitation training and assigns projects when applicable.

Section IV

ANTIOCH UNIFIED SCHOOL DISTRICT

LABOR COMPLIANCE PROGRAM OFFICE

Operational Manual

SECTION IV

OPERATION MANUAL

Site Visitations

1. Safety is the paramount factor for any site visit to any Antioch Unified School District construction projects. Do not enter any area that appears unsafe. Site monitor is expected to exercise reasonable caution at all times.

2. All authorized personnel visiting any Antioch Unified School District construction site are required to be properly identified as a District representative by wearing visible picture ID's (badge), or identifying themselves as such. Additionally, all authorized personnel are required to wear hard hats and safety shoes.

3. Authorized personnel shall visit all sites on a non-interference basis and take a minimum amount of the workers' time for interview purposes.

4. Upon arrival at a site, the site monitor will check in at the site superintendent's (contractor's) trailer prior to any interviewing. In the event there is not a construction trailer, you will check in at the site's administrative office. Identify yourself and state the purpose of the visit. Sign in if required to do so. If the site superintendent cites some reason that denies access to the site, promptly and politely remove yourself. Make a note of this occurrence and include in your report to the LCO.

5. Check to see that the following are displayed in the contractor's trailer:
   - EOE Posters
   - Prevailing wage sheets posted
   - Sign-in Log
   - Listing of subcontractors on site

   If any of these items are not readily visible, remind the contractor that these postings are part of the contractual requirements. On subsequent visits, make sure that these items are posted, or the contractor will be found to be in noncompliance.

6. There will be times when the site superintendent is somewhere on the site and/or there is no contractor present in the trailer. You should check in at the District's Inspector of Record (IOR) trailer. The IOR will also be able to tell you which contractors are on the site at that time. If all trailers are empty or locked, try to locate the site superintendent or IOR on the site prior to commencing interviewing.

Interviewing

1. Once you have checked in with the site superintendent and obtain access to the site, try to locate tradespersons working in clusters. For instance, several painters, electricians, roofers, etc. working in one area. Approach the workers individually in a non-threatening, professional manner. Identify yourself, indicate that you are a District representative, and that you need only a few seconds of their time to ask some very generic questions to ensure that they are receiving the proper rate of pay for the type of work they are doing. Again, do

not endanger yours or any tradesperson's safety in conducting these interviews. Do not insist that someone on a scaffold 40 feet in the air come down for an interview. Do not ask anyone to form a line until you can get to them; allow them to continue working until you can get to them individually.

These interviews are random; two or three tradespersons for each subcontractor are more than sufficient for one visit. Any persons missed are usually picked up on the next visit. If only one tradesperson is at the site, then interview that person if possible. If you are told that the rest of the crew will be there in an hour, do not wait, unless your total site interviewing will take that length of time. Thirty minutes of interviewing per site is typically sufficient, depending upon the site size and/or number of subcontractors present. Contractor tradesperson should also be interviewed.

2. Using the Labor Compliance Site Visitation Interview form, ask each person the following: name, social security number, employer, title (trade), rate of pay, and task being performed at the time of interview.

3. Should someone decline to speak with you, respect those wishes. If someone asks if this is union-related, tell them no. Antioch Unified School District works with both open and closed shop trades.

4. If you try to interview someone who does not speak English and you cannot communicate in the appropriate language, try to locate a coworker who can interpret for you. If you find an entire crew unable to speak English and no interpreter, include this in your report to the LCO.

5. If someone refuses to disclose his social security number to you, respect those wishes. However, assure that person that all information given is kept strictly confidential.

6. If someone does not know their rate of pay (most tradespersons don't know), ask for a guesstimate. If the response is, "whatever prevailing wage is", so indicate on the form.

7. If someone indicates that he is an apprentice, make sure that you ask him what period. These can be anywhere from 1st to 10th. If he's not sure, ask him how many years he's been apprenticed in the specific trade and/or to guesstimate and so indicate on the interview form.

8. ALWAYS thank them for their time.

9. Keep in mind that you are there to collect information only, do not tell them how to do their jobs. Should you witness what you consider a potentially unsafe or unwarranted condition, you are to contact the site inspector or job superintendent of your findings immediately and make a note on your site visitation log of what you observed. Upon your return to the office, report your findings to the LCO.

Reporting

1. All original interview forms shall be submitted to the LCO no later than the end of each workweek.

Section V

ANTIOCH UNIFIED SCHOOL DISTRICT

LABOR COMPLIANCE PROGRAM OFFICE

Procedures

SECTION V

PROCEDURES

Certified Payroll Verification Procedures

1. The Facilities Department and the Maintenance & Operation Department will provide the Labor Compliance Officer with construction work schedules.

2. Upon receipt of certified payroll reports from general/subcontractors once a week, compare information from the Labor Compliance visitation log to the contractors certified payroll and the prevailing wage schedule.

3. Compare name and social security number with trade classification listed.

4. Ensure prevailing wage listed is correct for the classification listed using the prevailing wage schedule

5. Check for employment of apprentices, correct rate of pay, and proper ratio to journey workers.

6. Contact the contractor in writing and send by certified mail any inaccuracies in the verification of its certified payroll.

7. If clarification/correction is not received within two weeks form the contractor, the Labor Compliance Officer will commence an investigation.

8. Upon completion of the investigation, a report will be sent to the Department of Industrial Relations with recommendations for penalties to be applied to the contractor.

9. Retain all original interview forms and annotate the database as applicable.

Site Monitor Procedures

1. Receive construction site work schedule from Labor Compliance Officer.

2. Check in with site administrative office/site superintendent

3. Utilizing the Labor Compliance Site Visitation Interview form, conduct interviews with workers.

4. Note on your form any infractions you may observe while conducting the interview.

5. Return interview form to the Labor Compliance Officer.

6. Report any infractions you observed to the Labor Compliance Officer.

Section VI

ANTIOCH UNIFIED SCHOOL DISTRICT

LABOR COMPLIANCE PROGRAM

Forms

ANTIOCH UNIFIED SCHOOL DISTRICT

LABOR COMPLIANCE PROGRAM

PREVAILING WAGE HANDOUT

THE PUBLIC WORKS REQUIREMENTS ARE:

(A) the appropriate number of apprentices are on the job site, as set forth in Labor Code Section 1777.5.
(B) worker's compensation coverage, as set forth in Labor Code Sections 1860 and 1861.
(C) keep accurate records of the work performed on the public works project, as set forth in Labor Code Section 1812.
(D) inspection of payroll records pursuant to Labor Code Section 1776, and as set forth in 8 CCR Section 16400(e).
(E) other requirements imposed by law.
(5) Withhold monies. See Labor Code Section 1727.
(6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771.
(7) Deny the right to bid on public work contracts to contractors or subcontractors who have violated public work laws, as set forth in Labor Code Section 1777.7.
(8) Not permit workers on public works to work more than eight hours a day or 40 hours in any one calendar week, unless compensated at not less than time and a half as set forth in Labor Code Section 1815.
Exception: If the prevailing wage determination requires a higher rate of pay for overtime work than is required under Labor Code Section 1815, then that higher overtime rate must be paid [,as specified in 16200(a)(3)(F).]
(9) Not take or receive any portion of the workers' wages or accept a fee in connection with a public works project, as set forth in Labor Code Sections 1778 and 1779.
(10) Comply with those requirements as specified in Labor Code Sections 1776(g), 1777.5, 1810, 1813, and 1860.

THE CONTRACTOR AND SUBCONTRACTOR SHALL:

(1) Pay not less than the prevailing wage to all workers, as defined in CCR's section 16000(a), and as set forth in Labor Code Sections 1771 and 1774;
(2) Comply with the provisions of Labor Code Sections 1773.5, 1775, and 1777.5 regarding public works job sites;
(3) Provide workers' compensation coverage as set forth in Labor Code Section 1861;
(4) Comply with Labor Code Sections 1778 and 1779 regarding receiving a portion of wages or acceptance of a fee;
(5) Maintain and make available for inspection payroll records, as set forth in Labor Code Section 1776;
(6) Pay workers overtime pay, as set forth in Labor Code Section 1815 or as provided in the collective bargaining agreement adopted by the Director as set forth in 8 CCR Section 16200(a)(3); and
(7) Comply with Section 16101 of these regulations regarding discrimination.
(8) Be subject to provisions of Labor Code Section 1777.7 which specifies the penalties imposed on a contractor who willfully fails to comply with provisions of Section 1777.5.
(9) Comply with those requirements as specified in Labor Code Sections 1810 and 1813.
(10) Comply with other requirements imposed by law.

APPRENTICE TRAINING

SEE LABOR CODE SECTION 1777.5 (e)
(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program **that can supply apprentices to the site of the public work**. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also
be submitted to the awarding body if requested by the awarding body.
Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement

of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

APPRENTICE TRAINING CONTIBUTION REQUIREMENTS

SEE CALIFORNIA CODE OF REGULATIONS: TITLE 8, ARTICLE 4,

16200(G) **Wage rates, training contributions and apprenticeship contributions.**

Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or
2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.
3. If neither of the above will accept the funds, cash pay shall be as provided for in ccr's section 16200(a)(3)(I).

SEE CALIFORNIA CODE OF REGULATIONS: TITLE 8, ARTICLE 10, SECTION 230.2

§230.2. **Payment of Apprenticeship Training Contributions to the Council.**

(a) Contractors who are neither required nor wish to make apprenticeship training contributions to the applicable local training trust fund shall make their training contributions to the Council. Contractors may refer to the Director of the Department of Industrial Relations applicable prevailing wage determination for the amount owed for each hour of work performed by journeymen and apprentices in each apprenticeable occupation.

(b) Training contributions to the Council are due and payable on the 15th day of each month for work performed during the preceding month.

(c) Training contributions to the Council shall be paid by check and shall be accompanied by a completed CAC-2 Form, Training Fund Contributions, (Rev. 10/91), or the following information:

(1) The name, address, and telephone number of the contractor making the contribution.
(2) The contractor's license number.
(3) The name and address of the public agency that awarded the contract.
(4) The jobsite location, including the county where the work was performed.
(5) The contract or project number.
(6) The time period covered by the enclosed contributions.
(7) The contribution rate and total hours worked by apprenticeable occupation.

CERTIFYING PERSON

SEE CALIFORNIA CODE OF REGULATIONS: TITLE 8,GROUP 3, ARTICLE 1,16000 DEFINITIONS.

A person with the authority to affirm under penalty of perjury that the records provided, depict truly, fully and correctly the type of work performed, the hours worked, days worked and amounts paid.

CHANGES TO PREVAILING RATE AFTER AWARD

SEE LABOR CODE SECTION: 1773.6

No effect once the contract notice to bidders is published.

1773.6. If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published. *Exceptions; classifications marked as a double asterisks.*

CREDITS, FOR FRINGE BENEFIT PAYMENTS

SEE CALIFORNIA CODE OF REGULATIONS: TITLE 8, GROUP3, ARTICLE 4,

16200(i) Credit Available For Actual Payment of Fringe Benefit Costs up to the Prevailing Amount. The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)-(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

And memo from the division of industrial relations dated 11-15-90.

THE RULE:

The contractor can pay amounts for individual benefits different than the state shows in the wage reports so long as it is not more than the total amount permitted for all benefits. Any contractor paid amount less than the total benefit requirements listed in the state wage reports must be paid to the employee.

EMPLOYEE'S SUBJECT TO PREVAILING WAGES

SEE LABOR CODE SECTION 1771, 1772 & 1776 AND SEE

AUSD general conditions all workers on the project shall be paid the wage of the trade they are most closely related to. This includes: any one on site, and off site even at remote manufacturing facilities.

1771. Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to **all** workers employed on public works.

1772. Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

EMPLOYER PAYMENTS

SEE CALIFORNIA CODE OF REGULATIONS: TITLE 8, ARTICLE 1, SECTION 16000 DIFINITIONS

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

FRINGE BENEFIT PAYMENT REQUIREMENTS

SEE CALIFORNIA CODE OF REGULATIONS: TITLE 8, GROUP 3, ARTICLE 1, 16000 DEFINITIONS

All fringe benefits must be irrevocably paid to an authorized fund or to the employee.

No unpaid amounts are allowed.

FRINGE BENEFITS INCLUDE

CALIFORNIA CODE OF REGULATIONS: TITLE 8, ARTICLE 1, SECTION 16000. DEFINITIONS

3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

FRINGE BENEFITS DO NOT INCLUDE

CALIFORNIA CODE OF REGULATIONS: TITLE 8, ARTICLE 1, SECTION 16000. DEFINITIONS

(b) The term "general prevailing rate of per diem wages"

does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

PAYROLL RECORDS INCLUDE

CALIFORNIA CODE OF REGULATIONS: TITLE 8, ARTICLE 1, SECTION 16000. DEFINITIONS

All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the

disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

PERSONS REQUIRED TO RECEIVE PREVAILING WAGES

SEE LABOR CODE SECTIONS:

1771....., shall be paid to all workers employed on public works.

1774. The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

AUSD General Conditions require all workers not in a prevailing wage classification to be paid the wage most closely related to the craft or trade they are involved with.

WITHHOLDING PAYMENTS, JUSTIFICATION

SEE LABOR CODE SECTION: 1727 & 1771.5(b),(5)

SEE CALIFORNIA CODE OF REGULATIONS: TITLE 8, ARTICLE 5, SECTION

16435(a) "Withhold" means to cease payments by the awarding body, or others who pay on its behalf, or agents, to the general contractor. Where the violation is by a subcontractor, the general contractor shall be notified of the nature of the violation and reference made to its rights under Labor Code Section 1729.

(b) "Contracts." Except as otherwise provided by agreement, only contracts under a single master contract, or contracts entered into as stages of a single project, may be the subject of withholding.

(c) "Delinquent payroll records" means those not submitted on the date set in the contract.

(d) "Inadequate payroll records" are any one of the following:

(1) A record lacking the information required by Labor Code Section 1776;

(2) A record which contains the required information but not certified, or certified by someone not an agent of the contractor or subcontractor;

(3) A record remaining uncorrected for one payroll period, after the awarding body has given the contractor notice of inaccuracies detected by audit or record review. Provided, however, that prompt correction will stop any duty to withhold if such inaccuracies do not amount to 1 percent of the entire Certified Weekly Payroll in dollar value and do not affect more than half the persons listed as workers employed on that Certified Weekly Payroll, as defined in Labor Code Section 1776 and Title 8 CCR Section 16401.

DIRECTOR OF INDUSTRIAL RELATIONS PRECEDENTIAL DECISIONS WHICH REQUIRE PREVAILING WAGES:

Decision 92-036: stands for the payment of out of state workers if they are working on California "Public Works"

Decision 93-019: stands for the payment of truck drivers removing, delivering or relocating material on a "Public Works"

Decision 94-017: stands for the payment of waste processors off site if the waste is exclusively from a "Public Works"

COURT DECISIONS:

Standard Traffic Services v. Department of Transportation (case 132667) Shasta: partners are due prevailing wages
If working on a "Public Works"

QUESTIONS. CALL DANE RUDDELL AUSD 925/776-2073

CALIFORNIA CODE OF REGULATIONS

APPENDIX A: Suggested checklist of Labor law requirements to review at prejob conference. Section 16430 (a) (2)
The federal and state labor law requirements applicable to the contract are composed of but not limited to the following items.

Project _____

Contractor's Signature _____ Date _____

	Initials of Awarding Body's Representative	Initials of awarded Contractors Representative
(1) The contractor's duty to pay prevailing wages under Labor Code Section 1770 et seq., should the project exceed the exemption amounts;		
(2) The contractor's duty to employ registered apprentices on the public works project under Labor Code Section 1777.5;		
(3) The penalties for failure to pay prevailing wages (for non-exempt project and employ apprentices including forfeitures and debarment under Labor Code Sections 1775 and 1777.7;		
(4) The requirement to keep and submit copies upon request of certified payroll records under Labor Code Section 1776:, and penalties for failure to do so under Labor Code Section 1776(g);		
(5) The prohibition against employment discrimination under Labor Code Sections 1735 and 1777.6; the Government Code, and Title VII of the Civil Rights Act of 1964;		
(6) The prohibition against accepting or extracting kickbacks from employee wages under Labor Code Section 1778;		
(7) The prohibition against accepting fees for registering any person for public work under Labor Code Section 1779; or for filing work orders on public works under Labor Code Section 1780;		
(8) The requirement to list all subcontractors under Public Contract Code Section 4100 et seq.;		
(9) The requirement to be properly licensed and to require all subcontractors to be properly licensed and the penalty for employing workers while unlicensed under Labor Code Section 1021 and under the California Contractors License Law, found at Business and Professions Code Section 7000 et seq.;		
(10) The prohibition against unfair competition under Business and Professions Code Section 17200-17208;		
(11) The requirement that the contractor be properly insured for Workers Compensation under Labor Code Section 1861;		
(12) The requirement that the contractor abide by the Occupational, Safety and Health laws and regulations that apply to the particular construction project;		
(13) The requirement to provide equal opportunity for historically underutilized groups as required in the Public Contracts Code and in the contract;		

ANTIOCH UNIFIED SCHOOL DISTRICT

PROCUREMENT AND DISTRIBUTION DEPARTMENT
LABOR COMPLIANCE PROGRAM

CALIFORNIA CODE OF REGULATIONS CHECKLIST

After the District awards a public works contract, and prior to the commencement of work on that contract, a mandatory Job Start meeting (Pre-Job conference) shall be conducted by the LCO or Representative with the contractor and those subcontractors listed in its bid documents. The following is a listing of labor law requirements applicable to the public works contract:

1. Payment of Prevailing Wage Rates

a. All workers on the project are to be paid not less than the specified general prevailing wage rate by the contractor and its subcontractors, unless subject to exemption.

b. The contractor is responsible for complying with all applicable general prevailing wage rates for tradesworkers and any rate changes which may occur during term of the contract.

c. Prevailing wage rates and rate changes are to be posted at the job site for workers to view.

d. The LCO will provide contractors with copies of prevailing wage rates upon request as well as copies of any revisions to prevailing rate wages received from the Department of Labor.

2. Apprentices

a. It is the duty of the contractor and subcontractors to employ registered apprentices on public works projects.

4. Certified Payroll Records

a. Contractors and subcontractors are required to keep accurate payroll records which reflect the name, address, social security number, and work classification of each employee; the straight time and overtime hours worked each day and each week; the fringe benefits; and the actual per diem wages paid to each journeyperson, apprentice, worker, or other employee hired in connection with a public works project.

b. Employee payroll records shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor/subcontractor, or shall be furnished to any employee, or to his or her authorized representative on request.

c. Contractors and subcontractors shall maintain their certified payrolls on a weekly basis and shall submit said payrolls to the LCO when requested to do so, but no less often than once a week. CONTRACTORS ARE RESPONSIBLE FOR SUBMITTAL OF THEIR PAYROLLS AND THOSE OF THEIR RESPECTIVE SUBCONTRACTORS AS ONE PACKAGE. In the event that there has been no work performed during a given week, the Certified Payroll Record shall be annotated with the words "No Work" for that week.

3. **Penalties**

a. Penalties, including forfeitures and debarment, shall be imposed for contractor/subcontractor failure to pay prevailing wages (for nonexempt projects) and for failure to employ apprentices.

b. Penalties shall also be imposed for failure to provide certified payroll records (and to provide them by the date requested), failure to provide Monthly Utilization Reports (CC-257) by the date requested, failure to pay workers for work in excess of 8 hrs/day and 40 hrs/week, and for failure to be a properly licensed contractor or subcontractor.

5. **Nondiscrimination in Employment; Equal Opportunity**

1. All contractors and subcontractors are required to avoid discrimination in employment, and shall make good faith efforts to comply with the District's goal in hiring Disabled Veteran Business Enterprises.

6. **Kickback Prohibited**

Contractors and subcontractors are prohibited from accepting or extracting "kickbacks" from employee wages.

7. **Acceptance of Fees Prohibited**

Contractors and subcontractors are prohibited from exacting any type of fee for registering individuals for public work or for filling work orders on public works contracts.

8. **Listing of Subcontractors**

Contractors are required to list all subcontractors hired to perform work on public works project when that work is equivalent to more than one-half of one percent of the total effort.

9. **Proper Licensing**

All contractors and subcontractors are required to be properly licensed.

10. **Unfair Competition**

Contractors and subcontractors are prohibited from engaging in unfair competition.

11. **Workers' Compensation Insurance**

All contractors and subcontractors are required to be insured against liability for workers compensation, or to undertake self-insurance.

12. **OSHA**

Contractors and subcontractors are required to comply with the Occupational, Safety and Health laws and regulations applicable to the particular public works project.

In accordance with federal and state laws, and with District policy and contract documents, the undersigned contractor herein certifies that it will comply with the foregoing labor law requirements; and fully understands that failure to comply with these requirements will subject it to the penalties cited herein. The contractor also herein certifies that it has been provided with a copy of the Antioch Unified School District Labor Compliance Program Package with includes:

1. Labor Law Requirements Checklist (included herein)
2. Applicable General Prevailing Wage Rate Determinations
3. Blank Certified Payroll Record forms
4. Fringe Benefit Statements
5. Blank Monthly Employment Utilization (CC-257) forms
6. State apprenticeship requirements (DAS-140)
7. Copy of the Labor Code relating to Public Works and Public Agencies (Part 7, Chapter 1, Sections 1720-1861

IT IS THE CONTRACTOR'S RESPONSIBILITY TO PROVIDE COPIES OF THE DISTRICTS LABOR COMPLIANCE PROGRAM PACKAGE TO ALL LISTED SUBCONTRACTORS AND TO ANY SUBSTITUTED SUBCONTRACTORS.

_____ _____

Contractor **Date**

_____

Name/Title of Contractor Authorized Representative

_____

Name/Title of AUSD Labor Compliance Representative

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF APPRENTICESHIP STANDARDS
28 CIVIC CENTER PLAZA, ROOM 525
SANTA ANA, CA 92701

TO ALL PUBLIC WORKS CONTRACTORS

Congratulations on having been awarded a public works project.

The Division of Apprenticeship Standards wishes to bring to your attention your responsibilities under California Labor Code Section 1777.5 Apprentices on Public Works. (Excerpts from California Labor Code relating to apprentices on public works. DAS-10 is attached).

Compliance with California Labor Code Section 1777.5 requires all public works contractors and subcontractors to:

- Submit contract award information within 10 days of contract award, to the applicable Joint Apprenticeship Committee, which shall include an estimate of Journeymen hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. This information may be submitted on the attached form. DAS 140.

- Employ apprentices on the public work in a ratio to journeymen of no less than one hour of apprentices work for every five hours of labor performed by a journeyman.

- Pay the apprentice rate on public works projects only to those apprentices who are registered as defined in Labor Code Section 3077.

- Contribute to the training fund in the amount identified in the Prevailing Wage Rate publication for journeymen and apprentices. Contractors who choose not to contribute to the local training trust fund must make their contribution to the California Apprenticeship Council (CAC) at P.O. Box 420603, San Francisco, CA 94142.

- Training fund contributions to the CAC are due and payable on the 15th day of each month for work performed during the preceding month.

- Training fund contributions to the CAC shall be paid by check and shall be accompanied by a completed form CAC-2 (attached).

Failure to comply with the provisions of the Labor Code Section 1777.5 may result in the loss of the right to bid on all public works projects for a period of one to three years and the imposition of a civil penalty of $100.00 for each calendar day of noncompliance. Contractors should provide a copy of this material to each subcontractor.

If the Division of Apprenticeship Standards can be of assistance to you, please contact our office at (714) 558-4126.

EXERPTS FROM THE CALFORNIA LABOR CODE RELATING TO APPRENTICES ON PUBLIC WORKS

Chapter 1 of Division 2
APPRENTICES ON PUBLIC WORKS

1773.3. An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

1776. (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

1777.5. (a) Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

(b) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either (1) the apprenticeship standards and apprentice agreements under which he or she is training or (2) the rules and regulations of the California Apprenticeship Council.

(d) When the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this section and may apply to any apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval or denial of the apprenticeship program shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that the program. "Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, "contractor" includes any subcontractor under a contractor who performs any public works not excluded by subdivision (o).

(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hour computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. Where an hourly apprenticeship ratio is not

feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this section that has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1-to-5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio, as set forth in this section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(1) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(2) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(3) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(4) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

(l) When an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract. At the end of each fiscal year the California Apprenticeship Council shall make grants to each apprenticeship program in proportion to the number of hours of training provided by the program for which the program did not receive contributions, weighted by the regular rate of contribution for the program. These grants shall be made from funds collected by the California Apprenticeship Council during the fiscal year pursuant to this subdivision from contractors that employed registered apprentices but did not contribute to an approved apprenticeship program. All these funds received during the fiscal year shall be distributed as grants.

(n) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

(o) This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days.

(p) All decisions of an apprenticeship program under this section are subject to Section 3081.

1777.6. It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as registered apprentices on any public works, on the ground of the race, religious creed, color, national origin, ancestry, sex, or age, except as provided in Section 3077, of such employee.

1777.7. (a) A contractor or subcontractor that knowingly violates Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty shall be based on consideration whether the violation was a good faith mistake due to inadvertence. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(b) (1) In the event a contractor or subcontractor is determined by the Administrator of Apprenticeship to have knowingly violated any provision of Section 1777.5, the Administrator shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on or receive any public works contract for a period of up to one year for the first violation and for a period of up to three years for a second or subsequent violation. Each period of debarment shall run from the date the determination of noncompliance by the Administrator of Apprenticeship.

(2) An affected contractor or subcontractor may obtain a review of the debarment or civil penalty by transmitting a written request to the office of the Administrator within 30 days after service of the order of debarment or civil penalty. If the Administrator receives no request for review within 30 days after service, the order of debarment or civil penalty shall become final for the period authorized.

(3) Within 20 days of the timely receipt of a request for hearing, the Administrator shall provide the contractor or subcontractor the opportunity to review any evidence the Administrator may offer at the hearing. The Administrator shall also promptly disclose to the contractor or subcontractor any nonprivileged documents obtained after the 20-day time limit.

(4) Within 90 days of the timely receipt of the a request for hearing, a hearing shall be commenced before an impartial hearing officer designated by the Administrator and possessing the qualifications of an administrative law judge pursuant to Section 11502 of the Government Code. The contractor or subcontractor shall have the burden of showing compliance with Section 1777.5. The decision to debar shall be reviewed by a hearing officer or court only for abuse of discretion.

(5) Within 45 days of the conclusion of the hearing, the hearing officer shall issue a written decision affirming, modifying, or dismissing the debarment or civil penalty. The decision shall contain a notice of findings, findings, and an order. This decision shall be deemed the final decision of the Administrator and shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Administrator. Within 15 days of issuance of the decision, the hearing officer may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(6) An affected contractor or subcontractor may obtain review of the final decision of the Administrator by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the final decision to debar or to assess a civil penalty. If no petition for a writ of mandate is filed within 45 days after service of the final decision, the order shall become final. If the petitioner claims that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the entire record.

(7) The Administrator may file a certified copy of a final order with the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business.

(c) If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

(1) The contract executed between the contractor and the subcontractor or the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.

(3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

(4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

(d) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first-time violation and with the concurrence of the apprenticeship program, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(e) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(f) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council

Division of Apprenticeship Standards

APPRENTICES ON PULIC WORKS

SUMMARY OF REQUIREMENTS

Compliance with California Labor Code Section 1777.5 requires all public works contractors and subcontractors to:

- Submit contract award information to the applicable joint apprenticeship committee, including an estimate of the journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed.

  The contract award information shall be in writing, and shall be provided to the applicable apprenticeship committee within 10 days of the date of the agreement or contract award, but in no event later than the first day in which the contractor has workers employed upon the public work. (California Code of Regulations, Title 8, Section 230.)

- Employ apprentices on the public work in a ratio to journeymen of no less than one hour of apprentice work for every five hours of labor performed by a journeyman.

- Contribute to the training fund in the amount identified in the Prevailing Wage Rate publication for journeymen and apprentices. Contractors who choose not to contribute to the local training trust fund must make their contributions to the California Apprenticeship Council, P.O. Box 420603, San Francisco, CA 94142. Training contributions to the Council are due and payable on the 15th of the month for work performed during the preceding month.

  Training contributions to the Council shall be paid by check and shall be accompanied by a completed CAC2 form, Training Fund Contributions, or the following information (California Code of Regulations, Title 8, Section 230.2 c):

  1. The name, address and telephone number of the contractor making the contribution.
  2. The contractor's license number.
  3. The name an address of the public agency that awarded the contract.
  4. The jobsite location, including the county where the work was performed.
  5. The contract or project number
  6. The time period covered by the enclosed contributions.
  7. The contribution rate and total hours worked by the apprenticable occupation(s).

- Pay the apprentice rate on public works projects only to those apprentices who are registered, as defined in Labor Code Section 3077:

Sec. 3077. The term "apprentice" as used in this chapter, means a person at least 16 years of age who has entered into a written agreement, in this chapter called an "apprentice agreement", with an employer or program sponsor. The term of apprenticeship for each apprenticeable occupation shall be approved by the chief, and in no case shall provide for no less than 2,000 hours or reasonably continuous employment for such person for his or her participation in an approved program of training through employment and through education in related and supplemental subjects.

This form should be sent to the Apprenticeship Committee of the craft or trade in area of the site of the public work. If you have any questions as to the address of the appropriate Apprenticeship Committee, contact the nearest office of the Division of Apprenticeship Standards (DAS). Consult your telephone directory under California, State of, Industrial Relations, for the DAS office in your area. *Do not send this form to the Division of Apprenticeship Standards.*

PUBLIC WORKS
CONTRACT AWARD INFORMATION

Name of Contractor:	Contractor's State License No.:
Contractor's Mailing Address -- Number & Street, City, Zip Code:	Area Code & Telephone No.:
Name & Location of Public Works Project:	Date of Contract Award:
	Date of Expected or Actual Start of Project:
Name & Address of Public Agency Awarding Contract	Estimated Number of Journeymen Hours:

APPRENTICES

Occupation of Apprentice	Number To Be Employed	Approximate Dates To Be Employed

Check One Of The Boxes Below

Please Note: Your election of options is not to be deemed a request for the immediate dispatch of apprentices. Contractors must make a separate request for actual dispatch.

Box 1 ☐ We will request dispatch of apprentice(s) for this job in accordance with Section 230.1 (A), California Code of Regulations. We voluntarily choose to comply with the applicable Apprenticeship Committee Standards for the duration of this job only, with regard to training apprentices and to the payment of training contributions.

Box 2 ☐ We will request dispatch of apprentice(s) for this job in accordance with Section 230.1 (A), California Code of Regulations, but do not agree to be bound by the applicable Apprenticeship Committee Standards in training the apprentices; instead, we agree to employ and train apprentice(s) in accordance with the California Apprenticeship Council regulations, including section 230.1 of the California Code of Regulations, governing employment of apprentices on public work projects.

Box 3 ☐ We are already approved to train apprentices by the applicable Apprenticeship Committee and we will employ and train under the Standards. We will request dispatch of apprentices for this job in accordance with Section 230.1 (A), California Code of Regulations.

Box 4 ☐ We will not request the dispatch of apprentice(s) since apprentices are not required on this job under the provisions of California Labor Code Section 1777.5, because:

_____

_____

Signature: _____

Typed Name _____

Title: _____ Date: _____

State of California
Department of Industrial Relations
P.O. Bo 420603
San Francisco, CA 94142

Please use a separate form for each jobsite, listing occupations for the jobsite. One check, payable to the California Apprenticeship Council, may be submitted for all jobsites and/or occupations. Training fund contributions are not accepted by the California Apprentice Council for federal public works projects, or for non-apprenticable occupations such as laborers, utility technicians, teamsters, etc.

TRAINING FUND CONTRIBUTIONS

California Apprenticeship Council

Name and Address of Contractor/Subcontractor making Contribution	Contractor's License Number
	Contract or Project Number
Name and Address of Public Agency Awarding Contract	Jobsite Location (Including County)
	Period Covered by Contribution

Classification(s) or Workers (Carpenter, Plumber, Electrician, Etc.)	Hours	Cont. Rate per Hour	Amount

Signature	Date
Title	Area Code & Telephone Number

CAC 2

120841431

ANTIOCH UNIFIED SCHOOL DISTRICT
CONTRACTOR FRINGE BENEFIT STATEMENT

Contract Number / Name:	Contract Location:	Today's Date:

Contractor / Subcontractor Name:	Business Address:

In order that the proper Fringe Benefit rates can be verified when checking payrolls on the above contract, the hourly rates for fringe benefits, subsistence and/or travel allowance payment made for employees on the various classes of work are tabulated below.

Classification:	Effective Date:	Subsistence or Travel Pay: $

FRINGE BENEFITS			
Health & Welfare	$	PAID TO:	Name: Address:
Pension	$	PAID TO:	Name: Address:
Vacation/ Holiday	$	PAID TO:	Name: Address:
Training and/or Other	$	PAID TO:	Name: Address:

Classification:	Effective Date:	Subsistence or Travel Pay: $

FRINGE BENEFITS			
Health & Welfare	$	PAID TO:	Name: Address:
Pension	$	PAID TO:	Name: Address:
Vacation/ Holiday	$	PAID TO:	Name: Address:
Training And/or Other	$	PAID TO:	Name: Address:

Classification:	Effective Date:	Subsistence or Travel Pay: $

FRINGE BENEFITS			
Health & Welfare	$	PAID TO:	Name: Address:
Pension	$	PAID TO:	Name: Address:
Vacation/ Holiday	$	PAID TO:	Name: Address:
Training And/or Other	$	PAID TO:	Name: Address:

Supplemental statements must be submitted during the progress of work should a change in rate of any of the classifications be made.

Submitted: Contractor / Subcontractor	By: Name / Title

Antioch Unified School District

Monthly Employment Utilization Report

Current Goals	Reporting Period	Name and Location of Contractor		Employers I.D. No.
Minority 24%	From 06-01-00	ABC Construction Company 232 Cass Street Antioch, Ca 92123	Martin Luther King Elementary School 115 31 Street Antioch, Ca 92102	90-2111100
Female 6.9%	To 06-30-00			

CONSTRUCTION TRADE	Classifications	Total All Employees By Trade		Black (Not of Hispanic Origin)		Hispanic		Asian or Pacific Islander		American Indian or Alaskan Native		Minority Percentage	Female Percentage	Total Number of Employees		Total Number of Minority Employees	
		M	F	M	F	M	F	M	F	M	F			M	F	M	F
Plumbers	Journey Worker	1500	200	140		60				100				8	2	3	
	Apprentice	120						120						1		1	
	Trainee		60									22%	13%		1		
Laborers	Journey Worker	3270	600		100			240		120				25	5	3	
	Apprentice	735												5			
	Trainee	160										9%	12%	2			
Carpenters	Journey Worker	1625	240	125				100						12	2	2	
	Apprentice	200		100										2		1	
	Trainee											15%	11%				
Electricians	Journey Worker	810	120											6	1		
	Apprentice																
	Trainee	60				60						6%	12%	1		1	
Masons	Journey Worker	540												4			
	Apprentice																
	Trainee	80										0%	0%	1			
Total Journey Workers		7745	1160	265	100	60		340		220				55	10	8	
Total Apprentices		1055		100				120						8		2	
Total Trainees		300	60			60						12%	11%	3	2	1	
Grand Total		10320		465		120		460		220				78		12	

Company Official's Signature and Title	Telephone Number Include area code	Date Signed	Page
C. T. Smith Controller	(619) 292-0000	6-30-00	1 of 1

120861433

1434

ANTIOCH UNIFIED SCHOOL DISTRICT — PUBLIC WORKS WEEKLY CERTIFIED PAYROLL REPORTING FORM

Name of Contractor or Subcontractor: ABC Lighting Company

Business Address: 123 Main Street Antioch Ca 92222

Contractor's License#: 00-111-2222

Worker's Compensation Policy# 99-888-77

S = Straight Time O = Overtime SDI = State Disability Insurance
*Other = Any other deductions, contributions and/or payments whether or not included or required by prevailing wage determinations must be separately listed.

Employee's Name, Address and Social Security Number	# of withholding exemptions	Work Classification	Hours Worked Each Day — Day & Date: M	T	W	TH	F	S	S		Total Hours	Rate of Pay	Gross Amount Earned
John Smith 444 5th Avenue Antioch CA 92111 444-55-6666	S-4	Fixture Cleaner	8	8						S	16	11.50	This Project: 184.00 All Projects: 725.00
										O			

Deductions, Contributions and Payments

Federal Tax	FICA Soc Sec	State Tax	SDI	Vacation /Holiday	Health & Welfare	Pension	Training	Fund Admin	Dues	Travel/ Subs.	Savings	Other*	Total Deductions
0	14.08	0	1.29										15.37

Net Wages Paid for Week: 168.63 Check 12345

SAMPLE

Employee's Name, Address and Social Security Number	# of withholding exemptions	Work Classification	Hours Worked Each Day — Day & Date: M	T	W	TH	F	S	S		Total Hours	Rate of Pay	Gross Amount Earned
Juan Gomez 1212 Main Street Antioch, CA 95555 555-66-9999	M-3	Fixture Cleaner	8	8	8		8			S	40	12.00	This Project: 480.00 All Projects: 936.00
										O			

Deductions, Contributions and Payments

Federal Tax	FICA Soc Sec	State Tax	SDI	Vacation /Holiday	Health & Welfare	Pension	Training	Fund Admin	Dues	Travel/ Subs.	Savings	Other*	Total Deductions
29.00	36.72	1.34	3.36										70.42

Net Wages Paid for Week: 409.58 Check 12346

			Hours Worked Each Day — Day & Date: M	T	W	TH	F	S	S		Total Hours	Rate of Pay	Gross Amount Earned
										S			This Project:
										O			All Projects:

Deductions, Contributions and Payments

Federal Tax	FICA Soc Sec	State Tax	SDI	Vacation /Holiday	Health & Welfare	Pension	Training	Fund Admin	Dues	Travel/ Subs.	Savings	Other*	Total Deductions

Net Wages Paid for Week: Check

I, Mary Jones (Name -- print), the undersigned, am Payroll Clerk (position of business) with the authority to act for and on behalf of ABC Lighting (name of business and/or contractor), certify under penalty of perjury that the records or copies thereof submitted and consisting of 1 (description, no. of pages) are the originals or true, full, and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named.

Date: 6/30/00 Signature:

12087

(Reduced by Antioch Unified School District)

California Department of Industrial Relations

PUBLIC WORKS PAYROLL REPORTING FORM

Page of

NAME OF CONTRACTOR OR SUB CONTRACTOR | CONTRACTORS LICENSE # / SPECIALTY LICENSE # | ADDRESS

PAYROLL NO. | FOR WEEK ENDING | SELF-INSURED CERTIFICATE # / WORKERS' COMPENSATION POLICY # | PROJECT OR CONTRACT NO. / PROJECT AND LOCATION

(1) NAME, ADDRESS AND SOCIAL SECURITY NUMBER OF EMPLOYEE	(2) NO. OF WITH-HOLDING EXEMPTIONS	(3) WORK CLASSIFICATION		(4) Day / Date / Hours Worked Each Day: M	T	W	TH	F	S	S	(5) TOTAL HOURS	(6) HOURLY RATE OF PAY	(7) GROSS AMOUNT EARNED: THIS PROJECT	ALL PROJECTS	(8) DEDUCTIONS, CONTRIBUTIONS AND PAYMENTS: FED TAX	FICA (SOC SEC)	STATE TAX	SDI	VAC/ HOL	HEALTH & WELF	PENSION	TRANING	FUND ADMIN	DUES	TRV/ SUBS	SAVINGS	OTHER*	TOTAL DEDUCTIONS	(9) NET WGS PAID FOR WEEK	CHECK NO.
			S																											
			O																											
			S																											
			O																											
			S																											
			O																											
			S																											
			O																											

Form A 1-131 (New 2-80)
(form has been reduced to fit page)

S = Straight Time
O = Overtime
SDI = State Disability Insurance

*OTHER - Any other deductions, contributions and/or payment whether or not included or required by prevailing wage determinations must be separately listed. Use extra sheet if necessary

CERTIFICATION must be completed

I, _____ (Name - Print), the undersigned, am _____ (position with business) with the authority to act for and on behalf of _____ (name of business and/or contractor), certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check,or whatever form to the individual or individuals named.

Date: _____ Signature: _____

public entity may require a more strict and/or more extensive form of certification.

12088435

GENERAL PREVAILING WAGE DETERMINATION MADE BY THE DIRECTOR OF INDUSTRIAL RELATIONS
PURSUANT TO CALIFORNIA LABOR CODE PART 7, CHAPTER 1, ARTICLE 2, SECTIONS 1770, 1773 AND 1773.1
FOR COMMERCIAL BUILDING, HIGHWAY, HEAVY CONSTRUCTION AND DREDGING PROJECTS
CRAFT: # CARPENTER

DETERMINATION: SD-23-31-4-2000-1
ISSUE DATE: February 22, 2000
EXPIRATION DATE OF DETERMINATION: June 30, 2000** The rate to be paid for work performed after this date has been determined. If work will extend past this date, the new rate must be paid and should be incorporated in contracts entered into now. Contact the Division of Labor Statistics and Research for specific rates at (415) 703-4774.

LOCALITY: All localities within Contra Costa County

CLASSIFICATION (JOURNEYPERSON)	Basic Hourly Rate	Employer Payments: Health and Welfare	Pension	Vacation/ Holiday	Training	Straight-Time Hours	Total Hourly Rate	Overtime Hourly Rate: Daily 1 1/2X	Saturday a 1 1/2X	Sunday and Holiday
ENGINEERING CONSTRUCTION										
Carpenter (Heavy and Highway work)	$25.25	2.30	1.01	2.72 b	.30	8	31.58	44.205	44.205	56.83
Light Commercial	20.40	2.30	1.01	2.72 b	.30	8	26.73	36.93	36.93	47.13
Bridge Carpenter (Highway work)	25.38	2.30	1.01	2.72 b	.30	8	31.71	44.40	44.40	57.09
Millwright	25.75	2.30	1.01	2.72 b	.30	8	32.08	44.955	44.955	57.83
Pile Driver	25.38	2.30	1.01	2.72 b	.30	8	31.71	44.40	44.40	57.09
Diver, Wet (up to 50 ft. depth)cd	55.76 117.85	2.30	1.01	2.72 b	.30	8	62.09	89.97	89.97	
Diver, Standby	28.38	2.30	1.01	2.72 b	.30	8	34.71	48.90	48.90	63.09
Diver's Tender	27.38	2.30	1.01	2.72 b	.30	8	33.71	47.40	47.40	61.09

DETERMINATION: SD-23-31-4-2000-1A
ISSUE DATE: February 22, 2000
EXPIRATION DATE OF DETERMINATION: July 1, 2000** The rate to be paid for work performed after this date has been determined. If work will extend past this date,
the new rate must be paid and should be incorporated in contracts entered into now. Contact the Division of Labor Statistics and Research for specific rates at (415) 703-4774.

LOCALITY: All localities within Antioch County

BUILDING CONSTRUCTION										
Carpenter	$23.40	2.30	1.01	2.17 b	.30	8	29.18	40.88	40.88	52.58
Light Commercial	18.72	2.30	1.01	2.17 b	.30	8	24.50	33.86	33.86	43.22

DETERMINATION: SD-31-741-1-2000-1
ISSUE DATE: FEBRUARY 22, 2000
EXPIRATION DATE OF DETERMINATION: May 31, 2000* Effective until superseded by a new determination issued by the Director of Industrial Relations. Contact the
Division of Labor Statistics and Research (415) 703-4774 for the new rates after 10 days from the expiration date, if no subsequent determination is issued.

LOCALITY: All localities within Antioch County

Classification (Journeyperson)	Basic Hourly Rate	Employer Payments: Health and Welfare	Pension	Vacation/ Holiday	Training	Straight-Time Hours	Total Hourly Rate	Overtime Hourly Rate: Daily 1 1/2X	Saturday a 1 1/2X	Sunday and Holiday
Terrazzo Installer	$29.55	2.30	1.01	1.72 b	-	8	34.58	49.355	49.355	64.13
Terrazzo Finisher	23.05	2.30	1.01	1.72 b	-	8	28.08	39.605	39.605	51.13

# Indicates an apprenticeable craft. Rates for apprentices are available in the General Prevailing Wage Apprentice Schedules. a Saturday in the same workweek may be worked at straight-time rate for the first 8 hours if the employee was unable to complete the 40 hours during the normal workweek. b Includes supplemental dues. c Shall receive a minimum of 8 hours pay for any day or part thereof. d For specific rates over 50 ft. depth, contact the Division of Labor Statistics and Research.

DESCRIPTION:
Engineering Construction
Refers to construction which requires a Class A license and includes bridges, highways, dams and also power plants and other heavy industrial type projects.
Building Construction
Requires a Class B license and includes non-residential buildings (such as hospitals, government buildings, public schools) and commercial buildings (with the exception of industrial buildings).

RECOGNIZED HOLIDAYS: Holidays upon which the general prevailing hourly wage rate for Holiday work shall be paid, shall be all holidays in the collective bargaining agreement, applicable to the particular craft, classification, or type of worker employed on the project, which is on file with the Director of Industrial Relations. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code. You may obtain the holiday provisions for the current determinations on the Internet at http://www.dir.ca.gov/DLSR/PWD. Holiday provisions for current or superseded
determinations may be obtained by contacting the Prevailing Wage Unit at (415) 703-4774.

TRAVEL AND/OR SUBSISTENCE PAYMENT: In accordance with Labor Code Sections 1773.1 and 1773.9, contractors shall make travel and/or subsistence payments ... each worker to execute the work. Travel and/or subsistence requirements for each craft, classification or type of worker may be obtained from the Prevailing Wage Unit at (415) 703-4774.

ANTIOCH UNIFIED SCHOOL DISTRICT
LABOR COMPLIANCE SITE VISITATION INTERVIEW FORM
FORMA DE INTREVISTA DEL SITIO SOBRE CONDECENCIA LABORARIA
Labor Compliance Officer 925/776-2073

SITE NAME:_____ DATE_____
SITIO: FECHA:

PROJECT NAME:_____

CONTRACT #:_____ Interior / Exterior (circle)

CONTRACTOR:_____
CONTRANTE:

SUBCONTRACTOR:_____
SUBCONTRATANTE

Person Interviewed:_____
Nombre de Persona Entrevistada

S/S Number _____/_____/_____
Numero de Seguro Social

Position Title:_____
Possion O Titulo del Entrevistado

Task Being Performed at Time of This Interview:_____
Clase de Labor Desenpenando al Tiempo de Entrevista

Hourly Pay Rate: $_____
Salario Horario

OBSERVATIONS:

Site Inspector:_____Telephone

Project Superintendent:_____Telephone_____

Total number of workers observed on the visit:_____

Type of work observed:_____

Type of workers observed: _____

Was the worker believable? Yes No

Did the superintendent or foreman accompany you on the site? Yes No

Explain additional information received from the worker:_____
_____
_____

Interview Conducted by:_____

SITE VISITATION LOG

SITE	VISIT DATE	PRIME CONTRACTOR	SUB CONTRACTOR	EMPLOYEE NAME	SOCIAL SECURITY #	POSITION TITLE	TASK PERFORMED AT INTERVIEW	PAY RATE	COMPLIANT / NON COMPLIANT	LABOR COMPLIANCE OFFICE COMMENTS
Hoover	9/1/99	Baker	Mills	John Doe	111-11-1111	Plumber	Repairing Plumbing	$34.19	Compliant	Certified Payroll Records check out
Hoover	9/1/00	Baker	Mills	Mark Baker	222-22-2222	Laborer	Painting	$10.40	Non	Certified Payroll does not check out with interview

ANTIOCH UNIFIED SCHOOL DISTRICT

July 21, 2000

Certified Mail

Mr. John Doe
ACME Painting
13414 Labor Street
Los Angeles, CA 90605

Sample

Pre Award Letter

Dear Mr. Doe:

The Antioch Unified School District has identified your firm as the apparent low bidder for Contract #90-225 Portable Contract Moving Services and has scheduled board approval of a contract requiring your compliance with Division 2 Part 7 of the California Labor Code. This will require the payment of prevailing wages to all workers employed on the project and the reporting of the certified weekly payroll to the LCO. The Labor Code requires, prior to the start of work, that a person qualified to certify documents for your firm attend a review meeting with the awarding body concerning the Labor Code prevailing wage laws.

The LCO is formally requesting the appearance of the certifying person for the code review, the submittal of the required weekly certified payroll records or nonperformance reports, and the monthly submittal of employment utilization reports, all identified in the contract general conditions.

This request is made pursuant to, and authorized by, California State Labor Code Section 1776(b) (2), which states, "A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations" and California Code of Regulations section 16430 (a) (2).

The goal of the LCO is to provide the necessary information, assistance, forms and procedures to allow your project to move forward on schedule and in compliance with the State's Labor Code.

Please call the Antioch Unified School District's Labor Compliance Officer at (925) 776-2073 to set an appointment and receive the necessary forms prior to the start of your project.

Respectfully,

Dane Ruddell
Labor Compliance Officer

ANTIOCH UNIFIED SCHOOL DISTRICT

July 27, 2000 Certified Mail

Jane Doe
ACME Flooring
8320 Camino Santa Fe
Antioch, CA 92121

Sample
Post Award Letter

Dear Ms. Doe:

The Antioch Unified School District has awarded your firm a contract requiring your compliance with Part 7, chapter 1 of the California Labor Code. This will require the payment of prevailing wages to all workers employed on the project and the reporting of the weekly payroll to the District's Labor Compliance Officer.

The Labor Code requires, prior to the start of work, that a person qualified to sign and certify for your firm attend a review with the awarding body of the Labor Code prevailing wage laws.

The Labor Compliance Officer goal is to provide the necessary information, assistance, forms and procedures to allow your project to move forward on schedule and in compliance with the State's Labor Code.

Please call the Antioch Unified School District's Labor Compliance Officer at (925) 776-2073 to set an appointment and receive the necessary forms prior to the start of your project.

Respectfully,

Dane Ruddell
Labor Compliance Officer

ANTIOCH UNIFIED SCHOOL DISTRICT

March 23, 2000 Certified Mail

Sample
1st Request for
Certified Payrolls

John Doe
ACME Construction Co.
3170 Labor Street
Vista, CA 92083-8318

Mr. Doe:

The Antioch Unified School District's Labor Compliance Officer is formally requesting copies of Certified Payroll Records and Monthly Utilization Reports for the modernization of Cubberly, Jones and Fletcher schools. We are requesting the records from the beginning of the project through project completion for your firm and all subcontractors.

This request is made pursuant to, and authorized by, California State Labor Code Section 1776 (b) (2) and Section 1776 (g) (3) and the contract general conditions requiring weekly employee payments and weekly certified payroll submittals.

Labor Code Section 1776 (b) (2) states: "A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations."

Labor Code 1776 (g) (3) states: "The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated."

Please forward all weekly Certified Payroll Records and Monthly Utilization Reports on the District and state approved forms previously provided to: Antioch Unified School District, Labor Compliance Officer, P.O. Box 768, Antioch, CA 94509. If you have any questions, contact me at (925) 776-2073.

Respectfully,

Dane Ruddell
Labor Compliance Officer

Prime Contractor:
Project:

Original Request: 02/08/00 This Request: 02/08/00

1. **Monthly Utilization Forms must be provided for:**

2. **Apprenticeship Training Agreement (similar to Form DAS 1) must be provided for:**

3. **Apprenticeship Training Agreement (similar to Form DAS 7) must be provided for:**

4. **Training Fund Contributions (Form CAC 2 or equivalent) must be provided for:**

5. **Public Works Contract Award Information (Form DAS 140) with the name, address and phone number of the training program notified by all project contractors must be provided for:**

6. **Fringe Benefits Statements must be provided for:**

7. **Signed certified Payroll report or statement of Non-Performance with original signatures must be provided for:**

   contractors are responsible for submittal of their payrolls and those of their respective subcontractors as one package, which must be in the District's Labor Compliance Officer **within one week of each weekly paycheck**. In the event there has been no work performed during a given week, the certified payroll record shall be annotated with the words "No Work" for that week.

8. **To determine the required hours for apprentices on this project we will need the contractor to Identify all sub-contractors who will perform work in involving less than $30,000 or who will be on the project less than 20 calendar days or both.**

9. **Either the Public Works Payroll Reporting Form (Form A-1-131) or the Antioch Unified School District reporting form must be used.**

Missing Document List

Attachment 2

ACME HIGH SCHOOL RE-ROOF

PRIME CONTRACTOR: **ACME ROOFING CO., INC**

Original Issue date: 00-00-0000 Latest Issue: 00-00-0000

REPORTING CONTRACTOR :**COMMERCIAL AND INDUSTRIAL ROOFING CO.,INC**								**Antioch Unified school**		
CONTRACTOR PROVIDED INFORMATION								**District comments**		
Employee Name & Social Security Number	**Work Classification**	**Week Ending**	**Rate Paid**	**Fringes Paid**	**Gross Per Hour**	**Hours Worked**	**Gross Amount Paid**	**Prevailing Wage Rate**	**Amount they should have been paid**	**Difference**
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
					$0.00		$0.00		$0.00	$0.00
								Total Contractor Difference:		**$0.00**

Total Project Difference $0.00

ANTIOCH UNIFIED SCHOOL DISTRICT

March 1, 2000 Certified Mail

Mr. Doe
ACME Construction Co.
115 Market Place, Suite A
Los Angeles, CA 92029-1353

Sample

Certified Payroll Correction Letter

Dear Mr. Doe:

The Antioch Unified School District's Labor Compliance Officer has formally requested copies of Certified Payroll Records and Monthly Utilization Reports for Bid Project Portable Contract 82 - Phase 2. We have reviewed your submittal and require additional information.

This new request is made pursuant to, and authorized by, California State Labor Code Sections 1774, 1775, 1776, 1777.5, 1777.7, 1810, 1813 and 1815. Additionally, the contract general conditions require weekly certified payroll record submittals to the Districts Labor Compliance Officer and weekly payment of employee wages.

Labor Code §1776 (b) (2) states: "A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations."

Labor Code §1776 (g) states: "The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portions thereof, for each worker, until strict compliance is effectuated."

Please correct and supply the data requested in the attachments and submit on approved forms to: Antioch Unified School District, Labor Compliance Officer, P.O. Box 768, Antioch, CA 94509. If you have any questions, contact me at (925) 776-2073.

Respectfully,

Dane Ruddell
Labor Compliance Officer

Enc. (2)

ANTIOCH UNIFIED SCHOOL DISTRICT

Report of Action for Prevailing Wage Violations

Name of Project:_____

Contract Number:_____ First Advertised Date:_____

County Where Work Is Performed:_____

Date Notice of Completion Filed:_____

Date of Project Acceptance or Current Percent Complete:_____

Name and Address of Prime Contractor:

_____

_____

_____

Project's Scope of Work:_____

_____

Contractors in Violation of the Labor Code and their Scope of Work:_____

_____

Statement of the Issues Identified to the Contractor:_____

_____

_____

Summary of the Audit Investigation:

CPR Spread Sheets
Labor Code Sections Violated:

Summary of Penalty Assessment Justification:_____

_____

_____

Identify Labor Code 1775 and 1813 Penalties Requested with Calculated Totals:

_____

Is the Violation Due to Mistake, Inadvertence or is it a Willful Failure to Pay the Correct Wages:

_____

Previous Record in Meeting Prevailing Wage Obligations:_____

_____

Identify and Provide All Correspondence:_____

Identify and Provide Any Contractor Response:_____

Recommend Penalty Assessment:_____

ANTIOCH UNIFIED SCHOOL DISTRICT

Report of Action for Prevailing Wage Violations

Name of Project:_____

Contract Number:_____ First Advertised Date:_____

County Where Work Is Performed:_____

Date Notice of Completion Filed:_____

Date of Project Acceptance or Current Percent Complete:_____

Name and Address of Prime Contractor:

_____

_____

_____

Project's Scope of Work:_____

_____

Contractors in Violation of the Labor Code and their Scope of Work:_____

_____

Statement of the Issues Identified to the Contractor:_____

_____

_____

Summary of the Audit Investigation:

CPR Spread Sheets
Labor Code Sections Violated:

Summary of Penalty Assessment Justification:_____

_____

_____

Identify Labor Code 1775 and 1813 Penalties Requested with Calculated Totals:

_____

Is the Violation Due to Mistake, Inadvertence or is it a Willful Failure to Pay the Correct Wages:

_____

Previous Record in Meeting Prevailing Wage Obligations:_____

_____

Identify and Provide All Correspondence:_____

Identify and Provide Any Contractor Response:_____

Recommend Penalty Assessment:_____

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director-Legal Unit
?0 W. Fourth St, Suite 600
Los Angeles, CA 90013

GRAY DAVIS, *GOVERNOR*

Tel. No (213) 576-7?
Fax (213) 576-7?

EXHIBIT J

August 14, 2003

Ms. Shirley Opie
Assistant Executive Director
Commission on State Mandates
980-Ninth Street, Suite 300
Sacramento, CA 95814

RE: Clovis Unified School District
Test Claim No.: 01-TC-28

Dear Ms. Opie:

Enclosed for filing please find an original and 2 copies of the Department of Industrial Relations's Supplemental Position Statement and Request for Summary Disposition in the above stated matter. Please file original and conform one of the copies and return to us in the enclosed self-addressed envelope.

If you have any questions, please call me at the number above.

Yours truly,

Anthony Mischel (ms)

Anthony Mischel

ASM/ms

Encl.

BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of Clovis Unified School District, Test Claimant, Re: California Prevailing Wage Law.	Test Claim No: 01-TC-28

Department of Industrial Relations's

Supplemental Position Statement

And Request For Summary Disposition

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Attorneys for Respondent Department of Industrial Relations

INTRODUCTION

On May 22, 2003, the California Supreme Court issued its decision in *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727, 134 Cal.Rptr.2nd 237 ("*Kern*").[1] The decision disposes of some of the Test Claimants' claims (no subvention for voluntary programs) and raises an additional defense the Department now asserts (nature of program subject to mandate and availability of alternative funding sources). This Supplemental Position Statement addresses only these issues, without unnecessary repetition of the earlier arguments presented. The Supreme Court's decision, however, means there is no longer any support for several of the claims for subvention made by Test Claimants. The Department requests that these claims be summarily rejected prior to any hearing on the remainder of the Test Claim.[2] *Kern* substantially weakens any remaining claim for the reasons set forth below.

Kern addressed several unsettled issues defining those programs that constitute a "new program or increased level of service." The case arose from a Commission subvention order on nine education-related programs, all of which at their inception were mandatory programs. All of the programs contained substantial funding from state and federal sources. One of the requirements for these programs was the creation of local governing councils. Before the period for which costs were awarded, school districts' participation in eight of the nine programs' became voluntary. While the districts were under a mandatory duty to provide these programs, the scope of the Brown Open Meeting Act's (Government Code § 54950.5 *et seq.*) requirement expanded to require notice of the local council meetings for all the governing councils.[3] The school districts sought subvention for the costs associated with compliance with the Brown Act requirements, approximately $90.00 per meeting.

---

[1] A copy of this case is not attached as the Commission was a party to the action.
[2] These claims are numbers 3, 4, 5, 11, 12, 17, 18, 19.
[3] The Brown Act requirements were superceded by comparable Education Code requirements.

The Court made four significant rulings, all of which have some application to the Claim in this case:

1. What is a "Program": "First, we reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, without regard to whether a claimant's participation in the underlying program is voluntary or compelled."
2. Effect of Voluntary Activities: "Second, we conclude that as to *eight* of the nine underlying funded programs here at issue, claimants have not been legally compelled to participate in those programs, and hence cannot establish a reimbursable state mandate as to those programs based upon a theory of legal compulsion."
3. Effect of Access to Other Funds: "Third, assuming (without deciding) that claimants have been legally compelled to participate in *one* of the nine programs, we conclude that claimants nonetheless have no entitlement to reimbursement from the state for such expenses, because they have been free at all relevant times to use funds provided by the state for that program to pay required program expenses — including the notice and agenda costs here at issue."
4. Scope of No Reasonable Alternative Claim: "Finally, we reject claimants' alternative contention that even if they have not been *legally* compelled to participate in the underlying funded programs, as a *practical* matter they have been compelled to do so and hence to incur notice-and agenda-related costs."

Id., 30 Cal.4th at 731.

All four of these points have direct application here as the decision clarifies the focus of the inquiry as to the definition of a "program" and when is the program a mandate.

IN DETERMINING THE PROGRAM INVOLVED, THE COMMISSION SHOULD LOOK TO THE ACTIVITY IN WHICH THE LOCAL AGENCY INVOLVES ITSELF. IF THE UNDERLYING GOVERNMENTAL ACTIVITY IS VOLUNTARY, THEN INCREASED COSTS FOR THE RESULTING ENFORCEMENT ACTIVITY IS NOT A "MANDATE."

The *Kern* Court reached the obvious conclusion that, for subvention purposes, the proper focus was on the actual activity by the governmental agency, to wit, the educational programs themselves and not the Brown Act requirements. The Court found that all of the programs initially were mandatory. However, prior to the years under consideration, statutory changes to the programs' enabling legislation allowed school districts to participate on a voluntary basis, although the State provided economic incentives to continue participating in the programs. The Court held that this economic incentive did not create a mandate, even though the local agencies had to continue to comply with the requirement to have local governing councils and to comply with the Brown Act. In doing so, the Court approved the analysis in *City of Merced v. State of California* (1984) 153 Cal.App.3rd 777. In doing so, the Court adopted *Merced*'s narrow definition of what constituted a "mandate."

In *Merced*, the city needed some real property for a public project. When less formal methods failed to produce the result the City wanted, it chose to proceed by an action for eminent domain. Under state law, the cost of eminent domain had to include business good will. The City argued that subvention was necessary for the increased costs associated with complying with state law. The Court of Appeal denied subvention because, while the City had to proceed by eminent domain if it wanted the property, it was not legally obligated to obtain the property. That is, it was the City's voluntary

decision to obtain the land. In approving *Merced*, the Court held:

> [I]f a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded programs, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.
>
> ...the proper focus [of the] legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves.

Id., 30 Cal.4th at 743.

The Court's reaffirmation of *Merced* means that the focus of the Commission's inquiry must be on the governmental activity that underlies the Claim and not necessarily on the resulting compliance requirements; in this case, the "program" would be the local agencies' decision to engage in construction under contract, paid for in whole or in part with public funds. The question is whether the local agencies are under a "legal compulsion" to engage in construction under contract, paid for in whole or in part with public funds. Labor Code § 1720(a). The enforcement responsibilities in the Labor Code that flow as a consequence of the local agencies' activities do not, in themselves, constitute mandates because the enforcement activities are not the "program" subject to subvention. If there is no legal compulsion for a construction project, then there can be no subvention for any enforcement costs that flow from a local agency's decision to engage in a specific public work.

The test now set by the Supreme Court, as applied here, will require a two step inquiry:

> Is a local agency **legally compelled** to engage in construction using public funds?
>
> If so, is the local agency **legally compelled** to do so under contract (i.e., not with its own workforce)?

Only if the answers to these questions are both affirmative can there be a legally compelled "program" in the public works context.[4] Test Claimants have not argued that they are under some compulsion to actually engage in construction of school facilities.[5] Even if the Claimants are under some legal compulsion, there is nothing that prevents them from performing that construction with its own employees.

PROGRAMS THAT, DURING THE CLAIM PERIOD, ARE NOT REQUIRED BY STATE LAW DO NOT QUALIFY FOR REIMBURSEMENT.

Assuming the Commission rejects the defense that there is no reimbursement allowed for any prevailing wage enforcement because all construction is a voluntary act, certain claims concerning Claimants' enforcement activities are still clearly barred by the new decision and should not be heard at the evidentiary hearing.

Kern's rejection of the eight of the nine programs was explicitly based on the fact that the programs were not required by state law during the claim period. In the context of this Test Claim, there can be no question, therefore, that there is no right to reimbursement for any expense associated with such voluntary activities as seeking review of prevailing wage rates and determinations (Test Claim nos: 3-5), the requirements of operating a Labor Compliance Program under Labor Code § 1771.5 (Test Claim nos: 11, 12) or participation in public works citation appeals (Test Claim nos: 17-19). In essence, *Kern* provides absolute support for the Department's position (See Opposition to Test Claims, pg. 29). These claims should be summarily dismissed at this stage of the proceedings.

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[4] Test Claimants would still have to prove that any mandate about which they complain was a new program. *See*, generally Opposition to Test Claim.

[5] Such an argument would require that other state agencies be joined as DIR has no involvement in determining when school construction must occur.

REIMBURSEMENT IS NOT PROPER WHERE THE TEST CLAIMANTS HAVE ACCESS TO ALTERNATIVE SOURCES OF FUNDING FOR THE PROGRAM, EVEN WHERE THE ALTERNATIVE SOURCES DO NOT SUPPLY TOTAL REIMBURSEMENT.

The *Kern* Court also denied subvention where other sources of funding existed for the same "mandate." *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at 746 - 747. In *Kern*, the Court characterized the costs for the one arguably mandated program as "minimal" and noted that the Legislature provided for the right to use education funds to comply with the Brown Act notice provisions. The Court held that even when the state reduces the amount of available funding for a program, no mandated increased costs occurs. "The circumstance that the program funds claimants may have wished to use exclusively for substantive program activities are thereby reduced, does not in itself transform the related costs into a reimbursable state mandate." *Id.*, 30 Cal.4th at 748 (citation omitted).

In school construction (both Test Claimants are school districts), state funding is already provided through the School Allocation Board ("SAB"), which provides funding to districts based on an SAB formula that pays anywhere from 40% to 80% of the cost of construction. In some instances, such for as the recently enacted AB 1506 (Labor Code § 1771.7) requirements for Labor Compliance Programs for specific SAB funding, SAB provides funding for operating a Labor Compliance Program as well as the cost of actual construction. Test Claimants have not made a credible case that SAB funding does not take care of whatever costs Claimants have incurred; in fact, Test Claimants have not even mentioned the availability of these funds nor indicated whether they subtracted this alternative funding prior to claiming that the cost of complying with the California Prevailing Wage Law exceeds $300.00 per year.

TEST CLAIMANTS CANNOT MEET THEIR BURDEN TO PROVE A MANDATE FOR VOLUNTARY ACTIVITIES UNLESS THEY CAN DEMONSTRATE "DRACONIAN CONSEQUENCES" FOR THE FAILURE TO PARTICIPATE IN PUBLIC WORKS.

Finally, one of the issues that Test Claimants raised in the initial Claim was whether subvention was required even for voluntary activities because there was no alternative to the enforcement activity. See Test Claimants' Response to DIR, 2/14/03, pg. 5. Claimants relied on *City of Sacramento v. State of California* (1990) 50 Cal.3rd 51. In essence, Test Claimants alleged that even for programs that carried no "legal compulsion," they are required to comply with prevailing wage obligations or suffer severe consequences. This is not the standard, however.

The *Kern* decision is again instructive here. In *Kern*, the claimants argued that even though eight of the programs were voluntary, the reality was that districts in fact had no alternative but to participate in the educational program. The question for the Court was whether its *City of Sacramento* decision created an exception to the "legally compelled" requirement for subvention. In *City of Sacramento*, the Court decided that federal mandates could be created when the failure to participate in a federal program would result in ""certain and severe federal penalties" including "double ... taxation" and other "draconian" measures ... as a practical matter." *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at 749 (citation omitted). The Court did not determine whether this standard for federal mandates applied equally to state mandates or whether a narrower standard of actual "legal compulsion" applied.

The Court held that there is no mandate when school districts are "free to decide whether to (i) continue to participate and receive program funding, even though the school district must incur program-related costs associated with the notice and agenda requirements, or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation --- in other words, if *on balance*, the

funded program, even with strings attached, is deemed beneficial." *Id., 39* Cal.4th at 753. However, participation in a beneficial program, even it there are attendant costs associated with the voluntary participation, does not create a legal compulsion that creates a reimbursement right. "We reject the suggestion, implicit in claimants' argument, that the state cannot legally provide school districts with funds for voluntary programs, and then effectively reduce that funding grant by requiring school districts to incur expenses in order to meet conditions of program participation." *Id.,* 30 Cal.4th at 754.

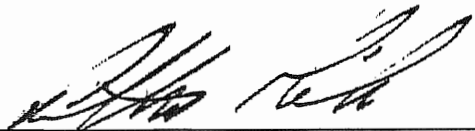
CONCLUSION

The Supreme Court has held that the purpose of the subvention rules "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities." *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81. Test Claimants have not made any showing that the California Prevailing Wage Law is such a shift of responsibility or that local agencies are 'ill equipped' to carry out their role in protecting California workers. The claims based on voluntary activities by Test Claimants (such as seeking and appealing wage determinations, operating Labor Compliance Programs, or intervening in private contractor appeals from wage citations) clearly no longer are subject to subvention and should be dismissed summarily at this point.

Dated: August 13, 2003

Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR-LEGAL UNIT
JOHN M. REA, Chief Counsel
STEVEN A. MCGINTY, Asst. Chief Counsel
ANTHONY MISCHEL, Counsel



ANTHONY MISCHEL
ATTORNEY FOR DEPARTMENT OF
INDUSTRIAL RELATIONS

PROOF OF SERVICE

(Code Civ. Proc. §§ 1013a, 2015.5)

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.
And Affected Parties and State Agencies

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 320 W. Fourth Street, Suite 600, Los Angeles, CA 90013.

On August 14, 2003, I served the enclosed **Department of Industrial Relations's Supplemental Position Statement,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Loa Angeles, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

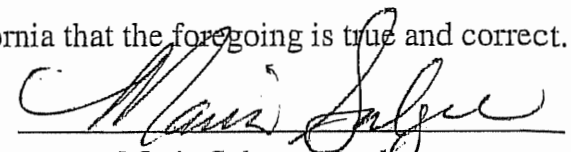
(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
A (1 orig.+ 2 copies)	Ms. Shirley Opie Asst. Executive Director Commission on State Mandates 980-Ninth Street, Suite 300 Sacramento, CA 95814	State Agency
A	Mr. Ramon dela Guardia Deputy Attorney General Department of Justice 1300 I. Street, Suite 125 Sacramento, CA 95814	State Agency
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842	Interested Party
A	Dr. Carol Berg Education Mandated Cost Network 1121 L. Street, Suite 1060 Sacramento, CA 95814	Interested Party
A	Executive Director, (E-08) State Board of Education 721 Capitol Mall, Room 558 Sacramento, CA 95814	State Agency
A	Mr. Glenn Haas, Bureau Chief State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816	State Agency
A	Ms. Beth Hunter, Director Centration, Inc. 8316 Red Oak Street, Suite 101 Rancho Cucamonga, CA 91730	Interested Person

A	Mr. Tom Lutzenberger (A-15) Principal Analyst Department of Finance 915 L. Street, 6th Floor Sacramento, CA 95814	State Agency
A	Mr. Bill McGuire Assistant Superintendent Clovis Unified School District 1450 Herndon Clovis, CA 93611-0599	Claimant
A	Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Interested Person
A	Mr. Keith B. Petersen President SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Claimant
A	Mr. Gerald Shelton, Director (E-8) California Department of Education Fiscal & Administrative Services Division 1430 N. Street, Suite 2213 Sacramento, CA 95814	State Agency
A	Mr. Steve Shields Shields Consulting Group, Inc. 1536 - 36th Street Sacramento, CA 95816	Interested Party
A	Mr. Steve Smith, CEO Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Interested Party
A	Mr. Scott Kronland Altshuler, Berzon, Nassbaum, Rubin & Demain 177 Post Street, Suite 300 San Francisco, CA 94108	Interested Party

Executed on August 14, 2003, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Maria Salazar, Declarant

State of California • Department of General Services • Gray Davis, G
OFFICE OF PUBLIC SCHOOL CONSTRUC
Interagency Support Division
1130 K Street, Suite 400 • Sacramento, California 95814 • (916) 445-3160

EXHIBIT K

September 15, 2003

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, Ca 95814

Dear Ms. Higashi:

As requested in your letter dated August 14, 2003, the Office of Public School Construction (OPSC) has reviewed the test claim submitted by the Clovis Unified School District asking the Commission to determine whether specified costs are incurred by the school district as required by statute in initiating and enforcing a Labor Compliance Program (LCP) (Claim Number 01-TC-28). Following please find responses to the questions addressed in your letter:

1. **Do the provisions listed in the notice impose a new program or higher level of service within an existing program upon local entities within the meaning of Section 6, Article XIIIB of the California Constitution and costs mandated by the State pursuant to Section 17514 of the Government Code?**

   Participation in the School Facility Program (SFP), Chapter 12.5 of the Education Code (EC) by a school district is voluntary. The Education Code does not compel a district to obtain funding from the State through the SFP as a condition of building schools. School districts may choose to build facilities through the use of district raised funds. Program elements are only required if a district chooses to participate in the program. Additionally, Labor Code (LC) Section 1771.7 states "an awarding body that *chooses* to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002....for a public works project, shall initiate and enforce...a labor compliance program".

   Therefore, if a school district chooses to participate in the SFP and the project is funded from Proposition 47 and the Notice to Proceed for the construction phase of the project is issued on or after April 1, 2003, the district is required to initiate and enforce a LCP approved by the Department of Industrial Relations (DIR) pursuant to LC Section 1771.7. The OPSC requires that a district self-certify on the *Application for Funding,* Form SAB 50-04 that it has or will initiate a LCP. Prior to a release of State funds the district is required to certify on the *Fund Release Authorization,* Form SAB 50-05 that it has initiated a LCP. At the time of project audit the district is required to submit substantiating documents as outlined in the SFP, *Substantial Progress and Expenditure Audit Guide*, May 2003. LC Section 1771.7 does not require a LCP on all public work projects but only makes it a requirement of the SFP for a school district that chooses to voluntarily participate.

In addition, the EC provided the State Allocation Board (SAB) with the authority to increase the per pupil grant amount to accommodate the State's share for the additional costs due to the initiation and enforcement of a LCP. These increases were approved by the SAB on July 2, 2003 and are currently being provided.

2. **Does Government Code Section 17556 preclude the Commission from finding that any of the test claim provisions impose costs mandated by the State?**

   Yes. It appears that Government Code Section 17556(d) precludes the Commission from finding that any provisions of the test claim impose costs mandated by the State.

   Education Code Section 17556(d):
   The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increase level of service.

   Statute allows a school district the authority to raise program costs through the passage of local bonds, proceeds from the sale of surplus property, other revenue sources including developer fees and Mello-Roos for capital outlay needs.

3. **Have funds been appropriated for this program (e.g. state budget) or are there any other sources of funding available? If so, what is the source?**

   Funding for the SFP may be provided through the passage of statewide general obligation bonds, if the district elects to apply. Most recently, in November 2002, the voters approved Proposition 47 - Kindergarten-University Public Education Facilities Bond Act of 2002. The bond allocated $8,085,800,000 for new construction and $3,294,200,000 for modernization of school facilities.

If you have any questions regarding this letter, please contact Ms. Elizabeth Dearstyne, Project Manager, at edearsty@dgs.ca.gov or (916) 323-0073.

Sincerely,

LUISA M. PARK
Executive Officer
Office of Public School Construction

LMP:ED:rm

Enclosures

cc: Commission's Parties and Interested Parties List as of 1/16/03 (Enclosure)

Original List Date: 7/8/2002
Last Updated: 1/16/2003
List Print Date: 08/14/2003
Claim Number: 01-TC-28(First Amendment)
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Fiscal and Administrative Services Division
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Department of Industrial Relations
Office of the Director
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102

Tel: (415) 703-4240
Fax: (415) 703-5058

SixTen and Associates
Mandate Reimbursement Services

Exhibit L

'ITH B. PETERSEN, MPA, JD, President
.52 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

September 13, 2003

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 01-TC-28
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

I have received the Supplemental Position Statement and Request For Summary Disposition of the Department of Industrial Relations ("DIR") dated August 13, 2003, to which I now respond on behalf of the test claimant.

Although none of the objections generated by DIR are included in the statutory exceptions set forth in Government Code Section 17556, the objections stated additionally fail for the following reasons:

1. The Comments of the DIR are Incompetent and Should be Excluded

Test claimant objects to the Statement and Request of the DIR, in total, as being legally incompetent and move that it be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information and belief."

The DIR comments do not comply with this essential requirement.[1]

[1] Test claimant filed an identical objection to its original comments dated January 15, 2003.

2. There is no Provision in Mandate Law for Summary Disposition

DIR requests that the Commission reject the test claim summarily prior to any hearing on the test claim. There is no provision in the law that allows such a drastic motion.

The identification and payment of costs mandated by the state is governed by Chapter 4 of Division 4 of Title 2 of the Government Code, Sections 17550, et. seq. Commission procedure is controlled by Article 1, sections 17550 through 17571.

Section 17551[2] requires the Commission to *hear and decide* a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution. Section 17552[3] provides that the chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim

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[2] Government Code Section 17551, added by Chapter 1459, Statutes of 1984, Section 1, as amended by Chapter 11124, Statutes of 2002, Section 30.2, effective September 30, 2002:

"(a) The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution.

(b) Commission review of claims may be had pursuant to subdivision (a) only if the test claim is filed within the time limits specified in this section.

(c) Local agency and school district test claims shall be filed not later than three years following the date the mandate became effective, or in the case of mandates that became effective before January 1, 2002, the time limit shall be one year from the effective date of this subdivision.

(d) The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district filed on or after January 1, 1985, that the Controller has incorrectly reduced payments to the local agency or school district pursuant to paragraph (2) of subdivision (d) of Section 17561."

[3] Government Code Section 17552, added by Chapter 1459, Statutes of 1984, Section 1, as amended by Chapter 879, Statutes of 1986, Section 3:

"This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIIIB of the California Constitution."

reimbursement for costs mandated by the state as required by Section 6 of Article XIIIB of the California Constitution.

Section 17553[4], subdivision (a), requires the Commission to adopt procedures for

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[4] Government Code Section 17553, added by Chapter 1459, Statutes of 1984, Section 1, as amended by Chapter 643, Statutes of 1999, Section 3:

"(a) The commission shall adopt procedures for receiving claims pursuant to this article and for providing a hearing on those claims. The hearing procedure shall provide for presentation of evidence by the claimant, the Department of Finance and any other affected department or agency, and any other interested person. The procedures shall ensure that a statewide cost estimate is adopted within 12 months after receipt of a test claim, when a determination is made by the commission that a mandate exists. This deadline may be extended for up to six months upon the request of either the claimant or the commission. Hearing of a claim may be postponed at the request of the claimant, without prejudice, until the next scheduled hearing.

(b) The procedures adopted by the commission pursuant to subdivision (a) shall include the following:

(1) Provisions for acceptance of more than one claim on the same statute or executive order relating to the same statute or executive order filed with the commission, and, absent agreement by the test claimants to the contrary, to designate the first to file as the lead test claimant.

(2) Provisions for consolidating test claims relating to the same statute or executive order filed with the commission with time limits that do not exceed 90 days from the initial filing for consolidating the test claims and for claimants to designate a single contact for information regarding the test claim.

(3) Provisions for claimants to designate a single claimant for a test claim relating to the same statute or executive order filed with the commission, with time limits that do not exceed 90 days from the initial filing for making that designation.

(c) If a completed test claim is not received by the commission within 30 calendar days from the date that an incomplete test claim was returned by the commission, the original test claim filing date may be disallowed, and a new test claim may be accepted on the same statute or executive order.

(d) In addition, the commission shall determine whether an incorrect reduction claim is complete within 10 days after the date that the incorrect reduction claim is filed. If the commission determines that an incorrect reduction claim is not complete, the commission shall notify the local agency and school district that filed the claim stating the reasons that the claim is not complete. The local agency or school district shall have

receiving claims pursuant to this article and for *providing a hearing* on those claims. The hearing procedure shall provide for *presentation of evidence* by the claimant, the Department of Finance and any other affected department or agency, and any other interested person. Subdivision (b) sets forth minimum procedures to be adopted. These minimum procedures do not provide for the summary disposition of test claims.

Section 17555[5] provides that the commission shall determine if there are costs mandated by the state after a *public hearing* on the claim in which the claimant and any other interested organization or individual may participate.

The procedures required by Section 17553 are found in Chapter 2.5 of Title 2, California Code of Regulations, commencing at section 1181. The procedural rules regarding test claims are found in Article 3, commencing with Section 1183.

Section 1183.02, allows the Department of Finance, Office of the State Controller, and any affected state agency the opportunity to review and provide a written response, opposition, or recommendations concerning the test claim and to *present evidence at the hearing* on the test claim. There is no provision for summary adjudication.

Section 1183.03 provides for a claimant's rebuttal to responses, opposition or recommendations. Section 1183.04 provides for informal conferences, the purpose of

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30 days to complete the claim. The commission shall serve a copy of the complete incorrect reduction claim on the Controller. The Controller shall have no more than 90 days after the date the claim is delivered or mailed to file any rebuttal to an incorrect reduction claim. The failure of the Controller to file a rebuttal to an incorrect reduction claim shall not serve to delay the consideration of the claim by the commission."

[5] Government Code Section 17555, added by Chapter 945, Statutes of 1995, Section 7:

"(a) The commission, within 10 days after receipt of a test claim based upon a statute or executive order, shall set a date for a public hearing on the claim within 75 days. The test claim may be based upon estimated costs that a local agency or school district may incur as a result of the statute or executive order and may be filed at any time after the statute is enacted or the executive order is adopted. The claim shall be submitted in a form prescribed by the commission. After a hearing in which the claimant and any other interested organization or individual may participate, the commission shall determine if there are costs mandated by the state.

"This section shall become operative on July 1, 1996."

which is to set dates for receipt of responses, opposition or recommendations, claimant rebuttal, completion of staff analysis and *the hearing on the test claim*. There is no provision for summary adjudication.

Section 1183.05 allows motions to consolidate or sever test claims. Section 1183.06 allows the Executive Director to consolidate test claims. Section 1183.07 requires commission staff to prepare a final written analysis of the test claim *before the hearing* on the test claim. There is no provision for summary adjudication.

Government Code Section 17554[6] allows the Commission to the waive application of any procedural requirement imposed by this chapter or pursuant to Section 17553 in order to expedite action on the claim, but only with the agreement of all parties to the claim.

Therefore, it is quite clear that there is no provision either in law or regulations which permits summary adjudication.

3. Legal Compulsion is not a Legal Requirement

DIR's motion depends entirely upon its interpretation that *Department of Finance v. Commission on State Mandates*[7] requires legal compulsion to perform a new or increased duty before the Commission can find a new reimbursable mandate.

DIR's reliance on *Department of Finance* is both factually and legally misguided.

The court in *Department of Finance* did not hold a test claimant needed to show legal compulsion, in fact it clearly avoided that issue:

> "For the reasons explained below, although we shall analyze the legal

---

[6] Government Code Section 17554, added by Chapter 1179, Statutes of 1988, Section 1:

"With the agreement of all parties to the claim, the commission may waive the application of any procedural requirement imposed by this chapter or pursuant to Section 17553 in order to expedite action on the claim. The authority granted by this section includes the consolidation of claims and the shortening of time periods."

[7] Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727.

> compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement under article XIII B, section 6, because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate." (Opinion, at page 736, emphasis in the original)

In other words, the court found it "unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement under article XIII B, section 6."

In conclusion, the Request for Summary Disposition filed by the Department of Industrial Relations should be denied because: (1) the request is legally incompetent, (2) there is no provision for summary adjudication in mandate law, and (3) public schools and agencies must comply with the state's prevailing wage laws.

CERTIFICATION

I certify by my signature below, under penalty of perjury, under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

Commission on State Mandates

Original List Date: 7/8/2002
Last Updated: 8/15/2002
List Print Date: 01/15/2003
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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DECLARATION OF SERVICE

RE: Prevailing Wage Rate
CLAIMANT: Clovis Unified School District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of September 13, 2003, addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

AND per mailing list attached

FAX: (916) 445-0278

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 9/16/03, at San Diego, California.

D. Bramwell
Diane Bramwell

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director-Legal Unit
320 W. Fourth St, Suite 600
Los Angeles, CA 90013

GRAY DAVIS, *GOVERNOR*

Tel. No (213) 576-7
Fax (213) 576-7

Exhibit M

October 7, 2003

Paula Higashi, Executive Director
Commission on State Mandates
980-Ninth Street, Suite 300
Sacramento, CA 95814

RE: Clovis Unified School District
Test Claim No.: 01-TC-28
Prevailing Wage Rates

Dear Ms. Higashi:

Enclosed please find original and two copies of the Verification for the Department Of Industrial Relations's Supplemental Position Statement And Request For Summary Disposition. Please conform a copy and return to us in the self-addressed envelope provided for your convenience.

If you have any questions, please call me at the number above.

Yours truly,

Maria Salazar
Secretary to Anthony Mischel

/ms

Encl.

Verification

I, ANTHONY MIISCHEL, declare under penalty of perjury that I have read the attached **Department of Industrial Relations's Supplemental Position Statement And Request For Summary Disposition** and know it is true and correct to the best of my knowledge.

Executed this 7th day of October 2003, at Los Angeles, California.

ANTHONY MISCHEL, Declarant

PROOF OF SERVICE

(Code Civ. Proc. §§ 1013a, 2015.5)

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.
And Affected Parties and State Agencies

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 320 W. Fourth Street, Suite 600, Los Angeles, CA 90013.

On October 7, 2003, I served the enclosed **Verification for the Department of Industrial Supplemental Position Statement And Request For Summary Disposition,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Loa Angeles, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
A (1 orig.+ 2 copies)	Ms. Shirley Opie Asst. Executive Director Commission on State Mandates 980-Ninth Street, Suite 300 Sacramento, CA 95814	State Agency
A	Mr. Ramon dela Guardia Deputy Attorney General Department of Justice 1300 I. Street, Suite 125 Sacramento, CA 95814	State Agency
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842	Interested Party
A	Dr. Carol Berg Education Mandated Cost Network 1121 L. Street, Suite 1060 Sacramento, CA 95814	Interested Party
A	Executive Director, (E-08) State Board of Education 721 Capitol Mall, Room 558 Sacramento, CA 95814	State Agency
A	Mr. Michael Havey State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816	State Agency
A	Ms. Beth Hunter, Director Centration, Inc. 8316 Red Oak Street, Suite 101 Rancho Cucamonga, CA 91730	Interested Person

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A	Mr. Tom Lutzenberger (A-15) Principal Analyst Department of Finance 915 L. Street, 6th Floor Sacramento, CA 95814	State Agency
A	Mr. Bill McGuire Assistant Superintendent Clovis Unified School District 1450 Herndon Clovis, CA 93611-0599	Claimant
A	Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Interested Person
A	Mr. Keith B. Petersen President SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Claimant
A	Mr. Gerald Shelton, Director (E-8) California Department of Education Fiscal & Administrative Services Division 1430 N. Street, Suite 2213 Sacramento, CA 95814	State Agency
A	Mr. Steve Shields Shields Consulting Group, Inc. 1536 - 36th Street Sacramento, CA 95816	Interested Party
A	Mr. Steve Smith, CEO Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Interested Party
A	Mr. Scott Kronland Altshuler, Berzon, Nassbaum, Rubin & Demain 177 Post Street, Suite 300 San Francisco, CA 94108	Interested Party

A	Ms. Sandy Reynolds Reynords Consulting Group, Inc. P.O. Box 987 Sun City, CA 92586	Interested Party
A	Mr. Keith Gmeinder Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Interested Party

Executed on October 7, 2003, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Maria Salazar, Declarant

BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of Clovis Unified School District, Test Claimant, Re: California Prevailing Wage Law.	Test Claim No: 01-TC-28

Department of Industrial Relations's

Response to Test Claim Amendment

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Attorneys for Respondent Department of Industrial Relations

INTRODUCTION

The amendment to the Test Claim concerns a recent amendment to the Labor Code of a single section affecting those school districts that choose to accept state construction bond money for their construction. As with the Department's Supplemental Brief, this brief will not reargue issues already argued but will incorporate the prior arguments into this brief.

The amendment to the claim for subvention because of this new Labor Code section fails for the same reasons as discussed in the Department's initial brief on voluntary, labor compliance programs ("LCP") and discussed in the Department's August 21, 2003. The newly created LCPs under Labor Code § 1771.7 are voluntary programs for local school districts and already receive funding for their activities through the state construction bond money. There is, therefore, no mandate and no increased need for funding.

FACTS

Labor Code § 1771.7(a) provides:

(a) An awarding body that chooses to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004 for a public works project, shall initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program, as described in subdivision (b) of Section 1771.5, with respect to that public works project.[1]

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[1] The full text of the section is

a) An awarding body that chooses to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004 for a public works project, shall initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program, as described in subdivision (b) of Section 1771.5, with respect to that public works project.

(b) This section shall apply to public works that commence on or after April 1, 2003. For purposes of this subdivision, work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work, does not constitute the commencement of a

public work.

(c)(1) For purposes of this section, if any campus of the California State University chooses to use the funds described in subdivision (a), then the "awarding body" is the Chancellor of the California State University. For purposes of this subdivision, if the chancellor is required by subdivision (a) to initiate and enforce, or to contract with a third party to initiate and enforce, the labor compliance program described in that subdivision, then in addition to the requirements imposed upon an awarding body by subdivision (b) of Section 1771.5, the Chancellor of the California State University shall review the payroll records described in paragraphs (3) and (4) of subdivision (b) of Section 1771.5 on at least a monthly basis to ensure the awarding body's compliance with the labor compliance program.

(2) For purposes of this subdivision, if an awarding body described in subdivision (a) is the University of California or any campus of that university, and that awarding body is required by subdivision (a) to initiate and enforce, or to contract with a third party to initiate and enforce, the labor compliance program described in that subdivision, then in addition to the requirements imposed upon an awarding body by subdivision (b) of Section 1771.5, the payroll records described in paragraphs (3) and (4) of subdivision (b) of Section 1771.5 shall be reviewed on at least a monthly basis to ensure the awarding body's compliance with the labor compliance program.

(d)(1) An awarding body described in subdivision (a) shall make a written finding that the awarding body has initiated and enforced, or has contracted with a third party to initiate and enforce, the labor compliance program described in subdivision (a).

(2)(A) If an awarding body described in subdivision (a) is a school district, the governing body of that district shall transmit to the State Allocation Board, in the manner determined by that board, a copy of the finding described in paragraph (1).

(B) The State Allocation Board may not release the funds described in subdivision (a) to an awarding body that is a school district until the State Allocation Board has received the written finding described in paragraph (1).

(C) If the State Allocation Board conducts a post award audit procedure with respect to an award of the funds described in subdivision (a) to an awarding body that is a school district, the State Allocation Board shall verify, in the manner determined by that board, that the school district has complied with the requirements of this subdivision.

(3) If an awarding body described in subdivision (a) is a community college district, the Chancellor of the California State University, or the office of the President of the University of California or any campus of the University of California, that awarding body shall transmit, in the manner determined by the Director of the Department of Industrial Relations, a copy of the finding described in paragraph (1) to the director of that department, or the director of any successor agency that is responsible for the oversight of employee wage and employee work hours laws.

(e) Notwithstanding Section 17070.63 of the Education Code, for purposes of this act, the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's sha1487 the increased costs of a new construction or modernization project due to the

There are several elements to this new section of the Labor Code: A school district has to decide to perform construction and has to decide to seek to fund this construction from one of two bond initiatives. If the district makes both decisions, only then does it needs to create an LCP under Labor Code § 1771.5. As seen in DIR's initial response to the Test Claim, LCPs allows LCPs to keep any penalties assessed and collected.

The bond acts referred to in Labor Code § 1771.7 provide for the percentage of funding for construction that the state will provide from 50% (new construction) to 80% (hardship situations) of the total cost of construction. See, Office of Public School Construction, *Statistical and Fiscal Data for the School Facilities Program* (Exhibit E to this Reply). The Education Code continues to provide that this contribution of state money is the sole source of state funds for school construction and that a district's acceptance of the money constitutes a waiver of any claim for more state money. Education Code § 17070.63

The bond money is distributed by the School Allocation Board ("SAB"). The SAB recently has provided funding guidelines for LCPs created under Labor Code § 1771.7, using the same percentage as the school district receives for its construction costs. See, Reports of Executive Officer, School Allocation Board, July 2, 2003, August 27, 2003 (attached as Exhibits F and G to this Reply).

ARGUMENT

THE CREATION OF LABOR COMPLIANCE PROGRAMS IS NOT MANDATED BY LABOR CODE SECTION 1771.7.

It is now a truism that voluntary acts, even if performed to obtain funding, remain voluntary. Subvention is never required when a local agency engages in these acts, even if a funding shortfall results. See, *Department of Finance v. Commission on State Mandates* (2003), 30 Cal.4th 727, 134 Cal.Rptr.2nd 237 ("*Kern*"); See also, Department of

initiation and enforcement of the labor compliance program.

Industrial Relations Supplemental Brief, dated August 12, 2003. A school district can decide to build schools but not to apply for the specific bond money, in which case there is no requirement for an LCP. If the district decides to tap this particular source of new state money for construction, it comes with some strings (creation of an LCP) as well as money from SAB to run the LCP. See, OPSC Response, September 15, 2003. This situation is no different than the *Kern* situation decided by the Supreme Court. In fact, Test Claimants have made no showing that *Kern* is at all distinguishable.

Test Claimants claim there are new mandates that flow from the creation of an LCP (after a district decides to seek funding from the enumerated two sources) such as meeting the requirements of approval by the Labor Commissioner, operating enforcement (either directly or through a third party), and participating in appeals from their enforcement activities.[2] However, these mandates flow directly and only from the **voluntary decision** by school districts to seek specific funding. Nothing mandates that decision, and therefore there is no new mandate for any of the claimed increased costs.

IMPLEMENTATION OF LABOR COMPLIANCE PROGRAMS POTENTIALLY INCREASES SCHOOL DISTRICT REVENUES.

Test Claimants have not provided any information that would lead to the conclusion that Labor Code § 1771.7 in fact will increase costs. In making their bald assertions, Test Claimants have failed to consider three potential sources of income, which must be counted before making any claim for subvention.

Not all increased costs create the need for subvention, and budgetary shortfalls do not *per se* create such a requirement. *Kern*, *supra*, 30 Cal.4th at 748. As pointed out in DIR's initial response, one of the features for voluntary LCPs is that the local agency that utilizes an LCP can retain the penalties it assesses and collects. These penalties include $25.00 per day per employee for contractors' failure to submit accurate Certified Payroll

[2] Test Claimants provide voluminous instructional material from the Labor Commissioner, all of which were distributed in order to reduce the work required for nascent voluntary LCPs to get through the application process quickly.

Records, up to $50.00 per day per worker for the failure to pay prevailing wages, and $25.00 per day per worker for the failure to pay overtime premium pay.

For the purpose of subvention, these penalties should be calculated at the amount actually assessed, rather than collected, to ensure that the local agencies do not seek state money to make up shortfalls it creates by less than aggressive enforcement. Allowing the local agencies to determine from whom they will collect would reverse the requirement that the increased costs be imposed by the state and that the local agency have no other source of funds before subvention is ordered. Where other sources of funds exist, they must be utilized. *Id.*

Secondly, there is a steady source of funds available to Test Claimants in the form of increased funding from SAB. The Test Claim Amendment does not mention this source of funding nor address the fact that the Education Code provides that acceptance of the money from SAB constitutes the school district's agreement that it is not receivir state money from any other source. The SAB's new reimbursement rules constitute the only state support to which Test Claimants are allowed. To allow subvention at all would therefore force a violation of the Education Code.

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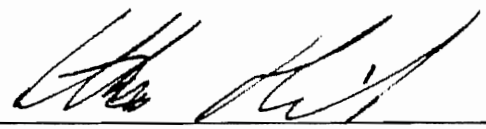
CONCLUSION

For these reasons, until Test Claimants can make a case that a school district's decision to engage in construction and to accept funding from two specific bonds is not a voluntary act, the Commission should not consider this amendment. Labor Code § 1771.7 does not create a mandate but rather a condition that must occur only after a voluntary decision by a school district. Further, even if § 1771.7 were considered a mandate, subvention cannot be ordered because school districts have multiple other sources of funding school construction.

Dated: October 6, 2003

Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR-LEGAL UNIT
JOHN M. REA, Chief Counsel
STEVEN A. MCGINTY, Asst. Chief Counsel
ANTHONY MISCHEL, Counsel



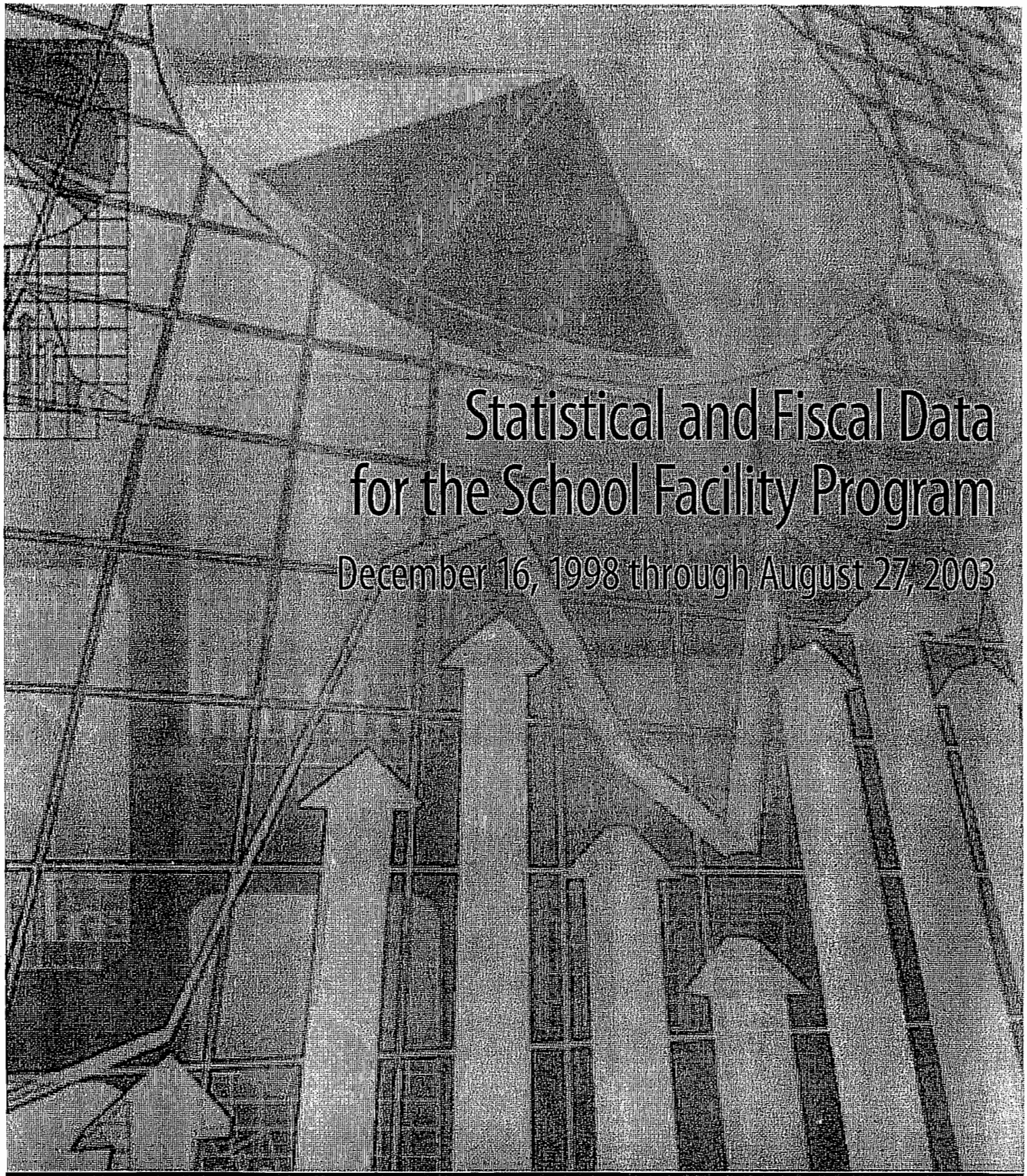
ANTHONY MISCHEL
ATTORNEY FOR DEPARTMENT OF
INDUSTRIAL RELATIONS

Verification

I, ANTHONY MIISCHEL, declare under penalty of perjury that I have read the attached **Department of Industrial Relations's Response to Test Claim Amendment** and know it is true and correct to the best of my knowledge.

Executed this 6th day of October 2003, at Los Angeles, California.

ANTHONY MISCHEL, Declarant



Statistical and Fiscal Data for the School Facility Program

December 16, 1998 through August 27, 2003

Prepared by the

Office of Public School Construction

1130 K Street, Suite 400

Sacramento, California 95814

www.opsc.dgs.ca.gov

Luisa M. Park Executive Officer

Bruce B. Hancock Assistant Executive Officer

Karen McGagin Deputy Executive Officer

Historical Data

SECTION 1 APPORTIONMENTS FROM PROPOSITION 47: $9,337,800,679

The information presented in this section represents all allocations of Proposition 47 funds from December 2002. The amounts include financial, facility and excessive cost hardships as well as site acquisition, site development and projects which received a design and/or site only apportionment. Costs to administer the program are not included. Includes $16,186,513 apportioned for 18 Joint-Use projects.

	NEW CONSTRUCTION	MODERNIZATION	CHARTER SCHOOLS	CRITICALLY OVER-CROWDED SCHOOLS
Apportionments	$4,249,736,166	$3,276,964,513	$97,034,156	$1,697,872,847
Pupils Housed	334,465	986,659	2,651	53,472
Number of Projects	819	1,986	6	303
Funds Released	$3,212,977,310	$1,749,509,580		

Total Proposition 47 Apportionments: $9,337,800,679
Remaining Proposition 47 Funds: $2,062,199,321

A detailed report listing the projects apportioned from Proposition 47 is posted monthly on the OPSC Web site at: http://www.opsc.dgs.ca.gov.

SECTION 2 APPORTIONMENTS FROM PROPOSITION 1A: $6,661,082,345

The information presented in this section represents all allocations of Proposition 1A funds from December 1998 through August 27, 2003. This section will be updated January and July. The amounts include financial, facility and excessive cost hardships as well as site acquisition, site development and projects which received a design and/or site only apportionment. Qualified Lease-Purchase projects which were grandfathered and received Proposition 1A funds are included. The figure also includes funds dedicated for class size reduction. Projects which received an apportionment, but were later rescinded, have been removed and the funding added to the remaining Proposition 1A Funds. $13,700,000 was transferred from the State Relocatable Classroom Fund to the Proposition 1A Fund for facility hardship. Interest earned on the fund has also been added. Costs to administer the program are not included.

	NEW CONSTRUCTION	MODERNIZATION
Apportionments	$3,556,482,218	$2,631,668,489
Pupils Housed	338,512	919,326
Number of Projects	770	1,667

Class Size Reduction: $472,931,638

The California Department of Education is responsible for the allocation of these funds. This figure includes site mitigation funds for Los Angeles Unified School District and Santa Ana Unified School District. A detailed report listing the districts apportioned can be found on the Office of Public School Construction (OPSC) Web site at: http://www.opsc.dgs.ca.gov.

Total Proposition 1A Apportionments: $6,661,082,345 (Proposition 1A funds released to districts with construction contracts is 95% of the funds apportioned.)

A detailed report listing the projects apportioned from Proposition 1A is posted monthly on the OPSC Web site at: http://www.opsc.dgs.ca.gov.

SECTION 3 AVERAGE VALUE OF APPLICATIONS AND APPROVED PER MONTH

This section details the average value of new construction and modernization applications processed to the State Allocation Board (SAB) from January 1999 through August 27, 2003. Does not include financial hardship.

New Construction—Estimated averager workload value of SAB approvals per month:	$102,575,701
Modernization—Estimated average workload value of applications received per month:	$101,709,765
Total Average Value of SFP Applications Per Month:	**$204,285,466**

SECTION 4 AVERAGE PER PUPIL APPORTIONMENT

The information presented in this section represents the average apportionment made to a new construction or modernization application. The average is developed from all construction application apportionments made from the inception of the School Facility Program (SFP) through the date of this report. The State share includes site development, site acquisition and excessive hardship costs and is only the State share of the total project cost. Partial apportionments for advance site and planning applications were not included in the average. A separate column shows the average cost of the State apportionment, which is the State share plus financial hardship.

New Construction

GRADE	STATE SHARE	STATE APPORTIONMENT (STATE SHARE PLUS FINANCIAL HARDSHIP)
K–6	$8,196	$10,203
7–8	$8,410	$10,584
9–12	$11,253	$14,191
Total Average[1]	**$9,392**	**$11,779**

Modernization

GRADE	STATE SHARE	STATE APPORTIONMENT (STATE SHARE PLUS FINANCIAL HARDSHIP)
K–6	$2,629	$2,711
7–8	$2,785	$2,865
9–12	$3,637	$3,754
Total Average[1]	**$2,979**	**$3,072**

Note: To calculate the average total project cost (State share plus district match), multiply the figure in the State share column by 2 for new construction and by 1.25 for modernization.

[1] Total average is found by dividing all SFP construction application apportionments by the total number of pupils served.

SECTION 4.1 ADMINISTRATIVE EXPENSES FUNDED FROM PROPOSITION 1A

The State Allocation Board incurs expenses for the administration of the School Facility Program and the apportionment and distribution of Proposition 1A funds. The costs consist of the following categories:

Administrative Costs: Costs associated with staffing provided by the Office of Public School Construction and the California Department of Education, School Facilities Planning Division.

Pooled Money Investment Fund (PMIF): The State Allocation Board borrows cash from the state PMIF in order to make fund releases to eligible, approved SFP applications. When the State Treasurer subsequently sells bonds made available from Proposition 1A, the PMIF loans are retired. The interest charged on the PMIF loans is partially off-set by interest earned on Proposition 1A funds.
State Controller and State Treasurer: Costs to compensate these agencies for services related to fund releases and bond sales.

This section will be updated January and July.

ADMINISTRATIVE EXPENSES FUNDED FROM PROPOSITION 1A	TOTAL TO DATE	PERCENT TO DATE
Administrative Costs	$42,417,406	0.63
Pooled Money Investment Fund	$ 8,595,833	0.13
State Controller and State Treasurer	$ 2,000,046	0.03
Total	$53,013,285	0.79

Applications Awaiting Funding

SECTION 5 APPLICATIONS AWAITING FUNDING AS OF AUGUST 27, 2003: $590,671,846

This section represents the State apportionment cost of all projects for new construction and modernization in the OPSC that have been received, but have not yet been funded. The figures include financial, facility and excessive cost hardships, site development, site acquisition costs and separate site and/or design applications.

WORKLOAD	APPORTIONMENT COST (NOT FUNDED)
New Construction	$314,681,412
Modernization	$198,866,285
Total Applications Awaiting Funding	**$513,547,697**

Workload... All projects for new construction and modernization that have been accepted for processing, but have not yet been submitted to the SAB. These costs have not been validated and may increase or decrease.

A detailed workload report listing the projects is posted bi-weekly on the OPSC Web site at: **http://www.opsc.dgs.ca.gov**. The workload totals in this report may vary with the workload totals on the Web site because they reflect information available on different dates.

SECTION 6 ELIGIBILITY APPLICATIONS ON FILE AS OF AUGUST 27, 2003

This section details the total eligibility represented by SFP eligibility applications filed, processed, and approved by the SAB. Applications received but not processed are not included. The eligibility is expressed as the number of pupils for which the district may request new construction or modernization funding. The data is based on five year enrollment projections. It is adjusted when a new construction or modernization funding application is approved which utilizes a portion of the eligibility. Column 1 is the eligibility for which no design or new construction applications have been filed. Column 2 is the eligibility for which design funding applications have been approved by the SAB, but for which no new construction or modernization funding applications have been filed. The total reflects eligibility on file for which future new construction or modernization funding applications may be filed. See Section 7 for a calculation of the potential cost of this eligibility.

New Construction

GRADE	COLUMN 1	COLUMN 2	TOTAL PUPILS
K–6	370,507	65,874	436,381
7–8	156,067	14,116	170,183
9–12	385,129	25,703	410,832
Total Pupils	**911,703**	**105,693**	**1,017,396**

Modernization

GRADE	COLUMN 1	COLUMN 2	TOTAL PUPILS
K–6	478,159	23,999	502,158
7–8	196,803	10,440	207,243
9–12	318,718	14,904	333,622
Total Pupils	**993,680**	**49,343**	**1,043,023**

SECTION 7 COST OF ELIGIBILITY APPLICATIONS APPROVED AS OF AUGUST 27, 2003: $15,624,319,611

This section represents the total State share of eligibility applications on file with the OPSC. Explanations of the assumptions used are found in Part A through D.

New Construction

Part A reflects approved new construction eligibility (Section 6, Column 1) times the average State apportionment, including financial hardship (Section 4). Part B reflects approved new construction eligibility for projects which have approved design apportionments, but are eligible for the remaining construction apportionment (Section 6, Column 2). Since design only projects are financial hardship and have received 20 percent of the total project cost, it is assumed that the State will fund the remaining 80 percent of the total project cost in the future.

Part A. New Construction Eligibility

GRADE	PUPILS (SECTION 6, COLUMN 1)		AVERAGE STATE APPORTIONMENT (SECTION 4)		
K–6	370,507	×	$10,203	=	$3,780,282,921
7–8	156,067	×	$10,584	=	$1,651,813,128
9–12	385,129	×	$14,191	=	$5,465,365,639
	911,703		Total New Construction Grant		$10,897,461,688

Part B. New Construction Eligibility—Projects with Design Approvals

GRADE	PUPILS (SECTION 6, COLUMN 1)		AVERAGE STATE APPORTIONMENT (SECTION 4)		
K–6	65,874	×	$ 8,196	× 2 × 80% =	$863,845,286
7–8	14,116	×	$ 8,410	× 2 × 80% =	$189,944,896
9–12	25,703	×	$11,253	× 2 × 80% =	$462,777,374
	105,693		Total Design Only Costs		$1,516,567,557
			Total New Construction Part A and B		$12,414,029,245

Modernization

Part C reflects approved modernization eligibility (Section 6, Modernization, Column 1) times the average State apportionment (Section 4). Part D reflects approved modernization eligibility for projects which have approved design apportionments, but are eligible for the remaining construction apportionment (Section 6, Modernization, Column 2). Since design only projects are financial hardship and have received 16 percent of the total project cost, it is assumed that they will continue to be financial hardship projects and that the State will fund the remaining 84 percent of the total project cost.

Part C. Modernization Eligibility

GRADE	PUPILS (SECTION 6, COLUMN 1)		AVERAGE STATE APPORTIONMENT (SECTION 4)		
K–6	478,159	×	$2,711	=	$1,296,289,049
7–8	196,803	×	$2,865	=	$ 563,840,595
9–12	318,718	×	$3,754	=	$1,196,467,372
	993,680		Total Modernization Grant		$3,056,597,016

Part D. Modernization Eligibility—Projects with Design Approvals

GRADE	PUPILS (SECTION 6, COLUMN 1)		AVERAGE STATE APPORTIONMENT (SECTION 4)				
K–6	23,999	×	$\frac{\$2,629}{80\%}$	×	84%	=	$ 66,248,040
7–8	10,440	×	$\frac{\$2,785}{80\%}$	×	84%	=	$ 30,529,170
9–12	14,904	×	$\frac{\$3,637}{80\%}$	×	84%	=	$ 56,916,140
	48,343		Total Design Only Costs				$153,693,350
			Total Modernization Part C and D				$3,210,290,366
			Total Cost of Eligibility Applications Approved				$15,624,319,611

REPORT OF THE EXECUTIVE OFFICER
State Allocation Board Meeting, July 2, 2003

IMPLEMENTATION OF ASSEMBLY BILL 1506 (WESSON)
GRANT ADJUSTMENTS FOR LABOR COMPLIANCE PROGRAMS

PURPOSE OF REPORT

To present proposed regulations to provide a per pupil grant increase to accommodate the State's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of a Labor Compliance Program (LCP).

BACKGROUND

Assembly Bill (AB) 1506, Chapter 868, Statutes of 2002, requires that the State Allocation Board (SAB) increase the per-pupil grant amounts in Education Code Section 17072.10 and 17074.10 to accommodate the State's share of the increased cost of new construction and modernization projects due to the initiation and enforcement of a LCP. The increases must be effective by July 1, 2003.

DESCRIPTION

Labor Compliance Program Costs

A LCP consists of three major activities: initiation, monitoring, and enforcement. Prior to the passage of AB 1506, only a handful of California K-12 public school districts had active LCP's. Most of these were designed by the individual districts and did not necessarily include all of the requirements of AB 1506 or approval by the Department of Industrial Relations. Additionally, most of the districts with LCP's were large, and applied the programs to all construction related contracts in the district, including even routine maintenance work. For this reason, costs applicable to individual projects were not readily available.

The Office of Public School Construction (OPSC), through discussions at the Implementation Committee, requested any available information related to the per project costs of conducting a LCP in a public school district. In response, the OPSC received a limited number of written proposals from third-party providers, as well as, a proposal for the California Community Colleges. This information, though very limited, served as the basis of the proposed per pupil grant adjustments proposed in this regulation.

STAFF COMMENTS

Although the Implementation Committee reached consensus on the proposed regulations, Staff agreed to advise the Board of some concerns expressed at the meetings held on this subject. School district representatives expressed the belief that the actual enforcement of labor code violations could lead to expensive legal and litigation costs, which are not anticipated in the proposal. Additionally, representatives of the Department of Finance pointed out that there is not a clear model of the minimum required to implement and enforce a LCP. Thus, the proposal could be based on the assumption that more work will be done than is actually required, thereby inflating the cost and the amount of the additional per pupil grant.

Staff acknowledges the possible validity of both comments. Given the urgency to adopt regulations by July 1, 2003, and given the very sparse data available at this moment, the Committee and Staff agreed the attached regulations should be presented to the SAB now, and that the amount of the per pupil grant should be revisited in approximately one year. At that time, information based on actual experience in school districts can be used to recommend an increase or a decrease in the additional per pupil grant for future apportionments.

(Continued on Page Two)

PROPOSAL

Using the information available, the OPSC developed a sliding scale based on the total cost of a project, less site acquisition, to determine the amount to be added for a LCP. This amount is then divided by the number of pupils in the project to determine the per pupil cost of the LCP. The State share is 50 percent of the resulting amount for new construction projects, and either 60 percent or 80 percent as appropriate for modernization.

The minimum total of the State and District share added to any project is $16,000. Samples of the adjustments are as follows:

- 1.6 percent but not less than $16,000 for any project under $1 million.
- $39,200 (0.78 percent) for a $5 million project
- $57,800 (0.57 percent) for a $10 million project.
- $86,000 (0.43 percent) for a $20 million project.

The State share is 50 percent of the amount for new construction projects, and 60 percent or 80 percent as appropriate for modernization.

Eligible Projects

A School Facility Program new construction and modernization project is eligible for an increase in the per pupil grant amount for the State's share of the cost of a LCP if both of the following conditions are met:

- The project was or will be funded from the proceeds of Proposition 47 or from the Kindergarten-University Public Education Facilities Bond Act of 2004, and
- Notice to Proceed for the initial contract for construction of the project was issued on or after April 1, 2003.

Projects apportioned in full prior to the enactment of these proposed regulations, and which are required to have a LCP in place at the time of the fund release request, may receive an additional one time apportionment for the costs associated with the LCP as calculated under these regulations.

RECOMMENDATIONS

1. Approve the additions and amendments to the regulation sections contained on the Attachments.

2. Authorize the OPSC to file the regulations on an emergency basis because Labor Code Section 1771.7 (e) requires the grant increases to be available not later than July 1, 2003.

3. Direct Staff to conduct a review of the per pupil grant increase proposed in these regulations and make recommendations for adjustments, if necessary, at the April 2004 SAB meeting.

This Item was approved by the State Allocation Board on July 2, 2003.

ATTACHMENT A
Proposed Regulatory Amendments
Implementation of Assembly Bill 1506 (Wesson)
Grant Adjustments for Labor Compliance Programs
State Allocation Board Meeting, July 2, 2003

Amend Regulation Section 1859.2 as follows:

Section 1859.2. Definitions.

"Labor Compliance Program (LCP)" shall be as described in subdivision (b) of Labor Code Section 1771.5 and approved by the Department of Industrial Relations.

Note: Authority cited: Sections 17070.35 and 17078.64, Education Code.

Reference: Sections 17009.5, 17017.6, 17017.7, 17021, 17047, 17050, 17051, 17070.15, 17070.51(a), 17070.71, 17070.77, 17071.10, 17071.25, 17071.30, 17071.33, 17071.35, 17071.40, 17071.76, 17072.10, 17072.12, 17072.18, 17072.33, 17073.25, 17074.10, 17075.10, 17075.15, 17077.40, 17077.42, 17077.45, 17078.52, 17078.56, 17280, and 56026, Education Code. Section 53311, Government Code and Section 1771.5, Labor Code.

Add Regulation Section 1859.71.4 as follows:

Section 1859.71.4 New Construction Pupil Grant Increase for Labor Compliance Program

(a) After determining all other funding authorized by these Regulations, the Board shall increase the per-unhoused-pupil grant amount by 50 percent of the following calculation for any project for which the district is required under Labor Code Section 1771.7(a) and (b) to initiate and enforce a LCP:
(1) Using the chart in (b) of this Section, determine the total amount of funding to be provided for the increased costs of a new construction project due to the initiation and enforcement of a LCP.
(2) Divide the amount determined in subsection (a)(1) by the total number of pupils, or by one if no pupils are assigned, in the approved application.
(b) The funding provided for a new construction project to initiate and enforce a LCP shall be calculated on the total project cost, exclusive of site acquisition costs, as follows:

$16,000	For the first $1 million or any part thereof, plus
1.6 percent	Of the next $1 million or any part thereof, plus
0.25 percent	Of the next $1 million or any part thereof, plus
0.15 percent	Of the next $1 million or any part thereof, plus
0.32 percent	Of the next $2 million or any part thereof, plus
0.31 percent	Of the next $2 million or any part thereof, plus
0.46 percent	Of the next $5 million or any part thereof, plus
0.44 percent	Of the next $5 million or any part thereof, plus
0.42 percent	Of the next $30 million or any part thereof, plus
0.4 percent	Of any remaining portion

Note: Authority cited: Section 17070.35, Education Code.

Reference: Section 17072.10, Education Code.

(Continued on Next Page)

Amend Regulation Section 1859.73.2 as follows:

Section 1859.73.2. New Construction Additional Grant for Replaced Facilities.

(a) In addition to any other funding authorized by these Regulations, the Board shall provide funding for the amount(s) in (b) below for the replacement cost of one-story buildings that are demolished at a school in order to increase pupil capacity of that school if all the following conditions are met:
(1) The school must be on MTYRE at the time the Approved Application is accepted.
(2) The site size as determined by the CDE for the existing capacity of the school is less than 75 percent of the recommended CDE site size.
(3) The pupil capacity of the school must be increased by at least the greater of (A) or (B) below:
(A) Twenty percent of the existing pupil capacity (before replacement) of the school. Existing pupil capacity shall be determined by multiplying classrooms intended for grades kindergarten through six by 25, classrooms intended for grades seven through 12 by 27, classrooms intended for Non-Severely Disabled Individuals with Exceptional Needs by 13 and classrooms intended for Severely Disabled Individuals with Exceptional Needs by nine. Classrooms shall not include any classrooms reduced from the Gross Classroom Inventory pursuant to Section 1859.32.
(B) 200 pupils.
(4) The sum of (A) and (B) below is less than the amount determined in (E) below:
(A) Determine the estimated cost of demolition of the one-story buildings to be replaced. The cost estimate shall be subject to review by the OPSC for conformance with the Saylor Current Cost Publication.
(B) Multiply the square footage of the buildings to be replaced by the Current Replacement Cost.
(C) Multiply the New Construction Grants requested in box 2a. of the Form SAB 50-04 by .01775 for K-6, .021 for 7-8 and .02472 for 9-12. For purposes of this calculation, assign Severely Disabled Individuals with Exceptional Needs and Non-Severely Disabled Individuals with Exceptional Needs pupil grants requested on Form SAB 50-04 as either K-6, 7-8 or 9-12 based on the type of project selected by the district on Form SAB 50-04.
(D) Determine the average appraised value of land per acre, including relocation costs, within the attendance boundaries of the school. The appraisal must be consistent with Section 1859.74.1.
(E) Multiply the sums of the products determined in (C) above by the average appraised value of land per acre determined in (D) above.
(5) The CDE has determined that the replacement of the one-story buildings on the existing site with multilevel building(s) would be the best available alternative and will not create a school with an inappropriate number of pupils in relation to the size of the site.
(6) The one-story buildings to be replaced on the existing site may not be leased facilities.
(7) With the exception of portables acquired with Class Size Reduction funds, the one-story buildings to be replaced on the site may not have been funded for either new construction or modernization funds from Proposition 1A funds within the past five years from the date the Approved Application is accepted.
(b) If the criteria in (a) are met, the additional funding is determined by multiplying $173.30 per square foot for Toilet Facilities and by $96.30 per square foot for all other facilities included in the one-story buildings to be replaced adjusted for the following:
(1) The amounts shall be adjusted ~~annually~~ in the manner prescribed in Section 1859.71.
(2) The amounts shall be increased by the percentage authorized in Section 1859.73 if the replacement area will be multilevel building(s).

The district is eligible for site development in accordance with Section 1859.76 including the demolition of the replacement structures as part of the SFP project.

Note: Authority cited: Section 17070.35, Education Code.

Reference: Sections 17071.46 and 17074.56, Education Code.

(Continued on Next Page)

Add Regulation Section 1859.78.1 as follows:

Section 1859.78.1 Modernization Pupil Grant Increase for Labor Compliance Program

(a) After determining all other funding authorized by these Regulations, the Board shall increase the per-pupil grant amount by the following calculation, less the district matching share required in Section 1859.79, for any project for which the district is required under Labor Code Section 1771.7(a) and (b) to initiate and enforce a LCP:
(1) Using the chart in Section 1859.71.4(b), determine the total amount of funding to be provided for the increased costs of a modernization project due to the initiation and enforcement of a LCP.
(2) Divide the amount determined in subsection (a)(1) by the total number of pupils, or by one if no pupils are assigned, in the approved application.

Note: Authority cited: Section 17070.35, Education Code.

Reference: Section 17074.10, Education Code

Amend Regulation Section 1859.79.2 as follows:

Section 1859.79.2. Use of Modernization Grant Funds.

The Modernization Grant plus any other funds provided by these Regulations shall be expended as set forth in Education Code Sections 17074.25 and 17070.15 (f) and may also be utilized for other purposes as set forth in Education Code Section 100420 (c). Modernization funding may also be used for the costs incurred by the district directly or through a contract with a third party provider for the initiation and enforcement of a LCP. Modernization funding, with the exception of savings, is limited to expenditure on the specific site where the modernization grant eligibility was generated. The grant may not be used for the following:
(a) New building area with the exception of the following:
(1) Replacement building area of like kind. Additional classrooms constructed within the replacement area will reduce the new construction baseline eligibility for the district.
(2) Building area required by the federal American with Disabilities Act (ADA) or by the Division of the State Architect's (DSA) handicapped access requirements.
(b) New site development items with the exception of:
(1) Replacement, repair or additions to existing site development.
(2) Site development items required by the federal ADA Act or by the DSA's handicapped access requirements.
(c) the evaluation and removal of hazardous or solid waste and/or hazardous substances when the Department of Toxic Substance Control has determined that the site contains dangerous levels of a hazardous substance, hazardous waste, or both that exceed ten percent of the combined adjusted grant and the district matching share for the project.
(d) Leased facilities not owned by another district or a county superintendent.

Modernization Grant funds shall be expended as set forth in Education Code Section 17074.25 and may also be utilized for other purposes as set forth in Education Code Section 100420(c).

Modernization Grant funds may be used on any school facilities on the site. If the classroom facilities on the site include areas that are currently ineligible for modernization, it will not disqualify those facilities from future modernization funding.

Note: Authority cited: Section 17070.35, Education Code.

Reference: Sections 17070.15, 17074.25 and 100420(c), Education Code.

(Continued on Next Page)

Amend Regulation Section 1859.82 as follows:

Section 1859.82. Facility Hardship.

A district is eligible for facility hardship funding to replace or construct new classrooms and related facilities if the district demonstrates there is an unmet need for pupil housing or the condition of the facilities, or the lack of facilities, is a threat to the health and safety of the pupils. A facility hardship is available for:

(a) New classrooms and/or subsidiary facilities (corridors, toilets, kitchens and other non-classroom space) or replacement facilities if either (1) or (2) are met:

(1) The facilities are needed to ensure the health and safety of the pupils if the district can demonstrate to the satisfaction of the Board that the health and safety of the pupils is at risk. Factors to be considered by the Board shall include the close proximity to a major freeway, airport, electrical facility, high power transmission lines, dam, pipeline, industrial facility, adverse air quality emission or other health and safety risks, including structural deficiencies required by the Division of the State Architect to be repaired, traffic safety or because the pupils reside in remote areas of the district and transportation to existing facilities is not possible or poses a health and safety risk.

If the request is for replacement facilities, a cost/benefit analysis must be prepared by the district and submitted to the OPSC that indicates the total costs to remain in the classroom or related facility and mitigate the problem is at least 50 percent of the Current Replacement Cost of the classroom or related facility. The cost/benefit analysis may include applicable site development costs as outlined in Section 1859.76. If the cost to remain in the classroom or related facility is less than 50 percent of the Current Replacement Cost, the district may qualify for a Modernization Excessive Cost Hardship Grant for rehabilitation costs pursuant to Section 1859.83 (e).

If the request is for replacement facilities that included structural deficiencies, the cost/benefit analysis must also include a report from a licensed design professional identifying the minimum work necessary to obtain Division of the State Architect approval. The report must contain a detailed cost estimate of the repairs. The report and cost estimate shall be subject to review by the OPSC for conformance with the Saylor Current Construction Cost Publication and, at the OPSC's discretion, the Division of the State Architect.

(2) The classroom or related facility was lost or destroyed as a result of a disaster such as fire, flood or earthquake and the district has demonstrated satisfactorily to the Board that the classroom or related facility was uninsurable or the cost for insurance was prohibitive.

If the district qualifies for a new or replacement school pursuant to either (1) or (2) above, the district is eligible for a New Construction Grant as a new construction project for the lesser of the pupils housed in the replaced facility based on loading standards pursuant to Education Code Section 17071.25(a)(2) or the latest CBEDS enrollment at the site.

If the district qualifies for replacement facilities on the same site pursuant to either (1) or (2) above, the district is eligible for funding as a new construction project. Replacement facilities shall be allowed in accordance with the square footage amounts provided in the chart in Section (b) below. If the facility eligible for replacement is not shown in the chart in Section (b) below, the replacement facility shall be limited to the square footage replaced. The grant amount provided shall be $173.30 per square foot for Toilet Facilities and $96.30 per square foot for all other facilities. Additional funding may be provided for applicable site development costs pursuant to Section 1859.76, New Construction Excessive Cost Hardship Grant(s) pursuant to Section 1859.83(a), (b) or (d), therapy room pursuant to Section 1859.72, multilevel construction pursuant to Section 1859.73 and project assistance pursuant to Section 1859.73.1. The amounts shown will be adjusted ~~annually~~ in the manner prescribed in Section 1859.71. <u>The district may be eligible for the funding provided to initiate and enforce a LCP as prescribed in Section 1859.71.4.</u>

Any grants provided pursuant to either (1) or (2) above will be reduced for any space deemed available by the Boa[illegible] in the district, the HSAA or Super HSAA that could be used to house some or all of the displaced pupils, fifty percent

of any insurance proceeds collectable by the district for the displaced facilities and fifty percent of the net proceeds available from the disposition of any displaced facilities.

(Continued on Next Page)

(b) A multi-purpose room, toilet, gymnasium, school administration or library/media center, facility that meets all the following:
(1) The facility was lost or destroyed as a result of a disaster, including but not limited to fire, flood or earthquake.
(2) The facility is no longer useable for school purposes as recommended by the California Department of Education and approved by the Board.
(3) The district has demonstrated satisfactorily to the Board that the facility was uninsurable or the cost of insurance was prohibitive.

If the district qualifies, the district is eligible for funding as a new construction project. The funding amount provided shall be $96.30 per square foot for library/media center, school administration, gymnasium and multi-purpose facilities, and/or $173.30 per square foot for Toilet Facilities. A New Construction Additional Grant may be provided for applicable site development costs pursuant to Section 1859.76, New Construction Excessive Cost Hardship Grant(s) pursuant to Section 1859.83(a) and (d), therapy room pursuant to Section 1859.72, multilevel construction pursuant to Section 1859.73 and project assistance pursuant to Section 1859.73.1. The amounts shown will be adjusted ~~annually~~ in the manner prescribed in Section 1859.71. The district may be eligible for the funding provided to initiate and enforce a LCP as prescribed in Section 1859.71.4.

Any grants provided pursuant to (b) above, shall be reduced by fifty percent of any insurance proceeds collectable by the district for the displaced facilities and fifty percent of the net proceeds available from the disposition of any displaced facilities.

The square footage provided, after accounting for all useable facilities on the site, shall not exceed the following:

Facility	*Elementary School Pupils*	*Middle School Pupils*	*High School Pupils*
Multi-Purpose (includes food service)	5.3 sq. ft. per pupil minimum 4,000 sq. ft.	5.3 sq. ft. per pupil minimum 5,000 sq. ft.	6.3 sq. ft. per pupil minimum 8,200 sq. ft.
Toilet	3 sq. ft. per pupil minimum 300 sq. ft.	4 sq. ft. per pupil minimum 300 sq. ft.	5 sq. ft. per pupil minimum 300 sq. ft.
Gymnasium (includes shower/locker)	N/A	12.9 sq. ft. per pupil minimum 6,828 sq. ft. maximum 16,000 sq. ft.	15.3 sq. ft. per pupil minimum 8,380 sq. ft. maximum 18,000 sq. ft.
School Administration	3 sq. ft. per pupil minimum 600 sq. ft.	3 sq. ft. per pupil minimum 600 sq. ft.	4 sq. ft. per pupil minimum 800 sq. ft.
Library/Media Center	2.3 sq. ft. per pupil plus 600 sq. ft.	3.3 sq. ft. per pupil plus 600 sq. ft.	4.3 sq. ft. per pupil plus 600 sq. ft.

Any facilities eligible for facility hardship not shown in the above chart shall be eligible for replacement square footage equal to the facilities replaced.

A district may request a determination of eligibility for facility hardship funding in advance of project funding.

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(c) A district seeking replaced facilities as a result of either (a) or (b) above must submit Form SAB 50-04 for the

(1) Within 18 months if the replacement facilities will be located on the same site.
(2) Within 24 months if the replacement facilities will be located on a replacement site.

(Continued on Next Page)

If an Approved Application for the replaced facility is not accepted within the time periods identified in (c)(1) or (c)(2) above, the Board shall re-review the criteria submitted by the district for replacement of the facility prior to apportionment of the replaced facility.

Note: Authority cited: Sections 17070.35 and 17075.15, Education Code.

Reference: Sections 17074.56, 17075.10 and 17075.15, Education Code.

Amend Regulation Section 1859.83 as follows:

Section 1859.83. Excessive Cost Hardship Grant.

...

(e) Excessive Cost for rehabilitation of facilities the Board has determined are a health and safety risk to the pupils pursuant to Section 1859.82 (a) (1) and the cost/benefit analysis to mitigate the problem and remain in the facility is less than 50 percent of the Current Replacement Cost of the facility. If the district qualifies, the district is eligible for funding of rehabilitation costs as a modernization project. If the Approved Application is received on or before April 29, 2002, the grant amount provided is 80 percent of the amount of the cost estimate required in Section 1859.82 (a) (1) that has been reviewed by the OPSC and approved by the Board. If the Approved Application is received after April 29, 2002, the grant amount provided is 60 percent of the amount of the cost estimate required in Section 1859.82(a) (1) that has been reviewed by the OPSC and approved by the Board. <u>The district may be eligible for the funding provided to initiate and enforce a LCP as prescribed in Section 1859.78.1.</u>

...

Amend Regulation Section 1859.125 as follows:

Section 1859.125. Joint-Use Project Grant Determination Based on Square Footage.

If the funding request is to construct square footage, the Joint-Use Grant is the lesser of the amount determined in (a) or (b):

(a) The sum of the amounts determined below:
(1) $173.30 for the Toilet Facilities in the Joint-Use Project as calculated in (a)(1)(B) below:
(A) Divide the eligible square footage of the Joint Use Project as determined in Section 1859.124 by the total square footage of the joint-use facility.
(B) Multiply the quotient determined in (a)(1)(A) by the Toilet Facilities in the joint-use facility.
(2) $96.30 for non-Toilet Facilities in the Joint-Use Project as calculated in (a)(2)(B) below.
(A) Divide the eligible square footage of the Joint Use Project as determined in Section 1859.124 by the total square footage of the joint-use facility.
(B) Multiply the quotient determined in (a)(2)(A) by the non-Toilet Facilities in the joint-use facility.
(3) 50 percent of site development work that meets the following criteria:
(A) It is necessary and applicable to the Joint-Use Project.
(B) It meets the requirements for service site development or utility costs as outlined in Section 1859.76(a) and/or (c). Off-site development work is not allowed as part of a Joint-Use Project; however, if off-site development work is necessary pursuant to Section 1859.76(b) for either a Type I or II Joint-Use Project, the district may request the eligible off-site work under the Qualifying SFP New Construction Project pursuant to Section 1859.123.
(C) It is considered excessive site development costs and not eligible for funding under the Qualifying SFP New Construction Project pursuant to Section 1859.123.

(b) $1 million if the Joint-Use Project will be located on a school site that is or will be serving Elementary School Pupil(s). $1.5 million if the Joint-Use Project will be located on a school site that is or will be serving Middle School Pupil(s). $2 million if the Joint-Use Project will be located on a school site that is or will be serving High School Pupils.

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If the district is requesting funding for site development work applicable to the Joint-Use Project, the district must submit a detailed cost estimate and appropriate DSA approved plans, with the Form SAB 50-07. The cost estimate must include appropriate justification documents that indicate the work is necessary to complete the Joint-Use Project and conform to the requirements of Section 1859.76.

Utility service(s) cost shall be prorated, if necessary, for any excess capacity not needed to service the Joint-Use Project.

The dollar amounts shown in (a) are adjusted ~~annually~~ in a manner prescribed in Section 1859.71 and are eligible for Excessive Cost Hardship Grant(s) pursuant to Section 1859.83 (a), (b) and (d). The district may be eligible for the funding provided to initiate and enforce a LCP as prescribed in Section 1859.71.4.

The Joint-Use Grant amounts provided in this Section and Section 1859.125.1, if applicable, shall be deemed the full and final apportionment for the application. Any costs incurred by the district beyond the Joint-Use Grant amount and the Joint-Use Partner(s) financial contribution pursuant to Section 1859.127, shall be the responsibility of the district and/or the Joint-Use Partner(s).

Note: Authority cited: Sections 17070.35 and 17075.15, Education Code.

Reference: Sections 17077.40, 17077.42 and 17077.45, Education Code.

Amend Regulation Section 1859.125.1 as follows:

Section 1859.125.1. Additional Type II Joint-Use Project Extra Cost Grant.

In addition to the square footage Joint-Use Grant provided in Section 1859.125, a Type II Joint-Use Project may receive funding for Extra Cost equal to the lesser of (a) or (b):
(a) An amount determined by subtracting (a)(2) from (a)(1):
(1) The sum of the following:
(A) 50 percent of the estimated cost to construct the Joint-Use Project.
(B) 50 percent of site development work that meets the following criteria:
1. It is necessary and applicable to the Joint-Use Project.
2. It meets the requirements of Section 1859.76(a) and/or (c).
3. It is considered excessive site development costs and not eligible for funding under the Qualifying SFP New Construction Project pursuant to Section 1859.123.
4. The district did not receive funding for the site development work under Section 1859.125.
(2) The sum of the following:
(A) $173.30 for the Toilet Facilities in the Joint-Use Project.
(B) $96.30 for the non-Toilet Facilities in the Joint-Use Project.
(b) An amount determined by subtracting (b)(2) from (b)(1):
(1) $1 million if the Joint-Use Project will be located on a school site that is or will be serving Elementary School Pupil(s). $1.5 million if the Joint-Use Project will be located on a school site that is or will be serving Middle School Pupil(s). $2 million if the Joint-Use Project will be located on a school site that is or will be serving High School Pupils.
(2) The Joint-Use Grant amount determined in Section 1859.125 based on square footage, if applicable.

If the district is requesting funding for site development work applicable to the Joint-Use Project, the district must submit a detailed cost estimate and appropriate DSA approved plans with the Form SAB 50-07. The cost estimate

must include appropriate justification documents that indicate the work is necessary to complete the Joint-Use Project and conform to the requirements in Section 1859.76.

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Utility service(s) cost shall be prorated, if necessary, for any excess capacity not needed to service the Joint-Use Project.

The amounts shown in (a) are adjusted ~~annually~~ in a manner prescribed in Section 1859.71. The district may be eligible for the funding provided to initiate and enforce a LCP as prescribed in Section 1859.71.4.

The Joint-Use Grant amount provided in this Section and Section 1859.125, if applicable, shall be deemed the full and final apportionment for the application. Any costs incurred by the district beyond the Joint-Use Grant amount and the Joint-Use Partner(s) financial contribution pursuant to Section 1859.127, shall be the responsibility of the district and/or the Joint-Use Partner(s).

Note: Authority cited: Sections 17070.35 and 17075.15, Education Code.

Reference: Sections 17077.40, 17077.42 and 17077.45, Education Code.

Amend Regulation Section 1859.145 as follows:

Section 1859.145. Preliminary Apportionment Determination.

The Preliminary Apportionment shall be equal to the sum of the following:
(a) The amounts shown below for each pupil included in a Preliminary Application:
(1) $5,226.82 for each elementary school pupil.
(2) $5,533.65 for each middle school pupil.
(3) $7,225.94 for each high school pupil.
(4) $16,653.06 for each pupil that is a Severely Disabled Individual with Exceptional Needs.
(5) $11,137.37 for each pupil that is a Non-Severely Disabled Individual with Exceptional Needs.
(b) An amount equal to 12 percent of the amount determined in (a) for multilevel construction, if requested by the district.
(c) An amount equal to one-half of the site acquisition value determined in Section 1859.145.1.
(d) An amount for site development cost determined, at the option of the district, by one of the following:
(1) One-half of the Site Development Cost for the specific site as authorized by Section 1859.76.
(2) One-half of the Site Development Cost as authorized by Section 1859.76 using historical information in the General Location. Historical information that may be considered to determine this estimated cost may include prior SFP projects of the district or other districts in the General Location.
(3) $70,000 multiplied by the proposed acres requested on the Form SAB 50-08 or Form SAB 50-09, as appropriate.
(e) If the Preliminary Application request is for a small new school on a site with no existing school facilities, an amount equal to the difference in the amount determined in (a) and the amount shown in the Chart in Section 1859.83(c). To determine the number of classrooms in the proposed project, divide the number of pupils requested on Form SAB 50-08 or Form SAB 50-09, as appropriate, by 25 for elementary school pupils, 27 for middle and high school pupils, 13 for Non-Severely Disabled Individuals with Exceptional Needs and 9 for Severely Disabled Individuals with Exceptional Needs. Round up.
(f) An amount due to urban location, security requirements and impacted site equal to 15 percent of the amount determined in (a) for a site that is 60 percent of the CDE recommended site size plus 1.166 percent for each percentage decrease in the CDE recommended site size below 60 percent when the following criteria are met:
(1) The district has requested an increase for multilevel construction pursuant to (b) above.
(2) The Useable Acres of the existing and/or proposed site are 60 percent or less of the CDE recommended site size, determined multiplying the sum of the pupil grants requested on Form SAB 50-08 or Form SAB 50-09, as

appropriate, and the current CBEDS enrollment on the site (if applicable) by .01775 for elementary school pupils, .021 for middle school pupils and .02472 for high school pupils. For purposes of this calculation, assign

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Severely Disabled Individuals with Exceptional Needs and Non-Severely Disabled Individuals with Exceptional Needs pupil grants requested on Form SAB 50-08 or Form SAB 50-09, as appropriate, as either elementary, middle or high school pupils based on the type of project selected by the district on Form SAB 50-08 or Form SAB 50-09, as appropriate. For purposes of COS projects, if the site for which the Preliminary Apportionment is requested is a Source School, for purposes of assigning Qualifying Pupils in the Preliminary Application, subtract those Qualifying Pupils from the current CBEDS enrollment on the site before completing this calculation.

(3) The value of the property as determined in Section 1859.145.1(a) is at least $750,000 per Useable Acre. This criterion does not apply to an application for an addition to an existing school site.

(g) An amount for the geographic location of the proposed project equal to the sum of the amounts determined in (a), (b), (d)(3), (e) and (f) multiplied by the indicated percentage factor in the Geographic Percentage Chart shown in Section 1859.83(a).

(h) For purposes of COS projects, an amount equal to 12 percent of the sum of the amounts determined in (a) through (g) for all Preliminary Applications received no later than May 1, 2003. For purposes of Charter School projects, an amount equal to 12 percent of the sum of the amounts determined in (a) through (g) for all Preliminary Charter School Applications received no later than March 31, 2003.

(i) If the district qualifies for financial hardship assistance pursuant to Section 1859.81 at the time of submittal of the Preliminary Application, an amount equal to the sum of the amounts determined in (a) through (h) less any district funds determined available for the project pursuant to Section 1859.81(a). Districts must meet the financial hardship criteria pursuant to Section 1859.81 at the time the request is made to convert the Preliminary Apportionment to a Final Apportionment, including an accountability of any district contribution made available at the time of the Preliminary Apportionment was made, in order to continue with financial hardship assistance for the project.

(j) If the district received an apportionment prior to November 5, 2002 pursuant to Section 1859.81.1(e), an amount equal to the sum of the amounts determined in (a) through (i) less the previously authorized apportionment amount.

The amounts shown in (a) shall be adjusted ~~annually~~ in a manner prescribed in Section 1859.71. <u>The district may be eligible for the funding provided to initiate and enforce a LCP as prescribed in Section 1859.71.4.</u>

Note: Authority cited: Sections 17070.35 and 17075.15, Education Code.

Reference: Sections 17075.10, 17078.10 and 17078.24, Education Code.

REPORT OF THE EXECUTIVE OFFICER
State Allocation Board Meeting, August 27, 2003

GRANT ADJUSTMENTS FOR LABOR COMPLIANCE PROGRAMS

PURPOSE OF REPORT

To apportion funds for projects eligible for grant increases for costs associated with a Labor Compliance Program (LCP).

BACKGROUND

On July 2, 2003, the School Facility Program (SFP) regulations specifying the per pupil grant increase for LCP costs were approved by the State Allocation Board (SAB). The projects shown on the attachments are eligible for the increase. Attachment A represents 264 new construction projects with a total State apportionment of $9,347,148. Attachment B represents 853 modernization projects with a total State apportionment of $18,584,084. The total State apportionment for these adjustments is $27,931,232.

AUTHORITY

Labor Code 1771.7 states in part that the SAB shall increase per pupil grant amounts to accommodate the State's share of the costs of initiating and enforcing a LCP. The law provides that a SFP project is eligible for an increase in the per pupil grant amount if both of the following conditions are met:

- The project was or will be funded from the proceeds of Propositions 47 or from the Kindergarten-University Public Education Facilities Bond Act of 2004, and
- Notice to Proceed for the initial contract for construction of the project was issued on or after April 1, 2003.

Projects apportioned in full which are required to have a LCP in place at the time of the fund release request, may receive an additional one time apportionment for the costs associated with the LCP.

DESCRIPTION

Certification forms were mailed to districts with SFP projects that received adjusted grant funding from Proposition 47 between December 18, 2002 and July 2, 2003. In order to request this grant increase, the district must have been able to certify to the following conditions:

- The District has or will initiate and enforce a LCP that has been approved by the Department of Industrial Relations (DIR); and,
- The projects listed were funded with Proposition 47 funds and the Notice to Proceed for construction was or will be issued on or after April 1, 2003; and,
- The District will submit to the OPSC, at the time of project audit, a copy of the Notice to Proceed, the DIR approved LCP, and expenditure evidence to support the LCP administration.

RECOMMENDATION

Apportion funds for eligible projects listed on Attachments A and B.

CONSENT
000019

New Construction

ATTACHMENT A
LABOR COMPLIANCE PROGRAM
SCHOOL FACILITY PROGRAM
State Allocation Board Meeting, August 27, 2003

District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Ackerman Elementary	Placer	50/66781-00-001	12/18/02	$8,000.00		$8,000.00	$8,000.00
Alhambra City Elementary	Los Angeles	50/64220-00-001	12/18/02	$17,110.00		$17,110.00	$17,110.00
Alhambra City Elementary	Los Angeles	50/64220-00-002	12/18/02	$16,742.00		$16,742.00	$16,742.00
Alhambra City Elementary	Los Angeles	50/64220-00-003	12/18/02	$16,590.00		$16,590.00	$16,590.00
Alhambra City Elementary	Los Angeles	50/64220-00-004	12/18/02	$16,450.00		$16,450.00	$16,450.00
Alhambra City Elementary	Los Angeles	50/64220-00-005	12/18/02	$16,230.00		$16,230.00	$16,230.00
Alhambra City Elementary	Los Angeles	50/64220-00-006	12/18/02	$16,251.00		$16,251.00	$16,251.00
Alhambra City Elementary	Los Angeles	50/64220-00-007	12/18/02	$13,617.00		$13,617.00	$13,617.00
Alhambra City Elementary	Los Angeles	50/64220-00-008	12/18/02	$16,520.00		$16,520.00	$16,520.00
Alhambra City Elementary	Los Angeles	50/64220-00-009	12/18/02	$14,127.00		$14,127.00	$14,127.00
Alhambra City Elementary	Los Angeles	50/64220-00-010	12/18/02	$9,064.00		$9,064.00	$9,064.00
Alhambra City Elementary	Los Angeles	50/64220-00-011	12/18/02	$18,981.00		$18,981.00	$18,981.00
Alhambra City Elementary	Los Angeles	50/64220-00-012	12/18/02	$25,596.00		$25,596.00	$25,596.00
Alhambra City Elementary	Los Angeles	50/64220-00-013	12/18/02	$16,017.00		$16,017.00	$16,017.00
Allensworth Elementary	Tulare	50/71795-00-002	04/23/03	$11,547.00	$11,547.00		$23,094.00
Alta Vista Elementary	Tulare	50/71811-00-001	01/22/03	$8,000.00	$8,000.00		$16,000.00
Antelope Valley Union High	Los Angeles	50/64246-00-001	12/18/02	$27,362.00	$27,362.00		$54,724.00
Apple Valley Unified	San Bernardino	50/75077-00-002	03/26/03	$23,545.00	$23,545.00		$47,090.00
Apple Valley Unified	San Bernardino	50/75077-00-009	03/26/03	$38,274.00	$38,274.00		$76,548.00
Beaumont Unified	Riverside	50/66993-00-003	07/02/03	$100,517.00	$100,517.00		$201,034.00
Beaumont Unified	Riverside	50/66993-00-006	07/02/03	$30,451.00	$30,451.00		$60,902.00
Carlsbad Unified	San Diego	50/73551-00-002	12/18/02	$58,331.00		$58,331.00	$58,331.00
Center Unified	Sacramento	50/73973-00-001	12/18/02	$45,618.00	$45,618.00		$91,236.00
Ceres Unified	Stanislaus	50/71043-00-001	03/26/03	$87,268.00		$87,268.00	$87,268.00
Ceres Unified	Stanislaus	50/71043-00-002	04/23/03	$22,968.00	$22,968.00		$45,936.00
Chaffey Joint Union High	San Bernardino	50/67652-00-004	12/18/02	$18,000.00		$18,000.00	$18,000.00
Chino Valley Unified	San Bernardino	50/67678-00-004	12/18/02	$34,229.00	$34,229.00		$68,458.00
Clear Creek Elementary	Nevada	50/66324-00-001	07/02/03	$9,687.00	$9,687.00		$19,374.00
Columbia Elementary	Shasta	50/69948-00-001	12/18/02	$10,216.00		$10,216.00	$10,216.00
Compton Unified	Los Angeles	50/73437-03-016	12/18/02	$17,294.00	$17,294.00		$34,588.00
Compton Unified	Los Angeles	50/73437-03-017	12/18/02	$17,177.00	$17,177.00		$34,354.00
Compton Unified	Los Angeles	50/73437-03-019	12/18/02	$17,210.00	$17,210.00		$34,420.00
Compton Unified	Los Angeles	50/73437-03-021	12/18/02	$16,481.00	$16,481.00		$32,962.00
Compton Unified	Los Angeles	50/73437-03-023	12/18/02	$16,986.00	$16,986.00		$33,972.00
Del Norte County Office Of Education	Del Norte	50/10082-00-001	12/18/02	$21,997.00	$21,997.00		$43,994.00
Denair Unified	Stanislaus	50/71068-00-002	02/26/03	$17,898.00		$17,898.00	$17,898.00
Elk Grove Unified	Sacramento	50/67314-00-018	07/02/03	$141,712.00		$141,712.00	$141,712.00
Escondido Union Elementary	San Diego	50/68098-00-001	12/18/02	$39,853.00	$39,853.00		$79,706.00
Escondido Union Elementary	San Diego	50/68098-00-002	12/18/02	$34,343.00	$34,343.00		$68,686.00
[illegible]	[illegible]	50/67702-00-010	05/28/03	$36,447.00		$36,447.00	$36,447.00

New Construction

ATTACHMENT A
LABOR COMPLIANCE PROGRAM
SCHOOL FACILITY PROGRAM
State Allocation Board Meeting, August 27, 2003

District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Los Angeles Unified	Los Angeles	50/64733-00-026	12/18/02	$8,000.00		$8,000.00	$8,000.00
Los Angeles Unified	Los Angeles	50/64733-00-029	12/18/02	$17,900.00		$17,900.00	$17,900.00
Los Angeles Unified	Los Angeles	50/64733-00-031	12/18/02	$8,000.00		$8,000.00	$8,000.00
Los Angeles Unified	Los Angeles	50/64733-00-033	12/18/02	$18,702.00		$18,702.00	$18,702.00
Los Angeles Unified	Los Angeles	50/64733-00-036	12/18/02	$8,000.00		$8,000.00	$8,000.00
Los Angeles Unified	Los Angeles	50/64733-00-037	12/18/02	$8,000.00		$8,000.00	$8,000.00
Los Angeles Unified	Los Angeles	50/64733-00-040	12/18/02	$14,359.00		$14,359.00	$14,359.00
Los Angeles Unified	Los Angeles	50/64733-00-051	12/18/02	$8,000.00		$8,000.00	$8,000.00
Los Angeles Unified	Los Angeles	50/64733-00-052	12/18/02	$52,044.00		$52,044.00	$52,044.00
Los Angeles Unified	Los Angeles	50/64733-00-053	12/18/02	$32,262.00		$32,262.00	$32,262.00
Los Angeles Unified	Los Angeles	50/64733-00-054	12/18/02	$8,000.00		$8,000.00	$8,000.00
Los Angeles Unified	Los Angeles	50/64733-00-057	12/18/02	$14,872.00		$14,872.00	$14,872.00
Los Angeles Unified	Los Angeles	50/64733-00-059	12/18/02	$18,105.00		$18,105.00	$18,105.00
Los Angeles Unified	Los Angeles	50/64733-00-061	12/18/02	$8,000.00		$8,000.00	$8,000.00
Los Angeles Unified	Los Angeles	50/64733-00-062	12/18/02	$14,689.00		$14,689.00	$14,689.00
Los Angeles Unified	Los Angeles	50/64733-00-064	12/18/02	$23,847.00		$23,847.00	$23,847.00
Los Angeles Unified	Los Angeles	50/64733-00-067	12/18/02	$8,000.00		$8,000.00	$8,000.00
Los Angeles Unified	Los Angeles	50/64733-00-068	12/18/02	$19,777.00		$19,777.00	$19,777.00
Los Angeles Unified	Los Angeles	50/64733-00-069	12/18/02	$11,369.00		$11,369.00	$11,369.00
Lucia Mar Unified	San Luis Obispo	50/68759-00-002	12/18/02	$22,883.00		$22,883.00	$22,883.00
Lucia Mar Unified	San Luis Obispo	50/68759-00-004	12/18/02	$21,995.00		$21,995.00	$21,995.00
Manteca Unified	San Joaquin	50/68593-01-004	05/28/03	$27,493.00		$27,493.00	$27,493.00
Manteca Unified	San Joaquin	50/68593-02-005	01/22/03	$33,065.00		$33,065.00	$33,065.00
Mariposa County Unified	Mariposa	50/65532-01-002	12/18/02	$8,000.00	$8,000.00		$16,000.00
Mariposa County Unified	Mariposa	50/65532-01-003	12/18/02	$9,171.00	$9,171.00		$18,342.00
Mariposa County Unified	Mariposa	50/65532-01-004	12/18/02	$10,805.00	$10,805.00		$21,610.00
Mariposa County Unified	Mariposa	50/65532-01-005	12/18/02	$15,871.00	$15,871.00		$31,742.00
Merced County Office Of Education	Merced	50/10249-00-004	12/18/02	$8,000.00	$8,000.00		$16,000.00
Mesa Union Elementary	Ventura	50/72470-00-001	12/18/02	$16,341.00		$16,341.00	$16,341.00
Modoc Joint Unified	Modoc	50/73585-00-001	12/18/02	$9,780.00		$9,780.00	$9,780.00
New Haven Unified	Alameda	50/61242-00-006	12/18/02	$71,023.00	$71,023.00		$142,046.00
Ocean View Elementary	Ventura	50/72512-00-003	03/26/03	$11,168.00		$11,168.00	$11,168.00
Oceanside City Unified	San Diego	50/73569-00-003	12/18/02	$43,627.00		$43,627.00	$43,627.00
Oxnard Unified	Ventura	50/72520-00-001	12/18/02	$23,333.00		$23,333.00	$23,333.00
Pajaro Valley Unified	Santa Cruz	50/69799-00-003	12/18/02	$25,295.00	$25,295.00		$50,590.00
Pajaro Valley Unified	Santa Cruz	50/69799-00-004	12/18/02	$34,929.00	$34,929.00		$69,858.00
Palmdale Elementary	Los Angeles	50/64857-00-008	12/18/02	$46,504.00	$46,504.00		$93,008.00
Palmdale Elementary	Los Angeles	50/64857-00-009	12/18	$45,125.00	$45,125.00		$90.00
Paramount Unified	Los Angeles	50/64873-00-002	12/18	$27,141.00	$27,141.00		$52.00

New Construction

ATTACHMENT A
LABOR COMPLIANCE PROGRAM
SCHOOL FACILITY PROGRAM
State Allocation Board Meeting, August 27, 2003

District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
San Bernardino County Office Of Education	San Bernardino	50/10363-03-020	07/02/03	$8,000.00	$8,000.00		$16,000.00
San Bernardino County Office Of Education	San Bernardino	50/10363-03-037	07/02/03	$8,000.00	$8,000.00		$16,000.00
San Bernardino County Office Of Education	San Bernardino	50/10363-04-002	12/18/02	$8,000.00	$8,000.00		$16,000.00
San Bernardino County Office Of Education	San Bernardino	50/10363-04-007	12/18/02	$8,000.00	$8,000.00		$16,000.00
San Francisco Unified	San Francisco	50/68478-28-001	12/18/02	$47,851.00		$47,851.00	$47,851.00
San Francisco Unified	San Francisco	51/68478-17-001	03/26/03	$26,736.00		$26,736.00	$26,736.00
San Jacinto Unified	Riverside	50/67249-00-003	12/18/02	$26,302.00	$26,302.00		$52,604.00
San Jacinto Unified	Riverside	50/67249-00-006	12/18/02	$19,127.00	$19,127.00		$38,254.00
San Joaquin County Office Of Education	San Joaquin	50/10397-00-007	12/18/02	$16,608.00	$16,608.00		$33,216.00
San Joaquin County Office Of Education	San Joaquin	50/10397-00-012	12/18/02	$17,062.00	$17,062.00		$34,124.00
San Joaquin County Office Of Education	San Joaquin	50/10397-00-015	12/18/02	$17,072.00	$17,072.00		$34,144.00
San Leandro Unified	Alameda	50/61291-00-003	04/23/03	$17,239.00		$17,239.00	$17,239.00
San Luis Obispo County Office Of Education	San Luis Obispo	50/10405-00-002	12/18/02	$18,808.00	$18,808.00		$37,616.00
San Luis Obispo County Office Of Education	San Luis Obispo	50/10405-00-006	12/18/02	$11,556.00	$11,556.00		$23,112.00
San Luis Obispo County Office Of Education	San Luis Obispo	50/10405-00-008	12/18/02	$17,685.00	$17,685.00		$35,370.00
San Luis Obispo County Office Of Education	San Luis Obispo	50/10405-00-010	12/18/02	$16,079.00	$16,079.00		$32,158.00
San Miguel Joint Union Elementary	San Luis Obispo	50/68825-00-002	03/26/03	$21,647.00	$21,647.00		$43,294.00
Santa Ana Unified	Orange	50/66670-00-003	12/18/02	$23,626.00		$23,626.00	$23,626.00
Santa Ana Unified	Orange	50/66670-00-006	12/18/02	$132,426.00		$132,426.00	$132,426.00
Santa Ana Unified	Orange	50/66670-00-007	12/18/02	$173,950.00		$173,950.00	$173,950.00
Santa Ana Unified	Orange	50/66670-00-010	03/26/03	$21,255.00		$21,255.00	$21,255.00
Santa Ana Unified	Orange	50/66670-00-011	03/26/03	$31,108.00		$31,108.00	$31,108.00
Selma Unified	Fresno	50/62430-00-001	12/18/02	$18,893.00	$18,893.00		$37,786.00
Selma Unified	Fresno	50/62430-00-002	12/18/02	$15,633.00	$15,633.00		$31,266.00
Selma Unified	Fresno	50/62430-00-004	12/18/02	$8,000.00	$8,000.00		$16,000.00
Selma Unified	Fresno	50/62430-00-005	12/18/02	$8,991.00	$8,991.00		$17,982.00
Selma Unified	Fresno	50/62430-00-006	12/18/02	$8,000.00		$8,000.00	$8,000.00
Selma Unified	Fresno	50/62430-00-008	12/18/02	$8,000.00	$8,000.00		$16,000.00
Selma Unified	Fresno	50/62430-00-009	12/18/02	$8,000.00		$8,000.00	$8,000.00
Selma Unified	Fresno	50/62430-00-010	12/18/02	$8,000.00	$8,000.00		$16,000.00
Selma Unified	Fresno	50/62430-00-012	12/18/02	$8,000.00	$8,000.00		$16,000.00
Selma Unified	Fresno	50/62430-00-013	05/28/03	$11,147.00	$11,147.00		$22,294.00
Selma Unified	Fresno	50/62430-00-014	05/28/03	$17,653.00	$17,653.00		$35,306.00
Selma Unified	Fresno	50/62430-00-015	05/28/03	$10,914.00	$10,914.00		$21,828.00
Selma Unified	Fresno	50/62430-00-016	05/28/03	$10,814.00	$10,814.00		$21,628.00
Selma Unified	Fresno	50/62430-00-017	05/28/03	$12,964.00	$12,964.00		$25,928.00
Selma Unified	Fresno	50/62430-00-018	05/28/03	$8,029.00	$8,029.00		$16,058.00
Selma Unified	Fresno	50/62430-00-019	05/28/03	$10,764.00	$10,764.00		$21,528.00
Sequoia Union High	San Mateo	50/69062-00-005	12/18/02	$8,000.00		$8,000.00	$8,000.00

New Construction

ATTACHMENT A
LABOR COMPLIANCE PROGRAM
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District	County	Application Number	Date Funded	Labor Compliance Program Costs			
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	Total State Apportionment
Upland Unified	San Bernardino	50/75069-00-006	12/18/02	$14,042.00		$14,042.00	$14,042.00
Upland Unified	San Bernardino	50/75069-00-011	12/18/02	$22,137.00		$22,137.00	$22,137.00
Val Verde Unified	Riverside	50/75242-00-008	12/18/02	$28,810.00	$28,810.00		$57,620.00
Val Verde Unified	Riverside	50/75242-00-009	12/18/02	$127,528.00	$127,528.00		$255,056.00
Val Verde Unified	Riverside	50/75242-00-010	02/26/03	$27,451.00	$27,451.00		$54,902.00
Val Verde Unified	Riverside	50/75242-00-014	02/26/03	$22,729.00	$22,729.00		$45,458.00
Visalia Unified	Tulare	50/72256-00-006	12/18/02	$26,481.00		$26,481.00	$26,481.00
Visalia Unified	Tulare	50/72256-00-007	12/18/02	$27,286.00		$27,286.00	$27,286.00
Vista Unified	San Diego	50/68452-00-004	12/18/02	$29,446.00	$29,446.00		$58,892.00
Vista Unified	San Diego	50/68452-00-007	04/23/03	$44,099.00	$44,099.00		$88,198.00
Wasco Union Elementary	Kern	50/63842-00-001	12/18/02	$12,087.00	$12,087.00		$24,174.00
Whittier City	Los Angeles	50/65110-00-001	12/18/02	$8,000.00		$8,000.00	$8,000.00
Whittier City	Los Angeles	50/65110-00-002	12/18/02	$8,000.00		$8,000.00	$8,000.00
Whittier City	Los Angeles	50/65110-00-003	12/18/02	$8,000.00		$8,000.00	$8,000.00
Whittier City	Los Angeles	50/65110-00-004	12/18/02	$8,000.00		$8,000.00	$8,000.00
Whittier City	Los Angeles	50/65110-00-005	12/18/02	$8,000.00		$8,000.00	$8,000.00
Whittier City	Los Angeles	50/65110-00-006	12/18/02	$8,000.00		$8,000.00	$8,000.00
Whittier City	Los Angeles	50/65110-00-007	12/18/02	$8,000.00		$8,000.00	$8,000.00
Whittier City	Los Angeles	50/65110-00-008	12/18/02	$8,000.00		$8,000.00	$8,000.00
William S. Hart Union High	Los Angeles	50/65136-00-003	12/18/02	$107,125.00	$107,125.00		$214,250.00
William S. Hart Union High	Los Angeles	50/65136-00-004	12/18/02	$55,571.00	$55,571.00		$111,142.00
Windsor Unified	Sonoma	50/75358-00-008	12/18/02	$17,176.00	$17,176.00		$34,352.00
Windsor Unified	Sonoma	50/75358-00-010	07/02/03	$20,173.00	$20,173.00		$40,346.00
Yosemite Union High	Madera	50/73734-00-006	07/02/03	$41,909.00		$41,909.00	$41,909.00
				$5,862,488.00	$3,484,660.00		$9,347,148.00

Modernization

ATTACHMENT B
LABOR COMPLIANCE PROGRAM
SCHOOL FACILITY PROGRAM
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District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Alhambra City Elementary	Los Angeles	57/64220-00-001	12/18/2002	$18,492.00		$4,623.00	$18,492.00
Alhambra City Elementary	Los Angeles	57/64220-00-002	12/18/2002	$27,196.00		$6,800.00	$27,196.00
Alhambra City Elementary	Los Angeles	57/64220-00-003	12/18/2002	$23,188.00		$5,797.00	$23,188.00
Alhambra City Elementary	Los Angeles	57/64220-00-004	12/18/2002	$21,991.00		$5,497.00	$21,991.00
Alhambra City Elementary	Los Angeles	57/64220-00-005	12/18/2002	$18,492.00		$4,623.00	$18,492.00
Alhambra City Elementary	Los Angeles	57/64220-00-006	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Alhambra City Elementary	Los Angeles	57/64220-00-007	12/18/2002	$26,204.00		$6,551.00	$26,204.00
Alhambra City Elementary	Los Angeles	57/64220-00-008	12/18/2002	$15,519.00		$3,880.00	$15,519.00
Alhambra City Elementary	Los Angeles	57/64220-00-009	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Alhambra City Elementary	Los Angeles	57/64220-00-010	12/18/2002	$25,934.00		$6,484.00	$25,934.00
Alhambra City High	Los Angeles	57/64238-00-001	12/18/2002	$47,173.00	$11,793.00		$58,966.00
Alhambra City High	Los Angeles	57/64238-00-002	12/18/2002	$48,049.00	$12,012.00		$60,061.00
Alhambra City High	Los Angeles	57/64238-00-003	12/18/2002	$40,398.00	$10,099.00		$50,497.00
Alisal Union Elementary	Monterey	57/65961-00-003	7/2/2003	$17,387.00		$11,591.00	$17,387.00
Alisal Union Elementary	Monterey	57/65961-00-004	7/2/2003	$19,935.00		$13,291.00	$19,935.00
Allensworth Elementary	Tulare	57/71795-00-001	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Alpine Union	San Diego	57/67967-00-002	4/23/2003	$15,030.00		$10,020.00	$15,030.00
Alta Vista Elementary	Tulare	57/71811-00-001	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Amador County Unified	Amador	57/73981-00-001	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Amador County Unified	Amador	57/73981-00-002	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Amador County Unified	Amador	57/73981-00-003	12/18/2002	$19,748.00		$4,937.00	$19,748.00
Amador County Unified	Amador	57/73981-00-004	12/18/2002	$14,206.00		$3,551.00	$14,206.00
Amador County Unified	Amador	57/73981-00-005	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Amador County Unified	Amador	57/73981-00-006	12/18/2002	$16,457.00		$4,114.00	$16,457.00
Amador County Unified	Amador	57/73981-00-007	12/18/2002	$14,497.00		$3,624.00	$14,497.00
Amador County Unified	Amador	57/73981-00-008	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Amador County Unified	Amador	57/73981-00-009	12/18/2002	$25,882.00		$6,471.00	$25,882.00
Amador County Unified	Amador	57/73981-00-010	12/18/2002	$26,693.00		$6,673.00	$26,693.00
Anaheim City	Orange	57/66423-00-018	2/26/2003	$22,403.00	$14,936.00		$37,339.00
Anaheim City	Orange	57/66423-00-020	2/26/2003	$20,342.00	$13,562.00		$33,904.00
Antelope Valley Union High	Los Angeles	57/64246-00-001	3/26/2003	$45,847.00	$30,565.00		$76,412.00
Antelope Valley Union High	Los Angeles	57/64246-00-002	3/26/2003	$39,316.00	$26,211.00		$65,527.00
Antelope Valley Union High	Los Angeles	57/64246-00-004	5/28/2003	$20,312.00		$13,541.00	$20,312.00
Antelope Valley Union High	Los Angeles	57/64246-00-005	7/2/2003	$9,600.00		$6,400.00	$9,600.00
Antelope Valley Union High	Los Angeles	57/64246-00-006	7/2/2003	$10,371.00		$6,914.00	$10,371.00
Apple Valley Unified	San Bernardino	57/75077-00-002	4/23/2003	$18,823.00	$12,549.00		$31,372.00
Apple Valley Unified	San Bernardino	57/75077-00-005	2/26/2003	$38,068.00	$25,379.00		$63,447.00
Arena Union Elementary	Mendocino	57/65557-00-001	12/18/2002	$15,004.00	$3,751.00		$18,755.00
Atwater Elementary	Merced	57/65631-00-002	12/18/2002	$19,058.00		$4,765.00	$19,058.00
Auburn Union Elementary	Placer	57/66787-00-001	5/28/2003	$13,358.00		$8,905.00	$13,358.00

ATTACHMENT B
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SCHOOL FACILITY PROGRAM
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District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Cascade Union Elementary	Shasta	57/69914-00-003	2/26/2003	$14,267.00		$9,512.00	$14,267.00
Centralia Elementary	Orange	57/66472-00-001	12/18/2002	$21,682.00		$5,421.00	$21,682.00
Centralia Elementary	Orange	57/66472-00-002	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Centralia Elementary	Orange	57/66472-00-003	12/18/2002	$24,299.00		$6,075.00	$24,299.00
Centralia Elementary	Orange	57/66472-00-004	12/18/2002	$25,838.00		$6,459.00	$25,838.00
Centralia Elementary	Orange	57/66472-00-005	12/18/2002	$21,598.00		$5,400.00	$21,598.00
Centralia Elementary	Orange	57/66472-00-006	12/18/2002	$26,183.00		$6,546.00	$26,183.00
Centralia Elementary	Orange	57/66472-00-007	12/18/2002	$23,896.00		$5,974.00	$23,896.00
Centralia Elementary	Orange	57/66472-00-008	12/18/2002	$25,182.00		$6,295.00	$25,182.00
Centralia Elementary	Orange	57/66472-00-009	12/18/2002	$20,108.00		$5,027.00	$20,108.00
Ceres Unified	Stanislaus	57/71043-00-001	5/28/2003	$22,397.00	$14,931.00		$37,328.00
Ceres Unified	Stanislaus	57/71043-00-002	5/28/2003	$9,600.00	$6,400.00		$16,000.00
Ceres Unified	Stanislaus	57/71043-00-003	5/28/2003	$12,244.00	$8,162.00		$20,406.00
Chaffey Joint Union High	San Bernardino	57/67652-00-002	12/18/2002	$25,378.00		$6,344.00	$25,378.00
Chaffey Joint Union High	San Bernardino	57/67652-00-003	12/18/2002	$37,058.00		$9,264.00	$37,058.00
Chino Valley Unified	San Bernardino	57/67678-00-001	2/26/2003	$27,840.00	$18,560.00		$46,400.00
Chino Valley Unified	San Bernardino	57/67678-00-002	12/18/2002	$27,416.00	$6,854.00		$34,270.00
Chula Vista Elementary	San Diego	57/68023-00-005	12/18/2002	$25,088.00		$6,272.00	$25,088.00
Chula Vista Elementary	San Diego	57/68023-00-009	12/18/2002	$23,415.00		$5,854.00	$23,415.00
Chula Vista Elementary	San Diego	57/68023-00-016	7/2/2003	$20,275.00		$13,517.00	$20,275.00
Chula Vista Elementary	San Diego	57/68023-00-017	7/2/2003	$20,463.00		$13,642.00	$20,463.00
Claremont Unified	Los Angeles	57/64394-00-001	12/18/2002	$45,797.00		$11,450.00	$45,797.00
Claremont Unified	Los Angeles	57/64394-00-002	12/18/2002	$13,323.00		$3,330.00	$13,323.00
Claremont Unified	Los Angeles	57/64394-00-003	12/18/2002	$14,790.00		$3,698.00	$14,790.00
Claremont Unified	Los Angeles	57/64394-00-006	12/18/2002	$28,012.00		$7,003.00	$28,012.00
Claremont Unified	Los Angeles	57/64394-00-007	12/18/2002	$20,484.00		$5,121.00	$20,484.00
Claremont Unified	Los Angeles	57/64394-00-008	12/18/2002	$19,962.00		$4,991.00	$19,962.00
Claremont Unified	Los Angeles	57/64394-00-009	12/18/2002	$18,208.00		$4,552.00	$18,208.00
Claremont Unified	Los Angeles	57/64394-00-010	12/18/2002	$25,071.00		$6,267.00	$25,071.00
Coachella Valley Unified	Riverside	57/73676-00-004	4/23/2003	$19,304.00		$12,869.00	$19,304.00
Coachella Valley Unified	Riverside	57/73676-00-005	4/23/2003	$9,600.00		$6,400.00	$9,600.00
Coachella Valley Unified	Riverside	57/73676-00-009	4/23/2003	$19,779.00		$13,185.00	$19,779.00
Columbia Elementary	Shasta	57/69948-00-001	2/26/2003	$9,600.00	$6,400.00		$16,000.00
Columbia Union Elementary	Tuolumne	57/72348-00-001	12/18/2002	$14,519.00		$3,630.00	$14,519.00
Compton Unified	Los Angeles	57/73437-01-021	12/18/2002	$26,230.00	$6,558.00		$32,788.00
Compton Unified	Los Angeles	57/73437-01-022	12/18/2002	$24,537.00	$6,134.00		$30,671.00
Compton Unified	Los Angeles	57/73437-01-023	12/18/2002	$24,014.00	$6,003.00		$30,017.00
Compton Unified	Los Angeles	57/73437-01-024	12/18/2002	$20,922.00	$5,230.00		$26,152.00
Compton Unified	Los Angeles	57/73437-01-025	12/18/20	$19,058.00	$4,765.00		$23 .00
Compton Unified	Los Angeles	57/73437-01-026	12/18/20	$28,020.00	$7,005.00		$35 .00
Compton Unified				$27,740.00	$6,936.00		$3 76.00

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ATTACHMENT B
LABOR COMPLIANCE PROGRAM
SCHOOL FACILITY PROGRAM
State Allocation Board Meeting, August 27, 2003

District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Del Norte County Unified	Del Norte	57/61820-00-003	12/18/2002	$27,480.00		$6,869.00	$27,480.00
Del Norte County Unified	Del Norte	57/61820-00-004	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Del Norte County Unified	Del Norte	57/61820-00-005	12/18/2002	$18,263.00		$4,566.00	$18,263.00
Del Norte County Unified	Del Norte	57/61820-00-006	12/18/2002	$14,599.00		$3,649.00	$14,599.00
Denair Unified	Stanislaus	57/71068-00-001	12/18/2002	$14,978.00		$3,745.00	$14,978.00
Denair Unified	Stanislaus	57/71068-00-002	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Denair Unified	Stanislaus	57/71068-00-003	3/26/2003	$18,690.00		$12,461.00	$18,690.00
Desert Sands Unified	Riverside	57/67058-00-007	12/18/2002	$19,838.00		$4,960.00	$19,838.00
Desert Sands Unified	Riverside	57/67058-00-008	12/18/2002	$20,325.00		$5,081.00	$20,325.00
Desert Sands Unified	Riverside	57/67058-00-009	12/18/2002	$22,702.00		$5,676.00	$22,702.00
Dos Palos Oro-Loma Joint Unified	Merced	57/75317-00-001	5/28/2003	$9,600.00		$8,400.00	$9,600.00
Dos Palos Oro-Loma Joint Unified	Merced	57/75317-00-002	5/28/2003	$16,162.00		$10,775.00	$16,162.00
Dos Palos Oro-Loma Joint Unified	Merced	57/75317-00-003	5/28/2003	$22,242.00		$14,828.00	$22,242.00
Dos Palos Oro-Loma Joint Unified	Merced	57/75317-00-004	5/28/2003	$15,008.00		$10,005.00	$15,008.00
Dos Palos Oro-Loma Joint Unified	Merced	57/75317-00-005	5/28/2003	$9,600.00		$6,400.00	$9,600.00
Duarte Unified	Los Angeles	57/64469-00-003	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Duarte Unified	Los Angeles	57/64469-00-004	12/18/2002	$24,639.00		$6,160.00	$24,639.00
Duarte Unified	Los Angeles	57/64469-00-005	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Duarte Unified	Los Angeles	57/64469-00-006	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Duarte Unified	Los Angeles	57/64469-00-007	1/22/2003	$31,737.00		$7,934.00	$31,737.00
Durham Unified	Butte	57/61432-00-001	3/26/2003	$9,600.00		$6,400.00	$9,600.00
Earlimart Elementary	Tulare	57/71902-00-003	2/26/2003	$9,600.00		$6,400.00	$9,600.00
East Side Union High	Santa Clara	57/69427-00-010	3/26/2003	$58,120.00		$38,746.00	$58,120.00
El Rancho Unified	Los Angeles	57/64527-00-013	12/18/2002	$25,535.00		$6,383.00	$25,535.00
El Rancho Unified	Los Angeles	57/64527-00-014	12/18/2002	$12,800.00		$3,200.00	$12,800.00
El Rancho Unified	Los Angeles	57/64527-00-015	12/18/2002	$23,906.00		$5,976.00	$23,906.00
El Rancho Unified	Los Angeles	57/64527-00-016	5/28/2003	$9,600.00		$8,400.00	$9,600.00
Elverta Joint Elementary	Sacramento	57/67322-00-001	5/28/2003	$10,442.00	$6,961.00		$17,403.00
Elverta Joint Elementary	Sacramento	57/67322-00-002	5/28/2003	$9,600.00	$6,400.00		$16,000.00
Enterprise Elementary	Shasta	57/69971-00-005	5/28/2003	$9,600.00		$8,400.00	$9,600.00
Escondido Union Elementary	San Diego	57/68098-00-003	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Escondido Union Elementary	San Diego	57/68098-00-004	12/18/2002	$25,781.00	$6,445.00		$32,226.00
Escondido Union Elementary	San Diego	57/68098-00-005	12/18/2002	$24,977.00	$6,244.00		$31,221.00
Escondido Union Elementary	San Diego	57/68098-00-006	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Escondido Union Elementary	San Diego	57/68098-00-007	12/18/2002	$20,331.00	$5,082.00		$25,413.00
Escondido Union Elementary	San Diego	57/68098-00-008	12/18/2002	$25,780.00	$6,444.00		$32,224.00
Escondido Union Elementary	San Diego	57/68098-00-009	12/18/2002	$20,660.00	$5,165.00		$25,825.00
Escondido Union Elementary	San Diego	57/68098-00-010	12/18/2002	$25,653.00	$6,414.00		$32,067.00
Escondido Union Elementary	San Diego	57/68098-00-011	12/18/2002	$26,871.00	$6,717.00		$33,588.00
Escondido Union Elementary	San Diego	57/68098-00-012	12/18/2002	$27,823.00	$6,955.00		$34,778.00
Etiwanda Elementary	San Bernardino	57/67702-00-001	12/18/2002	$19,251.00		$4,813.00	$19,251.00

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District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Fresno Unified	Fresno	57/62166-00-014	12/18/2002	$69,469.00		$17,368.00	$69,469.00
Fresno Unified	Fresno	57/62166-00-040	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Fresno Unified	Fresno	57/62166-00-043	12/18/2002	$22,603.00		$5,650.00	$22,603.00
Fresno Unified	Fresno	57/62166-00-052	12/18/2002	$13,166.00		$3,291.00	$13,166.00
Fresno Unified	Fresno	57/62166-00-054	12/18/2002	$18,432.00		$4,608.00	$18,432.00
Fresno Unified	Fresno	57/62166-00-079	12/18/2002	$27,875.00		$6,969.00	$27,875.00
Fresno Unified	Fresno	57/62166-00-081	12/18/2002	$21,720.00		$5,430.00	$21,720.00
Fresno Unified	Fresno	57/62166-00-082	2/26/2003	$28,281.00		$18,854.00	$28,281.00
Gateway Unified	Shasta	57/75267-00-001	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Gateway Unified	Shasta	57/75267-00-002	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Gateway Unified	Shasta	57/75267-00-003	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Gateway Unified	Shasta	57/75267-00-004	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Gateway Unified	Shasta	57/75267-00-005	12/18/2002	$13,085.00	$3,271.00		$16,356.00
Gateway Unified	Shasta	57/75267-00-006	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Gateway Unified	Shasta	57/75267-00-007	12/18/2002	$31,264.00	$7,817.00		$39,081.00
Gateway Unified	Shasta	57/75267-00-008	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Gateway Unified	Shasta	57/75267-00-009	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Gateway Unified	Shasta	57/75267-00-010	12/18/2002	$17,417.00	$4,355.00		$21,772.00
Glendale Unified	Los Angeles	57/64568-00-021	7/2/2003	$25,130.00		$16,753.00	$25,130.00
Glendora Unified	Los Angeles	57/64576-00-001	3/26/2003	$52,535.00		$35,023.00	$52,535.00
Glendora Unified	Los Angeles	57/64576-00-002	3/26/2003	$9,600.00		$6,400.00	$9,600.00
Glendora Unified	Los Angeles	57/64576-00-003	4/23/2003	$20,225.00		$13,483.00	$20,225.00
Glendora Unified	Los Angeles	57/64576-00-004	4/23/2003	$24,664.00		$16,442.00	$24,664.00
Glendora Unified	Los Angeles	57/64576-00-005	4/23/2003	$20,123.00		$13,415.00	$20,123.00
Glendora Unified	Los Angeles	57/64576-00-006	4/23/2003	$19,571.00		$13,047.00	$19,571.00
Glendora Unified	Los Angeles	57/64576-00-007	4/23/2003	$19,596.00		$13,064.00	$19,596.00
Glendora Unified	Los Angeles	57/64576-00-008	4/23/2003	$22,730.00		$15,154.00	$22,730.00
Glendora Unified	Los Angeles	57/64576-00-010	5/28/2003	$20,323.00		$13,548.00	$20,323.00
Gold Trail Union	El Dorado	57/61887-00-001	4/23/2003	$18,560.00		$12,374.00	$18,560.00
Golden Plains Unified	Fresno	57/75234-00-001	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Golden Plains Unified	Fresno	57/75234-00-002	12/18/2002	$22,977.00		$5,744.00	$22,977.00
Golden Plains Unified	Fresno	57/75234-00-003	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Golden Plains Unified	Fresno	57/75234-00-004	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Gorman Elementary	Los Angeles	57/64584-00-001	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Grant Elementary	Shasta	57/70003-00-001	2/26/2003	$9,600.00	$6,400.00		$16,000.00
Greenfield Union	Kern	57/63503-00-001	12/18/2002	$20,787.00		$5,197.00	$20,787.00
Greenfield Union	Kern	57/63503-00-002	12/18/2002	$19,303.00		$4,826.00	$19,303.00
Gustine Unified	Merced	57/73619-00-001	12/18/2002	$18,377.00	$4,594.00		$22,971.00
Gustine Unified	Merced	57/73619-00-002	12/18/2	$12,800.00	$3,200.00		$ 10.00
	Merced	57/73619-00-003	12/18/2002	$14,772.00	$3,693.00		$ 35.00

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District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
La Mesa-Spring Valley	San Diego	57/68197-00-007	12/18/2002	$21,410.00	$5,353.00		$26,763.00
La Mesa-Spring Valley	San Diego	57/68197-00-014	12/18/2002	$21,379.00	$5,345.00		$26,724.00
La Mesa-Spring Valley	San Diego	57/68197-00-015	12/18/2002	$22,187.00	$5,547.00		$27,734.00
La Mesa-Spring Valley	San Diego	57/68197-00-016	12/18/2002	$22,804.00	$5,701.00		$28,505.00
La Mesa-Spring Valley	San Diego	57/68197-00-017	12/18/2002	$23,805.00	$5,951.00		$29,756.00
La Mesa-Spring Valley	San Diego	57/68197-00-018	12/18/2002	$22,390.00	$5,597.00		$27,987.00
La Mesa-Spring Valley	San Diego	57/68197-00-019	12/18/2002	$21,937.00	$5,485.00		$27,422.00
Laguna Salada Union Elementary	San Mateo	57/68932-00-006	12/18/2002	$14,348.00		$3,588.00	$14,348.00
Laguna Salada Union Elementary	San Mateo	57/68932-00-007	12/18/2002	$17,307.00		$4,327.00	$17,307.00
Laguna Salada Union Elementary	San Mateo	57/68932-00-008	12/18/2002	$22,908.00		$5,727.00	$22,908.00
Lake Tahoe Unified	El Dorado	57/61903-00-003	12/18/2002	$21,121.00		$5,280.00	$21,121.00
Lake Tahoe Unified	El Dorado	57/61903-00-004	12/18/2002	$23,454.00		$5,863.00	$23,454.00
Lakeport Unified	Lake	57/64030-00-004	7/2/2003	$19,838.00		$13,225.00	$19,838.00
Lakeport Unified	Lake	57/64030-00-005	5/28/2003	$19,760.00		$13,173.00	$19,760.00
Lakeport Unified	Lake	57/64030-00-006	7/2/2003	$20,427.00		$13,617.00	$20,427.00
Lakeside Union Elementary	Kern	57/63552-00-002	12/18/2002	$19,138.00		$4,785.00	$19,138.00
Lancaster Elementary	Los Angeles	57/64667-00-003	12/18/2002	$19,453.00		$4,864.00	$19,453.00
Lancaster Elementary	Los Angeles	57/64667-00-004	2/26/2003	$22,693.00		$15,129.00	$22,693.00
Lancaster Elementary	Los Angeles	57/64667-00-005	5/28/2003	$19,682.00	$13,122.00		$32,804.00
Lancaster Elementary	Los Angeles	57/64667-00-006	5/28/2003	$18,711.00	$12,473.00		$31,184.00
Le Grand Union Elementary	Merced	57/65722-00-001	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Leggett Valley Unified	Mendocino	57/75218-00-003	4/23/2003	$9,600.00	$6,400.00		$16,000.00
Leggett Valley Unified	Mendocino	57/75218-00-004	4/23/2003	$9,600.00	$6,400.00		$16,000.00
Lincoln Unified	San Joaquin	57/68569-00-001	12/18/2002	$38,100.00		$9,525.00	$38,100.00
Lincoln Unified	San Joaquin	57/68569-00-003	12/18/2002	$13,226.00		$3,306.00	$13,226.00
Lincoln Unified	San Joaquin	57/68569-00-004	1/22/2003	$23,033.00		$5,758.00	$23,033.00
Linden Unified	San Joaquin	57/68577-00-006	5/28/2003	$12,677.00		$8,451.00	$12,677.00
Live Oak Elementary	Santa Cruz	57/69765-00-004	5/28/2003	$9,600.00		$6,400.00	$9,600.00
Livermore Valley Joint Unified	Alameda	57/61200-00-007	12/18/2002	$23,766.00		$5,946.00	$23,766.00
Livermore Valley Joint Unified	Alameda	57/61200-00-008	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Livermore Valley Joint Unified	Alameda	57/61200-00-009	2/26/2003	$21,211.00		$14,141.00	$21,211.00
Long Beach Unified	Los Angeles	57/64725-00-011	12/18/2002	$74,061.00		$18,516.00	$74,061.00
Long Beach Unified	Los Angeles	57/64725-00-012	12/18/2002	$78,033.00		$19,509.00	$78,033.00
Los Angeles County Office Of Education	Los Angeles	57/10199-00-011	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Los Angeles County Office Of Education	Los Angeles	57/10199-00-012	12/18/2002	$24,942.00	$6,235.00		$31,177.00
Los Angeles County Office Of Education	Los Angeles	57/10199-00-015	7/2/2003	$10,945.00	$7,296.00		$18,241.00
Los Angeles County Office Of Education	Los Angeles	57/10199-00-017	12/18/2002	$20,622.00	$5,156.00		$25,778.00
Los Angeles Unified	Los Angeles	57/64733-28-005	12/18/2002	$29,814.00		$7,453.00	$29,814.00
Los Angeles Unified	Los Angeles	57/64733-33-009	12/18/2002	$26,532.00		$6,633.00	$26,532.00
Los Gatos Union Elementary	Kern	57/63594-00-002	5/28/2003	$9,600.00	$6,400.00		$16,000.00
[illegible]	[illegible]	[illegible]	12/18/2002	$12,800.00	$3,200.00		$16,000.00

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District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Merced Union High	Merced	57/65789-00-004	12/18/2002	$27,729.00		$6,933.00	$27,729.00
Merced Union High	Merced	57/65789-00-005	12/18/2002	$26,156.00		$6,539.00	$26,156.00
Merced Union High	Merced	57/65789-00-006	12/18/2002	$21,053.00		$5,263.00	$21,053.00
Merced Union High	Merced	57/65789-00-007	12/18/2002	$22,304.00		$5,576.00	$22,304.00
Merced Union High	Merced	57/65789-00-008	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Middletown Unified	Lake	57/64055-00-001	12/18/2002	$25,961.00		$6,490.00	$25,961.00
Middletown Unified	Lake	57/64055-00-002	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Middletown Unified	Lake	57/64055-00-003	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Modesto City Elementary	Stanislaus	57/71167-00-001	12/18/2002	$16,896.00		$4,224.00	$16,896.00
Modesto City Elementary	Stanislaus	57/71167-00-005	7/2/2003	$20,561.00		$13,707.00	$20,561.00
Montebello Unified	Los Angeles	57/64808-00-018	12/18/2002	$19,636.00		$4,909.00	$19,636.00
Montebello Unified	Los Angeles	57/64808-00-023	12/18/2002	$19,724.00		$4,931.00	$19,724.00
Montebello Unified	Los Angeles	57/64808-00-025	12/18/2002	$26,646.00		$6,661.00	$26,646.00
Montebello Unified	Los Angeles	57/64808-00-026	12/18/2002	$20,349.00		$5,087.00	$20,349.00
Moreno Valley Unified	Riverside	57/67124-00-007	12/18/2002	$19,629.00	$4,907.00		$24,536.00
Moreno Valley Unified	Riverside	57/67124-00-008	12/18/2002	$21,759.00	$5,440.00		$27,199.00
Morgan Hill Unified	Santa Clara	57/69583-00-005	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Morgan Hill Unified	Santa Clara	57/69583-00-006	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Morgan Hill Unified	Santa Clara	57/69583-00-007	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Morgan Hill Unified	Santa Clara	57/69583-00-008	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Morgan Hill Unified	Santa Clara	57/69583-00-009	2/26/2003	$17,570.00		$11,714.00	$17,570.00
Morgan Hill Unified	Santa Clara	57/69583-00-011	5/28/2003	$9,600.00		$6,400.00	$9,600.00
Mountain Elementary	Santa Cruz	57/69773-00-001	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Mountain Empire Unified	San Diego	57/68213-00-001	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Mountain Empire Unified	San Diego	57/68213-00-003	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Mountain Empire Unified	San Diego	57/68213-00-004	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Mulberry Elementary	Imperial	57/63206-00-001	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Napa Valley Unified	Napa	57/66266-00-023	12/18/2002	$23,417.00		$5,854.00	$23,417.00
New Haven Unified	Alameda	57/61242-00-005	12/18/2002	$27,041.00	$6,761.00		$33,802.00
New Haven Unified	Alameda	57/61242-00-007	1/22/2003	$24,529.00	$6,132.00		$30,661.00
Newark Unified	Alameda	57/61234-00-007	12/18/2002	$17,822.00		$4,456.00	$17,822.00
Newark Unified	Alameda	57/61234-00-009	12/18/2002	$14,357.00		$3,589.00	$14,357.00
Newhall Elementary	Los Angeles	57/64832-00-002	4/23/2003	$20,947.00		$13,965.00	$20,947.00
Newhall Elementary	Los Angeles	57/64832-00-003	4/23/2003	$19,596.00		$13,064.00	$19,596.00
Newport-Mesa Unified	Orange	57/66597-00-003	5/28/2003	$19,865.00		$13,244.00	$19,865.00
Newport-Mesa Unified	Orange	57/66597-00-009	7/2/2003	$27,038.00		$18,025.00	$27,038.00
Newport-Mesa Unified	Orange	57/66597-00-010	7/2/2003	$21,823.00		$14,549.00	$21,823.00
Newport-Mesa Unified	Orange	57/66597-00-011	7/2/2003	$17,546.00		$11,698.00	$17,546.00
Newport-Mesa Unified	Orange	57/66597-00-012	7/2/20[illegible]	$18,912.00		$12,608.00	$18,912.00
North Monterey County Unified	Monterey	57/73825-00-001	3/26/20[illegible]	$19,899.00		$13,266.00	$1[illegible].00
[illegible]	[illegible]	[illegible]	[illegible]203	$21,035.00		$14,023.00	$2[illegible].00

Modernization

ATTACHMENT B
LABOR COMPLIANCE PROGRAM
SCHOOL FACILITY PROGRAM
State Allocation Board Meeting, August 27, 2003

District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Oxnard Elementary	Ventura	57/72538-00-008	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Oxnard Elementary	Ventura	57/72538-00-009	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Oxnard Elementary	Ventura	57/72538-00-010	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Oxnard Elementary	Ventura	57/72538-00-011	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Oxnard Elementary	Ventura	57/72538-00-014	12/18/2002	$21,093.00		$5,274.00	$21,093.00
Oxnard Elementary	Ventura	57/72538-00-015	12/18/2002	$16,347.00		$4,086.00	$16,347.00
Oxnard Elementary	Ventura	57/72538-00-016	12/18/2002	$26,247.00		$6,562.00	$26,247.00
Oxnard Elementary	Ventura	57/72538-00-017	12/18/2002	$26,886.00		$6,722.00	$26,886.00
Oxnard Elementary	Ventura	57/72538-00-018	12/18/2002	$18,610.00		$4,652.00	$18,610.00
Oxnard Elementary	Ventura	57/72538-00-019	12/18/2002	$20,898.00		$5,224.00	$20,898.00
Oxnard Elementary	Ventura	57/72538-00-021	12/18/2002	$25,072.00		$6,268.00	$25,072.00
Oxnard Elementary	Ventura	57/72538-00-022	12/18/2002	$19,301.00		$4,825.00	$19,301.00
Oxnard Elementary	Ventura	57/72538-00-023	12/18/2002	$19,930.00		$4,983.00	$19,930.00
Oxnard Elementary	Ventura	57/72538-00-024	12/18/2002	$15,800.00		$3,950.00	$15,800.00
Oxnard Union High	Ventura	57/72546-00-002	12/18/2002	$40,523.00		$10,131.00	$40,523.00
Oxnard Union High	Ventura	57/72546-00-003	12/18/2002	$47,577.00		$11,894.00	$47,577.00
Oxnard Union High	Ventura	57/72546-00-004	12/18/2002	$35,592.00		$8,898.00	$35,592.00
Pajaro Valley Unified	Santa Cruz	57/69799-00-013	12/18/2002	$23,336.00		$5,834.00	$23,336.00
Pajaro Valley Unified	Santa Cruz	57/69799-00-014	4/23/2003	$11,128.00	$7,419.00		$18,547.00
Pajaro Valley Unified	Santa Cruz	57/69799-00-015	4/23/2003	$9,600.00	$6,400.00		$16,000.00
Pajaro Valley Unified	Santa Cruz	57/69799-00-017	4/23/2003	$11,876.00	$7,917.00		$19,793.00
Pajaro Valley Unified	Santa Cruz	57/69799-00-019	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Pajaro Valley Unified	Santa Cruz	57/69799-00-020	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Pajaro Valley Unified	Santa Cruz	57/69799-00-021	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Pajaro Valley Unified	Santa Cruz	57/69799-00-022	4/23/2003	$15,547.00	$10,364.00		$25,911.00
Palo Alto Unified	Santa Clara	57/69641-00-024	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Palo Verde Unified	Riverside	57/87181-00-003	12/18/2002	$26,167.00		$6,542.00	$26,167.00
Paramount Unified	Los Angeles	57/64873-00-002	2/26/2003	$20,396.00	$13,597.00		$33,993.00
Paramount Unified	Los Angeles	57/64873-00-003	2/26/2003	$18,350.00	$12,233.00		$30,583.00
Paramount Unified	Los Angeles	57/64873-00-004	2/26/2003	$19,334.00	$12,889.00		$32,223.00
Paramount Unified	Los Angeles	57/64873-00-005	2/26/2003	$9,600.00	$6,400.00		$16,000.00
Paramount Unified	Los Angeles	57/64873-00-006	2/26/2003	$13,789.00	$9,192.00		$22,981.00
Paramount Unified	Los Angeles	57/64873-00-007	2/26/2003	$9,600.00	$6,400.00		$16,000.00
Paramount Unified	Los Angeles	57/64873-00-008	2/26/2003	$15,584.00	$10,389.00		$25,973.00
Paramount Unified	Los Angeles	57/64873-00-009	2/26/2003	$9,600.00	$6,400.00		$16,000.00
Paramount Unified	Los Angeles	57/64873-00-010	2/26/2003	$10,249.00	$6,833.00		$17,082.00
Paramount Unified	Los Angeles	57/64873-00-011	2/26/2003	$31,540.00	$21,026.00		$52,566.00
Pasadena Unified	Los Angeles	57/64881-00-021	12/18/2002	$20,847.00		$5,212.00	$20,847.00
Pasadena Unified	Los Angeles	57/64881-00-026	12/18/2002	$19,442.00		$4,860.00	$19,442.00
Pasadena Unified	Los Angeles	57/64881-00-027	12/18/2002	$33,754.00		$8,438.00	$33,754.00
Pasadena Unified	Los Angeles	57/64881-00-028	12/18/2002	$17,024.00		$4,259.00	$17,024.00

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LABOR COMPLIANCE PROGRAM
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				Labor Compliance Program Costs			
				State Share		District Share	
District	County	Application Number	Date Funded	State LCP Increase	Financial Hardship	Cash Contribution	Total State Apportionment
Redding Elementary	Shasta	57/70110-00-002	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Redding Elementary	Shasta	57/70110-00-004	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Redding Elementary	Shasta	57/70110-00-006	12/18/2002	$12,800.00	$3,200.00		$16,000.00
Redlands Unified	San Bernardino	57/67843-00-001	12/18/2002	$29,283.00	$7,321.00		$36,604.00
Redlands Unified	San Bernardino	57/67843-00-002	12/18/2002	$31,016.00	$7,753.00		$38,769.00
Redlands Unified	San Bernardino	57/67843-00-003	12/18/2002	$26,312.00	$6,578.00		$32,890.00
Redlands Unified	San Bernardino	57/67843-00-008	12/18/2002	$17,190.00	$4,298.00		$21,488.00
Redlands Unified	San Bernardino	57/67843-00-009	12/18/2002	$16,576.00	$4,144.00		$20,720.00
Redlands Unified	San Bernardino	57/67843-00-010	12/18/2002	$15,434.00	$3,858.00		$19,292.00
Redlands Unified	San Bernardino	57/67843-00-011	12/18/2002	$30,327.00	$7,582.00		$37,909.00
Redondo Beach Unified	Los Angeles	57/75341-00-003	5/28/2003	$20,645.00		$13,763.00	$20,645.00
Rialto Unified	San Bernardino	57/67850-00-001	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Rialto Unified	San Bernardino	57/67850-00-002	12/18/2002	$27,635.00		$6,908.00	$27,635.00
Rialto Unified	San Bernardino	57/67850-00-003	12/18/2002	$27,837.00		$6,959.00	$27,837.00
Rialto Unified	San Bernardino	57/67850-00-008	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Rialto Unified	San Bernardino	57/67850-00-009	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Rialto Unified	San Bernardino	57/67850-00-011	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Rialto Unified	San Bernardino	57/67850-00-012	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Richfield Elementary	Tehama	57/71654-00-001	7/2/2003	$9,600.00	$6,400.00		$16,000.00
Rincon Valley Union Elementary	Sonoma	57/70896-00-001	7/2/2003	$17,172.00		$11,448.00	$17,172.00
Rincon Valley Union Elementary	Sonoma	57/70896-00-002	7/2/2003	$9,600.00		$6,400.00	$9,600.00
Rincon Valley Union Elementary	Sonoma	57/70896-00-003	7/2/2003	$14,477.00		$9,652.00	$14,477.00
Rincon Valley Union Elementary	Sonoma	57/70896-00-004	7/2/2003	$15,592.00		$10,395.00	$15,592.00
Rincon Valley Union Elementary	Sonoma	57/70896-00-005	7/2/2003	$15,426.00		$10,284.00	$15,426.00
Rincon Valley Union Elementary	Sonoma	57/70896-00-006	7/2/2003	$9,600.00		$6,400.00	$9,600.00
Rio Elementary	Ventura	57/72561-00-004	12/18/2002	$14,329.00		$3,582.00	$14,329.00
Rio Elementary	Ventura	57/72561-00-005	12/18/2002	$17,073.00		$4,268.00	$17,073.00
Rio Linda Union Elementary	Sacramento	57/67405-00-001	12/18/2002	$14,934.00		$3,733.00	$14,934.00
Rio Linda Union Elementary	Sacramento	57/67405-00-002	12/18/2002	$18,953.00		$4,738.00	$18,953.00
Riverdale Joint Unified	Fresno	57/75408-00-004	5/28/2003	$16,334.00		$10,890.00	$16,334.00
Riverside Unified	Riverside	57/67215-00-008	12/18/2002	$25,378.00		$6,345.00	$25,378.00
Riverside Unified	Riverside	57/67215-00-010	12/18/2002	$27,234.00		$6,808.00	$27,234.00
Riverside Unified	Riverside	57/67215-00-011	12/18/2002	$24,433.00		$6,109.00	$24,433.00
Riverside Unified	Riverside	57/67215-00-012	12/18/2002	$25,556.00		$6,390.00	$25,556.00
Rocklin Unified	Placer	57/75085-00-002	7/2/2003	$9,600.00		$6,400.00	$9,600.00
Roseville City Elementary	Placer	57/66910-00-001	12/18/2002	$24,545.00		$6,136.00	$24,545.00
Roseville City Elementary	Placer	57/66910-00-002	12/18/2002	$13,329.00		$3,333.00	$13,329.00
Roseville City Elementary	Placer	57/66910-00-003	12/18/2002	$22,275.00		$5,569.00	$22,275.00
Ross Valley	Marin	57/75002-00-002	2/26/[illegible]	$13,547.00		$9,032.00	$[illegible]47.00
Ross Valley	Marin	57/75002-00-003	2/26/[illegible]	$15,403.00		$10,269.00	$[illegible]03.00
[illegible]	[illegible]	[illegible]	[illegible]/2003	$10,727.00		$7,149.00	$[illegible]722.00

CONSENT

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SCHOOL FACILITY PROGRAM
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District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
San Juan Unified	Sacramento	57/67447-00-037	12/18/2002	$12,800.00		$3,200.00	$12,800.00
San Juan Unified	Sacramento	57/67447-00-039	12/18/2002	$15,508.00		$3,878.00	$15,508.00
San Juan Unified	Sacramento	57/67447-00-040	12/18/2002	$12,800.00		$3,200.00	$12,800.00
San Juan Unified	Sacramento	57/67447-00-041	12/18/2002	$30,865.00		$7,717.00	$30,865.00
San Juan Unified	Sacramento	57/67447-00-043	12/18/2002	$12,800.00		$3,200.00	$12,800.00
San Juan Unified	Sacramento	57/67447-00-044	12/18/2002	$12,800.00		$3,200.00	$12,800.00
San Juan Unified	Sacramento	57/67447-00-045	12/18/2002	$12,800.00		$3,200.00	$12,800.00
San Juan Unified	Sacramento	57/67447-00-046	12/18/2002	$12,800.00		$3,200.00	$12,800.00
San Juan Unified	Sacramento	57/67447-00-047	12/18/2002	$12,800.00		$3,200.00	$12,800.00
San Juan Unified	Sacramento	57/67447-00-048	12/18/2002	$12,800.00		$3,200.00	$12,800.00
San Juan Unified	Sacramento	57/67447-00-049	12/18/2002	$16,004.00		$4,001.00	$16,004.00
San Juan Unified	Sacramento	57/67447-00-051	12/18/2002	$17,209.00		$4,302.00	$17,209.00
San Juan Unified	Sacramento	57/67447-00-054	2/26/2003	$12,520.00		$8,346.00	$12,520.00
San Leandro Unified	Alameda	57/61291-00-001	2/26/2003	$17,386.00		$11,590.00	$17,386.00
San Leandro Unified	Alameda	57/61291-00-002	2/26/2003	$16,632.00		$11,087.00	$16,632.00
San Leandro Unified	Alameda	57/61291-00-003	2/26/2003	$19,589.00		$13,059.00	$19,589.00
San Leandro Unified	Alameda	57/61291-00-004	2/26/2003	$22,297.00		$14,865.00	$22,297.00
San Leandro Unified	Alameda	57/61291-00-005	2/26/2003	$23,322.00		$15,548.00	$23,322.00
San Leandro Unified	Alameda	57/61291-00-006	3/26/2003	$42,669.00		$28,446.00	$42,669.00
San Leandro Unified	Alameda	57/61291-00-007	3/26/2003	$18,645.00		$12,430.00	$18,645.00
San Leandro Unified	Alameda	57/61291-00-008	3/26/2003	$20,970.00		$13,980.00	$20,970.00
San Leandro Unified	Alameda	57/61291-00-009	3/26/2003	$16,720.00		$11,146.00	$16,720.00
San Mateo-Foster City	San Mateo	57/69039-00-008	12/18/2002	$28,409.00		$7,102.00	$28,409.00
San Mateo-Foster City	San Mateo	57/69039-00-011	12/18/2002	$27,094.00		$6,773.00	$27,094.00
San Mateo-Foster City	San Mateo	57/69039-00-012	12/18/2002	$16,953.00		$4,238.00	$16,953.00
San Rafael City Elementary	Marin	57/65458-00-001	12/18/2002	$17,793.00		$4,448.00	$17,793.00
San Rafael City Elementary	Marin	57/65458-00-003	12/18/2002	$19,374.00		$4,844.00	$19,374.00
San Rafael City Elementary	Marin	57/65458-00-006	12/18/2002	$14,213.00		$3,553.00	$14,213.00
San Rafael City Elementary	Marin	57/65458-00-007	12/18/2002	$13,236.00		$3,309.00	$13,236.00
Santa Ana Unified	Orange	57/66670-00-002	12/18/2002	$27,939.00		$6,985.00	$27,939.00
Santa Ana Unified	Orange	57/66670-00-003	2/26/2003	$22,937.00		$15,291.00	$22,937.00
Santa Ana Unified	Orange	57/66670-00-005	2/26/2003	$21,369.00		$14,246.00	$21,369.00
Santa Ana Unified	Orange	57/66670-00-006	2/26/2003	$20,780.00		$13,853.00	$20,780.00
Santa Ana Unified	Orange	57/66670-00-008	3/26/2003	$20,686.00		$13,791.00	$20,686.00
Santa Ana Unified	Orange	57/66670-00-010	3/26/2003	$20,761.00		$13,841.00	$20,761.00
Santa Ana Unified	Orange	57/66670-00-011	4/23/2003	$23,702.00		$15,801.00	$23,702.00
Santa Ana Unified	Orange	57/66670-00-012	4/23/2003	$22,086.00		$14,725.00	$22,086.00
Santa Ana Unified	Orange	57/66670-00-013	3/26/2003	$26,735.00		$17,823.00	$26,735.00
Santa Ana Unified	Orange	57/66670-00-014	5/28/2003	$14,093.00		$9,396.00	$14,093.00
Santa Ana Unified	Orange	57/66670-00-015	7/2/2003	$16,446.00		$10,963.00	$16,446.00

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District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Sweetwater Union High	San Diego	57/68411-00-011	7/2/2003	$30,429.00	$20,287.00		$50,716.00
Sweetwater Union High	San Diego	57/68411-00-012	5/28/2003	$28,007.00	$18,671.00		$46,678.00
Tahoe-Truckee Unified	Placer	57/66944-00-004	12/18/2002	$24,288.00		$6,072.00	$24,288.00
Tahoe-Truckee Unified	Placer	57/66944-00-008	12/18/2002	$27,687.00		$6,921.00	$27,687.00
Temecula Valley Unified	Riverside	57/75192-00-001	12/18/2002	$17,554.00	$4,388.00		$21,942.00
Thermalito Union	Butte	57/61549-00-006	7/2/2003	$19,393.00	$12,928.00		$32,321.00
Torrance Unified	Los Angeles	57/65060-00-001	12/18/2002	$25,330.00		$6,332.00	$25,330.00
Torrance Unified	Los Angeles	57/65060-00-002	12/18/2002	$26,468.00		$6,616.00	$26,468.00
Torrance Unified	Los Angeles	57/65060-00-003	12/18/2002	$26,883.00		$6,721.00	$26,883.00
Torrance Unified	Los Angeles	57/65060-00-004	12/18/2002	$17,568.00		$4,392.00	$17,568.00
Torrance Unified	Los Angeles	57/65060-00-005	12/18/2002	$26,105.00		$6,526.00	$26,105.00
Torrance Unified	Los Angeles	57/65060-00-006	12/18/2002	$22,563.00		$5,641.00	$22,563.00
Torrance Unified	Los Angeles	57/65060-00-007	12/18/2002	$23,675.00		$5,919.00	$23,675.00
Torrance Unified	Los Angeles	57/65060-00-008	12/18/2002	$22,658.00		$5,665.00	$22,658.00
Torrance Unified	Los Angeles	57/65060-00-009	12/18/2002	$27,073.00		$6,769.00	$27,073.00
Torrance Unified	Los Angeles	57/65060-00-010	12/18/2002	$41,023.00		$10,255.00	$41,023.00
Torrance Unified	Los Angeles	57/65060-00-011	12/18/2002	$20,565.00		$5,141.00	$20,565.00
Torrance Unified	Los Angeles	57/65060-00-012	12/18/2002	$27,257.00		$6,814.00	$27,257.00
Torrance Unified	Los Angeles	57/65060-00-014	12/18/2002	$21,157.00		$5,289.00	$21,157.00
Torrance Unified	Los Angeles	57/65060-00-015	12/18/2002	$43,128.00		$10,782.00	$43,128.00
Torrance Unified	Los Angeles	57/65060-00-016	12/18/2002	$25,909.00		$6,477.00	$25,909.00
Torrance Unified	Los Angeles	57/65060-00-018	12/18/2002	$24,953.00		$6,239.00	$24,953.00
Torrance Unified	Los Angeles	57/65060-00-019	12/18/2002	$25,895.00		$6,474.00	$25,895.00
Torrance Unified	Los Angeles	57/65060-00-021	12/18/2002	$26,852.00		$6,713.00	$26,852.00
Torrance Unified	Los Angeles	57/65060-00-024	12/18/2002	$20,361.00		$5,090.00	$20,361.00
Torrance Unified	Los Angeles	57/65060-00-027	12/18/2002	$43,325.00		$10,831.00	$43,325.00
Torrance Unified	Los Angeles	57/65060-00-028	12/18/2002	$45,175.00		$11,293.00	$45,175.00
Torrance Unified	Los Angeles	57/65060-00-029	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Torrance Unified	Los Angeles	57/65060-00-030	2/26/2003	$19,804.00		$13,269.00	$19,804.00
Tracy Joint Unified	San Joaquin	57/75499-00-001	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Tracy Joint Unified	San Joaquin	57/75499-00-002	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Tracy Joint Unified	San Joaquin	57/75499-00-003	12/18/2002	$13,446.00		$3,361.00	$13,446.00
Tracy Joint Unified	San Joaquin	57/75499-00-004	12/18/2002	$38,752.00		$9,687.00	$38,752.00
Traver Joint Elementary	Tulare	57/72223-00-001	5/28/2003	$9,600.00	$6,400.00		$16,000.00
Tustin Unified	Orange	57/73643-00-001	12/18/2002	$40,984.00		$10,246.00	$40,984.00
Tustin Unified	Orange	57/73643-00-002	12/18/2002	$42,051.00		$10,512.00	$42,051.00
Tustin Unified	Orange	57/73643-00-003	12/18/2002	$26,837.00		$6,709.00	$26,837.00
Tustin Unified	Orange	57/73643-00-004	12/18/2002	$17,470.00		$4,368.00	$17,470.00
Tustin Unified	Orange	57/73643-00-005	12/18/20	$23,335.00		$5,833.00	$23,[illegible]0
Tustin Unified	Orange	57/73643-00-006	12/18/20	$16,045.00		$4,011.00	$16,[illegible]0
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]

Modernization

ATTACHMENT B
LABOR COMPLIANCE PROGRAM
SCHOOL FACILITY PROGRAM
State Allocation Board Meeting, August 27, 2003

District	County	Application Number	Date Funded	Labor Compliance Program Costs			Total State Apportionment
				State Share		District Share	
				State LCP Increase	Financial Hardship	Cash Contribution	
Walnut Valley Unified	Los Angeles	57/73460-00-007	12/18/2002	$34,982.00		$8,745.00	$34,982.00
Walnut Valley Unified	Los Angeles	57/73460-00-008	12/18/2002	$15,271.00		$3,817.00	$15,271.00
Walnut Valley Unified	Los Angeles	57/73460-00-009	12/18/2002	$24,840.00		$6,211.00	$24,840.00
Washington Union Elementary	Monterey	57/66233-00-001	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Washington Union Elementary	Monterey	57/66233-00-002	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Weaverville Elementary	Trinity	57/71787-00-002	5/28/2003	$20,117.00	$13,411.00		$33,528.00
West Covina Unified	Los Angeles	57/65094-00-002	12/18/2002	$21,379.00		$5,345.00	$21,379.00
West Covina Unified	Los Angeles	57/65094-00-007	5/28/2003	$20,906.00		$13,937.00	$20,906.00
West Covina Unified	Los Angeles	57/65094-00-008	7/2/2003	$20,949.00		$13,965.00	$20,949.00
William S. Hart Union High	Los Angeles	57/65136-00-005	3/26/2003	$25,911.00	$17,273.00		$43,184.00
William S. Hart Union High	Los Angeles	57/65136-00-006	3/26/2003	$52,788.00	$35,192.00		$87,980.00
William S. Hart Union High	Los Angeles	57/65136-00-007	3/26/2003	$48,086.00	$32,058.00		$80,144.00
Wilmar Union Elementary	Sonoma	57/71019-00-001	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Windsor Unified	Sonoma	57/75356-00-003	4/23/2003	$17,923.00	$11,949.00		$29,872.00
Winters Joint Unified	Yolo	57/72702-00-002	12/18/2002	$16,433.00		$4,108.00	$16,433.00
Woodlake Union Elementary	Tulare	57/72272-00-001	12/18/2002	$18,325.00		$4,581.00	$18,325.00
Woodlake Union High	Tulare	57/72280-00-001	12/18/2002	$25,638.00		$6,409.00	$25,638.00
Woodland Joint Unified	Yolo	57/72710-00-003	12/18/2002	$20,934.00		$5,234.00	$20,934.00
Woodland Joint Unified	Yolo	57/72710-00-005	12/18/2002	$21,799.00		$5,450.00	$21,799.00
Woodland Joint Unified	Yolo	57/72710-00-008	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Woodland Joint Unified	Yolo	57/72710-00-009	12/18/2002	$31,092.00		$7,773.00	$31,092.00
Woodland Joint Unified	Yolo	57/72710-00-010	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Woodland Joint Unified	Yolo	57/72710-00-011	12/18/2002	$17,554.00		$4,388.00	$17,554.00
Woodland Joint Unified	Yolo	57/72710-00-013	12/18/2002	$13,071.00		$3,268.00	$13,071.00
Woodland Joint Unified	Yolo	57/72710-00-014	2/26/2003	$15,705.00		$10,470.00	$15,705.00
Woodland Joint Unified	Yolo	57/72710-00-015	2/26/2003	$35,670.00		$23,781.00	$35,670.00
Yosemite Union High	Madera	57/73734-00-002	7/2/2003	$10,679.00		$7,119.00	$10,679.00
Yreka Union High	Siskiyou	57/70516-00-002	5/28/2003	$20,708.00		$13,806.00	$20,708.00
Yuba City Unified	Sutter	57/71464-00-004	12/18/2002	$12,800.00		$3,200.00	$12,800.00
Yuba City Unified	Sutter	57/71464-00-006	12/18/2002	$19,595.00		$4,898.00	$19,595.00
Yuba City Unified	Sutter	57/71464-00-007	12/18/2002	$23,123.00		$5,781.00	$23,123.00
Yuba City Unified	Sutter	57/71464-00-009	12/18/2002	$46,462.00		$11,616.00	$46,462.00
Yuba City Unified	Sutter	57/71464-00-012	12/18/2002	$19,344.00		$4,836.00	$19,344.00
				$17,196,484.00	$1,387,600.00		$18,584,084.00

GRAND TOTAL FOR NEW CONSTRUCTION AND MODERNIZATION $27,931,232.00

PROOF OF SERVICE

(Code Civ. Proc. §§ 1013a, 2015.5)

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.
And Affected Parties and State Agencies

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 320 W. Fourth Street, Suite 600, Los Angeles, CA 90013.

On October 6, 2003, I served the enclosed **Department of Industrial Relations's Response to Test Claim Amendment,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Loa Angeles, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
A (1 orig.+ 2 copies)	Ms. Shirley Opie Asst. Executive Director Commission on State Mandates 980-Ninth Street, Suite 300 Sacramento, CA 95814	State Agency
A	Mr. Ramon dela Guardia Deputy Attorney General Department of Justice 1300 I. Street, Suite 125 Sacramento, CA 95814	State Agency
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842	Interested Party
A	Dr. Carol Berg Education Mandated Cost Network 1121 L. Street, Suite 1060 Sacramento, CA 95814	Interested Party
A	Executive Director, (E-08) State Board of Education 721 Capitol Mall, Room 558 Sacramento, CA 95814	State Agency
A	Mr. Michael Havey State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816	State Agency
A	Ms. Beth Hunter, Director Centration, Inc. 8316 Red Oak Street, Suite 101 Rancho Cucamonga, CA 91730	Interested Person

A	Mr. Tom Lutzenberger (A-15) Principal Analyst Department of Finance 915 L. Street, 6th Floor Sacramento, CA 95814	State Agency
A	Mr. Bill McGuire Assistant Superintendent Clovis Unified School District 1450 Herndon Clovis, CA 93611-0599	Claimant
A	Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Interested Person
A	Mr. Keith B. Petersen President SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Claimant
A	Mr. Gerald Shelton, Director (E-8) California Department of Education Fiscal & Administrative Services Division 1430 N. Street, Suite 2213 Sacramento, CA 95814	State Agency
A	Mr. Steve Shields Shields Consulting Group, Inc. 1536 - 36th Street Sacramento, CA 95816	Interested Party
A	Mr. Steve Smith, CEO Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Interested Party
A	Mr. Scott Kronland Altshuler, Berzon, Nassbaum, Rubin & Demain 177 Post Street, Suite 300 San Francisco, CA 94108	Interested Party

A	Ms. Sandy Reynolds Reynords Consulting Group, Inc. P.O. Box 987 Sun City, CA 92586	Interested Party
A	Mr. Keith Gmeinder Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Interested Party

Executed on August 14, 2003, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Maria Salazar, Declarant

SixTen and Associates
Mandate Reimbursement Services

EXHIBIT N

ITH B. PETERSEN, MPA, JD, President
32 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

October 17, 2003

RECEIVED
OCT 20 2003
COMMISSION ON STATE MANDATES

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 01-TC-28
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

I have received the comments of Department of General Services (DGS) by the Office of Public School Construction, dated September 15, 2003, to which I now respond on behalf of the test claimant.

DGS cites subdivision (b) of Section 17556 incorrectly. The objections stated additionally fail for the following reasons:

1. **The Comments of DGS are Incompetent and Should be Excluded**

Test claimant objects to the Comments of the DGS, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information and belief."

The comments of DGS do not comply with this essential requirement.

2. Exclusive Use of Local Funds is Not Realistic

DGS argues that the law does not compel a district to obtain funding from the State as a condition of building schools, school districts may choose to build facilities through the use of district raised funds. The use of locally raised funds is not realistic.

(a) Districts' Ability to Borrow is Strictly Limited

The authority to issue local school bonds is found in Chapter 1 of Part 10 in Division 1 of Title 1 of the Education Code, commencing at Section 15100. This authority is strictly limited.

Education Code Section 15100 allows a district, when in its judgment it is advisable, and requires it, upon a petition of the majority of its qualified electors, to order an election and submit to the electors of the district the question whether the bonds of the district shall be issued and sold for the purpose of raising money for the purchase of school lots, the building or purchasing of school buildings and the making of alterations or additions to school buildings. Section 15102 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district. Section 15106 provides that unified school districts or community college districts may not exceed 2.5 percent of the taxable property of the district.

Chapter 1.5 of Part 10 sets forth the Strict Accountability in Local School Construction Bonds Act of 2000, commencing with Section 15264. ("Proposition 39 bonds") Here again, bonded indebtedness is strictly limited.

Section 15266 provides that the Act is an alternative to authorizing and issuing bonds pursuant to Chapter 1 or Chapter 2 (commencing with Section 15300) when the governing board of a school district or community college district decides, pursuant to a two-thirds vote, to pursue the authorization and issuance of bonds for school facilities. Section 15268 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district and may only be issued if the tax rate levied would not exceed thirty dollars ($30) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIIIA of the California Constitution. Section 15270 provides that a unified school district may not authorize or issue bonds that exceed 2.5 percent of the taxable property of the district and may only be issued if the tax rate levied to meet the requirements of Section 18 of Article XVI of the California Constitution in the case of indebtedness incurred pursuant to this chapter at a single election, by a unified school district, would not exceed sixty dollars ($60) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to

increase in accordance with Article XIIIA of the California Constitution.

Chapter 2 of Part 10 sets forth the Bonds of School Facilities Improvement Districts Act, commencing with Education Code Section 15300. Here again, bonded indebtedness is strictly limited.

Section 15300 provides that the chapter provides a method for the formation of school facilities improvement districts consisting of a portion of the territory within a school district or community college district and for the issuance of general obligation bonds by the school facilities improvement district. Section 15330 provides that the total amount of bonds issued shall not exceed 1.25 percent of the taxable property of the school facilities improvement district. Section 15334.5 further provides that no bonded indebtedness may be incurred pursuant to this chapter in an amount that would cause the bonded indebtedness of the territory of the school district or community college district of which the school facilities improvement district is a part, to exceed the limitation of indebtedness specified in Sections 15102 and 15106.

To the extent school districts and community college districts already have bonded indebtedness at or near these limits, the argument of DGS that these districts need not apply for state funding and may build urgently needed[1] school facilities through the use of district raised funds is specious reasoning.

(b) The Legislative History of School Finance Legislation Shows an Intent of the Legislature that the State Should Provide the Financing For Schools

A review of the legislative history of school finance shows that the Legislature knows that the State must bear the major burden of financing the construction of new school facilities.

Chapter 4 of Part 10 of Division 1 of Title 1 of the Education Code sets forth the State School Building Aid Law of 1949, commencing with Education Code Section 15700. Section 15700 provides:

> "The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in

[1] In some instances the "need" for new school facilities is created by the state. For example Education Code Section 16047 dictates a minimum square footage per pupil in grades kindergarten through 6th grade; Section 16052 dictates a minimum for grades 7 through 8; and Section 16054 dictates a minimum for grades 9 through 12.

providing necessary and adequate school sites and buildings for the pupils of the public school system, the system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.

In adopting this act, the Legislature considers that the great need in school construction is for adequate classrooms for the education of the pupils of the public school system...To the end that school classrooms may be made available at once and to all school districts in need of such classrooms..." (emphasis supplied)

Section 15704 requires the State Allocation Board to adopt rules which gives:

"...priority in allocating funds to districts to those districts where the children will benefit most from additional schoolhouse facilities...based on acuteness of overcrowding, on sudden growth in attendance, on amount of local tax funds expended for housing of a character within the purposes of this chapter, and on the time the district's application has been ready for allotment..."

Chapter 6 contains the State School Building Aid Law of 1952, commencing with Education Code Section 16000. Section 16001 provides:

"The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in providing necessary schoolsites and buildings for the pupils of the public school system, this system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.

In adopting this chapter, the Legislature considers that the great need in school construction is for classrooms for the education of the pupils of the public school system...To the end that school classrooms may be made available at once and to all school districts in need of such classrooms..." (emphasis supplied)

Section 16007 requires the State Allocation Board to adopt rules which would:

"...give priority in allocating funds to districts to those districts where the children will benefit most from additional schoolhouse facilities...based on acuteness of overcrowding, on rapidity of growth in attendance, and on the time the district's application has been ready for allotment..."

Article 3 of Chapter 6, contains provisions for School Housing Aid for Exceptional Children, commencing with Education Code Section 16190. Section 16190 provides:

> "The board may make apportionments...from any state bonds heretofore or hereafter authorized by the electorate for state school building aid...for assistance to school districts in providing necessary housing and equipment for the education of exceptional children."[2]

Section 16196 provides that:

> "...Except as otherwise provided in this section, not more than 50 percent of the amount of any apportionment made pursuant to this section shall be repaid..."

Article 4 of Chapter 6, commencing with Section 16210, is entitled School Housing Aid For Compensatory Education Purposes. Section 16210 sets aside $35 million dollars of the proceeds of the sale of bonds authorized by the State School Building Aid Bond Law of 1966 to assist school districts. Section 16210 provides:

> "...The Director of Compensatory Education may establish priorities for purposes of allocations and grants under this article based upon comparative needs of school districts and the urgency thereof. No interest shall be charged to a school district for an allocation or grant made under this article to the school district..."

Section 16211 provides that grants may be made to:

> "...districts...maintaining schools for kindergarten, or any of grades 1 to 6, inclusive...which have reduced the number of pupils to full-time equivalent classroom teachers in kindergarten and any of grades 1 to 6, inclusive, in those schools to a ratio of 25 to 1, or better. The grants shall be made for...¶...any of the following:
>
> (a) Acquisition, by purchase or lease, and the installation and equipping of portable classrooms for classroom instructional purposes.

---

[2] Education Code Section 16191 defines "exceptional children" to mean "physically handicapped pupils, mentally retarded pupils, educationally handicapped pupils, multihandicapped pupils, or pupils enrolled in development centers for the handicapped required or allowed to be educated pursuant to Part 30 (commencing with Section 56000)."

(b) Acquisition of land for schoolsites.

(c) Construction and equipping of permanent school buildings and facilities.

(d) Reconstruction, renovation or remodeling of existing school buildings and facilities.

(e) Any combination of the above."

Section 16212 allows:

> "In lieu of grants to districts pursuant to subdivision (a) of Section 16211...the board may expend moneys available for grants under this article for the acquisition of portable buildings and facilities and equipment by the state, and thereafter convey the same to the eligible districts...(in) the form of sale, lease, outright grant, or other suitable form of conveyance, as determined by the board."

Section 16214 provides:

> "For each school district which receives a grant or allocation pursuant to this article...the Controller shall compute an amount equal to one cent ($0.01) on each one hundred dollars ($100) of the assessed valuation of property within the district...(¶)...The Controller shall make the computations and deductions required by this section for 30 fiscal years or until the time as the total of the amounts so deducted equal 50 percent of the amount of the grant or allocation which was made to the school district, whichever first occurs...(¶)...the maximum rate of school district tax for the school district for which the computation is made shall be increased by one cent ($0.01) per each one hundred dollars ($100) of the assessed value of property within the district..."

Article 5 of Chapter 6, commencing with Education Code Section 16230, sets forth the provisions for School Housing Aid For Districts Impacted by Seasonal Agricultural Employment. Section 16230 sets aside $1,500,000 of the proceeds of bonds issued under the State School Building Aid Bond Law of 1966:

> "...for the acquisition of portable school and classroom buildings (and) may be made available by the board, upon the recommendation of the Director of Compensatory Education, to any school district which, because of the influx for temporary periods in the school year of large numbers of persons employed in seasonal agricultural work, experiences emergency increases in school enrollments of such magnitude as to make it impossible or

impractical to accommodate the additional pupils in existing school buildings and facilities available to the district."

Section 16231 provides:

"...The use of the portable school and classroom buildings may be made available to a school district by letting the same to the district free of charge, or by lease, or by conveying the same to the district under lease-purchase agreement, sale, or outright grant, as determined by the State Allocation Board upon consultation with, and the advice of, the Director of Compensatory Education..."

Article 7 of Chapter 6, commencing with Education Code Section 16260, provides for the Children's Center Construction Law of 1968.

Section 16261 states:

"The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to provide assistance to school districts and to county superintendents of schools for the construction of children's center facilities. Children's centers are of general concern and interest to all the people of the state, and the education and care of children of working parents are a joint obligation of both the state and local agencies operating children's centers..." (emphasis supplied)

Section 16263 requires:

"...The board shall adopt any rules and regulations (which) shall establish a system of priorities (and) give special consideration to school districts...containing substantial numbers of families who are recipients of aid to families with dependent children or who are former or potential recipients of the aid..."

Section 16272 provides for matching funds:

"For each one dollar ($1) of money allocated to a local agency which is expended for a project, the local agency shall expend local funds for the project in an amount which bears the same percentage to the one dollar ($1) as the modified assessed valuation per unit of the average daily attendance of the local agency bears to the statewide modified assessed valuation per average daily attendance of all local agencies..."

Article 9 of Chapter 6, commencing with Education Code Section 16310, is entitled School Housing Aid For Rehabilitation and Replacement of Structurally Inadequate School Facilities. Section 16312 states:

> "The Legislature hereby declares that it is in the interest of the state and the people thereof to provide assistance to school districts in rehabilitating or replacing structurally unsafe school facilities inasmuch as the education of children is an obligation of the state, and the obligation carries with it a corresponding responsibility for the physical safety of children while attending school." (emphasis supplied)

Section 16313 states:

> "It is the intent of the Legislature in enacting this article to provide a means through repayable state loans for school districts...to house their pupils in facilities that are structurally safe."

Section 16317 requires the State Allocation Board to adopt rules which:

> "...shall give priority in allocating funds to districts which will benefit most from the reconstruction or replacement of schoolhouse facilities...based on the age and structural safety of existing buildings at the school or schools where the construction or reconstruction will occur, acuteness of overcrowding and density of population in the attendance areas affected, or any other factors that will insure that the greatest need will be served in allocating funds under this article."

Chapter 8 of Part 10 contains the Urban School Construction Aid Law of 1968, commencing with Education Code Section 16700. Section 16701 provides:

> "The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid urban school districts of the state in reconstructing, modernizing, or replacing schoolsites and buildings for pupils of the public school system who are now housed in substandard schools..."

Section 16705 requires the State Allocation Board to adopt rules which:

> "...shall give priority in allocating funds to urban districts to those districts where the children will benefit most from schoolhouse facilities...based upon the age of existing buildings and the acuteness of overcrowding at

> the school or schools where the construction or reconstruction will occur, the density of population in the attendance areas affected, or any other factors that will insure that the greatest need will be served."

Section 16720 provides for repayment:

> "Each district to which an apportionment or apportionments has been made under this chapter shall repay a portion or all of the principal amount of such apportionment or apportionments and the accrued interest thereon in 30 equal annual payments, as shall be determined by the Controller pursuant to this section...(¶)...In any year, beginning with the 1981-82 fiscal year, in which the annual repayment exceeds the amount which may be raised by a levy of 0.0075 percent of the full value in the district,...the Controller shall grant a deferment of the annual repayment which is in excess of the amount that would be produced by a tax of 0.0075 percent of the full value of the district..."

Chapter 12 of Part 10 establishes the "Leroy F. Greene State School Building Lease-Purchase Law of 1976", commencing with Section 17000. Section 17001 states:

> "(a) The Legislature hereby declares that it is in the interest of the state and the people thereof for the state to reconstruct, remodel, or replace existing school buildings that are educationally inadequate or that do not meet present-day structural safety requirements, and to acquire new schoolsites and buildings for the purpose of making them available to local school districts for the pupils of the public school system, that system being a matter of general concern <u>inasmuch as the education of the children of the state is an obligation and function of the state.</u>"

Article 11 of the Leroy F. Greene School Facilities Act of 1998, commencing with Education Code Section 17078.10, provides for:

> " (c) ..."preliminary apportionment"... for eligible applicants with critically overcrowded schools in advance of full compliance with all of the application requirements otherwise required for an apportionment pursuant to this chapter..."

Chapter 14 of Part 10, commencing with Education Code Section 17085 is entitled the "Emergency School Classroom Law of 1979" and is cited as the State Relocatable Classroom Law of 1979. Section 17086 states:

> "...the Legislature recognizes that the ad valorem tax is no longer available

> as a source of revenue for the construction of necessary school facilities. The Legislature considers that the greatest need in school construction is for classrooms for the education of public school pupils. It is the intent of the Legislature to satisfy this primary need to the greatest extent possible before providing any additional educational facilities, regardless of how desirable such additional facilities may be."

Chapter 15 of Part 10, commencing with Section 17100, established the School District Revenue Bond Act. This Act is based on the finding of the legislature that:

> "The Legislature hereby finds and declares that the State School Building Lease-Purchase Fund, pursuant to Section 17008, and the proceeds from the sale or lease of surplus school property are the two sources available to school districts to finance the construction of school facilities to relieve overcrowding. However, these sources are still insufficient to meet the construction needs statewide of school districts." (emphasis supplied)

In summary, the last 60 years of legislative history shows repeated and consistent recognition that school districts are unable to meet the school construction needs of their pupils. The history repeatedly reveals an admission that the education of school children is the primary responsibility of the state. The history of the inability of school districts and the obligation of the state to educate children results in the above recited litany of state money for school construction at low or no interest rates, repayment requirements of less than the amounts apportioned, and repayment terms unavailable anywhere else. Education of children is an obligation and function of the state. Classrooms are required to provide that education. Therefore, building classrooms is a state obligation.

3. Non-Legal Compulsion Requires School Districts' Participation

DGS argues that the law does not compel a district to obtain funding from the State as a condition of building schools, school districts may choose to build facilities through the use of district raised funds. This suggestion, however, results in non-legal compulsion in the form of double taxation which is prohibited by *City of Sacramento v. State of California*.(1990) 50 Cal.3d 51, 70-76. (hereinafter, referred to as *Sacramento II*)

Sacramento II Facts:

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified"

unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and has sought to maintain federal compliance ever since.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter chapter 2/78), to conform to Public Law 94-566, and required the state and all local governments to participate in the state unemployment insurance system on behalf of their employees.

Sacramento I Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 (hereinafter *Sacramento I*) the Court of Appeal affirmed concluding, inter alia, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B, and the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under Section 9(b).[3]

In other words, *Sacramento I* concluded that the loss of federal funds and tax credits did not amount to "compulsion".

Sacramento II Litigation

[3] Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

After remand, the case proceeded through the courts again. In *Sacramento II*, the court held that the obligations imposed by chapter 2/78 failed to meet the "program" and "service" standards for mandatory subvention because it imposed no "unique" obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was reversed.

However, the court disapproved its prior ruling in *Sacramento I* which held that the loss of federal funds and tax credits did not amount to "compulsion". Therefore, both state and local governments could levy taxes for their chapter 2/78 coverage obligations without reduction of their article XIII B fiscal limits.

Sacramento II "Compulsion" Reasoning

Plaintiffs argued that the test claim legislation required a clear legal compulsion not present in Public Law 94-566. Defendants responded that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.

In disapproving *Sacramento I*, the court explained:

> "If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments." (Opinion, at page 74, emphasis added)

Plaintiffs argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state's employers faced only with the federal tax. The court replied to this suggestion:

> "However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards." (Opinion, at page 74)

In other words, failure to comply with the federal requirements was not an acceptable option because it would result in double taxation. Terminating its own system was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving the state without discretion. The only reasonable alternative was to comply with the new legislation, since the state was practically

"without discretion".

The Supreme Court in *Sacramento II* concluded by stating that there is no final test for a determination of "mandatory" versus "optional":

> "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Opinion, at page 76)

"Kern" Affirms that this is a Form of Non-Legal Compulsion

In *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 ("Kern"), the supreme court first made it clear that the decision did not hold that legal compulsion was necessary in order to find a reimbursable mandate:

> "For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement under article XIII B, section 6, because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate." (Opinion, at page 736, emphasis in the original)

After concluding that the facts in *Kern* did not rise to the standard of non-legal compulsion, the court affirmed that double taxation or other draconian consequences could result in non-legal compulsion:

> "In sum, the circumstances present *in the case before us* do not constitute the type of non-legal compulsion that reasonably could constitute, in claimants' phrasing, a 'de facto' reimbursable state mandate. Contrary to the situation that we described in (Sacramento II), a claimant that elects to discontinue participation in one of the programs *here at issue* does not face 'certain and severe...penalties' such as 'double...taxation' or other 'draconian' consequences (citation), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations."

(Opinion, at page 754, emphasis supplied to illustrate holding is limited to facts presented)

Therefore, "carrot and stick" situations must still be determined on a case by case basis.

Application of Facts to Law

As noted by DGS, in November 2002, the voters approved Proposition 47, the Kindergarten-University Public Education Facilities Bond Act of 2002, which allocated $8,085,800,000 for new construction and $3,294,200,000 for the modernization of school facilities. This is a state general obligation bond measure to be repaid by taxation levied on all residents of the state, including school district constituents. Also as noted by DGS, if a school district chooses to participate, it is required to initiate and enforce a Labor Compliance Program approved by the Department of Industrial Relations.

DGS suggests that, if a school district wants to build needed new facilities, but does not want to initiate and enforce a Labor Compliance Program, the district has the discretion to build those facilities through the use of district raised funds. These new "district raised funds" would need to be repaid from taxes raised only from the constituents of that school district. Any "election" to use district funds does not relieve the residents of that district from still paying taxes to reduce the state bonds. The citizens of that district would then be required to pay taxes both to the state to repay the state bonds, and to the district to repay the district raised funds. Net result: double taxation.

The only reasonable alternative to school districts is to use available Proposition 47 state funds and to enforce a labor compliance program. The facts presented in this case constitute the type of non-legal compulsion that reasonably would constitute a 'de facto' reimbursable state mandate.

4. Government Code Section 17556(d) Does Not Apply to Construction Funding

DGS offers Government Code Section 17556, subdivision (d)[4] for the proposition that test claimants are precluded from recovery because any new construction costs can be paid for by local bonds, sale of surplus property or other revenue sources, including

[4] Government Code Section 17556, subdivision (d), precludes a finding of mandated costs if the school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

developer fees. Bond revenues, sales proceeds and developer fees are not service charges, fees or assessments to the consumer of public services.

In addition, Section 17556 presupposes the existence of a mandate which is contrary to the state's position. Also, subdivision (d) refers to the levy of service charges, fees and assessments against students. The levy of service charges, fees and assessment against students for any aspect of public education would be constitutionally prohibited by Article 9, Section 5, of the California constitution which requires the state to provide free schools.

In addition, the California Department of Education has issued Fiscal Management Advisory 97-02[5] which makes it quite clear that tuition, fees, deposits and other charges may only be made when specifically authorized by law. The examples set forth in the advisory clearly demonstrate that the tuition, fees, deposits and other charges referred to in Government Code Section 17556, subdivision (d) clearly do not encompass sources for the construction of school facilities.

In conclusion, the response of the DGS should be ignored as legally incompetent for its failure to comply with Section 1183.02 of Title 2, California Code of Regulations. In addition, the test claim should be approved as submitted because the comments of DGS are both factually and legally incorrect.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

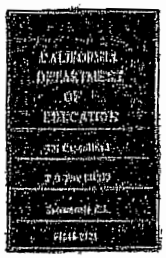
C: Per Mailing List Attached

[5] A copy of Fiscal Management Advisory 97-02 and its cover letter dated October 30, 1997 is attached hereto as Exhibit "A" and is incorporated herein by reference.

EXHIBIT A
CALIFORNIA DEPARTMENT OF EDUCATION
FISCAL MANAGEMENT ADVISORY 97-02

1550

BELAINE EASTIN
State Superintendent of Public Instruction



FISCAL MANAGEMENT ADVISORY 97-02

October 30, 1997

TO: County and District Superintendents

FROM: Patrick Keegan, Deputy Superintendent
Finance, Technology, and Information Services

SUBJECT: Fees, Deposits, and Other Charges

School district administrators frequently ask the Department to provide additional guidance on the matter of fees. This Advisory which supersedes Fiscal Management Advisory 87-03 is provided for that purpose, and reflects the most recent legislation and California Supreme Court interpretations. The following narrative contains a number of conclusions based on legal references. Most of these references are to a particular case or opinion. Those conclusions without attribution represent the opinions of the Department's Legal Office.

TUITION, FEES, DEPOSITS, AND OTHER CHARGES IN CALIFORNIA PUBLIC SCHOOLS, K-12 AND ADULT SCHOOLS

I. A Free Public School System

> "A pupil enrolled in a school shall not be required to pay any fee, deposit, or other charge not specifically authorized by law."[1]

With this language the State Board of Education made clear that fees are not to be imposed except where specifically authorized by law. This administrative regulation, or "law" of the State Board was promulgated based on the authority of Article IX, Section 5 of the California Constitution. Article IX, Section 5 provides for a free school system:

> "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

The State Supreme Court in 1874 held that this provision entitled students to be educated at public expense.[2]

The Attorney General has, in several opinions, [3]consistently ruled that school districts do not have authority to levy fees for any elective or compulsory class. Further, districts may not require security deposits for locks, lockers, books, class apparatus, musical instruments, uniforms, or other equipment.

The administrative regulation noted above prohibited fees except those "...specifically authorized by law." Certain fees have been authorized by law since the rule was promulgated.

The 1984 California Supreme Court decision, Hartzell v. Connell,[4] raises serious questions about the imposition of a non-statutory fee for extracurricular activities. The lead opinion acknowledges that fees may be charged for "recreational" activities but not for "educational" activities. Extracurricular activities are described in the opinion as an integral component of public education; they are a part of the educational program according to this decision.

The court held that the "...imposition of fees for educational activities offered by public high school districts violates the free school guarantee. The constitutional defect in such fees can neither be corrected by providing waivers to indigent students nor justified by pleading financial hardship."

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[1]Title 5 California Code of Regulations, Section 350
[2]Wade v. Flood, 48 Cal. 36, 51 (1874)
[3]Ops. Cal. Atty. Gen. No. NS-4114, 1942
[4]35 Cal. 3d 899 (1984)

II. Fees Authorized by Law

The Education Code specifically authorizes certain fees. Except for home to school transportation fees discussed later, none of those Code sections have been challenged and the Hartzell v. Connell decision did not directly rule on their legality. Therefore, districts may continue to levy fees as authorized in the following Education Code sections:

A. Fees that a district may collect for furnishing materials to a pupil for items the pupil has fabricated from such materials for his or her own use. Such fees may not exceed cost. (Education Code section 39526)

B. Fees that a district may charge pupils for transportation to and from school under limited circumstances. (Education Code sections 38028, 39807.5 and 39837)

C. Charges for food served to pupils. (Education Code sections 39870-39874, 39876)

D. Charges to the parent or guardian of any pupil who loses a book, defaces books or other school property. Liability limits for lost items or damage are adjusted annually by the State Superintendent of Public Instruction pursuant to statute. (Education Code section 48904)

E. Charges for field trips or excursions, principally for transportation. The authority to charge a fee for field trips or excursions is not directly stated in the Education Code. Rather, it provides that "No pupil shall be prevented from making the field trip or excursion because of lack of sufficient funds." (Education Code section 35330)

F. Districts must make medical, hospital, or accident insurance available to pupils who may be injured while participating in field trips. The cost of the insurance may be paid by the pupil or his parents. (Education Code section 35331)

G. Governing boards may expend from the general fund of the district any money which is budgeted for community services to establish and maintain community service classes. They may charge student fees not to exceed the cost of maintaining such classes. (Education Code section 51815)

H. A governing board may charge a tuition fee to adults for any class except classes in English and citizenship for foreigners, classes in elementary subjects, and classes for which high school credit is granted when taken by a person not holding a high school diploma. (Education Code section 52612)

I. Districts must provide, and each member of an athletic team must have, accidental death, injury and medical insurance coverage. The cost of such insurance may be paid by the pupil unless the pupil is unable to pay for such insurance. (Education Code sections 32220-32224)

J. A school district may require a deposit from a borrower of school band instruments, music, uniforms, and other regalia for use on an excursion to a foreign country. (Education Code section 40015)

K. Pupils whose parents are actual and legal residents of an adjacent foreign country or an adjacent state shall be charged a tuition fee. (Education Code sections 48050 and 48052)

L. The regulations of the governing board may provide for the sale of materials purchased from the incidental expense account to pupils in classes for adults, for use in connection with such classes. The proceeds of all such sales shall be deposited in that account (Education Code section 52615). A high school district board may charge for textbooks used in classes for adults or impose a refundable deposit on loaned books. (Education Code section 60410)

M. The governing board of a school district may sell class material to persons enrolled in classes for adults. This may include materials necessary for the making of articles by students enrolled in adult education. The materials shall be sold at not less than the cost to the district; any article made shall be the property of the person who made it. (Education Code section 39527)

N. The governing board of any elementary, high, or unified school district may charge a fee for school camp programs, provided that payment of such fee is not mandatory. No pupil shall be denied the opportunity to participate in a school camp program because of non-payment of the fee. (Education Code section 35335)

O. Families utilizing child care and development services shall be charged a fee by the school district, but no fees shall be assessed against families whose children are enrolled in the state preschool program, or for such services provided to severly handicapped children (Education Code sections 8263(e)(f) and 8250(d).). Standards for fees appear in Education Code section 8265. The school district may also impose a fee for a program of supervision of children before and after school. (Education Code section 8487 and 8488)

P. School districts may offer a fingerprint program for children in kindergarten or newly enrolled children and shall assess a fee to the parent or guardian who chooses to participate. (Education Code section 32390)

III. District Obligation to Provide Without Charge

The opinions of the Attorney General mentioned earlier indicate that charges may not be levied for the following:

A. A deposit in the nature of a guarantee that the district would be reimbursed for loss to the district on account of breakage, damage to, or loss of school property.

B. An admission charge to an exhibit, fair, theater or similar activity for instruction or extracurricular purposes when a visit to such places is part of the district's educational program.

C. A tuition fee or charge as a condition to enrollment in any class or course of instruction, including a fee for attendance in a summer or vacation school, a registration fee, a fee for a catalog of courses, a fee for an examination in a subject, a late registration or program change fee, a fee for the issuance of a diploma or certificate, or a charge for lodging.

D. Membership fees in a student body or any student organization as a condition for enrollment or participation in athletic or other curricular or extracurricular activities sponsored by the school.

E. Education Code section 48053 prohibits charging an apprentice, or his or her parents or guardian, for admission or attendance in any class.

F. Textbooks and workbooks must be furnished without charge by elementary and high school districts except for classes for adults. A charge may not be made for their use (Education Code sections 60070 and 60410).

Education Code section 40011 provides:

> "Writing and drawing paper, pens, inks, blackboard erasers, crayons, lead pencils, and other necessary supplies for the use of the schools, shall be furnished under direction of the governing board of the school district."

The Attorney General has issued an opinion interpreting this language. He was asked specifically whether a student could be required to furnish any or all of the following:

A. Art material for art classes and mechanical drawing sets

B. Cloth to be used in dressmaking classes and wood for carpentry classes

C. Gym suits and shoes for physical education classes

D. Bluebooks in which to write a final examination

E. Paper on which to write a theme or report when such theme or report is a required assignment.

The Attorney General concluded that all the above-mentioned materials were "necessary supplies" and as such had to be furnished by the school district. He reasoned that the articles listed in A, B, C, and D, "appear to be supplies that must be available to students in order to participate in regular classroom work in the particular subjects involved." As to E, the Attorney General stated that "paper to be used on which to write a theme or report must also be furnished when required as a part of the classroom activity."[5]

The Attorney General limited his discussion to the questions specifically asked and did not state what materials a district is not obligated to furnish. However:

> "[s]upplies,...must be furnished free of cost to students when the supplies are what might be termed 'school supplies' and are necessary in order for the students to pursue a course of study."

The Attorney General's use of the term "school supplies" is meant to exclude from the district's obligation those items or materials which, although necessary for class participation, are essential regardless of whether or not a person is a student. For example, a school district would not be obligated to furnish corrective lenses, clothes, and so forth. Such items are needed whether or not one is a student.

Specifically with respect to gym clothes, Education Code section 49066(b) states that: "No grade of a pupil participating in a physical education class, however, may be adversely affected due to the fact that the pupil does not wear standardized physical education apparel where the failure to wear such apparel arises from circumstances beyond the control of the pupil," such as, for example, lack of funds.

It should be determined whether a fee for a particular item is specifically authorized by statute. If not, it should be determined whether a particular item is required by law to be furnished free or whether it comes under the category of "necessary supplies." If it does, then the district must furnish the item without charge.

It is the position of the Department that a school district may require its students to purchase their own gym clothes of a district specified design and color so long as the design and color are of a type sold for general wear outside of school. Once the required gym uniforms become specialized in terms of included logos, school name or other characteristics not found on clothing for general use outside of school, they are school supplies and the district must provide those uniforms free of charge.

It is the opinion of the Department's legal office that a school district may not charge a fee or require students to purchase necessary materials even if the

[5]Ops. Cal Atty. Gen. No. NS-4414, 1942

district maintains a special fund to assist students with financial need or waives such fee or charge for students with financial need. The fee or charge still remains a condition for all other students not so assisted. The court in Hartzell v. Connell, discussed below, held that a fee-waiver policy for needy students does not save the fee.

IV. Extracurricular Activities

On April 20, 1984, the California Supreme Court decided, in Hartzell v. Connell 35 Cal. 3d 899, that a public school district may not charge fees for educational programs simply because they are denominated "extracurricular." As expressed by the lead opinion, the court concluded that "the imposition of fees as a precondition for participation in non-statutory educational programs offered by public high schools on a noncredit basis violates the free schools guarantee of the California Constitution and the prohibition against school fees contained in Title 5, Section 350 of the California Administrative Code." (now California Code of Regulations).

Some significant observations by the various justices and ramifications of the decision are as follows:

A. The lead opinion was written by Chief Justice Bird with Justices Broussard and Reynoso concurring specifically. The approach taken to the issue by the Chief Justice holds that the free school guarantee extends to all activities which constitute an integral, fundamental part of elementary and secondary education or which amount to necessary elements of any school's activity. The opinion concludes that extracurricular activities constitute an integral component of public education.

B. The lead opinion holds that fee based extracurricular activities are also illegal under Title 5 California Code of Regulations 350 (5 CCR 350) which prohibits the imposition of "...any fee, deposit, or other charge not specifically authorized by law."

C. Apart from the fee issue, this particular holding has wide reaching significance. Along with constitutional provisions and statutes, any regulation adopted by the State Board of Education or Superintendent of Public Instruction is a "law." Education Code section 35160, the so-called "permissive code" authority allows school districts to carry on any activity or act in any manner "...which is not in conflict with or inconsistent with, or preempted by, any law..."

D. As noted above, several provisions of the Education Code permit school districts to impose charges or fees, e.g.: Section 35330 (field trips and excursions), Section 48909 (charge for lost textbook), Section 35335 (school camps), Sections 32220-32224 (requires members of athletic teams to purchase death, accident and hospital insurance), Section 40015 (deposit for use of a school musical instrument), Section 39804 (pupil transportation), and so forth. In

his separate opinion, in which he concurs in the judgment, Justice Kaus raised the question whether, under the decision, any of the statutory fees and charges (Paragraph II, supra) would be unconstitutional. Because none of the statutory fees were in issue, the court made no ruling in that respect. The Hartzell decision is binding precedent for invalidation of any non-statutory fees of the type examined by that court. Except for home to school transportation fees (Section 39807.5), the constitutionality of the statutory fees and charges is yet to be judicially decided.

E. In a footnote the lead opinion states that the: "[e]ducational activities are to be distinguished from activities which are purely recreational in character. Examples of the latter might include attending weekend dances or athletic events." This statement may cause future litigation on the issue of whether the challenged fee based activity is educational or recreational. The issue is complicated by the fact that while citing an athletic event as possibly being recreational, the court invalidated a fee based athletic activity because it was held to be educational. This could be reconciled by interpreting the footnote as allowing a fee if the participation is solely as a spectator.

F. The defendants argued that their fee-waiver policy for needy students satisfies the requirements of the free school requirement. They suggested that the right to be educated at public expense amounts merely to a right not to be financially prevented from enjoying educational opportunities. The court answered that such an argument plainly contradicts the plain free school language of the Constitution.

V. Home to School Transportation Fees

Education Code section 39807.5 allows school districts to charge parents a fee for home to school transportation provided to their children by the district. On a constitutional challenge the California Supreme Court in Arcadia School District v. State Department of Education,[6] upheld the transportation fee statute. According to the court, permitting school districts to charge parents and guardians for the transportation of students to and from school does not violate the California Constitution free school guarantee. Unlike the extracurricular activities held to be free in Hartzell v. Connell (supra), transportation is neither an educational activity nor an essential part of school activity. Home to school transportation is not included within the free school guarantee.

[6] 2 Cal.4th 251 (1992)

VI. Tuition for Summer School.

No statute specifically authorizes tuition for summer school. Therefore, tuition or any fee or charge is prohibited under Section 350 of Title 5 California Code of Regulations (supra at page 1), which according to the court in Hartzell v. Connell (supra), is a law within the meaning of the so-called permissive provisions of Education Code section 35160.

VII. Community Service Classes

The governing board of a school district is authorized to maintain community service classes and to charge fees to cover the costs of maintaining such classes (Education Code sections 51810 and 51815). These classes may be convened at any time during the school year as may be determined by the governing board (Education Code section 51812).

Community service classes are not intended to teach required courses that students in grades K-12 must complete as part of their instructional programs. Community service classes usually include classes in music, drama, art, handicraft, science, literature, nature study, nature contacting, aquatic sports, athletics, and other such classes of general interest to the community (See Education Code, section 51810). These classes are primarily intended for adults and are open only to those minors whom the governing board believes will profit from such classes (Education Code, section 51811). It is the Department's position, therefore, that community service classes may not be used as summer schools for K-12 students, except for the incidental attendance of students with special interest in the subjects being taught.

VIII. Summer Schools Conducted Under Contract by Private Parties

The provisions of law relating to contracts whereby private parties conduct a portion of the educational program are not entirely clear. Neither the California Constitution nor the Education Code specifically prohibits contracts for educational services. Education Code section 35160 authorizes districts to engage in any activity not prohibited by law.

Section 6, Article IX, of the California Constitution prohibits a school district from transferring, directly or indirectly, any part of the public school system, or the placing of any part of the public school system under the jurisdiction of any authority other than a public school authority. This constitutional provision was explained in CTA v. Fullerton.[7] That case involved a school district which let a contract for a private vendor to conduct its driver training program. The court held that the district had not transferred a part of the school system, but only a part of the curriculum. The court's reasoning is that the curriculum is only a function of the system and not a part of the system. This reasoning would seem also to validate contracting for a summer school program. However, in dicussing this constitutional prohibition, the court stated that the Constitution would be violated if the control and management of the driver training program were to be transferred to a private authority. This would be true because the various

[7] 82 Cal.App.3d 249, 1978

administrative units authorized to maintain and administer the curriculum with the public school system constitute, along with the curriculum, a part of the system. Thus, contracting for a summer school program would be valid under Article IX, Section 6 only if the school district maintains exclusive control and management of the educational program.

The requirement for the maintenance of control and management, however, places the contracting district in a legally impossible position when tuition fees are charged. If the contractor providing the program charges tuition the district might thereby be in violation of the prohibition against tuition charges.

IX. Leasing School Buildings for Educational Use.

The Education Code provides authority for school districts to lease, or allow the use of, unneeded school buildings and classroom space, or to enter into joint occupancy or joint use agreements with private entities including private schools. (Education Code sections 39360, 39379, 39380, 39381, 39440, 39444, 39470, and 40040, et seq.)

When authorizing school buildings to be used by another entity for a summer school program, however, the district should consider the following:

A. When leasing to a sectarian organization, the district must avoid violating the religious establishment prohibition of the First Amendment to the United States Constitution. According to the California Attorney General, a school district cannot lease or loan vacant classrooms to a sectarian institution for religious purposes while public school is concurrently in session.[8]

B. The use granted under the Civic Center Act must not result in a monopoly for the benefit of any person or organization. (Education Code section 40041 et seq.) (Effective 1/1/98 renumbered to 38130)

X. Charter Schools.

Education Code section 47605(d) prohibits a charter school from charging tuition, but does not mention fees or other charges. Should it be argued that a certain educationally based fee or other charge is not in the nature of a tuition, the charter school would, nevertheless, be prohibited from assessing them. Although a charter school is exempt from the laws governing school districts (Education Code section 47610), the California Constitution, which is the highest law of the state, cannot be rendered inapplicable by the Legislature. Therefore, any tuition, fee or other charge relating to the charter school's educational program is prohibited by the free school guarantee of the California Constitution Article IX, Section 5, as interpreted in Hartzell v. Connell, supra.

[8]60 Ops. Cal. Atty. Gen. 269

XI. Educational Clinics.

A certified clinic may not charge any fee for services to any pupil or to the parent, guardian, or custodian of any pupil for which the clinic receives reimbursement (Education Code section 58557)

The purpose of this Advisory is to inform school districts and county superintendents of the existing law involving fees in the school and to cite various case and opinions on the subject. Except with respect to citations and references to statutes, regulations and court decisions, this Advisory is merely explanatory and compliance therewith is not mandatory, nor is there any intent to suggest a particular course of action. Each local educational agency should seek the advice of its own legal counsel in the development of local policy.

Questions about this advisory may be directed to the Department's Legal Office at (916) 657-2495.

Original List Date: 7/8/2002
Last Updated: 1/16/2003
List Print Date: 09/16/2003
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of:	No. 01-TC-28
Clovis Unified School District	Prevailing Wage Rate Labor Code Section 1720 et al. Public Contract Code Section 22022 Title 8, CCR, Section 16000 et al, Statutes of 2001, Chapter 938 et al.

Clovis Unified School District has amended its test claim to include recent amendments to Labor Code section 1771.7. These amendments apply to school and community college districts[1] that choose to finance a public works project with funds from either the

[1] The amendments also apply to state universities and the University of California but, as state agencies, they are not claimants.

Kindergarten-University Public Facilities Bond Act of 2002 or, if approved by the voters, the Kindergarten-University Public Education Facilities Bond Act of 2004.

As amended, Labor Code section 1771.7 requires awarding bodies to initiate and enforce labor compliance programs (LCP) on public works projects financed with funds from the two bond acts. The administration of the LCP can be undertaken with district staff or through a third party contractor. In its First Amended Claim, Clovis merely discusses the text of the legislation and administrative documents implementing the legislation and to describes all the duties required to administer an LCP and to document that it has established and administered an LCP for one of the projects. However, Clovis offers no analysis or proof for the underlying assumption that the new legislation constitutes a state mandate.

This is understandable because the legislation creates no mandate. Section 1771.7 applies only to an "awarding body that chooses to use [specified state bond] funds." (Lab. Code § 1771.7 (a).) A local entity is not required to reimbursement when it is not legally compelled to engage in the underlying practice or program. (*Department of Finance v. Commission on State Mandates* (2003) 30 Cal. 4th 727, 740.) Since school districts are only required to establish LCPs when they choose to use bond funds from either the 2002 or 2004 Bond Acts, the LCP requirements of Section 1771.7 create no mandate because district participation in the underlying program is a voluntary undertaking.

Assuming that Section 1771.7 creates a mandate, the claimants are not entitled to any subvention because they have not shown or attempted to show that the initiation of a Section 1771.7 LCP would result in reimbursable costs.

Apart from the voluntary nature of the program, the State Allocation Board has adopted regulations that increase grants to schools and community colleges which obtain financing through the bond acts. (See Department of Industrial Relations' Response to Amendment, Exhibits F and G.) While these additional funds are based on the percentage of the project that is financed with state bond funds, this does not mean districts would be entitled to the subvention of any additional funds. As the Department of Industrial Relations has shown, LCPs generate revenue and cost savings. Since the State has provided additional revenues and additional revenue sources, there would be no reimbursable costs unless the LCP costs exceeded (1) the additional funds provided by the State Allocation Board regulations, and (2) the costs of the district's pre-existing responsibility to insure its contractors comply with the Prevailing Wage law. The First Amended Claim does not even attempt to show that the costs of Section 1771.7 LCPs exceed the costs of complying with districts pre-existing responsibilities under the prevailing wage law.[2]

In its amended claim, Clovis seeks reimbursement for the costs of contracting to have a third party administer an LCP. Even if Clovis could establish that Section 1771.7 creates a mandate, this would not be appropriate without an analysis and proof that contracting was cost effective because Section 1771.7 does not require districts to contract with third parties to administer an LCP. Contracting with a third party is a voluntary activity and is not a reimbursable activity unless the district could justify the contract as less costly than using district staff to meet its obligation.

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[2] See the Department of Industrial Relations' and the Department of Finance's initial filings for a discussion of the pre-existing duties of local entities to insure that prevailing wages are paid on public works projects.

CONCLUSION

Labor Code section 1771.7 does not create a state mandate because districts voluntarily participate in the he underlying program, the construction of school with state bond money. Assuming there was a mandate, the State has provided additional funds for the costs of LCPs and LCPs also generate revenues and cost savings. The Claimant has not shown that it has any costs above these additional funds, revenues and cost savings. Even if it could show additional costs, the districts are already required to comply with the Prevailing Wage law. This requirement is not a state mandate. To be eligible for a subvention, the districts would have to show their unfunded LCP costs exceed the district's costs of complying with the Prevailing Wage Law.

Dated: November 5, 2003

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: **Amended Claim 01-TC-28; Prevailing Wage Rate**

I declare that I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause: my business address is 1300 I Street, Sacramento, California 95814. I am readily familiar with the business practice, at my place of business, for the collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the postal service in the ordinary course of business on the same day on which it is placed for mailing.

On November 5, 2003, I served the following document:

Response to First Amended Claim

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at, California, addressed as shown below:

See Attached Mailing List

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on November 5, 2003, at Sacramento, California.

Jessica L Taylor

Jessica Taylor

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November 3, 2003

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Re: Test Claim 01-TC-28
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

I have received the "Response to Test Claim Amendment" dated October 6, 2003 filed by Department of Industrial Relations (DIR) to which I now respond on behalf of the test claimant.

Although none of the objections generated by DIR are included in the statutory exceptions set forth in Government Code Section 17556, the objections stated additionally fail for the following reasons:

DIR objects to the Test Claim Amendment on two grounds: (1) that labor compliance programs are not mandated by the test claim legislation, and (2) that implementation of labor compliance programs potentially increases school district revenues.

I

Adoption of LCPs are Inevitable

DIR argues that "Subvention is *never* required when a local agency engages in (voluntary) acts, even if a funding shortfall results", citing *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 ("Kern"). (Emphasis added) Therefore, its argument continues "these mandates flow directly and only from the **voluntary decision** by school districts to seek specific funding. Nothing mandates that decision, and therefore there is no new mandate for any of the claimed increased costs."

(Response, at pages 4-5, bold font in the original)[1]

A. There is no "Practical Alternative" to an LCP

The controlling case law on the subject of non-legal compulsion is still *City of Sacramento v. State of California* (1990) 50 Cal.3rd 51 (hereinafter referred to as *Sacramento II).*

1. *Sacramento II* Facts:

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified" unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and has sought to maintain federal compliance ever since.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter chapter 2/78), to conform to Public Law 94-566, and required the state and all local governments to participate in the state unemployment insurance system on behalf of their employees.

2. *Sacramento I* Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The

[1] DIR also argues that "Test Claimants (sic) have made no showing that "Kern" is at all distinguishable." Test claimant refers DIR to its letter dated September 13, 2003 made in response to DIR's "Supplemental Position Statement and Request For Summary Disposition" dated August 13, 2003, at pages 5-6, where "Kern" is distinguished. Further distinction is provided in this response.

State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 (hereinafter *Sacramento I*) the Court of Appeal affirmed concluding, inter alia, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B, and the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under Section 9(b).[2]

In other words, *Sacramento I* concluded that the loss of federal funds and tax credits did not amount to "compulsion".

3. *Sacramento II* Litigation

After remand, the case proceeded through the courts again. In *Sacramento II*, the court held that the obligations imposed by chapter 2/78 failed to meet the "program" and "service" standards for mandatory subvention because it imposed no "unique" obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was reversed.

However, the court disapproved that portion of *Sacramento I* which held that the loss of federal funds and tax credits did not amount to "compulsion". Therefore, both state and local governments could levy taxes for their chapter 2/78 coverage obligations without reduction of their article XIII B fiscal limits.

4. *Sacramento II* "Compulsion" Reasoning

Plaintiffs argued that the test claim legislation required a clear legal compulsion not present in Public Law 94-566. Defendants responded that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.

In disapproving *Sacramento I*, the court explained:

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[2] Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

> "If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments." (Opinion, at page 74)

Plaintiffs argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state's employers faced only with the federal tax. The court replied to this suggestion:

> "However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (Opinion, at page 74, emphasis supplied)

In other words, terminating its own system was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving the state without discretion. The only reasonable alternative was to comply with the new legislation, since the state was practically "without discretion".

The Supreme Court in *Sacramento II* concluded by stating that there is no final test for a determination of "mandatory" versus "optional":

> "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Opinion, at page 76)

B. Statutory Compulsion is not Required

In *Department of Finance v. Commission on State Mandates* (supra, at page 736) the supreme court first made it clear that the decision did not hold that legal compulsion was necessary in order to find a reimbursable mandate:

> "For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to

> reimbursement under article XIII B, section 6, because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate." (Emphasis in the original, underlining added)[3]

After concluding that the facts in *Kern* did not rise to the standard of non-legal compulsion, the court affirmed that either double taxation or other draconian consequences could result in non-legal compulsion:

> "In sum, the circumstances presented *in the case before us* do not constitute the type of non-legal compulsion that reasonably could constitute, in claimants' phrasing, a 'de facto' reimbursable state mandate. Contrary to the situation that we described in (Sacramento II), a claimant that elects to discontinue participation in one of the programs *here at issue* does not face 'certain and severe...penalties' such as 'double...taxation' or other 'draconian' consequences (citation), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations." (Opinion, at page 754, emphasis supplied to illustrate holding is limited to facts presented)

Therefore, "carrot and stick" situations must still be determined on a case by case basis.

C. Districts' Ability to Borrow is Strictly Limited

DIR simplifies its argument to say that school districts do not have to apply for the construction money made available when the voters approved Proposition 47, the Kindergarten-University Public Education Facilities Bond Act of 2002, which allocated $8,085,800,000 for new construction and $3,294,200,000 for the modernization of school facilities. DIR simply concludes that school districts can go elsewhere (not defined) to find money to use for construction and improvements. This simplistic approach is not realistic.

The authority to issue local school bonds is found in Chapter 1 of Part 10 in Division 1 of Title 1 of the Education Code, commencing at Section 15100. This authority is strictly limited.

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[3] This, of course, totally disproves DIR's claim that subvention is *never* required when a local agency engages in (voluntary) acts. (Supra)

Education Code Section 15100 allows a district, when in its judgment it is advisable, and requires it, upon a petition of the majority of its qualified electors, to order an election and submit to the electors of the district the question whether the bonds of the district shall be issued and sold for the purpose of raising money for the purchase of school lots, the building or purchasing of school buildings and the making of alterations or additions to school buildings. Section 15102 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district. Section 15106 provides that unified school districts or community college districts may not exceed 2.5 percent of the taxable property of the district.

Chapter 1.5 of Part 10 sets forth the Strict Accountability in Local School Construction Bonds Act of 2000, commencing with Section 15264. ("Proposition 39 bonds") Here again, bonded indebtedness is strictly limited.

Section 15266 provides that the Act is an alternative to authorizing and issuing bonds pursuant to Chapter 1 or Chapter 2 (commencing with Section 15300) when the governing board of a school district or community college district decides, pursuant to a two-thirds vote, to pursue the authorization and issuance of bonds for school facilities. Section 15268 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district and may only be issued if the tax rate levied would not exceed thirty dollars ($30) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIIIA of the California Constitution. Section 15270 provides that a unified school district may not authorize or issue bonds that exceed 2.5 percent of the taxable property of the district and may only be issued if the tax rate levied to meet the requirements of Section 18 of Article XVI of the California Constitution in the case of indebtedness incurred pursuant to this chapter at a single election, by a unified school district, would not exceed sixty dollars ($60) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIIIA of the California Constitution.

Chapter 2 of Part 10 sets forth the Bonds of School Facilities Improvement Districts Act, commencing with Education Code Section 15300. Here again, bonded indebtedness is strictly limited.

Section 15300 provides that the chapter provides a method for the formation of school facilities improvement districts consisting of a portion of the territory within a school district or community college district and for the issuance of general obligation bonds by the school facilities improvement district. Section 15330 provides that the total amount of bonds issued shall not exceed 1.25 percent of the taxable property of the school facilities improvement district. Section 15334.5 further provides that no bonded

indebtedness may be incurred pursuant to this chapter in an amount that would cause the bonded indebtedness of the territory of the school district or community college district of which the school facilities improvement district is a part, to exceed the limitation of indebtedness specified in Sections 15102 and 15106.

To the extent school districts and community college districts already have bonded indebtedness at or near these limits, the argument of DIR that these districts need not apply for this new state funding is specious reasoning.

D. The Legislative History of School Finance Legislation Shows an Intent of the Legislature that the State Should Provide the Financing For Schools

A review of the legislative history of school finance shows that the Legislature knows that the State must bear the major burden of financing the construction of new school facilities.

Chapter 4 of Part 10 of Division 1 of Title 1 of the Education Code sets forth the State School Building Aid Law of 1949, commencing with Education Code Section 15700. Section 15700 provides:

> "The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in providing necessary and adequate school sites and buildings for the pupils of the public school system, the system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.
>
> In adopting this act, the Legislature considers that the great need in school construction is for adequate classrooms for the education of the pupils of the public school system...To the end that school classrooms may be made available at once and to all school districts in need of such classrooms..." (emphasis supplied)

Section 15704 requires the State Allocation Board to adopt rules which gives:

> "...priority in allocating funds to districts to those districts where the children will benefit most from additional schoolhouse facilities...based on acuteness of overcrowding, on sudden growth in attendance, on amount of local tax funds expended for housing of a character within the purposes of this chapter, and on the time the district's application has been ready for allotment..."

Chapter 6 contains the State School Building Aid Law of 1952, commencing with Education Code Section 16000. Section 16001 provides:

> "The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in providing necessary schoolsites and buildings for the pupils of the public school system, this system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.
>
> In adopting this chapter, the Legislature considers that the great need in school construction is for classrooms for the education of the pupils of the public school system...To the end that school classrooms may be made available at once and to all school districts in need of such classrooms..." (emphasis supplied)

Section 16007 requires the State Allocation Board to adopt rules which would:

> "...give priority in allocating funds to districts to those districts where the children will benefit most from additional schoolhouse facilities...based on acuteness of overcrowding, on rapidity of growth in attendance, and on the time the district's application has been ready for allotment..."

Article 3 of Chapter 6, contains provisions for School Housing Aid for Exceptional Children, commencing with Education Code Section 16190. Section 16190 provides:

> "The board may make apportionments...from any state bonds heretofore or hereafter authorized by the electorate for state school building aid...for assistance to school districts in providing necessary housing and equipment for the education of exceptional children."[4]

Section 16196 provides that:

> "...Except as otherwise provided in this section, not more than 50 percent of the amount of any apportionment made pursuant to this section shall be

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[4] Education Code Section 16191 defines "exceptional children" to mean "physically handicapped pupils, mentally retarded pupils, educationally handicapped pupils, multihandicapped pupils, or pupils enrolled in development centers for the handicapped required or allowed to be educated pursuant to Part 30 (commencing with Section 56000)."

repaid..."

Article 4 of Chapter 6, commencing with Section 16210, is entitled School Housing Aid For Compensatory Education Purposes. Section 16210 sets aside $35 million dollars of the proceeds of the sale of bonds authorized by the State School Building Aid Bond Law of 1966 to assist school districts. Section 16210 provides:

> "...The Director of Compensatory Education may establish priorities for purposes of allocations and grants under this article based upon comparative needs of school districts and the urgency thereof. No interest shall be charged to a school district for an allocation or grant made under this article to the school district..."

Section 16211 provides that grants may be made to:

> "...districts...maintaining schools for kindergarten, or any of grades 1 to 6, inclusive...which have reduced the number of pupils to full-time equivalent classroom teachers in kindergarten and any of grades 1 to 6, inclusive, in those schools to a ratio of 25 to 1, or better. The grants shall be made for...¶...any of the following:
> (a) Acquisition, by purchase or lease, and the installation and equipping of portable classrooms for classroom instructional purposes.
> (b) Acquisition of land for schoolsites.
> (c) Construction and equipping of permanent school buildings and facilities.
> (d) Reconstruction, renovation or remodeling of existing school buildings and facilities.
> (e) Any combination of the above."

Section 16212 allows:

> "In lieu of grants to districts pursuant to subdivision (a) of Section 16211...the board may expend moneys available for grants under this article for the acquisition of portable buildings and facilities and equipment by the state, and thereafter convey the same to the eligible districts...(in) the form of sale, lease, outright grant, or other suitable form of conveyance, as determined by the board."

Section 16214 provides:

> "For each school district which receives a grant or allocation pursuant to

this article...the Controller shall compute an amount equal to one cent ($0.01) on each one hundred dollars ($100) of the assessed valuation of property within the district...(¶)...The Controller shall make the computations and deductions required by this section for 30 fiscal years or until the time as the total of the amounts so deducted equal 50 percent of the amount of the grant or allocation which was made to the school district, whichever first occurs...(¶)...the maximum rate of school district tax for the school district for which the computation is made shall be increased by one cent ($0.01) per each one hundred dollars ($100) of the assessed value of property within the district..."

Article 5 of Chapter 6, commencing with Education Code Section 16230, sets forth the provisions for School Housing Aid For Districts Impacted by Seasonal Agricultural Employment. Section 16230 sets aside $1,500,000 of the proceeds of bonds issued under the State School Building Aid Bond Law of 1966:

"...for the acquisition of...¶... portable school and classroom buildings (and) may be made available by the board, upon the recommendation of the Director of Compensatory Education, to any school district which, because of the influx for temporary periods in the school year of large numbers of persons employed in seasonal agricultural work, experiences emergency increases in school enrollments of such magnitude as to make it impossible or impractical to accommodate the additional pupils in existing school buildings and facilities available to the district."

Section 16231 provides:

"...The use of the portable school and classroom buildings may be made available to a school district by letting the same to the district free of charge, or by lease, or by conveying the same to the district under lease-purchase agreement, sale, or outright grant, as determined by the State Allocation Board upon consultation with, and the advice of, the Director of Compensatory Education..."

Article 7 of Chapter 6, commencing with Education Code Section 16260, provides for the Children's Center Construction Law of 1968.

Section 16261 states:

"The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to provide assistance to school districts

and to county superintendents of schools for the construction of children's center facilities. Children's centers are of general concern and interest to all the people of the state, and the education and care of children of working parents are a joint obligation of both the state and local agencies operating children's centers..." (emphasis supplied)

Section 16263 requires:

"...The board shall adopt any rules and regulations (which) shall establish a system of priorities (and) give special consideration to school districts...containing substantial numbers of families who are recipients of aid to families with dependent children or who are former or potential recipients of the aid..."

Section 16272 provides for matching funds:

"For each one dollar ($1) of money allocated to a local agency which is expended for a project, the local agency shall expend local funds for the project in an amount which bears the same percentage to the one dollar ($1) as the modified assessed valuation per unit of the average daily attendance of the local agency bears to the statewide modified assessed valuation per average daily attendance of all local agencies..."

Article 9 of Chapter 6, commencing with Education Code Section 16310, is entitled School Housing Aid For Rehabilitation and Replacement of Structurally Inadequate School Facilities. Section 16312 states:

"The Legislature hereby declares that it is in the interest of the state and the people thereof to provide assistance to school districts in rehabilitating or replacing structurally unsafe school facilities inasmuch as the education of children is an obligation of the state, and the obligation carries with it a corresponding responsibility for the physical safety of children while attending school." (emphasis supplied)

Section 16313 states:

"It is the intent of the Legislature in enacting this article to provide a means through repayable state loans for school districts...to house their pupils in facilities that are structurally safe."

Section 16317 requires the State Allocation Board to adopt rules which:

> "...shall give priority in allocating funds to districts which will benefit most from the reconstruction or replacement of schoolhouse facilities...based on the age and structural safety of existing buildings at the school or schools where the construction or reconstruction will occur, acuteness of overcrowding and density of population in the attendance areas affected, or any other factors that will insure that the greatest need will be served in allocating funds under this article."

Chapter 8 of Part 10 contains the Urban School Construction Aid Law of 1968, commencing with Education Code Section 16700. Section 16701 provides:

> "The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid urban school districts of the state in reconstructing, modernizing, or replacing schoolsites and buildings for pupils of the public school system who are now housed in substandard schools..."

Section 16705 requires the State Allocation Board to adopt rules which:

> "...shall give priority in allocating funds to urban districts to those districts where the children will benefit most from schoolhouse facilities...based upon the age of existing buildings and the acuteness of overcrowding at the school or schools where the construction or reconstruction will occur, the density of population in the attendance areas affected, or any other factors that will insure that the greatest need will be served."

Section 16720 provides for repayment:

> "Each district to which an apportionment or apportionments has been made under this chapter shall repay a portion or all of the principal amount of such apportionment or apportionments and the accrued interest thereon in 30 equal annual payments, as shall be determined by the Controller pursuant to this section...(¶)...In any year, beginning with the 1981-82 fiscal year, in which the annual repayment exceeds the amount which may be raised by a levy of 0.0075 percent of the full value in the district,...the Controller shall grant a deferment of the annual repayment which is in excess of the amount that would be produced by a tax of 0.0075 percent of the full value of the district..."

Chapter 12 of Part 10 establishes the "Leroy F. Greene State School Building Lease-Purchase Law of 1976", commencing with Section 17000. Section 17001 states:

> "(a) The Legislature hereby declares that it is in the interest of the state and the people thereof for the state to reconstruct, remodel, or replace existing school buildings that are educationally inadequate or that do not meet present-day structural safety requirements, and to acquire new schoolsites and buildings for the purpose of making them available to local school districts for the pupils of the public school system, that system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state."

Article 11 of the Leroy F. Greene School Facilities Act of 1998, commencing with Education Code Section 17078.10, provides for:

> " (c) ..."preliminary apportionment"... for eligible applicants with critically overcrowded schools in advance of full compliance with all of the application requirements otherwise required for an apportionment pursuant to this chapter..."

Chapter 14 of Part 10, commencing with Education Code Section 17085 is entitled the "Emergency School Classroom Law of 1979" and is cited as the State Relocatable Classroom Law of 1979. Section 17086 states:

> "...the Legislature recognizes that the ad valorem tax is no longer available as a source of revenue for the construction of necessary school facilities. The Legislature considers that the greatest need in school construction is for classrooms for the education of public school pupils. It is the intent of the Legislature to satisfy this primary need to the greatest extent possible before providing any additional educational facilities, regardless of how desirable such additional facilities may be."

Chapter 15 of Part 10, commencing with Section 17100, established the School District Revenue Bond Act. This Act is based on the finding of the legislature that:

> "The Legislature hereby finds and declares that the State School Building Lease-Purchase Fund, pursuant to Section 17008, and the proceeds from the sale or lease of surplus school property are the two sources available to school districts to finance the construction of school facilities to relieve overcrowding. However, these sources are still insufficient to meet the construction needs statewide of school districts." (emphasis supplied)

In summary, the last 60 years of legislative history shows repeated and consistent recognition that school districts are unable to meet the school construction needs of their pupils. The history repeatedly reveals an admission that the education of school

children is the primary responsibility of the state. The history of the inability of school districts and the obligation of the state to educate children results in the above recited litany of state money for school construction at low or no interest rates, repayment requirements of less than the amounts apportioned, and repayment terms unavailable anywhere else. Education of children is an obligation and function of the state. Classrooms are required to provide that education. Therefore, building classrooms is a state obligation.

II
Potential Costs and Revenues

A. The Commission Regulations Do Not Require Detail Program Cost Information.

DIR starts its second argument by stating "Test Claimants (sic) have not provided any information that would lead to the conclusion that Labor Code § 1771.7 in fact will increase costs." (DIR Response, at page 5) Test claimant refers DIR to the Declarations of William McGuire (Associate Superintendent - Business Services of Clovis Unified School District) and Thomas J. Donner (Executive Vice President of Business and Administration of Santa Monica Community College), attached to the Amended Test Claim as Exhibits 6 and 7, wherein each of them states an estimate that his respective district would incur expenses in excess of $1,000, annually. This complies with Government Code Section 17564,[5]

B. "Retained Penalties" are Neither Program Funding, Income or Revenue

DIR then goes on to argue "In making their (sic) bald assertions, Test Claimants (sic) have failed to consider three[6] potential sources of income, which must be counted before making any claim for subvention." The first so-called source is retained penalties a district assesses and collects. (DIR Response at pages 5-6)

Penalties are established to coerce compliance. They also recognize the fact that non-

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[5] Government Code Section 17564:

"(a) No claim shall be made pursuant to Sections 17551 and 17561, nor shall any payment be made on claims submitted pursuant to Sections 17551 and 17561, unless these claims exceed one thousand dollars ($1,000)..."

[6] DIR only reveals two of these three potential sources.

compliance often results in additional work by the monitoring agency. The statute creating the mandate does not identify these penalties as additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the mandate and prevent a finding of costs mandated by the state. Government Code Section 17556, subdivision (e)[7] Of course, to the extent that penalties are collected they would offset the total cost of the LCP. However, the DIR has provided no evidence that these penalties would be sufficient to compensate for the additional compliance oversight work performed by the district. Further, the notion that a sufficient number of contractors will be penalized and a significant cash flow will be generated therefrom is without foundation and cynical at best. School districts are not required to write "speeding tickets" in order to fund mandates.

C. Increased Funding From SAB is Indefinite and Uncertain

The second alleged source is described by DIR as a "steady source of funds available to Test Claimants (sic) in the form of increased funding from SAB." (DIR Response at page 6)

DIR does not identify the money well from which the second "steady source of funds" flows, but Test Claimant will assume, for purposes of argument, that DIR refers to subdivision (e) of Labor Code Section 1771.7 which directs that the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the labor compliance program." This DIR described "steady source of funds" was incapable of accurate determination when initiated:

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[7] Government Code Section 17556:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

...(e) The statute of executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
(f)..."

"Staff acknowledges the possible validity of both comments. Given the urgency to adopt regulations by July 1, 2003, and given the very sparse data available at this moment, the Committee and Staff agreed the attached regulations should be presented to the SAB now, and that the amount of the per pupil grant should be revised in approximately one year. At that time, information based on actual experience in school districts can be used to recommend an increase or a decrease in the additional per pupil grant for future apportionments." (Report of the Executive Officer entitled "Implementation of Assembly Bill 1506 (Wesson) Grant Adjustments for Labor Compliance Programs" presented at the State Allocation Board Meeting on July 2, 2003), attached to DIR's Response as Exhibit "F".

D. The Test Claim Recognizes the Revenues Potential

Test Claimant recognized both the source and the uncertainty of the source in the test claim:

"Subdivision (e) of new Labor Code Section 1771.7 provides that, notwithstanding Section 17070.63 of the Education Code, for purposes of the act, the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of a labor compliance program. To the extent that funds are appropriated, allocated and received, and relevant to the costs mandated by the state subject to reimbursement, they would reduce the amount of reimbursable costs occasioned by Section 1771.7 and the Executive Orders cited herein." (Test Claim, page 26, lines 7 through 16, emphasis supplied)

Therefore, DIR's argument fails in its entirely, since neither "funding" source meets the requirements of Government Code Section 17556, subdivision (e).

III
Conclusion

In *Sacramento II*, the supreme court found non-legal compulsion because "the alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." In the situation now before the Commission, telling school districts to ignore new state money to build and/or modernize

their schools is so far beyond the realm of practical reality that it cannot be considered. This draconian suggestion is not factually or legally well founded.

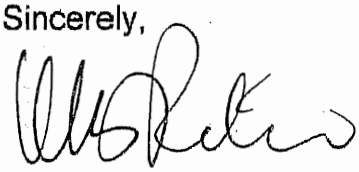
The test claim includes the declarations of two senior school officials which declare that compliance with an LCP will cost in excess of $1,000. Retained penalties are not identified in the test claim legislation as additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the costs of the mandate. Any increased funding is indefinite, uncertain and without a statutory guaranty that it will be received or be sufficient to cover the costs of the mandate. The test claim recognizes these possible sources of income and clearly states that they will be used to reduce the amounts claimed.

Therefore, Test Claimant moves the Commission to find that the test claim legislation does, in fact and law, create a reimbursable mandate.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,



Keith B. Petersen

C: Per Mailing List Attached

DECLARATION OF SERVICE

RE: Prevailing Wage Rate 01-TC-28
CLAIMANT: Clovis Unified School District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of November 3, 2003, addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Sacramento, CA 95814
FAX: (916) 445-0278

AND per mailing list attached

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 11/3/03, at San Diego, California.

Diane Bramwell

1590

Commission on State Mandates

Original List Date: 7/8/2002
Last Updated: 10/9/2003
List Print Date: 10/15/2003
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Mr. Michael Havey State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 445-8757 (916) 323-4807
Mr. Steve Smith Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Tel: Fax:	(916) 669-0888 (916) 669-0889
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SixTen and Associates
Mandate Reimbursement Services

EXHIBIT Q

KEITH B. PETERSEN, MPA, JD, President
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December 5, 2003

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 01-TC-28
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

I have received the Response to the Amended Test Claim of the Department of Finance ("DOF") dated November 5, 2003, authored by the Attorney General of the State of California, to which I now respond on behalf of the test claimant.

Although none of the objections generated by DOF are included in the statutory exceptions set forth in Government Code Section 17556, the objections stated additionally fail for the following reasons:

A. The Response of the DOF is Incompetent and Should be Excluded

Test claimant objects to the Response of the DOF, in total, as being legally incompetent and move that it be excluded from the record.[1] Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information and belief."

[1] Test claimant has filed an identical objection to the Response of the DOF dated February 18, 2003 to the original test claim. See: Test Claimant's response dated March 17, 2003. DOF must believe that it is immune from this requirement of the Commission.

The DOF Response does not comply with this essential requirement.

B. State Bond Programs Create Non-Legal Compulsion to Comply with Program Conditions

DOF first argues that "...the legislation creates no mandate. Section 1771.7 applies only to an 'awarding body that chooses to use [specified state bond] funds.' (Citation) A local entity is not required to reimbursement when it is not legally compelled to engage in the underlying practice or program. (Citation) Since school districts are only required to establish LCPs when they choose to use bond funds....the LCP requirements of Section 1771.7 create no mandate because district participation in the underlying program is a voluntary undertaking." (DOF Comments, at page 2) (Underlining in the original) DOF cites *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 ("Kern") as its authority.

Non-Legal Compulsion

The controlling case law on the subject of non-legal compulsion is still *City of Sacramento v. State of California* (1990) 50 Cal.3rd 51 (hereinafter referred to as *Sacramento II).*

1. *Sacramento II* Facts:

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified" unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and has sought to maintain federal compliance ever since.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter chapter 2/78), to conform to Public Law 94-566, and required the state and all local

governments to participate in the state unemployment insurance system on behalf of their employees.

2. *Sacramento I* Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 (hereinafter *Sacramento I*) the Court of Appeal affirmed concluding, inter alia, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B, and the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under Section 9(b).[2]

In other words, *Sacramento I* concluded that the loss of federal funds and tax credits did not amount to "compulsion".

3. *Sacramento II* Litigation

After remand, the case proceeded through the courts again. In *Sacramento II*, the court held that the obligations imposed by chapter 2/78 failed to meet the "program" and "service" standards for mandatory subvention because it imposed no "unique" obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was reversed.

However, the court disapproved that portion of *Sacramento I* which held that the loss of federal funds and tax credits did not amount to "compulsion".

4. *Sacramento II* "Compulsion" Reasoning

Plaintiffs argued that the test claim legislation required a clear legal compulsion not present in Public Law 94-566. Defendants responded that the consequences of

[2] Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.

In disapproving *Sacramento I*, the court explained:

> "If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments." (Opinion, at page 74)

Plaintiffs argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state's employers faced only with the federal tax. The court replied to this suggestion:

> "However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (Opinion, at page 74, emphasis supplied)

In other words, terminating its own system was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving the state without discretion. The only reasonable alternative was to comply with the new legislation, since the state was practically "without discretion".

The Supreme Court in *Sacramento II* concluded by stating that there is no final test for a determination of "mandatory" versus "optional":

> "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Opinion, at page 76)

5. Statutory Compulsion is not Required

In *Department of Finance v. Commission on State Mandates* (supra, at page 736) the supreme court first made it clear that the decision did not hold, as suggested by DOF,

that legal compulsion was necessary in order to find a reimbursable mandate:

> "For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement under article XIII B, section 6, because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate." (Emphasis in the original, underlining added)

After concluding that the facts in *Kern* did not rise to the standard of non-legal compulsion, the court affirmed that either double taxation or other draconian consequences could result in non-legal compulsion:

> "In sum, the circumstances presented *in the case before us* do not constitute the type of non-legal compulsion that reasonably could constitute, in claimants' phrasing, a 'de facto' reimbursable state mandate. Contrary to the situation that we described in (Sacramento II), a claimant that elects to discontinue participation in one of the programs *here at issue* does not face 'certain and severe...penalties' such as 'double...taxation' or other 'draconian' consequences (citation), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations." (Opinion, at page 754, emphasis supplied to illustrate holding is limited to facts presented)

Therefore, "carrot and stick" situations must still be determined on a case by case basis.

A District's Ability to Borrow is Strictly Limited

Since DOF argues that school districts are only required to establish LCPs when they choose to use state bond funds to construct or modernize their school facilities, DOF implicitly argues that school districts have the ability to borrow money to finance their own construction and modernization projects.

The authority to issue local school bonds is found in Chapter 1 of Part 10 in Division 1 of Title 1 of the Education Code, commencing at Section 15100. This authority is strictly limited.

Education Code Section 15100 allows a district, when in its judgment it is advisable,

and requires it, upon a petition of the majority of its qualified electors, to order an election and submit to the electors of the district the question whether the bonds of the district shall be issued and sold for the purpose of raising money for the purchase of school lots, the building or purchasing of school buildings and the making of alterations or additions to school buildings. Section 15102 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district. Section 15106 provides that unified school districts or community college districts may not exceed 2.5 percent of the taxable property of the district.

Chapter 1.5 of Part 10 sets forth the Strict Accountability in Local School Construction Bonds Act of 2000, commencing with Section 15264. ("Proposition 39 bonds") Here again, bonded indebtedness is strictly limited.

Section 15266 provides that the Act is an alternative to authorizing and issuing bonds pursuant to Chapter 1 or Chapter 2 (commencing with Section 15300) when the governing board of a school district or community college district decides, pursuant to a two-thirds vote, to pursue the authorization and issuance of bonds for school facilities. Section 15268 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district and may only be issued if the tax rate levied would not exceed thirty dollars ($30) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIII A of the California Constitution. Section 15270 provides that a unified school district may not authorize or issue bonds that exceed 2.5 percent of the taxable property of the district and may only be issued if the tax rate levied to meet the requirements of Section 18 of Article XVI of the California Constitution in the case of indebtedness incurred pursuant to this chapter at a single election, by a unified school district, would not exceed sixty dollars ($60) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIII A of the California Constitution.

Chapter 2 of Part 10 sets forth the Bonds of School Facilities Improvement Districts Act, commencing with Education Code Section 15300. Here again, bonded indebtedness is strictly limited.

Section 15300 provides that the chapter provides a method for the formation of school facilities improvement districts consisting of a portion of the territory within a school district or community college district and for the issuance of general obligation bonds by the school facilities improvement district. Section 15330 provides that the total amount of bonds issued shall not exceed 1.25 percent of the taxable property of the school facilities improvement district. Section 15334.5 further provides that no bonded indebtedness may be incurred pursuant to this chapter in an amount that would cause

the bonded indebtedness of the territory of the school district or community college district of which the school facilities improvement district is a part, to exceed the limitation of indebtedness specified in Sections 15102 and 15106.

At the request of Senator Quentin Kopp, the California Research Bureau has published the results of its research on School Facility Financing.[3] (hereinafter, "CRB History") A copy of the "CRB History" is attached hereto as Exhibit "A" and is incorporated herein by reference.

The CRB History has noted:

> "...Proposition 13 eliminated the ability of local school districts to levy additional special property taxes to pay off their facility indebtedness. Proposition 13 capped the ad valorem tax rate on real property at one percent of its value, thereby reducing the income from property taxes to such an extent that it virtually eliminated this source as a means for lease payments."[4]

To the extent school districts and community college districts already have bonded indebtedness at or near these limits, the argument of DIR that these districts need not apply for this new state funding is specious reasoning.

Legislative History of School Financing Legislation

A review of the legislative history of school finance shows that the Legislature knows that the State must bear the major burden of financing the construction of new school facilities.

The CRB History begins its report with:

> "As California enters the 21st Century, its public schools face many challenges. One significant challenge is the serious disrepair of an aging school facility infrastructure. Another challenge is the anticipated growth of nearly 2 million K-12 students during the next decade that will require

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[3] Cohen, Joel, "School Facility Financing - A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds", California Research Bureau (February 1999)

[4] Cohen, Joel (op.cit. at p.12)

many districts to build new schools to meet burgeoning student demand."[5]

This gloomy prediction follows many years of attempts by the state to assist school district finance public schools.

Chapter 4 of Part 10 of Division 1 of Title 1 of the Education Code sets forth the State School Building Aid Law of 1949, commencing with Education Code Section 15700. Section 15700 provides:

"The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in providing necessary and adequate school sites and buildings for the pupils of the public school system, the system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.

In adopting this act, the Legislature considers that the great need in school construction is for adequate classrooms for the education of the pupils of the public school system...To the end that school classrooms may be made available at once and to all school districts in need of such classrooms..." (emphasis supplied)

Section 15704 requires the State Allocation Board to adopt rules which gives:

"...priority in allocating funds to districts to those districts where the children will benefit most from additional schoolhouse facilities...based on acuteness of overcrowding, on sudden growth in attendance, on amount of local tax funds expended for housing of a character within the purposes of this chapter, and on the time the district's application has been ready for allotment..."

Chapter 6 contains the State School Building Aid Law of 1952, commencing with Education Code Section 16000. Section 16001 provides:

> "The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in providing necessary schoolsites and buildings for the pupils of the public school system, this system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.
>
> In adopting this chapter, the Legislature considers that the great need in school construction is for classrooms for the education of the

[5] Cohen, Joel (op. cit. p. 1)

pupils of the public school system...To the end that school classrooms may be made available at once and to all school districts in need of such classrooms..." (emphasis supplied)

Section 16007 requires the State Allocation Board to adopt rules which would:

"...give priority in allocating funds to districts to those districts where the children will benefit most from additional schoolhouse facilities...based on acuteness of overcrowding, on rapidity of growth in attendance, and on the time the district's application has been ready for allotment..."

Article 3 of Chapter 6, contains provisions for School Housing Aid for Exceptional Children, commencing with Education Code Section 16190. Section 16190 provides:

"The board may make apportionments...from any state bonds heretofore or hereafter authorized by the electorate for state school building aid...for assistance to school districts in providing necessary housing and equipment for the education of exceptional children."[6]

Section 16196 provides that:

"...Except as otherwise provided in this section, not more than 50 percent of the amount of any apportionment made pursuant to this section shall be repaid..."

Article 4 of Chapter 6, commencing with Section 16210, is entitled School Housing Aid For Compensatory Education Purposes. Section 16210 sets aside $35 million dollars of the proceeds of the sale of bonds authorized by the State School Building Aid Bond Law of 1966 to assist school districts. Section 16210 provides:

"...The Director of Compensatory Education may establish priorities for purposes of allocations and grants under this article based upon comparative needs of school districts and the urgency thereof. No interest shall be charged to a school district for an allocation or grant made under

[6] Education Code Section 16191 defines "exceptional children" to mean "physically handicapped pupils, mentally retarded pupils, educationally handicapped pupils, multihandicapped pupils, or pupils enrolled in development centers for the handicapped required or allowed to be educated pursuant to Part 30 (commencing with Section 56000)."

this article to the school district..."

Section 16211 provides that grants may be made to:

"...districts...maintaining schools for kindergarten, or any of grades 1 to 6, inclusive...which have reduced the number of pupils to full-time equivalent classroom teachers in kindergarten and any of grades 1 to 6, inclusive, in those schools to a ratio of 25 to 1, or better. The grants shall be made for...¶...any of the following:

(a) Acquisition, by purchase or lease, and the installation and equipping of portable classrooms for classroom instructional purposes.

(b) Acquisition of land for schoolsites.

(c) Construction and equipping of permanent school buildings and facilities.

(d) Reconstruction, renovation or remodeling of existing school buildings and facilities.

(e) Any combination of the above."

Section 16212 allows:

"In lieu of grants to districts pursuant to subdivision (a) of Section 16211...the board may expend moneys available for grants under this article for the acquisition of portable buildings and facilities and equipment by the state, and thereafter convey the same to the eligible districts...(in) the form of sale, lease, outright grant, or other suitable form of conveyance, as determined by the board."

Section 16214 provides:

"For each school district which receives a grant or allocation pursuant to this article...the Controller shall compute an amount equal to one cent ($0.01) on each one hundred dollars ($100) of the assessed valuation of property within the district...(¶)...The Controller shall make the computations and deductions required by this section for 30 fiscal years or until the time as the total of the amounts so deducted equal 50 percent of the amount of the grant or allocation which was made to the school district, whichever first occurs...(¶)...the maximum rate of school district tax for the school district for which the computation is made shall be increased by one cent ($0.01) per each one hundred dollars ($100) of the assessed value of property within the district..."

Article 5 of Chapter 6, commencing with Education Code Section 16230, sets forth the provisions for School Housing Aid For Districts Impacted by Seasonal Agricultural Employment. Section 16230 sets aside $1,500,000 of the proceeds of bonds issued under the State School Building Aid Bond Law of 1966:

> "...for the acquisition of...¶... portable school and classroom buildings (and) may be made available by the board, upon the recommendation of the Director of Compensatory Education, to any school district which, because of the influx for temporary periods in the school year of large numbers of persons employed in seasonal agricultural work, experiences emergency increases in school enrollments of such magnitude as to make it impossible or impractical to accommodate the additional pupils in existing school buildings and facilities available to the district."

Section 16231 provides:

> "...The use of the portable school and classroom buildings may be made available to a school district by letting the same to the district free of charge, or by lease, or by conveying the same to the district under lease-purchase agreement, sale, or outright grant, as determined by the State Allocation Board upon consultation with, and the advice of, the Director of Compensatory Education..."

Article 7 of Chapter 6, commencing with Education Code Section 16260, provides for the Children's Center Construction Law of 1968.

Section 16261 states:

> "The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to provide assistance to school districts and to county superintendents of schools for the construction of children's center facilities. Children's centers are of general concern and interest to all the people of the state, and the education and care of children of working parents are a joint obligation of both the state and local agencies operating children's centers..." (emphasis supplied)

Section 16263 requires:

> "...The board shall adopt any rules and regulations (which) shall establish a system of priorities (and) give special consideration to school districts...containing substantial numbers of families who are recipients of

aid to families with dependent children or who are former or potential recipients of the aid..."

Section 16272 provides for matching funds:

"For each one dollar ($1) of money allocated to a local agency which is expended for a project, the local agency shall expend local funds for the project in an amount which bears the same percentage to the one dollar ($1) as the modified assessed valuation per unit of the average daily attendance of the local agency bears to the statewide modified assessed valuation per average daily attendance of all local agencies..."

Article 9 of Chapter 6, commencing with Education Code Section 16310, is entitled School Housing Aid For Rehabilitation and Replacement of Structurally Inadequate School Facilities. Section 16312 states:

"The Legislature hereby declares that it is in the interest of the state and the people thereof to provide assistance to school districts in rehabilitating or replacing structurally unsafe school facilities inasmuch as the education of children is an obligation of the state, and the obligation carries with it a corresponding responsibility for the physical safety of children while attending school." (emphasis supplied)

Section 16313 states:

"It is the intent of the Legislature in enacting this article to provide a means through repayable state loans for school districts...to house their pupils in facilities that are structurally safe."

Section 16317 requires the State Allocation Board to adopt rules which:

"...shall give priority in allocating funds to districts which will benefit most from the reconstruction or replacement of schoolhouse facilities...based on the age and structural safety of existing buildings at the school or schools where the construction or reconstruction will occur, acuteness of overcrowding and density of population in the attendance areas affected, or any other factors that will insure that the greatest need will be served in allocating funds under this article."

Chapter 8 of Part 10 contains the Urban School Construction Aid Law of 1968, commencing with Education Code Section 16700. Section 16701 provides:

"The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid urban school districts of the state in reconstructing, modernizing, or replacing schoolsites and buildings for pupils of the public school system who are now housed in substandard schools..."

Section 16705 requires the State Allocation Board to adopt rules which:

"...shall give priority in allocating funds to urban districts to those districts where the children will benefit most from schoolhouse facilities...based upon the age of existing buildings and the acuteness of overcrowding at the school or schools where the construction or reconstruction will occur, the density of population in the attendance areas affected, or any other factors that will insure that the greatest need will be served."

Section 16720 provides for repayment:

"Each district to which an apportionment or apportionments has been made under this chapter shall repay a portion or all of the principal amount of such apportionment or apportionments and the accrued interest thereon in 30 equal annual payments, as shall be determined by the Controller pursuant to this section...(¶)...In any year, beginning with the 1981-82 fiscal year, in which the annual repayment exceeds the amount which may be raised by a levy of 0.0075 percent of the full value in the district,...the Controller shall grant a deferment of the annual repayment which is in excess of the amount that would be produced by a tax of 0.0075 percent of the full value of the district..."

Chapter 12 of Part 10 establishes the "Leroy F. Greene State School Building Lease-Purchase Law of 1976", commencing with Section 17000. Section 17001 states:

"(a) The Legislature hereby declares that it is in the interest of the state and the people thereof for the state to reconstruct, remodel, or replace existing school buildings that are educationally inadequate or that do not meet present-day structural safety requirements, and to acquire new schoolsites and buildings for the purpose of making them available to local school districts for the pupils of the public school system, that system being a matter of general concern <u>inasmuch as the education of the children of the state is an obligation and function of the state.</u>"

Article 11 of the Leroy F. Greene School Facilities Act of 1998, commencing with

Education Code Section 17078.10, provides for:

> "(c) ..."preliminary apportionment"... for eligible applicants with critically overcrowded schools in advance of full compliance with all of the application requirements otherwise required for an apportionment pursuant to this chapter..."

Chapter 14 of Part 10, commencing with Education Code Section 17085 is entitled the "Emergency School Classroom Law of 1979" and is cited as the State Relocatable Classroom Law of 1979. Section 17086 states:

> "...the Legislature recognizes that the ad valorem tax is no longer available as a source of revenue for the construction of necessary school facilities. The Legislature considers that the greatest need in school construction is for classrooms for the education of public school pupils. It is the intent of the Legislature to satisfy this primary need to the greatest extent possible before providing any additional educational facilities, regardless of how desirable such additional facilities may be."

Chapter 15 of Part 10, commencing with Section 17100, established the School District Revenue Bond Act. This Act is based on the finding of the legislature that:

> "The Legislature hereby finds and declares that the State School Building Lease-Purchase Fund, pursuant to Section 17008, and the proceeds from the sale or lease of surplus school property are the two sources available to school districts to finance the construction of school facilities to relieve overcrowding. <u>However, these sources are still insufficient to meet the construction needs statewide of school districts</u>." (emphasis supplied)

The CRB History predicts:

> "The Department of Finance has estimated that $16 billion is needed over the next decade for public school construction and rehabilitation. (Footnote omitted)...The California Teachers Association and the California Building Industry Association presented a plan to issue $2 billion a year for 10 years. (Footnote omitted) Governor Wilson proposed $2 billion a year for four consecutive years. In the end, Proposition 1A was passed. It provides $6.7 billion over a four year period. However,...it will not be enough to meet the entire anticipated need of the state. Based on the Department of Finance projections, the six years following this

bond issue will require roughly an additional $10 billion in State money."[7]

In summary, the last 60 years of legislative history shows repeated and consistent recognition that school districts are unable to meet the school construction needs of their pupils. The history repeatedly reveals an admission that the education of school children is the primary responsibility of the state. The history of the inability of school districts and the obligation of the state to educate children results in the above recited litany of state money for school construction at low or no interest rates, repayment requirements of less than the amounts apportioned, and repayment terms unavailable anywhere else. Education of children is an obligation and function of the state. Classrooms are required to provide that education. Therefore, building classrooms is, primarily, a state obligation.

More importantly, combining the dire need for more classrooms and the modernization of existing classrooms with the inability of school districts to finance these badly needed facilities, leaves but one conclusion to the equation: the availability of state funding from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004 creates a compulsion to initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program (LCP), as described in subdivision (b) of Section 1771.5. Here, the carrot is too large, and the stick is too short, to ignore.

C. The Test Claim Complies with the Requirements of Law as to Costs

DOF next argues, quite incorrectly, that "...the claimants (sic) are not entitled to any subvention because they (sic) have not shown or attempted to show that the initiation of a Section 1771.7 LCP would result in reimbursable costs. (DOF comments, at page 2)

Test claimant refers DOF to the Declarations of William McGuire (Associate Superintendent - Business Services of Clovis Unified School District) and Thomas J. Donner (Executive Vice President of Business and Administration of Santa Monica Community College), attached to the Amended Test Claim as Exhibits 6 and 7, wherein each of them states an estimate that his respective district would incur expenses in excess of $1,000, annually. This complies with Government Code Section 17564.[8]

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[7] Cohen, Joel (op.cit. At p.19)

[8] Government Code Section 17564:

"(a) No claim shall be made pursuant to Sections 17551 and 17561, nor shall any

D. Increased Funding from SAB is Indefinite and Uncertain

DOF next argues that "...The State Allocation Board has adopted regulations that increase grants to schools and community colleges which obtain financing through the bond acts....Since the State has provided additional revenues and additional revenue sources, there would be no reimbursable costs...." (DOF Comments, at page 3)

DOF refers to subdivision (e) of Labor Code Section 1771.7 which directs that the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the labor compliance program. These additional amounts were incapable of accurate determination when initiated:

> "Staff acknowledges the possible validity of both comments. Given the urgency to adopt regulations by July 1, 2003, and given the very sparse data available at this moment, the Committee and Staff agreed the attached regulations should be presented to the SAB now, and that the amount of the per pupil grant should be revised in approximately one year. At that time, information based on actual experience in school districts can be used to recommend an increase or a decrease in the additional per pupil grant for future apportionments." (Report of the Executive Officer entitled "Implementation of Assembly Bill 1506 (Wesson) Grant Adjustments for Labor Compliance Programs" presented at the State Allocation Board Meeting on July 2, 2003), a copy of which is attached to DIR's Response dated October 6, 2003, as Exhibit "F".

These possible, but not yet finally determined revenues have been accounted for in the Test Claim. (See: Section E, following)

E. The Test Claim Allows for Possible Other Revenues

Next, DOF argues that "...LCPs generate revenue and cost savings....there would be no reimbursable costs unless the LCP costs exceeded (1) the additional funds provided by the State Allocation Board regulations, and (2) the costs of the district's pre-existing responsibility to insure its contractors comply with the Prevailing Wage law. The First

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payment be made on claims submitted pursuant to Sections 17551 and 17561, unless these claims exceed one thousand dollars ($1,000)..."

Amended Claim does not even attempt to show that the costs of Section 1771.7 LCPs exceed the costs of complying with districts (sic) pre-existing responsibilities under the prevailing wage law." (DOF Comments, at page 3)

Section D, above, already deals with any additional funds provided by SAB. As to Test Claimant's "pre-existing responsibility", Test Claimant refers the Commission to the Response of the DOF to the original test claim dated February 18, 2003, where it asks the Commission to deny the original test claim because there were no reimbursable pre-existing duties. In particular, Test Claimant refers the Commission to page 11 of that document where DOF denies that Test Claimant has any obligation to comply with the pre-existing labor compliance program.

In either event, the Test Claim has allowed for the possible receipt of such revenues.

> "Subdivision (e) of new Labor Code Section 1771.7 provides that, notwithstanding Section 17070.63 of the Education Code, for purposes of the act, the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of a labor compliance program. To the extent that funds are appropriated, allocated and received, and relevant to the costs mandated by the state subject to reimbursement, they would reduce the amount of reimbursable costs occasioned by Section 1771.7 and the Executive Orders cited herein." (Test Claim, page 26, lines 7 through 16, emphasis supplied)

F. Third Party Justification is a Matter for the Parameters and Guidelines

Finally, DOF argues that "[C]ontracting with a third party is a voluntary activity and is not a reimbursable activity unless the district could justify the contract as less costly than using district staff to meet its obligation." (DOF Comments, at page 3)

The test claim legislation requires districts "to initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program". Obviously, districts must do one or the other. However, the determination of when a third party contractor is justified, is a matter traditionally left for determination by the local school district, based on the staff skills and resources available to the district.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

DECLARATION OF SERVICE

RE: Prevailing Wage Rate 01-TC-28
CLAIMANT: Clovis Unified School District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of December 5, 2003, addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
FAX: (916) 445-0278

AND per mailing list attached

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 12/5/03, at San Diego, California.

Diane Bramwell

EXHIBIT A
HISTORY OF SCHOOL FACILITY FINANCING
CALIFORNIA RESEARCH BUREAU
FEBRUARY 1999

CRB

School Facility Financing

A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds

By Joel Cohen

Prepared at the Request of Senator Quentin Kopp

FEBRUARY 1999

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CRB 99-01

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CONTENTS

EXECUTIVE SUMMARY

As California enters the 21st Century, its public schools face many challenges. One significant challenge is the serious disrepair of an aging school facility infrastructure. Another challenge is the anticipated growth of nearly 2 million K-12 students during the next decade that will require many districts to build new schools to meet burgeoning student demand. Recognizing the substantial need for infrastructure, in November 1998, California voters passed Proposition 1A, a bond measure that provides $6.7 billion for public K-12 school construction and repair.

This measure establishes two new programs for the disbursement of bond funds and simplifies the application process by which schools apply for school construction resources. This change in programs, and in the methods by which funds are allocated, is important to the people of the State, as school districts, many of which have facilities in serious disrepair or require new construction, vie for their portion of the $6.7 billion pie.

Historically, the process by which schools applied for and received construction funds was cumbersome and complex. Furthermore, the research suggests that school districts that were sophisticated and knowledgeable about the complicated school facilities construction process were the most successful in securing funding – often at the expense of less sophisticated and uninformed school districts. Proposition 1A corrects much of this dynamic by simplifying the application and administrative processes, thereby creating a more level playing field for all school districts.

In order to understand the significance and relevance of this new process and its concomitant programs, however, it is useful to review the history of school construction financing in California and to understand the various pitfalls that existed under previous programs so as to avoid similar pitfalls in the future. This paper discusses that history and highlights the problems with preexisting programs.

It begins with an examination of the State Allocation Board and its staff (the Office of Public School Construction). Specifically, it reviews the role of the Board which is responsible for establishing policies for the distribution of school facility financing funds. It discusses how the Board, which was established in 1947, has evolved during the past five decades from one that set policy for various *loan* programs to one that today sets policy for *grant* programs.

The paper also discusses how various externalities—legislative or voter imposed initiatives, such as Proposition 13—have affected the Board's policies and procedures. The paper notes that the Board changed its policies often, and its policy shifts created an untenable dynamic for school districts as they attempted to secure funding. In particular, the paper highlights how districts were forced to weave their way through a complex, bureaucratic maze of applications, forms, and plans; and how this dynamic forced school districts to employ sophisticated personnel, or to contract with savvy consultants, in order to secure state financing for their construction projects.

This paper also presents a history of bond initiatives during the past five decades. It is clear that throughout this history there was never enough State money available to school districts for facility construction or repair. In fact, in spite of the $6.7 billion approved by Proposition 1A, experts estimate that an additional $10 billion will be required during the next decade. This paper discusses how the constant shortage of funds caused districts to use "whatever" means available to them to secure funding.

Voters have consistently been generous in approving the vast majority of statewide bond initiatives. Only three bond proposals out of 24 have failed in the past 50 years, and those that failed did so during times of recession. However, it is not clear how much additional debt voters will be willing to incur. This has especially been true since the passage of Proposition 13 in 1978, when the State began taking on a larger role in supporting school construction then it had before. To that end, this paper discusses how Proposition 1A creates a mechanism for school districts to tap state resources, and how school districts may need to tap other sources of facility funding.

Proposition 1A forges a partnership between the State and school districts for financing the construction and repair of their schools. Under its new programs, the State will provide 50 percent of the cost associated with building new schools, and provide 80 percent of the cost associated with modernizing existing facilities. It requires school districts to match state resources. However, school districts that are unable to offer this match can receive hardship funds based on prescriptive criteria. This paper provides details regarding these new programs and compares them to programs previously administered by the State Allocation Board. It also discusses how the Board is required to respond to district requests.

Proposition 1A is not the only impetus behind simplifying the school facility financing process. Concurrently, the Office of Public School Construction has rewritten the application process for funds to make it more user-friendly to school districts and has even offered applications and program information via the Internet. This paper discusses these changes.

The paper concludes with options that the Governor and the Legislature may wish to consider, including: offering protection to small and rural school districts when bond funds are exhausted; requiring annual financial reporting by the State Allocation Board; providing an on-line technical support for program applicants; and redeveloping the State funding source for school facility construction and rehabilitation.

REQUEST FOR RESEARCH

Programs and administrative procedures in Proposition 1A may produce significant changes to the previous programs and the manner by which the State Allocation Board distributes resources for school facility construction. In light of these changes, Senator Quentin Kopp requested that the California Research Bureau provide research on the following topics:

- A history of the State Allocation Board. How was the board's funding program intended to work and how has it evolved?

- An explanation of the State Allocation Board process. How does the State Allocation Board work? What are the procedures and criteria for receiving allocations? How are priorities set?

INTRODUCTION—THE PASSAGE OF PROPOSITION 1A

On November 3, 1998, California voters passed Proposition 1A - a $9.2 billion school bond initiative, and the largest of its kind passed in our nation's history. Over the next four years, revenues from Proposition 1A's general obligation bonds will provide $6.7 billion to public K-12 schools and $2.5 billion to public colleges and universities for the purposes of constructing new facilities and repairing existing ones.

The State Allocation Board will have the responsibility for determining a fair means of distributing the $6.7 billion available to K–12 schools. Many experts feel that developing such a system will be a daunting task, in spite of the fact that Proposition 1A/Senate Bill 50 is very prescriptive regarding the allocation of its bond funds.

This paper begins with a history and a discussion of the role of the State Allocation Board. Next, it examines the 24 state bond initiatives since 1947 and discusses how the Board has evolved its policies for distributing resources generated by these bond efforts. It then presents an overview of Proposition 1A and how this initiative creates a new allocation program that differs from previous ones. The paper also discusses the various problems that existed within the State Allocation Board's previous resource allocation systems and how Proposition 1A addresses these problems. It concludes with a section that offers options that the Legislature may wish to consider regarding the policies that the State Allocation Board should use for the equitable distribution of bond funds.

HISTORY OF THE STATE ALLOCATION BOARD AND ITS ROLE IN SCHOOL FACILITY FINANCING

There is a long and complex history regarding public school construction in California. This paper begins a review of the history in 1947[1] when the state legislature created the State Allocation Board.[2] Chapter 243, Statutes of 1947, established the State Allocation Board[3] as a successor to the Post War Public Works Review Board. That statute specifically authorized the board to allocate funds for building and repairing schools. In addition, it designated the State Allocation Board to make allocations for public works projects when no other state officer or agency had authority to appropriate state or federal funds.[4] Although it had many other fund allocation requirements during its five-decade history, the State Allocation Board today allocates funds only for school construction and renovation.

Composition of the Board

The State Allocation Board is comprised of seven members: two Senate members appointed by the Senate Rules Committee; two Assembly members appointed by the Speaker of the Assembly; the Director of the Department of General Services or his/her designee; the Director of the Department of Finance or his/her designee; and the Superintendent of Public Instruction or his/her designee. This appointment structure has existed since the Board's inception in 1947.[5]

Although its basic appointment structure is set in statute, its actual membership changes over time. One member, Senator Leroy Greene, served on the Board for over 20 years. Some Board members have served for only one meeting, while others have served an entire legislative session.

The four legislatively appointed State Allocation Board members provide a strong policy influence to the State Allocation Board. Through them, other members of the Legislature have input into the Board's policy and decision-making processes.

Policy Requirements

Members of the State Allocation Board are charged to formulate fair systems for determining priorities among project proposals. Prior to the passage of Proposition 1A/SB 50 in 1998, the Board was responsible for developing a fair and equitable appeals process that addressed the "special needs" of school districts. Such "special needs" included disaster relief, inability to secure matching funds, or inability to locate affordable property.

Board members also had extraordinary power to set school facility financing policy. Although the Board falls under the auspices of the State Administrative Procedures Act, it has often ignored the Act's provisions. It was common that board policies were changed from meeting to meeting, and that these new policies were not readily made public.[6] Therefore, school districts that were uninformed of existing policy operated at a distinct disadvantage. They may not have known the appropriate procedures for receiving

financing approval. Conversely, school districts that utilized hired consultants or had staff that regularly monitored the Board's actions knew exactly what mechanisms and procedures would be necessary for them to secure funding.

State Allocation Board Staff

The Office of Public School Construction (formerly the Office of Local Assistance), within the Department of General Services, was and continues to be responsible for providing staff work that is necessary to carry out the policies and implement the various programs of the State Allocation Board. The State Allocation Board is responsible for policies regarding the allocation of funds for building new schools and for repairing, upgrading, and rehabilitating old ones.

The Office of Public School Construction staff is also responsible for disseminating to school districts information regarding board policy and programs. Under its previous programs, the staff was responsible for making recommendations to the State Allocation Board regarding various appeals made by school districts that may have been denied funding, or that may have required special funding consideration. To that end, the Office of Public School Construction staff influenced where school districts fell on the long queue of project proposals considered and passed by the State Allocation Board. Staff also could have influenced Board decisions by advocating for specific school district projects.

Outside Influence

The State Allocation Board and the Office of Public School Construction staff have also been influenced by a variety of external interest groups. These include, but are not limited to, private school facility financing consultants, school board members, school administrators, teachers, parents, developers, California Building Industry Association, financial institutions, and other members of the Legislature. In addition, various state agencies with influence included the Division of State Architect, Department of Finance, and the Department of Education. These interests groups played and are likely to play a significant role in determining funding for projects that may have been denied or required special consideration. Consultants in particular, whether employed by or on contract with school districts, played an active role in the process. Many of these consultants, whose offices are in the same building as that of the Office of Public School Construction, influenced decisions of both the Office of Public School Construction staff and the State Allocation Board. Consultants were current on Board policies and procedures, and were highly sophisticated about the complicated processes that school districts must follow in order to obtain funding. They have been instrumental in shepherding proposals through the complex maze of funding phases - application to construction. School districts that did not contract with such advocates were often at a competitive disadvantage.

Evolution of State Allocation Board Programs—From Loans to Grants

The State Allocation Board has evolved markedly during the past five decades. Initially, its school programs provided resources to school districts via *loan programs* in which

districts were required to repay their assistance with property tax revenues. In addition, school districts used local school bonds to finance their various construction projects. In both cases, a two-thirds popular vote was required.

Proposition 13

With the passage of Proposition 13 in 1978, the State Allocation Board's loan orientation was significantly altered. Under Proposition 13, the amount of tax that property owners paid was limited to no more than one percent of the assessed value of their property. Local property tax revenues diminished, and the burden to fund many local government programs was shifted to the State, including public school construction. Further, local governments lost much of their property taxing authority, and the Legislature and Governor were forced to rethink how school districts could repay their existing loans to the State Allocation Board.

Recognizing that many school districts faced bankruptcy by being unable to service their loans, the Legislature in 1979 directed the State Allocation Board to allow school districts four options: (1) withhold payments on their loans; (2) temporarily delay their payments; (3) pay only a portion of their loan obligations; (4) or not pay back their loans at all. Further, with the implementation of these options, the Legislature required that the State Allocation Board shift its policy focus from a *loan-based* program to a *grant-based* program. This shift to grant-based programs remains today.

HISTORY OF SCHOOL BOND INITIATIVES—A CYCLE OF UNDER-FUNDING

The electorate of the state has been ultimately responsible for determining the availability of resources for school construction. The electorate must have confidence in the state's economy, and perceive a need for new and upgraded schools. Without such assurances, the electorate can and has rejected various bond efforts. Since 1949, voters have been asked to approve 24 bond measures related to school construction and renovation, and have passed 21 of these proposals. However, an interesting history follows regarding the content of these initiatives.

State as a Bank—The Loan Program 1949-1978

Legislation enacted in 1949[7] and 1952[8] established a loan-grant program "to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the public school system."[9] During this time period, the first baby boomers entered school, and for the next two decades, California public school enrollment increased by roughly 300 percent.[10] The Legislature recognized that many school districts faced substantial enrollment growth, while lacking the bond debt capacity that was necessary to finance large building programs. In fact, many school districts had reached their financial capacity to service the bonds that they previously incurred.

As a result, the Legislature developed a program to provide loans to school districts that were approaching or were likely to exceed their legal level of bonded indebtedness.[11] This new program was financed through State general obligation bonds. This program also required building construction standards and placed fiscal controls on the districts, including maximum cost standards and square feet per pupil limitations.[12] School districts, however, retained control over the design and construction of their facilities. Districts that wanted to participate in the state loan program were required to receive approval from two-thirds of their district's electorate in order to incur the debt. A surcharge on the local property tax provided revenues to service the loan debt.

The State formula provided that the total amount due on some loans would be less than the total amount of the actual loan. Some experts believe that the state's willingness to forgive part of school district loans through this formula was a precursor to the state grant program discussed below.

The First Loan Program Bond Initiatives

In 1949, the state issued its first bond proposal for education facilities financing[13] in the amount of $250 million.[14] This first initiative also began a cycle of inadequate funding. In that year, the Legislature thought that $400 million was necessary (over what school districts could afford above their debt limits) to meet the need of school districts that were facing enrollment growth from the new generation of baby boomers. However, after substantial debate, the bond proposal was reduced to $250 million, because the sponsors thought, "the people would not vote for such a large sum at one time."[15] In arguments

against the bond, opponents argued that $250 million was insufficient. Therefore, absent full funding, voters should reject the initiative. The measure passed.

In 1952, another school construction bond of $185 million was put before the voters. Proponents of this initiative stated that the amount was "extremely" conservative. A comprehensive study by the State Department of Education at that time revealed that $198 million was needed, while the Department of Finance estimated the need at $250 million. Again, the amount of needed resources surpassed the amount proposed, and the cycle of chronically under-funded facility financing for schools continued.

To further exacerbate the shortfall, the 1952 proposition, along with subsequent propositions offered in 1956, 1958, and 1960, included "poison pill" language that limited the Legislature's ability to appropriate any additional funds for school construction beyond that in the various propositions.[16] If the Legislature approved any additional resources for school construction, the amount of bonds that were sold would be reduced by an amount equal to the additional appropriation. After 1960, however, bond proposals excluded the language that precluded the Legislature from raising additional capital outlay funds.

During a two-decade period, the State Allocation Board administered this program as a bank. Resources from the state were limited, and many school districts were uncomfortable with the concept of borrowing money from the state, rather than from their local constituents. Further, since school districts were obligated to reach full bond indebtedness before applying for state loans, many did not participate. For these reasons, many school districts chose not to build facilities until their bonding capacity grew. Hence, many school districts found themselves chasing dollars after their schools were overcrowded—a situation not unlike today.

The Early 1970s

As a result of a major earthquake in the San Fernando Valley (Sylmar) in 1971, the state authorized $30 million[17] for a new program to finance the rehabilitation and construction of earthquake safe schools,[18] and for the renovation of buildings that the earthquake damaged.[19] This program was known as the School Buildings Safety Fund. Like its predecessor programs, the 1971 Act created a state loan program for eligible school districts. The Act also included provisions to forgive loans for school districts that had reached their bonding capacity. The 1971 program was augmented by a 1972 state bond initiative of $350 million of which $250 million was set aside for structural repairs due to earthquakes.[20] This latter bond initiative also provided a method for financing buildings in districts that did not meet the criteria of the program that was initiated in 1971,[21] and it required the State Allocation Board to first approve those applications from school districts for earthquake repairs. The State Allocation Board gave second consideration to funding projects for other types of repairs or upgrades. Hence, the Board began a new system for not only new construction but also repairs, as well as a system that set priorities.

A Changing Paradigm

From 1970 to 1980, public school enrollment statewide decreased by roughly one percent per year.[22] Reductions in both immigration and domestic in-migration to the state, as well as a decrease in the state's birth rate caused this decline. During this decade, there were sufficient resources available from local property tax revenues and from the state's loan program to meet the various rehabilitation needs especially of those school districts that were experiencing enrollment declines. The State Allocation Board thus shifted its loan program emphasis from new construction to rehabilitation, and to upgrading unsafe facilities that were damaged due to the 1971 earthquake.[23]

Nevertheless, some school districts continued to experience enrollment growth in response to suburban housing development.[24] In spite of such growth patterns, the State Allocation Board set its priorities to favor rehabilitation projects over new construction. The Board's orientation accentuated the differences between growing school districts and those that required rehabilitation, and caused an unequal state spending system that favored property rich urban districts over fiscally poor and growing suburban districts.[25]

To counter the State Allocation Board's orientation toward urban rehabilitation, growing suburban school districts recognized that in order to fund new school construction, they would have to depend almost entirely on their local property tax base. As more people demanded affordable housing in suburban neighborhoods, developers accommodated them by building numerous suburban housing units. The sheer increase in the number of suburban homes added significant resources to the property tax base, thereby benefiting the school districts that served those communities. Furthermore, the ongoing demand for suburban housing caused the prices of homes in these areas to increase precipitously, adding even more resources to the property tax base. Although school districts could have requested to reduce those tax rates that supported them to a minimum amount, they did not. Most districts kept their rates steady, and some even increased them. Homeowners, unhappy about menacing property taxes, sought relief. In 1972, the Legislature enacted a multi-year package, funded by the state's general fund, of $1.2 billion for school operation to be allocated over a three-year period and to serve as property tax relief.[26] In spite of this legislation, property taxes remained relatively high to cover local bond debt, and continued to be the primary source for school construction for growing school districts. Concurrently, the state continued to loan money to enrollment-static school districts for the purpose of rehabilitation.

Leroy Greene State School Building Lease Purchase Law

In 1976, the Leroy Greene State School Building Lease Purchase Law was signed into legislation.[27] This law established a state fund to provide loans to school districts for reconstruction, modernization, and replacement of school facilities that were more than 30 years old. The Act significantly altered the state's role in how school facilities construction was financed. Specifically, the state would no longer loan money; but it would finance school construction based on a leasing model.[28] Although the legislation was passed, the voters of the State remained unconvinced that more money was needed to

improve schools. Consequently, they did not pass the bond initiative that was necessary to fund the Lease Purchase Program.

The 1976 Act had specific language that created "priority points" for school districts that would apply for state funding. This was the first time that the State Allocation Board used a point system for creating a queue of approved projects. Priority points were given based on the number of unhoused students in the district, the rate of student enrollment growth, and how much rehabilitation a facility needed. Further, the Board instituted a first-come, first-served policy in which each accepted school district's application was stamped with a time and date.

Under the previous program, the state loaned money to school districts to build their facilities, and the school districts owned their property. Under the Greene legislation, however, the State maintained a lien on the property for the duration of the loan via a lease purchase agreement.[29] The State wanted to preclude school districts from purchasing land on a speculative basis using State money, only to sell the State funded property at a profit at a later date. This meant that the state would control the disposition of any school facility that it financed until the school district repaid its obligation on the lease.

The Proposition 13 Epoch 1978-1986

Proposition 13—Local Governments and School Districts Fiscally Stymied

With its passage, Proposition 13 eliminated the ability of local school districts to levy additional special property taxes to pay off their facility indebtedness. Proposition 13 capped the ad valorem tax rate on real property at one percent of its value, thereby reducing the income from property taxes to such an extent that it virtually eliminated this source as a means for lease payments. Proposition 13 also prohibited the electorate of a school district from authorizing a tax over-ride to pay debt service on bonds for the purpose of constructing needed school facilities.

To exacerbate this problem, the voters soundly defeated school construction bonds in both 1976 and 1978. They were two of only three[30] state general obligation bonds rejected by voters since 1947. The non-passage of these two successive bond initiatives, coupled with suburban enrollment growth, caused a statewide shortfall of $550 million[31] that was needed for school construction projects throughout the state in 1978.

Post Proposition 13

The limitations set by Proposition 13 caused school districts, counties and cities to turn to the state, which had a $3.8 billion surplus, to fill the gap.[32] In 1979, lawmakers approved a $2.7 billion (in 1978 dollars) "bailout" plan to assist schools and local governments.[33] Within a year, the state surplus was reduced to roughly $1 billion. Furthermore, the state had taken on a larger role as a funding source for school operations and capital improvement. To that end, it expected school districts to conform to its programs and projects.[34]

Effects of Proposition 13 on the Lease Purchase Program

In 1979, legislation implementing Proposition 13 included provisions for restructuring the State's Lease Purchase Program.[35] School districts that received funds from the state were required to pay rent to the State as low as $1 per year, creating an "unofficial" grant program.[36] In addition, school districts were to contribute up to 10% of the project's cost from local funds.[37] However, many school districts could not raise these matching funds through local bonds. They requested that the State fund their entire projects. The State Allocation Board created a waiting list of projects.

A Recession Further Complicates School Facility Financing

Beginning in 1982, California was in a recession that lasted until 1984. During this time period, the State's budget surplus was expended. School districts' recession experiences were complicated by the fact that student enrollments again began to increase again.[38] Approximately 60 percent of California's 1,034 districts at the time projected annual growth rates of over two percent between 1980-81 and 1983-84, with some districts projecting a doubling in their enrollment.[39] At the same time, estimates indicated that over one-third of the State's school buildings were over 30 years old and many needed substantial rehabilitation.[40] The Coalition for Adequate School Housing (CASH) estimated that the one-time cost of rehabilitating these older facilities would be $1.9 billion.[41] Further, CASH estimated that school districts would need an additional $400 million annually for the next five years for building and repairing school buildings. Since the State was in recession, such funds were not available. Thus the State had to rethink how it would prioritize its school facilities projects.

A New System for Funding School Construction

In light of the backlog of applications for state funds, the Office of Local Assistance (now known as the Office of Public School Construction) designed a numerical ranking system that used "priority points" to determine a school district's eligibility for funds. This system gave priority to school districts who had students who were "unhoused," and special consideration was given to how districts used certain facilities.[42] The more points a project application received, the higher on the list it was placed. Recognizing that school districts were facing enrollment growth and required further rehabilitation, the Legislature in 1982 authorized a general fund appropriation of $200 million for school construction projects. This amount was later reduced to $100 million.[43]

Further, in order to ease the burden that many school districts felt because of the recession, the State loosened the repayment schedule for its lease-purchase program. School districts were allowed, for 10 years, to pay one percent of the cost of state funded lease-purchase projects, rather than the 10 percent they initially were required to pay.[44] Again, the State Legislature and the State Allocation Board moved away from a loan program and more toward a grant program.

Multi-Track Year-Round Education

Recognizing that the State had very limited bond resources, the Legislature wanted a more cost-effective facilities financing incentive system for school districts. That system would force districts to use their space more efficiently. In response to the shift in policy, the Legislature passed Chapter 498, Statute of 1983. This statute encouraged school districts that were experiencing growth pressure to adopt multi-track year-round education (MTYRE) programs. MTYRE programs enroll students in several tracks throughout the entire calendar year. At any given time, one track is on vacation, but vacation periods are short in duration.[45] The MTYRE program allows a more intensive use of existing facilities, thereby reducing the need for new facilities in growing districts.

School districts received an immediate financial return if they participated in the MTYRE program. A school district that redirected its students into a MTYRE program received a grant of up to 10 percent[46] of the cost that would be necessary to build a new facility not to exceed $125 per student.[47] School districts that participated in MTYRE were eligible for air conditioning and insulation in their buildings.

In 1988, as pressure for state financing continued, the Legislature required that top priority for financing new construction projects be given to districts that used multi-track year-round education programs. School districts that offered MTYRE and were willing to match 50 percent of their construction costs received a funding priority from the State Allocation Board.[48] This put other school districts that could not meet these MTYRE and funding criteria at a distinct disadvantage. These latter school districts sought relief from the voters in 1986. Small school districts were one exception to the MTYRE requirement.

1986 Lease Purchase Program

In 1986, the voters approved Proposition 46. Proposition 46 amended Proposition 13[49] by restoring to local governments, including school districts, the ability to issue general obligation bonds and to levy a property tax increase to pay the debt service subject to a two-thirds vote of the local electorate.[50] This amendment allowed school districts to augment the one-percent cap on property taxes and to secure additional bond indebtedness to build and improve their schools.[51]

Passage of Proposition 46 helped, but did not solve school districts' financing problems. Many school districts were unable to secure the necessary two-thirds vote to authorize local funding, and still relied on state funding to assist them. Further, the federal government in 1986 passed legislation that required each state to remove friable asbestos from their educational facilities – another charge that the school districts could ill afford.

California adopted similar asbestos standards to those established by the federal government in 1986; however, few school districts reported their estimated costs for removing the substance. In light of the need to remove the asbestos, and in order to address the growing backlog of proposed school construction projects, voters passed Proposition 79 in 1988 - an $800 million bond initiative. It specifically set aside $100 million to cover asbestos removal.[52]

A Growing Shortfall and Greater Scrutiny

There is no doubt that from 1982 to 1988 state support for public school construction was limited and difficult to secure. The demand for new school facilities, for modernization, and for asbestos removal was great.[53] As of June 1, 1986, applications that were submitted by school districts to the State Allocation Board for state funding of *new school construction* projects alone totaled roughly $1.3 billion. In addition, applications for state funding for *reconstruction or rehabilitation* of school facilities totaled over $991 million.[54] Total demand for school facility improvement in 1986 was nearly $2.3 billion - an amount that significantly outweighed the $800 million voters approved in that year's bond initiative.[55] Even with a boost of funding of $150 million per year from Tidelands revenues in fiscal years 1984 and 1985, the Lease Purchase Program fell short.[56] By 1988, the shortfall had grown to $4 billion, in spite of the fact that voters had approved $2.5 billion in bond money from 1982-1988.

The State Allocation Board was forced to scrutinize every request for school construction funding, recognizing that absent a major infusion of State bond money, most districts would not receive funding for their projects. This scrutiny created an extremely competitive environment for the limited resources that were available to the schools. Many participants believe that school districts that contracted with knowledgeable consultants, or had district staff who were familiar with the State Allocation Board's policies and criteria, were the most successful in securing a high ranking place in the queue for resources, once those funds become available.

There is no definitive research or data that support this belief. Consultants are not required to report their involvement in the application process. However, there is substantial anecdotal evidence to support the assertion.

School Financing as a Collective Effort—The Three Legged Stool

In 1986, the Legislature recognized that resources were scarce and that no one governmental or private entity could finance school construction. It attempted to equalize the burden of school facilities financing between state government, local government and the private sector.[57] This concept was known as the "three legged stool." The idea was that the state would provide funds through bonds. Local government would provide its share through special taxes, general obligation, Mello-Roos and other bond proceeds. The private sector would provide funds through developer fees. Appendix A describes funding alternatives for these latter two legs of the stool.

The "three legged stool," however, never quite worked. For example, to assure that developers would not fund a disproportionate share of the cost to build schools, the Legislature, in 1986, capped the amount new homebuyers would pay for developer fees at $1.50 per square foot, and empowered the State Allocation Board to raise the cap by a certain amount each year. However, school districts found a loophole around the cap by requesting that cities impose a fee on their behalf, and cities imposed rates on some

developers that exceeded those allowed.[58] California courts upheld these fees in the Mira, Hart, Murrieta court cases.

Until the recent passage of Proposition 1A, many local governments have imposed developer fees that exceed those allowed by the Board. For example, in 1987, fees in San Diego and Orange counties reached a high of $8700 per house.[59] By 1990, total development fees for some homes reached $30,000.[60] Statewide, developer fees have increased from $31 million in 1978 to $200 million in 1997.

In 1998, the State Allocation Board increased the fee to $1.93 per square foot.[61] With the passage of Proposition 1A in November 1998, however, local governments have apparently lost their ability to increase their fees beyond those determined by the State Allocation Board. Further conflict is likely.

The 1990s—Complicated Funding Programs

In the fall of 1990, the Legislature passed legislation that created two programs that provided additional financial incentives for schools to offer year-round education.[62] The first of these programs provided a one-time grant to school districts to ease the expense of changing from traditional nine-month programs to year-round tracks. The second program provided an "operating grant" of between 50 percent and 90 percent of the amount districts saved the state by not having to build new schools. At the recommendation of the Office of the Legislative Analyst, the Legislature repealed the 1982 and 1986 incentive programs discussed above.[63]

In response to the 1990 legislation, the State Allocation Board developed a new priority system for allocating lease purchase money. Under this new system, the Board apportioned funds based on a combination of when an application was received and how many priority points it garnered. Through a complex formula, priority points were given to schools that had a significant number of "unhoused students," or had substantial rehabilitation needs. This procedure might have worked well if the state could have financed all applications in a timely manner. However, the demand for state money increased to the point where districts without special priorities could expect to wait years for the state to finance their projects.

The program was in effect for only one year when the Legislature repealed the program and created yet another system for allocating state money.[64] In 1991, the Legislature defined six priorities for funding. First priority was given to districts that had a "substantial"[65] enrollment in multi-track schedules, and that were paying at least 50 percent of the construction costs for their new schools. Second priority went to districts with a "substantial" year-round enrollment and that wanted the state to pay the entire cost of any new construction for their year-round schools. The remaining four priority levels took into consideration factors for those schools who did not meet the "substantial enrollment" criteria outlined above, or were unable to match state resources.

The complex set of formulas made it difficult for school districts to completely understand what criteria would best serve them. Further, throughout this period, the Board was

required to implement new programs and redefine its priorities. For example, in 1990 the Legislature created a program that was adopted by State Allocation Board for school districts that could not find adequate land on which to build a school. Known as the Space Saver Program, it was designed to assist urban school districts that could not obtain adequate acreage for a school campus. The first space saver school, developed in 1993, is scheduled to be completed in Spring 2000 in the Santa Ana Unified School District, in a former shopping mall.[66]

Another example of shifting priorities took place in 1996 when the Legislature mandated the Board to redirect its third highest priority to class size reduction from a previous focus on child-care facilities.[67] A third took place at the end of 1997 when the priority points system was replaced by a first-come, first served system. While there were exceptions to this rule, money was offered first to school districts willing to cover some of the costs associated with constructing or repairing facilities. Schools that could not afford to cover the remaining 50 percent were placed on a separate list.

Such shifts in policy, coupled with the significant complexity of formulas that drove the priority point system, along with the sporadic creation of new programs, caused many school districts to depend on outside consultants. These consultants understood the many policy changes that the Board enacted – sometimes on a monthly basis. They were also knowledgeable of new programs, and clearly understood the workings of the staff who carried forth the Board's policies. Without the assistance of consultants, school districts were unable to keep track of policy changes and special considerations enacted by the Board. Further, while the Board and its staff advised school districts regarding changes in their policies in a regularly published document, it did not provide a centralized source of materials, such as an up-to-date handbook. Consequently, school district personnel were often uninformed about the various nuances of the programs administered by the Board.

State Bond Efforts of the Nineties

As the State Allocation Board shifted its focus and policies throughout the early 1990s, Californians approved state school bond initiatives in 1990 for $1.6 billion and in 1992 for $2.8 billion. In one of its 1992 reports, the Department of Finance reported that statewide K-12 enrollment was estimated to grow by 200,000 new students per year for at least five years,[68] and that an estimated $3 billion would be needed annually for new school construction.[69] However, in spite of growing enrollments and a significant demand for facility rehabilitation, in 1994, the electorate rejected a $1 billion bond initiative. The State was in a recession.

A lack of State bond funds was not the only problem associated with the allocation of school construction funds. The Auditor General reported in 1991 that the Office of Local Assistance mismanaged state funds. It detailed that construction funds loaned to school districts were not recovered; that districts overpaid on some projects and failed to collect the overage; that it dispersed funds without proper documentation; and that it failed to conduct required close-out audits on construction projects.[70]

As a result of this audit, the Office of Public School Construction in concert with the State Allocation Board developed stringent internal and external audits and fiscal controls. These control mechanisms included increasing the detail of financial review of projects, prohibiting school districts from participating in the program unless a balance was not due, and no longer receiving rent checks for portable classrooms.[71]

Attempts to Ease Passage for Local Bonds

Recognizing that the State would be unable to fund the entire backlog of school construction proposals, Governor Pete Wilson in 1992 proposed a constitutional amendment to reduce the requirement for the passage of local bonds from two-thirds to a simple majority.[72] The idea was that local governments should have to meet the same 50 percent requirement as the State for passing bonds. Further, there was strong sentiment in the Wilson administration that local governments should pay an increased share of school construction costs. However, the Legislature rejected his plan.[73] Other attempts in recent years to reduce the vote for passage of local bonds from two-thirds to something less have also failed.[74]

1996 School Bond Issuance - Finally More Money

Proposition 203, passed by the voters in March 1996, provided $2.065 billion for school facility construction. However, the Legislature at the time estimated that school districts would need $7 billion in construction funds to meet enrollment growth that was anticipated during the next five years.[75] This $7 billion did not include the needs of Los Angeles Unified School District (LAUSD), which had 20 percent of the state's student population. At the time, LAUSD alone needed $3 billion to upgrade and modernize its schools.[76] Clearly, anticipated demand for State funds substantially exceeded available resources.

To respond to the many school district proposals, the State Allocation Board followed its general priority points policy. However, many school districts, recognizing that they would not receive funding for years because of their position in the funding queue, and because of the limited amount of resources that were available, resorted to creative means to try to secure funding for their projects. For example, some schools districts sought special consideration for funds by requesting emergency allocations. Such a tactic would allow a school district to receive funds immediately.[77] Other school districts used the appeals process to argue that their projects were needed more than those of other school districts that were higher in the queue.[78]

This cannibalistic dynamic caused a fair amount of resentment among those school districts that were bumped from a relatively high position in the queue by those districts that sought emergency relief or special consideration. Further, it was clear that the most sophisticated school districts found a variety of tactics that would secure the funding of their projects. These tactics are described in greater detail later in this paper under the section that describes how the Board processed its applications.

Class Size Reduction Causes Greater Housing Needs

The distribution of funds from Proposition 203 was further complicated by the Governor's Class Size Reduction Initiative. In particular, the State Allocation Board earmarked $95 million for the purpose of purchasing 2,500 portable classrooms for schools that were facing severe classroom shortages. This was in addition to $200 million that the Department of Education had available for assisting schools in purchasing such facilities. The Office of Public School Construction determined that a total of 17,500 classrooms were needed to accommodate class size reduction, and that there was only enough money to fund less than half of the estimated need.[79] The State Allocation Board reinterpreted Proposition 203 by creating a new Portables Purchase Program at the expense of their other programs. This caused some school districts to again get bumped in the queue for funding.

Never Enough Money—Still a Shortfall

Since1947, the electorate has approved all but three State bond initiatives. In spite of the voters' tendency to support various bond initiatives, by 1998, the backlog of school construction projects that were approved by the State Allocation Board, but unfunded, totaled more than $1.3 billion. Although the voters have been generous by approving bond initiatives roughly every two years,[80] there were times during the past five decades when bond money was not available for periods of four or six years.[81]

The Department of Finance has estimated that $16 billion is needed over the next decade for public school construction and rehabilitation.[82] Various bond proposals in 1997 and 1998 were circulated that considered multiple-year bond issuances. The California Teachers Association and the California Building Industry Association presented a plan to issue $2 billion a year for 10 years.[83] Governor Wilson proposed $2 billion a year for four consecutive years. In the end, Proposition 1A was passed. It provides $6.7 billion over a four-year period. However, while the amount appears generous, it will not be enough to meet the entire anticipated need of the state. Based on the Department of Finance projections, the six years following this bond issue will require roughly an additional $10 billion in State money.

Table 1 on page 18 shows the history of state school bond initiatives from 1949 to 1998. In the next sections of this report, we discuss the various programs, the complicated application process used by the State Allocation Board that school districts had to endure to secure funding, and how Proposition 1A attempts to simplify this process.

Table 1 - STATE SCHOOL CONSTRUCTION BONDS		
Title of Bond Initiative	Date & Year of Election	Funds Authorized
School Building Aid Law of 1949	November 8, 1949	$250,000,000
School Building Aid Law of 1952	November 4, 1952	$185,000,000
School Building Aid Law of 1952	November 2, 1954	$100,000,000
School Building Aid Law of 1952	November 4, 1958	$220,000,000
School Building Aid Law of 1952	June 7, 1960	$300,000,000
School Building Aid Law of 1952	June 5, 1962	$200,000,000
School Building Aid Law of 1952	November 3, 1964	$260,000,000
School Building Aid Law of 1952	June 7, 1966	A)$275,000,000
School Building Aid Law of 1952	June 6, 1972	B)$350,000,000
School Building Aid Law of 1952 And Earthquake	November 5, 1974	$150,000,000
School Building Lease-Purchase Bond Law of 1976 (Failed)	June 8, 1976	$200,000,000
School Building Aid Law of 1978 (Failed)	June 6, 1978	$350,000,000
School Building Lease-Purchase Bond Law of 1982	November 2, 1982	$500,000,000
School Building Lease-Purchase Bond Law of 1984	November 6, 1984	$450,000,000
Green-Hughes School Building Lease-Purchase	November 4, 1986	$800,000,000
School Facilities Bond Act of 1988	June 7, 1988	$800,000,000
1988 School Facilities Bond Act	November 8, 1988	$800,000,000
1990 School Facilities Bond Act	June 5, 1990	$800,000,000
School Facilities Bond Act of 1990	November 6, 1990	$800,000,000
School Facilities Bond Act of 1992	June 2, 1992	$1,900,000,000
1992 School Facilities Bond Act	November 3, 1992	$900,000,000
Safe Schools Act of 1994 (Failed)	June 7, 1994	$1,000,000,000
Public Education Facilities Bond Act of 1996, Proposition 203	March 1996	C)$3,000,000,000
Class-size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998, Proposition 1A	November 3, 1998	D)$9,200,000,000

Bonds in [bold] failed to receive a majority of votes.

A) New amount of 1966 bond authorization available for regular program is $185.5 million after deducting $35 million reserved for compensatory education facilities, $9.5 million for regional occupational centers, and $35 million for rehabilitation and replacement of earthquake damaged and unsafe schools.

B) Up to 250 million dollars earmarked for rehabilitation and replacement of unsafe schools.

C) One billion dollars earmarked for higher education facilities

D) Two and one-half billion dollars is allocated for higher education.

THE PROGRAMS

Prior to the approval of Proposition 1A, the State Allocation Board oversaw six active programs associated with school facility construction, repair, and remodeling. These six programs made up the Lease-Purchase Program that was discussed earlier in this paper. This section briefly describes these programs, discusses how the State Allocation Board set priorities for school district projects, explains how the Office of Public School Construction staff reviewed and acted upon district proposals, and how the State Allocation Board considered district appeals. The purpose is to advise the reader of not only the process and administration of allocation, but also some of the pitfalls that existed under the old system. Perhaps these pitfalls of the old system can be avoided when allocating Proposition 1A resources.

The Growth and Modernization Programs

The Growth and Modernization Programs allocated funds to school districts for building new schools (Growth Program) and for repairing existing facilities (Modernization Program). School districts qualified for the Growth Program based on an "allowable building standards" formula.

For its Growth Program, the State Allocation Board developed standards for the amount of space that was necessary to house students based on a district's number of ADA (Average Daily Attendance).[84] The Modernization Program provided funds to school districts for nonstructural improvements to permanent school facilities that were more than 30 years old, and for portable buildings that were more than 20 years old. Such nonstructural improvements included interior partitions, air conditioning, plumbing, lighting and electrical systems.

The Modernization Program provided funding for up to 25 percent of the replacement value of the building. Under some circumstances, districts could use additional funds beyond the 25 percent for handicap access compliance, including elevators when appropriate, and for alternate energy systems.

School districts could apply to this program by offering to match state funds and be listed as "Priority One," or they could ask the State to fund their entire project and be listed as "Priority Two."

Process for Receiving Growth and Modernization Funds

School districts that applied for growth and/or modernization funds were required to follow nine steps in three critical areas - planning, site selection and construction. Each of these three critical areas provided a separate and gradual funding stream for the school's project.

Planning Phase

During the planning phase, a district was required to complete four forms that demonstrated that it was eligible for either the growth or modernization program.

Eligibility to participate in the programs was based on enrollment patterns or the age and condition of those schools that required modernization. If a district met these standards, it moved on to the "site development phase."

Site Development Phase

Selecting a school site was critical. If a school district was participating in the modernization program, it would move to the next phase. The site would have to be safe and able to support the school's curriculum. An adequate site would have to meet certain standards with respect to size and location. Site review could take a school district months (if not years) to investigate. Under the growth program, a school district arranged a search committee to locate available properties and narrowed its search to three sites. In addition, the school district held public hearings regarding the impact of the lands to be used for educational purposes, and notified neighbors about possible site use. A representative from the Department of Education visited three selected sites to review and determine which was the most suitable site based on criteria including, but not limited to: street traffic safety; traffic congestion; geological hazards; and other environmental issues. All school districts followed a similar process for site selection whether they financed the project themselves, or requested State funding.[85]

Some school districts were unable to build new schools because they could not secure appropriate properties. This was especially true in urban and industrial areas where vacant land was not readily available or was extremely expensive.[86]

Once a district found an appropriate property, it was required to prepare a site development plan that included architectural and engineering drawings, along with building contract agreements. Districts were required to follow strict site development, plan development, and construction cost guidelines in order to be eligible for state funds.[87] Once these guidelines were met, the district proceeded to the construction phase.

Construction Phase

Every construction project received an allowance for site development and to erect a building. The eligible costs associated with construction for these programs were classified into several broad categories: building construction; site development; energy conservation; and supplemental funding for multi-story construction. In addition, facility funding included adjustment costs associated with geographic and regional differences, or the demolition of an existing structure.

A project architect for each contract developed final plans and documents as part of the project's final stage. These documents were used to establish a construction budget. The Division of the State Architect approved and monitored the district's final plans. After review, a construction apportionment was recommended to the State Allocation Board, which in turn authorized the distribution of funds. Upon completion of all regulatory oversight, the district was allowed to break ground.

The Deferred Maintenance Program

The Deferred Maintenance Program provided a 50 percent State match to assist school districts with expenditures for major repair or replacement of school buildings. Such repairs or replacements were for plumbing, heating, air conditioning, electrical systems, roofing, interior and exterior painting, and floor systems. School districts were required to place one and one-half percent of their general funds into an escrow account in order to receive a State match. For school districts that could not fit the parameters of the modernization program, the deferred maintenance program was the only alternative to receive State assistance.

The State also provided critical hardship funds to repair buildings that might seriously affect the health and/or safety of pupils. When available funding was insufficient to fully fund all hardship requests in any given year, the State Allocation Board created a priority list. However, the State Allocation Board often made exceptions to its list.

The Deferred Maintenance Program differed from the modernization program in that school districts were required to submit a five-year plan as to how their projects would be implemented. The plan displayed a rank for each project, and identified those projects that the school district would likely fund.

Deferred Maintenance Application Process

Based on the most recent available material, the deferred maintenance program had 13 steps, and a school district needed to complete several forms and documents. The 13 steps were divided into categories including a letter of interest, application process, critical hardship project documentation, and fund release.

A school district notified the Office of Public School Construction each year if it wanted to participate. Upon receipt of the initial letter, the Office of Public School Construction would send the district a request for its five-year plan of maintenance needs and an "Annual Application for Funds."

The school district would then provide the OPSC with a list of items scheduled for major repair or replacement,[88] along with its five-year implementation plan. When the district received state funds, it could only expend those resources for those items on the list. It could not redirect any resources toward administrative overhead, repair and maintenance of furniture, ongoing preventative maintenance, energy conservation, landscaping and irrigation, athletic stadium equipment, drapery or blackout curtains, testing underground storage tanks for leaks, or chalkboards.

Once the Office of Public School Construction approved a school district's list of projects it allocated funds accordingly. In cases of hardship, OPSC would visit the school prior to allocating funds. The district's governing board controlled and was responsible for all deferred maintenance funds. These funds were placed in a special escrow account.

The Year-Round Air Conditioning/Insulation Program

The Year-Round Air Conditioning/Insulation Program (ACI) began in 1986, as an incentive program for schools to operate during the summer.[89] In order to participate in the program, a school district was required to have a plan for Multi-Track Year-Round Education, or have 10 percent of its students enrolled in a Multi-Track Year-Round Education program. The ACI program assisted school districts by providing resources for air conditioning and insulation.

Year-Round Schools Air Conditioning/Insulation Application Process

The application process for the ACI program differed slightly for those school districts that had a year-round program from those that were planning a year-round program. However, regardless of their status, school districts were required to complete eleven stages in two phases to receive funding. If a school district had an air conditioning system that needed repair, it could not apply to this program, but could apply for funds under the deferred maintenance program.

A school district completed forms that included information on the buildings and spaces that would be affected, along with a report regarding the project's anticipated start-date. In addition, another application was required that provided information on whether the school site was experiencing enrollment growth, and whether some level of modernization was already in progress. Further, a school district that was not on a year-round schedule was required to show how its year-round calendar would be used. If the district was approved for funding, various allowances were provided to the district.[90] In addition to these allowances, the state would provide funds for gas and electric service, general site development, and air conditioning/insulation construction.

Items that were not covered by this program included costs for heating, window solar film, classroom doors and hardware, re-roofing, lighting, security, interior housing, fire alarm systems, unrelated repairs, installations, and painting.

The State Relocatable Classroom Program

The Relocatable Classroom program was designed to meet the needs of school districts that were impacted by excessive growth or unforeseen classroom emergencies. The State Allocation Board allocated funds for the acquisition, installation, and relocation of safe portable classroom facilities. The State maintained a fleet of 5,000 furnished classrooms that could be leased to school districts for $4,000 per year. Hardship cases could lease portables for $2,000 per year. These portable units were available on a first-come, first-served basis. However, there was no maximum amount of time a school district could keep the portables, and districts were not required to return them. Thus, some school districts have kept the portables indefinitely.

Relocatable Classroom Application Process

In order to participate in either relocatable classroom program, a school district was responsible for site preparation costs including electrical hookup, plumbing connection, a State Architect approved plan, insurance and maintenance. After approval by the Board, the district would be reimbursed for the cost of architect fees, electrical hookup, furniture and equipment, and plumbing installation. However, reimbursements were capped at $9,450 per classroom.

The Unused Site Program

The Unused Site Program was established in 1974 as part of the General Lease–Purchase umbrella. It required school districts and county superintendents of schools to pay a fee for district properties that were not used for "official" school purposes. "Official" school purpose was defined as being used for K-12 education, continuing or adult education, special education, childcare, or administration of any educational units.

This program did not provide funds directly to schools. However, resources generated from the fees that districts paid for unused facilities were used to cover deferred maintenance costs and to service the debt on the state's various school construction bonds. Since the Board simply administered the return of funds to the state, the funds could not be redirected to other programs administered by the Board. Proposition 1A eliminates their fee requirements.

The Office of Public School Construction Staff Review and The State Allocation Board's Appeals Process

The State Allocation Board meets roughly 11 times a year. At each meeting the Board reviews and approves about 200 applications for funding. Prior to the State Allocation Board's review, the Office of Public School Construction staff processes all applications. Before Proposition 1A, the approval processes for the programs, except for the growth and modernization programs, were straightforward. Either a school district's application fit a program's description for reimbursement, or it did not. Due to the complicated nature of the Growth and Modernization programs, "special considerations," or project applications that did not fit in the parameters of the program were placed in a different category. The State Allocation Board approved roughly 90 percent of all growth and modernization projects without special consideration. Issues requiring special consideration could include peculiarities of the proposed site, or the costs associated with a project. The applications were divided into special consents or "specials," and appeals. Both types permitted the Office of Public School Construction staff great latitude in the decision-making process, as they investigated and evaluated school district applications on a case-by-case basis.

A "special" occurred when OPSC staff reviewed a school district's application that did not meet the standards of the program, and determined that an exception should be made. This agreement may have required several meetings between the school district's administration and the OPSC staff. With OPSC staff recommendation, which may have

been inconsistent with State Allocation Board policy, this application would be brought before the State Allocation Board for review. This category was normally granted approval in one action.

An appeal occurred when OPSC staff reviewed a school district's application that did not meet the standards of the program, and determined an exception should not be made. If after several meetings an agreement could not be reached, the school district would bring its case before the State Allocation Board. An appeal was granted only on a case-by-case basis. At times, legislators have spoken on behalf of school districts at Board meetings.[91] The difference in the two types of special considerations was that a school district or its representative would have to defend its actions in an appeal. However, as already noted, only those people who kept up with the process and policy changes were adept enough to tackle an appeal. Therefore, a school district seeking an appeal before the State Allocation Board might seek help from legislators that represented them, or hire consultants. For instance, in the May 1998 State Allocation Board meeting, a well-versed school finance consultant appeared on behalf of the Apple Valley Unified School District. Apple Valley hired both a construction manager and a general contractor to erect its new school, in the face of board policies allowing a school district to hire only one such position. On behalf of the school district, the consultant addressed the State Allocation Board, and pointed out that in five other cases the State Allocation Board had voted in favor of a school district that hired both a general contractor and a construction manager.[92]

Less seasoned district representatives would not have known that the State Allocation Board had already set a precedent for funding projects that include both a construction manager and a general contractor.[93] The OPSC staff was not knowledgeable on this issue and therefore could not be a source of information.

PROPOSITION 1A—A POSSIBLE FIX TO SAB PROCESS PROBLEMS

Proposition 1A not only authorizes an additional $6.7 billion to K-12 schools, but it also offers a fix to several of the process problems discussed above. It replaces the provisions of the previous Lease-Purchase Program. This section discusses (1) the resource allocation provisions of the legislation; (2) the programmatic components of the legislation; and (3) how the legislation improves the resource allocation process over that which existed under previous bond programs.

Total Resource Allocation Provisions of Proposition 1A

The resource allocation system in Proposition 1A is specific and detailed. Bond proceeds are to be allocated in 2 two-year cycles: $3.35 billion available immediately; and $3.35 billion available after July 2, 2000. Of the $3.35 billion that is immediately available, $1.35 billion is earmarked for new construction, $800 million for modernization, $500 million for hardship cases, and $700 million for class-size reduction.

For the second $3.35 billion distribution, $1.55 billion will be available for new construction, $1.3 billion for modernization, and $500 million for hardship cases. There are no resources in the second allocation for class-size reduction.

School districts receive funding for their projects based on a per pupil formula. The formula is based on a statewide average cost for construction, adjusted each January for inflation. The figures are based on unhoused [94]average daily attendance (ADA). The per pupil ADA formula is as follows:

	Growth	Modernization
Elementary	$5,200	$2,496
Middle School	$5,500	$2,640
High School	$7,200	$3,456

It is anticipated that the initial $1.35 billion available for new construction during the first round of allocations will be insufficient to meet the needs of those school districts that are facing substantial enrollment growth. Proposition 1A establishes a priority point system for new construction projects when State bond resources are exhausted.[95] The Office of Public School Construction will process applications on a first-come, first-served basis from subsequent bond offerings.

In addition to the provisions outlined above, school districts that receive bond proceeds are required to set aside three percent of their general funds each year for 20 years for the purpose of deferred maintenance.

Components of Proposition 1A

Proposition 1A establishes three categories for funding. The first is the Growth Program, in which the State finances half the cost of new construction and the school district the other half. The second is the Modernization Program, in which 80 percent of the cost of rehabilitation is provided by the state and 20 percent by the school district. The third category is "hardship," in which the State funds up to 100 percent of the cost for emergency needs, or an increased proportion of its share for new construction or modernization.[96]

Proposition 1A holds harmless those school districts that received State Allocation Board approval for the construction phase of their projects (under the previous Priority 1 - able to provide a 50 percent match). They will receive growth and modernization funds, but under the rubric of the previous "Lease Purchase Program." This grant is supplemented by land costs, site development, and other adjustments.

Another new provision of the Proposition is that school districts can seek modernization resources after a facility is 25 years old, rather than 30 years under the previous program.

Schools districts that had received prior Board approval for Priority 2 projects (100 percent state funding) will have to either indicate their ability to finance 50 percent of their proposed projects or reapply under one of the new programs. If the school district cannot meet the provisions of the new programs, it can apply as a "hardship" case.

The California Supreme Court ruled in 1991 that cities and counties could limit housing development on the basis of the supply of classrooms.[97] Proposition 1A suspends, until 2006, the Court's ruling.[98] With the passage of Proposition 1A, school districts will not be able to limit new housing construction based on a rationale that school facilities do not exist. However, in 2006, if adequate bond funds for new construction are not available, cities and counties can once again deny development. Further, as discussed earlier, the Proposition permits the school board to increase developer fees to up to $1.93 per square foot.[99] Proposition 1A sets up a system where fees can be levied of up to 50 percent and 100 percent of the costs associated with building a school by developers under certain circumstances.

Proposition 1A Improves the Resource Allocation System of the State Allocation Board

Proposition 1A makes several changes to the programs administered by the State Allocation Board. It attempts to simplify the process of applying for funds, consolidates the Board's previous six programs into two, and attempts to create a more equitable funding system. It also makes the State Allocation Board and the Office of Public School Construction staff more accountable for their actions. Table 2 presents the differences between the Board's previous Lease Purchase Program, and the new programs that are initiated by Proposition 1A.

Table 2 - Comparison of Lease Purchase Program to Proposition 1A Programs

	LEASE PURCHASE PROGRAM	SCHOOL FACILITIES PROGRAM PROP 1A
FUNDING FACILITIES	Priority 1 projects-growth and modernization-received 50 percent funding based on actual costs from the state. Priority 2 projects-growth and modernization-received 100 percent funding form the state.	Growth projects receive 50 percent funding based on a per pupil formula from the state. Modernization projects receive 80% funding from the state. Hardship projects can receive up to 100 percent of funding from the state based on three broad categories financial, physical and excessive costs.
CONSTRUCTION EXCESSIVE COSTS & COST SAVINGS	Some excessive costs (i.e., change orders) were reimbursed by the state. Cost savings were returned to the state.	Excessive costs are not reimbursed by the state and school districts keep costs savings.
MODERNIZATION PROJECTS	Buildings must be at least 30 years old.	Buildings must be at least 25 years old.
PROJECT APPROVAL	Projects were approved three times in conjunction with the planning, site acquisition and construction phases.	Projects receive one approval (except hardships that receive two approvals).
FUND ALLOCATION	Funds were allotted after each phase.	Funds are allotted only after DSA approves plans, unless there is a hardship.
MAINTENANCE OF FACILITIES	Required school districts to set aside two percent of their general fund for ongoing maintenance.	Requires school districts to set aside three percent of their general funds for 20 years for ongoing maintenance.
PROPERTY LIENS	State maintains a lien to properties it funds.	State does not hold liens, and existing liens are released.
ARCHITECTURAL APPROVAL	Division of State Architect approved all plans.	The Division of State Architect or a state approved private engineering firm may approve plans.

	LEASE PURCHASE PROGRAM	SCHOOL FACILITIES PROGRAM PROP 1A
DEVELOPER FEES	The cap on fees was $1.93 per square foot; however, cities or counties could levy a higher fee and pass it to schools districts.	The cap on fees is $1.93 per square foot, adjusted biannually. Fees may be assessed up to 50 percent of the costs of a project if a school district has accessed other forms of financing including Mello-Roos, G. O. bonds, and parcel taxes. In order to increase fees, school districts must meet two of four criteria, including MTYRE, local school bond positive votes of 50 + 1 percent, 20 percent of students are housed in portables, 15 percent of bond debt used.
WHEN STATE FUNDS RUN DRY	Projects were placed on a pending state-funding list or charged a city-based developer fee.	Modernization projects may be placed on a pending state-funding list. Growth projects may be placed on a priority points list, or the school district may collect 100 percent of financing from a developer.
CONTAINING DEVELOPMENT (MIRA, HART MURRIETA COURT CASES)	Cities and counties on behalf of school districts were able to contain residential development by suspending the building of new facilities.	School districts can not request cities or counties to prohibit residential development based on a lack of funds or school facilities until 2006.
ARCHITECT & CONSTRUCTION MANAGEMENT FEES	Percentage caps on fees based on size of projects	No caps.
MODERNIZATION PROGRAM	Provides funding to building over 30 years old, and portables over 25 years old. Calculations done on a district basis.	Provides funding for buildings over 25 years old and portables over 20 years old. Provides funding on a site-specific basis.
AIRCONDITIONING-ASBESTOS PROGRAM	Allotted funds specifically to install AC and remove asbestos.	These are now incorporated in the modernization program.

Simplification

To further simplify the process, the Proposition reduced the number of school facility financing phases from three to one.[100] This is now possible because school districts receive a flat grant from the State based on the number of students they enroll, rather than on the estimated cost of a project. Under the previous program, each phase of a project was evaluated independently; thus the cost to the State for any given project could change. Under the new program, a school district receives a single grant for a single project, and cannot request that the state fund additional need beyond the original request.[101]

The Proposition also explicitly requires that the State Allocation Board initiate a public hearing process that notices any policy changes considered by the Board. It requires that the Board make available to school districts written up-to-date documentation that clearly explains its policies, and specifically describes how its new programs work.

Consolidation

Until Proposition 1A, the State Allocation Board administered as many as 13 programs. The most current six are discussed above. With the enactment of Proposition 1A, the number of programs has been reduced to two, along with a special category for hardship cases. This consolidation of programs makes it easier for school districts to choose a program that best suits their needs. It precludes the type of creative tactics that school districts were forced to pursue to match their projects to the right program in order for them to receive funding.

A More Open Process

The Proposition causes a major shift in policy direction for the State Allocation Board. Under its previous programs, the Board funded both new construction and modernization on a 50/50 matching basis. Under Proposition 1A, the Board is required to fund modernization projects more generously than new construction projects, in that the State will fund 80 percent of the cost for modernization compared to 50 percent for new construction.

Another major outcome of Proposition 1A is that the State Allocation Board no longer has the authority to offer grants to school districts that may seek funds for special projects without any real statutory framework. Now school districts must demonstrate that they meet specific hardship criteria set out in the new law. The practical effect of this change will depend on how the Board interprets this provision.

Previous legislation implicitly required that the State Allocation Board follow guidelines set forth in the Administrative Procedures Act (APA); however, the Board did not do so. Proposition 1A explicitly requires the Board to follow APA guidelines. This means that any change in policy or regulation considered by the Board must be properly noticed to the public before the Board can act. This requirement, if the Board follows the full spirit, will allow school districts to be fully informed of Board policies and procedures, as well as its rules and regulations.

PITFALLS IN THE PROCESS PRIOR TO PROPOSITION 1A

This section discusses the State Allocation Board's attempts to improve its system and the pitfalls that existed under the previous programs.

Until recently, rules governing the application process were labor-intensive, both for school districts and the state agency personnel (including the Office of Public School Construction and the Division of the State Architect). In 1989, the Legislature received a report outlining the complex application.[102] The report identified 54 steps school districts had to perform in order to receive application approval and eventual financing. In addition, the process required 24 separate forms.

Process Streamlined Recently

Since 1992, the OPSC has tried to be more efficient. Changes implemented by OPSC included: simplified and streamlined applications; improved response time for application review; improved policy information dissemination; and school districts were empowered to complete their own applications.

The most concrete indication that the Office of Public School Construction was becoming more efficient was in the application process. The application process for the Growth Program was reduced from 54 steps to nine. In addition, the number of forms that were needed to apply for funding was reduced from 24 to four.

School districts complained and begged for applications to be checked and approved for a State Allocation Board meeting agenda in an expeditious fashion. As part of the efficiency movement, the Office of Public School Construction set a goal to reduce the time from when a school district filed a completed application until it was placed on a State Allocation Board meeting agenda from over 400 days to 60 days.[103] Prior to Proposition 1A, applications on average still took longer than the 60 days to be reviewed. However, the office's efficiency achievement by reducing application review days is noteworthy.

In addition, the Office of Public School Construction worked more closely with school districts in the decision making process and provided greater leeway. In particular, school district personnel could self-certify certain information pertaining to a project rather than rely on state agency personnel. The self-certification process removed the time a school district would wait for a response from the Office of Public School Construction. It thereby shortened the application process.

Under its previous programs, it was difficult for school districts to get information pertaining to the funding process from the Office of Local Assistance (OLA) staff or from written materials. The Office of Public School Construction is now more service-oriented.[104] One can obtain information in person or from the office's Internet site.[105] In fact, the staff of the Office of Public School Construction is continually placing more information on the Internet. This information includes an automated project tracking system, Senate Bill 50 regulations, office contacts, and old board policy changes.

School Districts in Line Stand on Shifting Sands

Under the previous allocation system, school districts that completed their applications and were placed in queue were never guaranteed funding in the order their applications were received. The State Allocation Board dictated that school district applications were placed in an unfunded application list on a first-come/first-served basis. However, there were four general ways that school district applications could be "bumped" up or down in the queue.

Broad Classification Decisions

The first way a school district could get bumped was if the State Allocation Board decided to redirect its emphasis and fund a broad category of projects. For instance, the SAB could decide to fund all application projects from small school districts (no matter where they were in queue). If a school district was large, hundreds of proposed school projects could jump ahead in the funding queue.

The second way a school district could get bumped was if the State Allocation Board shifted the specific funding program allocations. Thus, for example, the State Allocation Board could decide to shift funds earmarked for the Growth Program to the State Portable Classroom Program.

Specific School District Decisions

The third way a school district could get bumped was if another school district application in queue with a later application filing date appealed to the State Allocation Board to change its application filing date to be ahead of other school districts. That school district application would be funded first.

The fourth way a school district could get bumped was if an emergency situation occurred and a school district requested critical hardship money from the State Allocation Board. The Board could provide these funds when available.

The application process requires equity and balance in order to ensure fair competition by school districts for State funds. The process needs to be flexible enough to handle emergency situations, yet firm enough to prohibit jockeying among school districts for better placement in the queue.

Proposition 1A halts the movement of funds from one program to another. However, the other examples are still feasible. Jockeying of school districts by consultants for better placement in line may continue to occur. This is especially true as Proposition 1A cannot handle the pent up demand for State funds. The next section discusses options that the Legislature may consider in order to improve this system.

OPTIONS FOR IMPROVING THE SCHOOL FACILITY FINANCING SYSTEM

A Separate List for Small and Rural School Districts

When the Proposition 1A funds are exhausted, new construction project applications will receive priority points for future funding. Small and rural school districts may require separate lists to ensure that they are placed near the front of a funding queue. This is necessary because there is no guarantee that the entire queue would receive future funding. Small and rural school districts, based on the current priority points system, may not receive enough priority points to approach the front of the queue. Larger school district applications, with greater per pupil need, may be able to position themselves high enough in the queue for funding by receiving favorable OPSC evaluations. Proposition 1A allows schools to skip to higher positions in the funding queue if they score higher priority points based on their number of unhoused students or if they can demonstrate a special hardship. *The Legislature may wish to create a separate list for small and rural school districts to create a more equitable system.*

Annual Report and Independent Accounting

In the early 1990s, many state agencies, boards, and commissions, because of budget cuts, postponed writing annual reports to the Legislature. These reports provided financial and policy information to the public. The State Allocation Board was one government entity that has not prepared regular audited reports of its programs' operations and expenditures for public review. The State Allocation Board will receive $6.7 billion over the next four years to fund school construction projects. *The Legislature may wish to require the Board to prepare for the Governor and Legislature an annual report that details how and to whom bond funds were distributed. The Legislature may wish to require that an independent accounting firm or the State Auditor General prepare the Board's report.*

On-Line Technical Assistance

Although the application and funding process administered by the Office of Public School Construction has been streamlined and simplified in recent years, certain components of the process are still cumbersome. The process should be simple enough that school districts do not need to hire consultants or lobbyists to advise them or to shepherd their proposals. *The Legislature may wish to pass legislation that would require the OPSC to develop a technical assistance program to provide school districts with the necessary information and advice they need in order to qualify for and receive bond funds. Such a system could include an automated Internet help-line.*

A Special General Fund Appropriation for School Construction

The State's bond capacity may not be able to fund every State infrastructure need, including schools, transportation, prisons, and water during the next decade. School facility needs are estimated conservatively at roughly $10 billion, while some estimates have put the figure at $40 billion for the next decade alone. According to the Department of Finance, the State can afford to service approximately $25 billion in additional debt. Thus, school facility financing alone could incur the entire debt capacity of the State. *The Legislature may wish to create a special appropriation fund for public school capital outlay as part of the State General Fund to augment the State's bond programs. In addition, the State may wish to design a school construction reserve fund, which is funded from budget surplus revenues.*

ENDNOTES

[1] Chapter 243, Statutes of 1947.
[2] If a school district wants state funding for construction or repair of a school, it must apply to the State Allocation Board for the money. There are school districts that repair and construct school buildings without the assistance of the State Allocation Board (i.e., San Diego Unified School District, San Luis Unified School District). However, this report will focus on a school district that requires state support.
[3] Chapter 243, Statutes of 1947. Initially, the State Allocation Board administered a number of Public Works programs for the State ranging from housing and employment assistance to school facilities construction. Various programs include: the Postwar Planning and Acquisition, Construction and Employment Act, Veterans Temporary Housing, State School Building Construction Programs, Emergency Relief Programs, and Community Assistance Programs (State Allocation Annual Report 1983-1984, p. 1).
[4] California Government Code 15502.
[5] Government Code 15490.
[6] While the State Allocation Board submitted policy changes to school districts, an up-to-date handbook was not made available. In addition, turnover of board members and school administrators may lead to ignorance of programs and the program changes.
[7] Amendments to the Constitution, Proposition 1, November 8, 1949.
[8] Amendments to the Constitution, Proposition 4, November 4, 1952.
[9] Op.cit.
[10] California School K-12 enrollment grew from 1.689 million students in 1950, to 4.633 million students in 1970 (State of California. Department of Education. Education Demographics Unit. CBEDS Data Collection. "Enrollment in California Public Schools 1950 through 1997").
[11] This is defined by California Education Code, Section 15102, as the legal limit of debt that a school district can incur based on the assessed value of property in that school district.
[12] Known as the State School Building Aid Program. The Legislature determined qualifications in order for school districts to participate in this program. They include the following provisions:

1. To qualify for a loan from the State a school district must have voted local bonds to 95 percent of its bonding ability.
2. Borrowing districts financially able to do so must repay the money to the State. Terms of 30 or 40 years of repayments are provided.
3. No money can be borrowed by a school district unless the proposed loan is approved by two-thirds vote of the electors of the district.
4. School construction, financed in any part by State loans will be subject to cost controls to be established by State Allocation Board (includes restrictions on the number of square feet of construction allowed per pupil).

[13] Amendments to the Constitution Propositions together with Arguments, Proposition 1, November 8, 1949. This bond issue was for $250 million.
[14] Voters set the initiative process in motion in 1911 under reform-minded Governor Hiram Johnson. Los Angeles Times. "State's Voters Face Longest List of Issues in 66 Years; November 8 Ballot to Carry Maze of 29 Propositions." July 7, 1988, p. 1-1.
[15] Amendments to the Constitution Propositions together with Arguments, Proposition 1, November 8, 1949. This bond issue was for $250 million.
[16] Amendments to the Constitution, Special Election, June 7, 1960, Proposition 2, Part II, Appendix. p. 2.
[17] School Building Safety Fund, December 1971.
[18] The Field Act, that mandates that school construction is able to withstand earthquakes, has yet to dictate how to build an indestructible building.
[19] Propositions and Proposed Laws, Together with Arguments, Primary Election Tuesday, June 6, 1972, p. 1.
[20] Ibid.
[21] State Allocation Board Report to the Legislature 1972-1973 Fiscal Year, p. 3.
[22] Public school K-12 enrollment declined from 4.457 million students in 1970 to 3.942 million students in 1980. (State of California. Department of Finance. Demographic Research Unit. 1997 Series California Public K-12 Graded Enrollment).

[23] Op.cit., p. 2.
[24] Ibid.
[25] Property rich communities often have more poor people than property poor communities. The presence of commercial and industrial development can make an otherwise poor district "rich" in its tax base. Conversely, affluent communities often discourage industrial development that would make them property rich, but environmentally poorer. The lack of correlation between poor people and property poor districts is often overlooked in discussions of school finance issues. Even though the distinction has been known for a long time. Campbell, Colin D.; Fischel, William A. National Tax Journal "Preferences for School Finance Systems; Voters Versus Judges." Footnotes from Helen Ladd. "Statewide Taxation of Commercial and Industrial Property for Education." National Tax Journal (June 1976): 143-153.
[26] Goff, Tom. "Passage of Tax Reform School Financing Bill Urged by Riles." Los Angeles Times, July 19, 1972, p. I-1.
[27] Section 17700 et al., Education Code.
[28] Property values were increasing dramatically all over the State. This model stopped school districts from speculating on land that was financed by the State.
[29] Op.cit., p. 2.
[30] Proposition 1 of 1978 was defeated 65 percent to 35 percent. Propositions from 1976, 1978 and 1994.
[31] Proposition 1 of 1976 would have provided $250 million, and Proposition 1 of 1978 would have provided $300 million.
[32] Shultz, Jim. "Major Firms Gained Most With Prop. 13." Sacramento Bee, September 13, 1997, p. F-1.
[33] Ibid.
[34] Karmin, Bennett. California's Bankrupt Schools." New York Times, July 17, 1983, pp. 4-21. Linsey, Robert. "San Jose Schools Declare Insolvency in Wake of Tax Revolt." The New York Times, June 30, 1983, p. A–14. However, some school districts that were academically and fiscally well managed prior to Proposition 13 faced problems. In 1983, the San Jose Unified School District filed for bankruptcy. The National School Boards Association stated that it was the first insolvency of a large school district since the depression. The San Jose Unified School District, at the time, held a reputation for excellence in education. It ranked 14th in the state in the ratio of students to teachers, and its teachers' salaries ranked second highest in Santa Clara County. However, since Proposition 13, the school district set aside maintenance and construction projects, laid off teachers and non-teaching administration, until it could not make further reductions and still continue to pay its staff.
[35] Chapter 282, Statutes of 1979. State School Building Lease Purchase Bond Law of 1984—Voter Pamphlet Analysis.
[36] While the loan program was still on the books, the state made exceptions to aid school districts.
[37] California Education Code, Sections 17730.2, 17732. However, the Attorney General cited that 10 percent of local funds to cover the costs associated with facility development is not required. Coalition for Adequate School Housing. CASH Register, November 1984, p. 3.
[38] California Department of Education. CBEDS Data Collection. Education Demographics Unit. 1998.
[39] Coalition for Adequate School Housing. CASH Register, September 1982, p. 1.
[40] Ibid.
[41] Coalition for Adequate School Housing. CASH Register, December 1982, p. 2., (in 1980-81 dollars).
[42] This evaluation was amended annually. The State developed a formula that was based on standards that considered how a facility was used and how many pupils were unhoused. In some years, the State gave preference to unhoused pupils, while in other years, the state gave first consideration to how a facility was used. Facility use included childcare, before and after school programs, adult education, and traditional K-12 programming.
[43] Savage, David. "Resolution Brings Tax Cuts, Schools Told." Los Angeles Times, October 15, 1982, p. B1.
[44] Assembly Bill 62, Chapter 820, Statutes of 1982.
[45] California Department of Education. California Year-Round Education Directory 1997-98.
[46] For example, a school district that needed to build a new elementary school that cost $4 million could receive $400,000 from the state if it chose to redirect students to existing facilities that incorporated the MTYRE program.

[47] Chapter 886, Statutes of 1986, added provisions that capped the grant at $125 per student.
[48] School districts that could not offer to cover any expenses (now referred to as a Priority 2) could conceivably wait years. MTYRE continues today, and has been a successful program. In 1997, more than 1.19 million or about 22 percent of California students attended schools with year-round calendars. The State Department of Education estimates that the MTYRE program has saved that State more than $1.8 billion in construction costs since its inception. In 1997-98, $66 million was allocated from the "mega item" of the state budget. About $40 million was sent to Los Angeles Unified School District to cover the reported 40,872 excess students. However, once students are "excess," they can not be counted as students for the Office of Public School Construction in the erection of new facilities. Approximately 102,000 students are "excess." While the program has provided relief for school construction, it remains a controversy whether educationally the program is successful.
[49] Proposition 46 on the June 1986 Ballot.
[50] Greene-Hughes School Building Lease-Purchase Bond Law of 1986 Voter Pamphlet.
[51] Proposition 46: Property Taxation, June 3, 1986.
[52] DeWolfe, Evelyn. "Schools Get Low Marks for Asbestos." Los Angeles Times, January 8, 1989.
[53] School enrollment bottomed to 4.089 million students in 1983, the same population amount that occurred in 1964. By 1986, student population increased to 4.377 million. California Department of Education. Education Demographics Unit. CBEDS. 1998.
[54] Op.cit.
[55] Op.cit.
[56] State Allocation Board Report to the Legislature 1984-85, 1985-86, Fiscal Years.
[57] AB 2926, Statutes of 1986.
[58] These were referred to as the Mira, Hart, Murrieta court cases.
[59] Later that year, fees were capped by the Legislature at $1.50 per square foot on residential units statewide.
[60] Fulton, William, "California Pulls Out the Stops; Cities Cope with Government Budget Deficit." American Planning Association, p. 24, October 1992. About one-third going to school districts.
[61] Cummings, Judith. "CA Turns to Developer Fees." The New York Times, January 16, 1987, p. A-15.
[62] Chapter 1261, Statutes of 1990.
[63] Legislative Analyst's Office, p. 23. "Building Schools in California: What Role Should the State Take in Local Capital Development?" Linda Herbert. Jesse Marvin Unruh Assembly Fellowship Journal, Volume II, 1991, pp. 1-4.
[64] Op.cit.
[65] Substantial enrollments are defined as at least 30 percent of the district's enrollment in kindergarten or any of the grades one to six, inclusive, or 40 percent of the students in the high school attendance area, see Education Code, Section 17717.7g.
[66] Conversation with Mike Vail, on January 21, 1999. Mr. Vail is the Assistant Superintendent of Facilities and Governmental Relations at the Santa Ana Unified School District.
[67] The class size reduction program reduced the ratio of students to teachers in kindergarten to third grades. It exacerbated the obstacles for school districts that were growing in size, but lacked facilities to house the new students. School districts that were not growing had to provide additional classroom space to account for smaller ratios of teachers to students in kindergarten to third grades. The State Allocation Board provided portable classrooms to cover the smaller-sized classes. The State Allocation Board estimates that thousands more classrooms are needed.
[68] Department of Finance, School Populations Projections. 1998.
[69] Jacobs, Paul. "Backers of Education Cite Jobs, Overcrowding." Los Angeles Times, May 27, 1992.
[70] Auditor General of California. "Some School Construction Funds are Improperly Used and not Maximized." January 1991.
[71] County of Sacramento Superior/Municipal Court, Court #97F05608, CJIS XREF #250593.
[72] Vrana, Deborah. "Assembly Rejects Plan in California to Ease Passage of School Bonds." The Bond Buyer, January 27, 1992.
[73] The passage required a two-thirds vote by the legislature.
[74] November 1993, Proposition 170 failed by 70 percent.

[75] Colvin, Richard Lee. "Bond Victory Heartening to Educators." Los Angeles Times, March 28, 1996, p. A1. Anderluh, Deborah, Sacramento Bee, March 31, 1996, p. A1. Of the $7 billion, $1.6 billion was estimated for overhauls of buildings over 30 years old, and $5.6 billion for new construction and classroom additions.

[76] Colvin, Richard Lee. "The California Vote (a Series)." Los Angeles Times, March 19, 1996, p. A3.

[77] If a school district has an application with the SAB to repair its roof and the roof is not fixed in a reasonable period of time, further structural damage may occur. This new or additional damage could bump the project to the top of the list.

[78] See the sub-section entitled "School Districts in Line Stand on Shifting Sands."

[79] Bazar, Emily and Jane Ferris. "Money for Portable Classrooms." Sacramento Bee, September 26, 1996.

[80] State bonds were proposed biannually in 1988, 1990, and 1992.

[81] In 1976 and 1978 bond measures were defeated by the electorate.

[82] "Lawmakers Scrap Over Billions in School Bonds." California Public Finance, May 5, 1997, p. 1.

[83] "Huge School Bond Mulled" California Public Finance, September 8, 1997, p. 1.

[84] This included the type of facility and the number of teaching stations (classrooms).

[85] The Department of Education, School Facilities Planning Division is responsible for site review and site plan review and is required to recommend all school locations for new schools and additions to schools site regardless of the funding source.

[86] For example, in 1988, the Los Angeles Unified School District wanted to rehabilitate a hotel into a school. The State Allocation Board paid $48 million to an escrow account in an attempt to hold the price to acquire the Ambassador Hotel. When the school district and State Allocation Board realized that the site was not acceptable and decided to back out of the contract, they found that the developer had removed the money placed in the escrow account. In addition, when the district attempted to backpedal out of the contract, the owner sued for a breach of contract. Currently, there are negotiations between the school district and the owner of the property, Donald Trump.

[87] A school district was responsible for developing detailed cost estimates for the proposed school or addition. Site support costs provided funds for the preparation of environmental impact documents, development of relocation reports, determination of relocation claims, and negotiation of site purchases. The state reimburses up to 85 percent of the amount expended for eligible sites.

[88] This list was limited to those school facility components that have approached or exceeded their normal life expectancy.

[89] Applications for projects and appeals with correspondence from Carol A. Fisher, Apple Valley Unified School District, Author.

[90] Reimbursable fees and costs related to plans include architect fees, Division of State Architect/ORS Plan Check fee, CDE Plan Check Fee, Preliminary Tests (like soil, foundation, and exploratory borings) and other fees, for instance, advertising construction bids, and printing of plans.

[91] Pascual, Psyche. "Funding to Build High School Finally Approved By State." Los Angeles Times, June 17, 1993.

[92] Understanding the board's other five opinions would be difficult to track if not impossible to uncover.

[93] To evaluate the State Allocation Board's policies and procedures, it was necessary to obtain the State Allocation Board Handbook. The Handbook contains procedures and policies for reviewing and criteria for approving applications from school districts for bond funds to build new schools. When this report was initiated, the Handbook that the State Allocation Board provided was dated 1995, but contained policies adopted in 1993. Further, the State Allocation Board changes its policies and procedures often, and has no administrative process by which it updates its Handbook. An up-to-date, comprehensive list of policies and procedures was not available in any other format. A new handbook for the Lease Purchase Program was available on line - however, it also suffered from a lack of regular updating. The State Allocation Board meets every month and, hypothetically, policy changes can occur each month. Prior to Proposition 1A, despite being subject to the Administrative Procedures Act, the State Allocation Board had no public notice or participation requirements for the procedures by which it changes its policies. Only long-term policies are published in the California Regulatory Notice Register. Such policies included contracting and affirmative action requirements. Furthermore, staff reported that policies change so frequently, that it would be impossible to include relevant policies in the reporter or any other document.

[94] The number of students above the maximum number set by CDE to be in a classroom.
[95] The priority points ranking mechanism is based on, among other things, the percentage of currently and projected unhoused students relative to the total population of the applicant district or attendance area.
[96] In hardship cases, the State will fund more than 50 percent of new construction if a school district is unable to come up with its 50 percent match and had gone through a reasonable effort. Similarly, districts that are unable to offer a 20 percent match for modernization can seek relief from the State. Financial hardship is defined for those school districts that cannot afford to build, repair, or replace facilities because of fiscal restrictions (for example, an inability to match state funding because of an inability to pass local bonds or a lack of bonding capacity). Facility hardship can also apply to school districts that lack adequate housing for their pupils due to a lack of health and public safety conditions; or because of a natural disaster, traffic safety, or the remote geographic location of pupils (i.e., rural). Excessive costs may be attributed to geographic location, size of project, the cost associated with a new project in urban locations that may require high security or toxic cleanup, and sites that may require seismic retrofitting.
[97] The State Supreme Court ruled that school districts that were unable to accommodate enrollment growth could ask their city and county councils to limit real estate developers from building additional housing. Some developers found it necessary to offer additional resources (land or money) to get support from school districts and city councils for their projects.
[98] In three legal challenges, the courts have ruled that cities were not precluded from making zoning or other land-use decisions, because of the availability of classroom space, see Mira Development Corporation v. City of San Diego, William S. Hart Union High School District v. Regional Planning Commission of the County of Los Angeles, Murietta Valley Unified School District v. County of Riverside. The practical effect of the rulings was that cities could limit development on the basis of the supply of classrooms. Some developers found it necessary to offer additional resources, land or money, to get support from school districts and city councils for their projects.
[99] If the State expends all of its Proposition 1A resources prior to 2006, school districts can ask developers to pay 100 percent of site acquisition and school construction costs. In order to receive developer support under these conditions, school districts must participate in the Multi-Track Year-Round Education program. The Proposition includes language that the State may reimburse developers for up to 50 percent of their costs if subsequent bond funds become available.
[100] Under the old program, school districts had three application phases for each of their projects – planning, site, and construction. Under the new program, there is only one application phase for the entire project proposal, except under hardship provisions.
[101] However, once the funds are distributed to the school district, the school district keeps the interest accrued on the funds.
[102] Price Waterhouse. Joint Legislative Budget Committee Office of the Legislative Analyst. Final Report of the Study of the School Facilities Application Process. January 10, 1988.
[103] One streamlined step is the self-certification process in the Lease Purchase Program.
[104] However, in light of the office's accomplishments, the author had to request information routinely more than once.
[105] www.dgs.ca.gov/opsc.
[106] School Services of California.

APPENDIX A

School District Financing Mechanisms

In addition to state bond funds, school districts have a variety of other alternatives for funding school construction. These include developer fees, certificate of participation, general obligation bonds, and Mello-Roos taxes. Also, a developer may simply build a school rather than consider other financing alternatives.

Local General Obligation Bonds

In 1986, after an eight-year hiatus, school districts could once again use general obligation bonds to finance school facilities. Bonds are a favorable method of financing, even though they require a two-thirds vote and proceeds cannot be used for items such as buses and furnishings. In 1986, 14 school districts offered bond initiatives. In 1987 and 1988, this number grew to 51 and 54 school districts, respectively. In November 1998, 36 school districts held bond elections.[106]

Developer Fees

In 1978, the Wilsona School District was the first to use developer fees. These fees added about $2,000 to the cost of a typical home in the Lancaster area. While school districts were exacting developer fees, there was no statute that explicitly permitted this activity. The Legislature standardized the authority by giving school districts direct authority to charge developer fees. School districts welcomed developer fees especially because they did not require an election, and the funds associated with the fees could be used for a wide variety of facilities that were associated with enrollment growth. In response to a growing number of complaints from developers, the Legislature capped the amount that could be collected in 1986. Proposition 1A prohibited local agencies from using the inadequacy of school facilities as a reason for not approving housing development projects. The authority to raise developer fees was placed with the State Allocation Board. However, developer fees generally are not enough to cover the full costs of constructing a school.

Certificates of Participation

Certificates of Participation (COPs) are another, though complicated, tool for districts to raise money without voter consent. The most common arrangement is that the district leases a new school owned by another government agency or a nonprofit agency, which in turn raises the capital to build the school by selling shares (certificates of participation). In the long run, lien revenues COPs are remarkably like bonds. One disadvantage of the COP arrangement is that it does not provide a new revenue source for the lease payments. Funds usually come from the school district's general fund.

Mello-Roos

The Mello-Roos Community Facilities Act, established in 1982, authorized school districts and local governments to form "community facilities districts." Subject to the approval of two-thirds of the voters, these special districts could sell bonds to raise revenues for the purpose of financing new buildings, or to rehabilitate existing school facilities. A majority of Mello-Roos districts are created in inhabitable areas that are proposed for development where voting is by the landowners. The district sets a specific tax per house.

Original List Date: 7/8/2002
Last Updated: 10/9/2003
List Print Date: 10/15/2003
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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EXHIBIT R

July 11, 2007

Mr. Keith Peterson
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And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: **Request for Specific Citations to Regulations**
Prevailing Wage Rate, 01-TC-28
Clovis Unified School District
Labor Code Sections 1720,1720.2,1720.3,1726,1727,1733,1735,1741,1742, 1742.1,1743,1750,1770,1771,1771.5,1771.6,1772,1773,1773.1,1773.2,1773.3, 1773.5,1773.6,1775,1776,1777.1,1777.5,1777.6,1777.7,1812,1813,1861;
Public Contract Code, Section 22002;
Statutes 1976, Ch. 281; Statutes 1976, Ch. 538; Statutes 1976, Ch. 599; Statutes 1976, Ch. 861; Statutes 1976, Ch. 1174; Statutes 1976, Ch. 1179; Statutes 1977, Ch. 423; Statutes 1978, Ch. 1249; Statutes 1979, Ch. 373; Statutes 1980, Ch 962; Statutes 1980, Ch. 992; Statutes 1981, Ch 449; Statutes 1983, Ch. 681; Statutes 1983, Ch. 1054; Statutes 1988, Ch. 160; Statutes 1989, Ch. 278; Statutes 1989, Ch. 1224; Statutes 1992, Ch. 913; Statutes 1992, Ch. 1342; Statutes 1993, Ch.589; Statutes 1997, Ch. 17; Statutes 1997, Ch. 757; Statutes 1998, Ch. 443; Statutes 1998, Ch. 485; Statutes 1999, Ch. 30; Statutes 1999, Ch. 83; Statutes 1999, Ch. 220; Statutes 1999, Ch. 903; Statutes 2000, Ch. 135; Statutes 2000, Ch. 875; Statutes 2000, Ch. 881; Statutes 2000, Ch. 920; Statutes 2000, Ch. 954; Statutes 2001, Ch. 804; Statutes 2001, Ch. 938;
Title 8, CCR, Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802,17201-17212, 17220-17229, 17230-17237,17240-17253, 17260-17264

Dear Mr. Peterson:

Commission staff is currently preparing a draft staff analysis on the *Prevailing Wage Rate* test claim, tentatively scheduled for the December 6, 2007 Commission hearing. The test claim asserts that several regulatory provisions impose reimbursable state-mandated activities. Exhibit 5 provides a copy of the regulations claimed.

The version of the regulations that was provided, however, shows that sections were added or amended at various times since 1976. Thus, it is unclear from the test claim what version of the regulations, as identified by the effective date and register number of the change to the regulations, the claimant is pleading. Without this information, staff is

unable to determine the activities in the regulations that the claimant is alleging to be reimbursable under article XIII B, section 6.

So that staff may complete the analysis, we are requesting that no later than August 1, 2007, the Commission be provided with the effective date and register number of the change to or addition of each specific regulatory provision which is alleged to create a newly mandated activity, as well as a copy of the regulation identifying that regulatory change or addition.

Please note that a similar claim, *Prevailing Wages* (03-TC-13), was filed by the City of Newport Beach and is also tentatively scheduled for the December 6, 2007 Commission hearing. The mailing list has been updated to reflect interested parties and persons for both test claims.

Please contact Deborah Borzelleri at (916) 322-4230 if you have questions.

Sincerely,

Paula Higashi
Executive Director

Commission on State Mandates

Original List Date: 7/8/2002
Last Updated: 4/26/2007
List Print Date: 07/11/2007
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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EXHIBIT S

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August 28, 2007

Paula Higashi, Executive Director
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980 Ninth Street, Suite 300
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Re: Chapter 938, Statutes of 2001
Test Claim 01-TC-28 as amended
Clovis Unified School District
Prevailing Wage Rate

Dear Ms. Higashi:

Please find enclosed the response to your request for supplemental information on the above referenced test claim. Specifically, a history of the Title 8, CCR, sections included in the test claim.

Sincerely,

Keith B. Petersen

C: Distribution List Attached

Submitted on August 28, 2007 By:
Keith B. Petersen
SixTen and Associates
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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Supplement to:	No. CSM. 01-TC -28 As amended July 21, 2003
	Prevailing Wage Rate
Test Claim Filed by	History Index for Title 8, California Code of Regulations
	Section 16000
	Sections 16001 through 16003
	Sections 16100 through 16102
Clovis Unified School District	Sections 16200 through 16206
	Sections 16300 through 16304
Test Claimant	Sections 16400 through 16403
	Sections 16410 through 16414
	Section 16425
	Sections 16426 through 16428
	Sections 16429 through 16432
	Section 16433
	Sections 16436 through 16439
	Section 16500
	Sections 16800 through 16802
	Sections 17201 through 17212
	Sections 17220 through 17229
	Sections 17230 through 17237
	Sections 17240 through 17253
	Sections 17260 through 17264

REQUEST FOR SUPPLEMENTAL INFORMATION

In a letter dated July 1, 2007, the Commission on State Mandates requested the claimant to provide "the effective date and register number of the change to or addition of each specific regulatory provision which is alleged to create a newly mandated activity, as well as a copy of the regulation identifying that regulatory change or addition."

In response, this supplement to the test claim (filed June 28, 2002 and as amended July 21, 2003) provides an index and copy of each change to the Title 8, CCR, sections included in the test claim. The Registers cited are attached as Exhibit A. Amended language is underlined (new language) or stricken out (deleted language).

HISTORY OF TITLE 8, CCR, SECTIONS INCLUDED IN THE TEST CLAIM

Register 56-08 Added §§ 16000-16004, 16100-16101 and 16200-16205, also known as "Group 3."

Register 72-13 No apparent change to Group 3. Added §§ 16209, 16209.1-16209.6 as emergency regulations, see Register 72-23.

Register 72-23 Certificate of Compliance for §§ 16209, 16209.1-16209.6 as added by 72-13.

Register 77-02 Repealed §§ 16000-16004, 16100-16101 and 16200-16205, previous Group 3. Added new Group 3, §§ 16000-16013, 16100-16109, 16200-16206 and 16300-16305, as emergency regulations.

Register 77-49 Added new "Group 5", §§ 17000-17299 regarding conflict of interest code disclosure.

Register 78-06	Repeals old Group 3 added by 56-8 and repeals new Group 3 added as emergency regulations by 77-02. Adds new Group 3, §§ 16000-16014, 16100-16109, 16200-16207.9.
Register 79-19	Added § 16015.
Register 80-06	Added §§ 16016-16019, 16207.10-16207.19. Repealed § 16207.9
Register 81-09	Repealed Group 5, §§ 17000-17311, previously added by 77-9. Adds new § 17000 and appendix, regarding conflict of interest code.
Register 82-51	Repealed Group 4, §§ 16209, 16209.1-16209.6, regarding employment of aliens.
Register 86-07	Renumbered and Amended: Former §§ 16000-16006 and 16008-16019 to § 16000. Former § 16100 to § 16002. Former § 16101 to § 16203. Former §§ 16102-16105 to § 16200. Former § 16106 to §16206. Former §§ 16107 (a), (b) and (c) to §§ 16201, 16202 and 16205. Former § 16108 to § 16204. Former § 16200 to § 16300. Former §§ 16007, 16201, 16202, 16204, and 16206 to § 16302. Former § 16207 to § 16303. Former §§ 16207.2 and 16207.3 to § 16304.

Former § 16207.5 to § 16100.

Former § 16207.7 to § 16301.

Former §§ 16207.10 - 16207.14 to § 16400.

Former §§ 16207.15 and 16207.16 to § 16401.

Former § 16207.17 to § 16402.

Former § 16207.18 to § 16403.

Former § 16207.19 to § 16500.

Repealed §§ 16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6, and 16207.8.

Added new §§ 16001, 16101 and 16102.

Register 88-35 Repealed § 16200(a)(8)(e).

Register 90-14 Added §§ 16800 - 16802 as emergency regulations.

Register 90-42 Added §§ 16800 - 16802 again as emergency regulations.

Register 91-12 Repealed emergency regulations §§ 16800 - 16802. Added new §§ 16800 - 16802.

Register 92-13 Amended:

§ 16000, various new definitions

§ 16001: added subsection (a))(1)-(3) and subsection (e) and renumbered former subsection (e) to (f).

§ 16100: amended subsection (b)(2)(B).

§ 16200: amended subsections (a)(1), (a)(3) and (b).

§ 16204: amended subsections (a)(3) and (b).

§ 16205

§ 16302: amended subsection (a).

§ 16500

Added §§ 16002.5, 16003, 16425-16439

Register 96-52 Amended:

§ 16000: Amended the definition of "prevailing rate"; repealed the definition of "predetermined changes".

§ 16001: Amended subsection (b) and (d).

16200: Repealer of subsection (a)(3)(B), subsection lettering, and amendment of newly designated subsections (a)(3)(B), (a)(3)(D), and (a)(3)(F)(3). Amendment of subsection (b).

§ 16204: Amendment of subsection (a)(3), repealer and new subsection (b).

Register 99-08 Pursuant to Sacramento Superior Court Order in Case 97CS00471 the amendments filed in 96-52 were invalidated and the prior regulations were reinstated.

Amended:

§ 16000: Change without regulatory effect restoring definition of "predetermined changes" and repealing amendments to definition of

"prevailing rate."

§ 16001: Change without regulatory effect repealing amendments to subsections (b) and (d) and

§ 16200: Change without regulatory effect repealing amendments in 96-52.

§ 16204: Change without regulatory effect repealing amendments in 96-52.

Added §§ 16410 - 16414 as emergency regulations.

Register 99-25 Repealed emergency regulations for §§ 16410 - 16414 and added new emergency regulations for §§ 16410 - 16414.

Register 99-41 Repealed emergency regulations for §§ 16410 - 16414 and added new emergency regulations for §§ 16410 - 16414.

Register 00-03 Repealed emergency regulations for §§ 16410 - 16414 and added new emergency regulations for §§ 16410 - 16414.

Register 00-18 Added §§ 16410 - 16414. Certificate of Compliance.

Register 02-03 Added new subchapter, §§ 17201 - 17212

Added new article 2, §§ 17220 - 17237

Added new article 3, §§ 17240 - 17253

Added new article 6, §§ 17260 - 17264

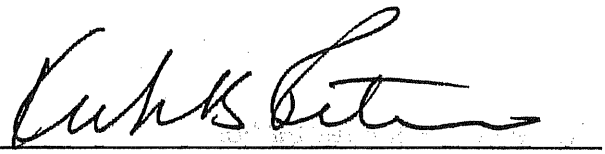
/

/

CERTIFICATION

By my signature below, I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this document is true and complete to the best of my own knowledge or information or belief, and that the attached regulations are true and correct copies of documents from archives of a recognized law library.

EXECUTED this 28 day of August 2007, at Sacramento, California



FOR THE TEST CLAIMANT

Keith Petersen, President

SixTen and Associates

ATTACHMENTS

Exhibit A Title 8, CCR Registers

Distributed to COSM mailing list dated 08/01/07

DECLARATION OF SERVICE

Re: Test Claim 01-TC-28
Prevailing Wage Rate
Clovis Unified School District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimants. I am 18 years of age or older and not a party to the entitled matter. My business address is 3841 North Freeway Blvd, Suite 170, Sacramento, CA 95834.

On the date indicated below, I served the attached letter dated August 28, 2007, with attachments, to Paula Higashi, Executive Director, Commission on State Mandates, to the Commission mailing list dated 8/01/07 for this test claim, and to:

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 28, 2007, at Sacramento, California.

Jason R. Cale

Commission on State Mandates

Original List Date: 7/8/2002
Last Updated: 4/26/2007
List Print Date: 08/01/2007
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Mr. Arthur Palkowitz San Diego Unified School District Office of Resource Development 4100 Normal Street, Room 3209 San Diego, CA 92103-8363	Tel: Fax:	(619) 725-7785 (619) 725-7564
Ms. Jeannie Oropeza Department of Finance (A-15) Education Systems Unit 915 L Street, 7th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-0328 (916) 323-9530
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1190 Sacramento, CA 95814	Tel: Fax:	(916) 445-3274 (916) 324-4888
Mr. J. Bradley Burgess Public Resource Management Group 1380 Lead Hill Boulevard, Suite #106 Roseville, CA 95661	Tel: Fax:	(916) 677-4233 (916) 677-2283
Ms. Ginny Brummels State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 324-0256 (916) 323-6527
Mr. Keith B. Petersen SixTen & Associates 3841 North Freeway Blvd., Suite 170 Sacramento, CA 95834	**Claimant Representative** Tel: Fax:	 (916) 565-6104 (916) 564-6103

Attachment to the Supplement dated August 28, 2007
No. CSM. 01-TC -28
As amended July 21, 2003
Prevailing Wage Rate

Title 8, CCR, Register 56-08

§§ 16000 - 16004

§§ 16100 - 16101

§§ 16200 - 16205

expense of the self-insurer, not more frequently than once each calendar year, and the expense incurred in making such examination and audit shall be paid by the self-insurer.

GROUP 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

Article 1. Definitions

16000. Person. The term "person" means any individual, partnership, corporation, association, or any local state, regional, national or international labor union, or any other organization, or any agent or officer thereof, authorized to act for and on behalf of any of the foregoing.

NOTE: Authority cited for group 3: Section 1773.5, Labor Code.

History: New group 3 (§§ 16000-16004, 16100-16101 and 16200-16205) filed 4-27-56; effective thirtieth day thereafter (Register 56, No. 8).

16001. Filing. Except where otherwise specifically provided by these Rules, the term "filing" means the deposit in the United States mail, postage prepaid and addressed to the person or agency with whom a paper or document is to be filed, except that in any event any paper or document required or permitted to be filed pursuant to these rules or pursuant to the prevailing wage provisions of the Labor Code, shall be deemed filed upon actual delivery to and receipt by such person or agency.

16002. Nearest Labor Market Area. The term "nearest labor market area" means that geographical area from which workmen of the crafts, classifications, and types to be used in the performance and execution of the public work will be drawn for employment upon such public work.

16003. Prevailing Rate. The term "prevailing rate" means the rate being paid to a majority of workmen engaged in the particular craft, classification or type of work within the locality if a majority of such workmen be paid at a single rate; if there be no single rate being paid to a majority, then the rate being paid the greater number.

16004. Wages. The term "wages" means all compensation of whatever description or form, and however ascertained or calculated, paid by employers to, for or on behalf of the employees.

Article 2. Determination and Publication of Prevailing Wage Rates

16100. Hourly Rates. Whenever there is no daily rate of wages generally prevailing for a given craft, classification or type of work, then the general prevailing rate of wages per hour shall be ascertained by the body awarding the contract or authorizing the public work for such craft, classification or type of work, and in such event the general prevailing rate of per diem wages shall be expressed as an hourly rate and shall be identified accordingly in the call for bids.

16101. Publication of Rates. In specifying wage rates in the published call for bids pursuant to Section 1773 of the Labor Code, the body awarding any contract for public work or otherwise undertaking public work shall directly list, identify and separately state in each published call for bids the prevailing rate of wages for each craft, classification or type of workmen needed to execute the contract.

Article 3. Petitions to Review Prevailing Wage Rate Determinations

16200. Authority Delegated to Labor Commissioner. The Labor Commissioner is the authorized representative of the Director of Industrial Relations for the purpose of acting on petitions filed pursuant to Labor Code Section 1773.4.

16201. Manner of Filing. Every petition pursuant to Section 1773.4 of the Labor Code shall be filed in triplicate with the director by delivery to the Labor Commissioner, 965 Mission Street, San Francisco 3, California. Petitions may be filed in person or by mail. The date of receipt of the petition by the Labor Commissioner shall constitute the date on which the petition is deemed filed.

16202. Form. Every petition or other document filed or served pursuant to these rules shall be printed or written upon good white paper of letter or legal size. The petition or other document, and all copies thereof served or filed, shall be clear and legible and if typewritten, shall be double-spaced, paged at the bottom, and all copies shall conform in all respects to the original petition or document. The petition or document shall be securely bound or stapled. The name, address and telephone of the organization filing the petition, or its attorney if the petition is filed by an attorney shall appear in the upper left-hand corner of the first page of the petition.

16203. Content. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(a) The name and address of the person filing the petition, together with the name and address of the person verifying the petition if different from the person filing the same.

(b) Whether the petitioner is a prospective bidder or the representative of a prospective bidder, or the representative of one or more crafts, classifications or types of workmen involved in the public work contract, together with a specific designation of the nature of petitioner's business, if he be a prospective bidder, or a designation of each craft, classification or type of workmen represented by him if the petitioner be a representative of one or more crafts, classifications or types of workmen involved in the public works project.

(c) The official name of the awarding body, together with the date on which the call for bids was first published and the name and location of the newspaper in which such publication was made. A true and correct full copy of the call for bids as published shall be attached to the petition.

(d) If petitioner be an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city or township, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(e) The manner in which the wage rate determination by the awarding body fails to comply with the provisions of Labor Code Section 1773.

(1) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of work needed to execute a contract is different from that ascertained by the awarding body shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim. Whenever such facts relate to a particular employer of such craft, classification or type of work, the facts stated must identify the employer by name and address and give the number or approximate number of workers involved.

(2) Every petition asserting that the awarding body has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the awarding body.

(3) Where the rates ascertained by the awarding body are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is to be performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

16204. Failure to Include Copy of Call for Bids. If the petition fails to contain a copy of the call for bids as provided in Section 16203(c), the director may dismiss the petition forthwith or may, if in his judgment good cause is shown, permit the petition to be amended to include such copy.

16205. Filing Copy With Awarding Body. If the petitioner be other than an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, file a copy of the petition with the awarding body. Immediately upon the filing of such copy with the awarding body, and not later than five days after the filing of the original petition, the petitioner shall file with the Labor Commissioner an affidavit of the filing with the awarding body.

(Next page is 901)

16101. Publication of Rates. In specifying wage rates in the published call for bids pursuant to Section 1773 of the Labor Code, the body awarding any contract for public work or otherwise undertaking public work shall directly list, identify and separately state in each published call for bids the prevailing rate of wages for each craft, classification or type of workmen needed to execute the contract.

Article 3. Petitions to Review Prevailing Wage Rate Determinations

16200. Authority Delegated to Labor Commissioner. The Labor Commissioner is the authorized representative of the Director of Industrial Relations for the purpose of acting on petitions filed pursuant to Labor Code Section 1773.4.

16201. Manner of Filing. Every petition pursuant to Section 1773.4 of the Labor Code shall be filed in triplicate with the director by delivery to the Labor Commissioner, 965 Mission Street, San Francisco 3, California. Petitions may be filed in person or by mail. The date of receipt of the petition by the Labor Commissioner shall constitute the date on which the petition is deemed filed.

16202. Form. Every petition or other document filed or served pursuant to these rules shall be printed or written upon good white paper of letter or legal size. The petition or other document, and all copies thereof served or filed, shall be clear and legible and if typewritten, shall be double-spaced, paged at the bottom, and all copies shall conform in all respects to the original petition or document. The petition or document shall be securely bound or stapled. The name, address and telephone of the organization filing the petition, or its attorney if the petition is filed by an attorney shall appear in the upper left-hand corner of the first page of the petition.

16203. Content. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(a) The name and address of the person filing the petition, together with the name and address of the person verifying the petition if different from the person filing the same.

(b) Whether the petitioner is a prospective bidder or the representative of a prospective bidder, or the representative of one or more crafts, classifications or types of workmen involved in the public work contract, together with a specific designation of the nature of petitioner's business, if he be a prospective bidder, or a designation of each craft, classification or type of workmen represented by him if the petitioner be a representative of one or more crafts, classifications or types of workmen involved in the public works project.

(c) The official name of the awarding body, together with the date on which the call for bids was first published and the name and location of the newspaper in which such publication was made. A true and correct full copy of the call for bids as published shall be attached to the petition.

(d) If petitioner be an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city or township, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(e) The manner in which the wage rate determination by the awarding body fails to comply with the provisions of Labor Code Section 1773.

(1) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of work needed to execute a contract is different from that ascertained by the awarding body shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim. Whenever such facts relate to a particular employer of such craft, classification or type of work, the facts stated must identify the employer by name and address and give the number or approximate number of workers involved.

(2) Every petition asserting that the awarding body has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the awarding body.

(3) Where the rates ascertained by the awarding body are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is to be performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

16204. Failure to Include Copy of Call for Bids. If the petition fails to contain a copy of the call for bids as provided in Section 16203(c), the director may dismiss the petition forthwith or may, if in his judgment good cause is shown, permit the petition to be amended to include such copy.

16205. Filing Copy With Awarding Body. If the petitioner be other than an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, file a copy of the petition with the awarding body. Immediately upon the filing of such copy with the awarding body, and not later than five days after the filing of the original petition, the petitioner shall file with the Labor Commissioner an affidavit of the filing with the awarding body.

(Register 72, No. 23—6-3-72)

GROUP 4. EMPLOYMENT OF ALIENS NOT ENTITLED TO LAWFUL RESIDENCE

Article 1. Obligation of Employer

16209. Definition of Alien Entitled to Lawful Residence. An alien entitled to lawful residence shall mean any non-citizen of the United States who is in possession of a Form I-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorizes him to work.

NOTE: Authority cited: Sections 55 and 59, Labor Code. Reference: Section 2805, Labor Code.

History: 1. New Group 4 (§§16209, 16209.1–16209.6) filed 3-24-72 as an emergency; effective upon filing (Register 72, No. 13).
2. Certificate of Compliance filed 6-2-72 (Register 72, No. 23).

16209.1. Inquiry of Applicant for Employment. In ascertaining whether an applicant for employment is not entitled to lawful residence in the United States, an employer shall, contemporaneous with the hiring, make inquiry of such applicant as to whether he is a citizen or an alien.

16209.2. Inquiry of Employee. In ascertaining whether an employee is not entitled to lawful residence in the United States, an employer shall make inquiry of such employee as to whether he is a citizen or an alien.

16209.3. Applicant or Employee Citizen. If the applicant for employment or employee claims to be a citizen, he may be employed or continued in the employ of the employer upon signing a declaration under penalty of perjury that he is a citizen of the United States. An employer who knowingly employs an alien not entitled to lawful residence shall not be exonerated from prosecution for violation of Labor Code Section 2805 notwithstanding his having obtained a signed declaration of citizenship from the alien.

16209.4. Applicant Alien—Requirement of Proof. If the applicant acknowledges that he is an alien, he shall be requested to produce a document which shows that the applicant is entitled to lawful residence in the United States. A document such as specified in Section 16209 shall be sufficient proof of lawful resident status. The applicant shall furnish such documentation within three days from the date of employment. In the event that he fails to furnish such documentation and employment is nevertheless continued and he is found to be an unlawful resident, the employer shall be presumed to have had knowledge of the employee's unlawful resident status.

16209.5. Employee Alien—Requirement of Proof. If the employee acknowledges that he is an alien, he shall be requested to produce a document which shows that he is entitled to reside in the United States. A document such as specified in Section 16209 shall be sufficient proof of lawful resident status. The employee shall furnish such documentation within three days. In the event that he fails to furnish

such documentation and employment is nevertheless continued and he is found to be an unlawful resident, the employer shall be presumed to have had knowledge of the employee's unlawful resident status.

16209.6. Definition of Adverse Effect. Employment of an alien not entitled to lawful residence under any of the following circumstances shall be deemed to have an adverse effect on lawful resident workers:

(a) Employment in any category of employment not enumerated on Schedule A in Labor Department Regulations 29 CFR § 60.7. Schedule A may be obtained from the Manpower Administration, U.S. Department of Labor, Washington, D.C.

(b) Payment by an employer to such employee of less than the federal or state minimum wage, whichever is higher.

History: 1. Amendment to subsection (a) filed 4-13-72 as procedural and organizational; effective upon filing (Register 72, No. 16).
2. Certificate of compliance filed 6-2-72 (Register 72, No. 23).

(Next page is 901)

Title 8, CCR, Register 77-02

§§ 16000 - 16013

§§ 16100 - 16109

§§ 16200 - 16206

§§ 16300 - 16305

GROUP 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

Article 1. Definitions

16000. Director. The term "Director" means the Director of the Department of Industrial Relations or a duly authorized representative.

NOTE: Authority cited for Group 3: Sections 54 and 1773.5, Labor Code. Reference: Sections 1770–1773.8, Labor Code.

History: 1. Repealer of Group 3, (Articles 1–3, Sections 16000–16004, 16100–16101 and 16200–16205) and new Group 3 (Articles 1–4, Sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1-3-77 as an emergency; effective upon filing (Register 77, No. 2). For prior history, see Register 56, No. 8.

16001. Division. The term "Division" means the Division of Labor Statistics and Research within the Department of Industrial Relations.

16002. Chief. The term "Chief" means the Chief of the Division of Labor Statistics and Research or a duly authorized representative, within the Department of Industrial Relations.

16003. Person. The term "person" means any individual, partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

16004. Public Works. The term "public works" as used in these regulations shall be as defined in Sections 1720, 1720.2 and 1720.3 of the Labor Code.

16005. Political Subdivision. The term "political subdivision" includes any county, city, district, township, public housing authority, or public agency of the State, and assessment or improvement districts.

16006. Awarding Body. The term "awarding body" means any state or local governmental agency, department, board, commission, bureau, district, office, authority, political subdivision, officer or agent awarding a contract for public work.

16007. Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these rules or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body, or the Division upon actual delivery to and receipt by such person, awarding body, or the Division.

16008. Nearest Labor Market Area. The term "nearest labor market area", for the purpose of following the procedures specified in Section 1773 of the Labor Code, means the nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

16009. Locality. "Locality" or "locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

16010. Employer Payments. The term "employer payments" includes:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees.

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents, or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected.

16011. Prevailing Rate. The term "prevailing rate" shall have the following meaning:

(a) When applied to the basic hourly rate of pay, the term means the rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers be paid at a single rate; if there be no single rate being paid to a majority, then the single rate being paid the greater number.

(b) When applied to other employer payments included in per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16012, (3), below, the term means, for each such type of payment, the single rate of contribution or cost being paid to or for the greater number of workers in the particular craft, classification or type of work who are paid the prevailing basic hourly rate of pay as defined in Section 16011(a), above.

(c) When applied to the rate for holiday or overtime work, the term means the single rate paid to or for the greater number of workers in the particular craft, classification or type of work who are paid the prevailing basic hourly rate of pay as defined in Section 16011(a), above.

16012. General Prevailing Rate of Per Diem Wages. (a) The term "general prevailing rate of per diem wages", and similar terms descriptive of determinations made by the Director pursuant to Sections 1773, 1773.1 and 1773.8 of the Labor Code and these rules and regulations, includes:

(1) the prevailing basic straight-time hourly rate of pay; and

(2) the prevailing rate for holiday and overtime work; and

(3) the prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like;

(I) apprenticeship or other training programs authorized by Section 3093 of the Labor Code;

(J) other bona fide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) *Provided,* that the term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) job related expenses other than travel time and subsistence pay;

(2) contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above in Section 16012;

(3) union, organizational, professional or other dues except as they may be included in and withheld from the basic hourly wage rate;

(4) industry or trade promotion;

(5) political contributions or activities;

(6) any benefit for employees, their families and dependents, or retirees, including any benefit enumerated above in Section 16012(3), where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit;

(7) such other payments as the Director may determine to exclude.

16013. Interested Party. Except where otherwise specifically provided by these rules and regulations, the term "interested party" means, when used with reference to a particular prevailing wage determination made by the Director,

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determination, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work, and/or

(3) Any awarding body concerned with the administration of a public works contract or proposed contract, which is subject to the particular prevailing wage determination.

Article 2. Determination of General Prevailing Rate of Per Diem Wages. Requesting and Publishing Determinations

16100. Recognized Crafts. The determinations of the Director will be limited to those crafts, classifications or types of workers employed in public works pursuant to Sections 1720, 1720.2 and 1720.3 of the Labor Code.

16101. Form of Expression. (a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The formula or method for calculating the prevailing hourly wage rate for overtime and holiday work and determining the hours of work for which overtime is paid.

(3) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of worker employed on the project, which is on file with the Director of Industrial Relations."

(4) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16012, (3), of these rules and regulations.

(5) The following statement when applicable: "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8".

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may (1) express the rate in the determination by specifying the formula or method used or (2) convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) As a supplement to each determination the Director will make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

16102. Method of Determination. The Director shall follow those procedures specified in Section 1773 of the Labor Code and in these rules and regulations when making prevailing wage determinations.

16103. Collective Bargaining Agreements. Filing. (a) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all of their collective bargaining agreements including any addenda which modify the agreements, as soon as practicable after their execution.

(b) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code and Section 16103, (a), of these rules and regulations shall be filed with and addressed to: Chief, Division of Labor Statistics and Research, P. O. Box 603, San Francisco, CA 94101.

(c) Collective bargaining agreements filed with the Division must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

(1) certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or a photocopy thereof, or a printed copy of a fully executed agreement showing the names of signatory parties, except in the case of a printed agreement the Director may require certification.

(2) names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement and provides any maps or additional information that may be needed to determine its precise geographic scope, if this is not clearly specified in the agreement;

(3) names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

(4) provides an estimate of the approximate number of workers currently employed under the terms of the agreement in California and, if practicable, in each county within the jurisdiction of the signatory local union or unions;

(5) provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

16104. Consideration of Other Data. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider further data from interested parties, and will give consideration to data submitted by any interested party, concerning the rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include but not be limited to the following for each project:

(a) The name, address, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16013;

(b) The basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16012 of these rules and regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(c) The number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(d) The location of the project;

(e) The name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(f) The type of construction (e.g. residential, commercial building, etc.);

(g) The approximate cost of construction;

(h) The beginning date and completion date, or estimated completion date, of the project;

(i) The source of data (e.g. "payroll records");

(j) The method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

16105. Collective Bargaining Agreements. Adoption. (a) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for any craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate in the form prescribed by these rules and regulations. Only those rates and employer payments specifically enumerated in Section 16012 of these rules and regulations shall be included in the rate adopted.

(b) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director will incorporate such changes in the determination.

(c) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The determination of the Director will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when said changes become definite and determined. A statement must be filed in the same manner as collective bargaining agreements are filed under Section 16103 of these rules and regulations. The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

16106. Errors. Corrections. Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination.

16107. Requesting Determinations. (a) When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout a large geographic area, the Director will issue an "area" determination based on that agreement. Area determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.

(b) An awarding body may request the Director to make a determination for particular crafts, classifications, or types of workers for which an area determination has not been made or issued, or has expired.

(c) Any awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that a prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. All requests for prevailing wage determinations must be in writing and must specify the location where the public work is to be performed, including the county, and the particular crafts, classifications, or types of workers for which a determination is needed.

16108. Effective Dates of Determinations. Area determinations issued by the Director will ordinarily show an issue date and an expiration date and will be effective until that expiration date, unless earlier modified, corrected, rescinded, or superseded by the Director; other determinations made on request will show an issue date but may not show an expiration date; *provided;* that determinations modified, corrected, rescinded, or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which the call for bids takes place less than 30 days after the filing of the agreement (see Section 1773.1 of the Labor Code).

16109. Publication of Prevailing Rates by Awarding Bodies. To the extent that an awarding body is required to specify the general prevailing rate of per diem wages in the published call for bids, in the bid specifications, and in the contract itself, pursuant to Section 1773.2 of the Labor Code, the rates as determined by the Director for each craft, classification, or type of worker needed to execute the contract, and in the form of expression adopted by the Director, shall be used. In lieu of specifying the rates in the call for bids, the bid specifications, and the contract, the awarding body may, pursuant to Section 1773.2 refer to copies of the applicable determinations of the Director on file at its principal office.

Article 3. Delegation of Authority: Petition to Review

16200. Delegation of Authority. Chief, Division of Labor Statistics and Research. (a) The Chief of the Division of Labor Statistics and Research is the authorized representative of the Director for the purpose of receiving collective bargaining agreements, petitions, and other documents and papers pertinent to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these rules and regulations.

(b) The Chief is the authorized representative of the Director for the purpose of gathering information needed to make prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code or these rules and regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purposes of the law.

(c) The Chief is the authorized representative of the Director for the purpose of responding to petitions to review determinations filed pursuant to Section 1773.4 of the Labor Code.

(d) All final determinations shall be made by the Director.

16201. Petition to Review. Those interested parties enumerated in Section 1773.4 of the Labor Code may file with the Chief, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

16202. Manner of Filing. Petition to Review. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed in triplicate with the Director by delivery to the Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. Petitions may be filed in person or by mail.

16203. Form. Every petition or other document filed or served pursuant to Section 1773.4 of the Labor Code and Article 3 of these rules and regulations shall be printed or written upon good white paper of letter size (8½ × 11), except as such is a copy of a prior executed petition, document, letter or paper. The petition or other document, and all copies thereof served or filed, shall be clear and legible and if typewritten, shall be double-spaced, paged at the bottom, and all copies shall conform in all respects to the original petition or document. Where attachments are referred to and used, they must be noted, attached and identified properly. The petition or document shall be securely bound or stapled. The name, address and telephone number of the person filing the petition or other document, letter or paper, or of the attorney representing the person, shall appear in the upper left-hand corner of the first page of said item. The signature of the person verifying said item shall appear in the lower right-hand corner of the last page.

16204. Content. Petition to Review. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(a) The name, address, and telephone number of the person filing the petition, together with the name, address and telephone number of the person verifying the petition, if different from the person filing the same.

(b) Whether the petitioner is an awarding body, or a prospective bidder or the representative of a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public work contract together with a specific designation of the nature of petitioner's business, if a prospective bidder, or a designation of each craft, classification or type of worker represented, if the petitioner be a representative of one or more crafts, classifications or types of workers involved in the public works project.

(c) The official name of the awarding body, together with the date on which the call for bids was first published and the name and location of the newspaper in which such publication was made. A true and correct full copy of the call for bids as published shall be attached to the petition.

(d) If petitioner be an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city or township, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(e) The manner in which the wage rate determination by the director fails to comply with the provisions of Labor Code Section 1773.

(1) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

(A) Whenever such facts relate to a particular employer of such crafts, classifications or types of workers, the facts stated must identify the employer by name and address and give the number or approximate number of workers involved.

(B) Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16103 of these rules and regulations.

(C) Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16105 of these rules and regulations.

(2) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(3) Where the rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is to be performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

16205. Failure to Include Copy of Call for Bids. If the petition fails to contain a copy of the call for bids as provided in Section 16204(c), the Director may dismiss the petition forthwith or may, if good cause is shown, permit the petition to be amended to include such copy.

16206. Filing Copy With Awarding Body. If the petitioner be other than an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, file a copy of the petition with the awarding body. Immediately upon the filing of such copy with the awarding body, and not later than five days after the filing of the original petition, the petitioner shall file with the Chief an affidavit of the filing with the awarding body.

Article 4. Hearing Procedures, Decision, Miscellaneous

16300. Director's Discretion to Act. The Director may in his or her discretion initiate an investigation or hold a hearing or take such other action as is reasonably necessary which would best effectuate the purposes of the law and of these rules and regulations, except as such action may be expressly prohibited by the law.

16301. Director's Choice of Action. In any matter or proceeding under these regulations, whether it be on the initiative of the Director, petition, or request by an interested party the Director shall take those actions he or she deems necessary in the best interest of the law and these regulations except as may be specifically provided otherwise by the law or these regulations.

16302. Hearings. When a hearing is held, it shall be in accordance with the following procedures:

(a) A time and place of the hearing shall be fixed.

(b) All interested parties made known to the Director shall be notified by registered or certified mail, return receipt requested, of the time and place of the hearing.

(c) Notification shall be at least one week in advance.

(d) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions.

(e) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(f) All witnesses testifying before the hearing officer shall testify under oath.

(g) A full transcript of the hearing shall be recorded.

16303. Hearing Officer. Decision. (a) The appointed hearing officer shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations.

(b) The decisions of the Director shall reflect a summary of the evidence, findings, or matters of fact and or law.

(c) The decision shall be sent, by certified or registered mail with return receipt requested, to all parties no later than 20 days after the hearing, except as may be earlier required in a Petition to Review pursuant to Section 1773.4 of the Labor Code.

(d) The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may reconsider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given all parties in the same manner as the notice of hearings as specified in Sections 16302, (b), (c), and (d) above and the decision upon reconsideration shall be as specified in (b), and (c) of this Section.

16304. Public Hearings. The hearing procedures enumerated in Sections 16302 and 16303, above, shall in no way be construed to affect the responsibilities or procedures pursuant to Title 2, Division 3, Part 1, Chapter 4.5 of the Government Code (commencing with Section 11371).

16305. Severability. If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provision or application, and to this end the provisions of these regulations are severable.

Title 8, CCR, Register 77-49

§§ 17200 - 17202

§§ 17210 - 17214

§§ 17220 - 17225

§§ 17230 - 17235

§§ 17240 - 17241

§§ 17250 - 17253

§§ 17260 - 17299

(Register 77, No. 49—12-3-77)

GROUP 5. DEPARTMENT OF INDUSTRIAL RELATIONS— CONFLICT OF INTEREST CODE

Article 1. General Provisions

17000. Purposes. The Political Reform Act of 1974, Government Code Section 81000 *et seq.*, seeks to ensure that public employees will perform their duties in an impartial manner free from bias caused by their personal financial interests.

To achieve this goal the Act requires that the Department of Industrial Relations, as a state agency, adopt and promulgate a Conflict of Interest Code applicable to public employees within the Department and its related boards, commissions, and agencies, and that the Department's Code require:

(1) That employees disclose their assets and income which may be materially affected by their official actions; and

(2) That employees be disqualified from acting, in appropriate circumstances, to avoid conflicts of interest.

To accomplish the goals and satisfy the requirements of the Political Reform Act of 1974, to maintain the integrity of and public trust in the employees of the Department of Industrial Relations, and to assure that the Department enforces the laws with which it is charged in a uniform and adequate manner, the Department of Industrial Relations hereby adopts and promulgates the following Conflict of Interest Code.

This Code has the force of law. Any violation of the Code by a designated employee may subject the employee to the sanctions provided by law. These sanctions may include dismissal, criminal conviction leading to incarceration and fine, and civil penalties. See Government Code section 91000 *et seq.* and Article 6 of this Code. Nothing in this Code shall exempt compliance from applicable provisions of any statute or Section 5.25 of the Policy and Procedural Manual of the Department of Industrial Relations (Incompatible Activities).

NOTE: Authority cited: Section 87311, Government Code. Reference: Section 87300, *et seq.*, Government Code.

History: 1. New Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) filed 12-2-77; effective thirtieth day thereafter. Approved by the Fair Political Practices Commission 1-19-77 (Register 77, No. 49).

17100. General Prohibition. No employee of the Department shall make, participate in making, or in any way attempt to use his or her official position to influence a departmental decision if the employee knows, or has reason to know that it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on a financial interest of the employee.

Article 2. Designation of Employees and Their Financial Disclosure Requirements

(Office of the Director)

17200. Designated Employees. Persons holding the following positions within the Office of the Director of the Department of Industrial Relations are designated employees and must file financial disclosure statements pursuant to this Code:

(a) Director, Chief Deputy Director, Deputy Director, all legal classes, Senior Management Analyst

(b) Special consultant, Staff Services Manager III, (Fiscal Officer), Associate Budget Analyst, Business Service Officer III, I, Accounting Technician (procurement).

17201. Section 17200(a) Reporting Requirements. Employees designated in Section 17200(a) shall report, in the manner specified in Article 3 of this Code, all their investments in business entities and their sources of income doing business in the State of California.

17202. Section 17200(b) Reporting Requirements. Employees designated in Section 17200(b) shall report, in the manner specified in Article 3 of this Code, investments in and income from any business entity which they know or have reason to know has within the preceding two years contracted, or plans to contract, with the Department of Industrial Relations to provide services, supplies, materials or machinery of any type to the Department.

(Labor Standards and Industrial Welfare)

17210. Designated Employees. Persons holding the following positions within the Division of Labor Standards Enforcement and Industrial Welfare Commission are designated employees and must file financial disclosure statements pursuant to this Code:

(a) Chief, Deputy Chief, Assistant Chief, Staff Counsel I, II, and III, Legal Counsel;

(b) Deputy Labor Commissioner II, III, and IV and Senior Special Investigator;

(c) Chairman, Commissioner, Executive Secretary, of Industrial Welfare Commission;

(d) Public member, wage board (Industrial Welfare Commission).

17211. Section 17210(a) Reporting Requirements. Employees designated in Sec. 17210(a) shall report, in the manner specified in Article 3 of this Code, any investment in business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by or has within the preceding 2 years contracted or plans to contract with the Division of Labor Standards Enforcement.

17212. Section 17210(b) Reporting Requirements. Employees designated in Sec. 17210(b) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Labor Standards Enforcement within the geographic area over which they exercise jurisdiction.

17213. Section 17210(c) Reporting Rquirements. Employees designated in Sec. 17210(c) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Industrial Welfare Commission.

17214. Section 17210(d) Reporting Requirements. The public member of each wage board shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that he or she knows or has reason to know is directly and materially subject to regulation by the Industrial Welfare Commission based on consideration of the recommendations of the wage board to which the public members belongs.

(Industrial Accidents and Workers' Compensation)

17220. Designated Employees. Persons holding the following positions within the Division of Industrial Accidents, the Workers' Compensation Appeals Board, and the office of the Manager, Self-Insurance Plans, are designated employees and must file financial disclosure statements pursuant to this Code:

(a) Administrative Director, Assistant Chief, Medical Director, Chief of Permanent Disability Rating Bureau, Chief, Rehabilitation Bureau, Permanent Disability Rating Specialist, (assigned to Benefit Notice Unit);

(b) District Medical Director, Medical Examiner, P.D.R. Area Supervisor, P.D.R. Specialist, Information Attorney, Referee WCAB, Referee-In-Charge WCAB (also known as Worker Compensation Judge and Presiding Worker Compensation Judge);

(c) Staff Services Manager, Administrative Assistant;

(d) Chairman, Commissioner, Secretary and Deputy Commissioner, Deputy Commissioner, Special Counsel, Staff Counsel;

(e) Program Manager, Consultant, and Field Representative of office of Self-Insurance Plans.

17221. Section 17220(a) Reporting Requirements. Employees designated in Sec. 17220(a) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that and they know or have reasons to know (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents.

17222. Section 17220(b) Reporting Requirements. Employees designated in Section 17220(b) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that and they know or have reasons to know (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents, *to the extent that* the business entity or source of income is subject to such regulation or engages in or derives its incomes from such insurance business within the geographic area over which the employee exercises jurisdiction. Workers' compensation judges perform judicial functions are also subject to the provisions of the California Code of Judicial Conduct.

17223. *Section 17220(c) Reporting Requirements. Employees designated in Section 17220(c) shall report, in the manner specified in* Article 3 of this Code, investments in and income from any business entity which they know or have reason to know has within the preceding 2 years contracted, or plans to contract, with the Division of Industrial Accidents to provide services, supplies, materials or machinery of any type to the Division, or has so contracted or plans to contract with the Department to serve the Division in said manner.

17224. Section 17220(d) Reporting. Employees designated in Section 17220(d) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that and they know or have reasons to know (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents.

17225. Section 17220(e) Reporting Requirements. Employees designated in Section 17220(e) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is a Self-Insurer for purposes of workers' compensation liability, has applied in the last two years or plans to apply for self-insurer status, or engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business or the administration or operation of self-insurance plans.

(Industrial Safety)

17230. Designated Employees. Persons holding the following positions within the Division of Industrial Safety are designated employees and must file financial disclosure statements pursuant to this Code:

(a) Chief, Deputy Chief, Assistant Chief for Consulting Education and Research, Administrative Assistant, Staff Services Manager;

(b) Staff Counsel (I, II, III), Senior Special Investigator, Special Investigator, Administrative Chief of Bureau of Investigation;
(c) Assistant Chief, Regional Manager, District Manager;
(d) Principal Engineer;
(e) Senior Safety Engineer, Safety Engineer, Senior Health Physicist, Associate Health Physicist.

17231. Section 17230(a) Reporting Requirements. Employees designated in Sec. 17230(a) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety or has within the preceding two years contracted or plans to contract with the Division of Industrial Safety.

17232. Section 17230(b) Reporting Requirements. Employees designated in Sec. 17230(b) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety.

17233. Section 17230(c) Reporting Requirements. Employees designated in Sec. 17230(c) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the geographic area over which they exercise jurisdiction.

17234. Section 17230(d) Reporting Requirements. Employees designated in Sec. 17230(d) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the subject matter area over which they exercise jurisdiction.

17235. Section 17230(e) Reporting Requirements. Employees designated in Sec. 17230(e) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the subject matter and geographic area over which they exercise jurisdiction.

(Occupational Safety and Health)

17240. Designated Employees. Persons holding the following positions within the Occupational Safety and Health Standards Board, the Occupational Safety and Health Appeals Board, and the Occupational Safety and Health Administrative Unit are designated employees and must file financial disclosure statements pursuant to this Code:

(a) Standards Board: Chairman and members of the Board, Executive Officer, Senior Safety Engineer, Staff Services Analyst;
(b) Appeals Board: Chairman and members of the Board, Executive Officer, Staff Counsel I, II, and III, Administrative Law Judge (Presiding, I, II), Forensic Engineer;
(c) Administrative Unit: Program manager, assistant program manager, senior research analyst, senior safety engineer.

17241. Section 17240 Reporting Requirements. Employees designated in Sec. 17240 shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Board or Unit for which they work.

(Apprenticeship)

17250. Designated Employees. Persons holding the following positions within the California Apprenticeship Council and the Division of Apprenticeship Standards are designated employees and must file financial disclosure statements pursuant to this Code:
(a) Chief, Chief Deputy, Assistant Chief, Special Assistant to Chief;
(b) Intergroup Relations Coordinator, Area Administrator, Senior Consultant;
(c) Staff Services Manager.

17251. Section 17250(a) Reporting Requirements. Employees designated in Sec. 17250(a) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Apprenticeship Standards or has within the preceding two years contracted or plans to contract with the Division of Apprenticeship Standards.

17252. Section 17250(b) Reporting Requirements. Employees designated in Sec. 17250(b) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Apprenticeship Standards within the geographic area over which they exercise jurisdiction.

17253. Section 17250(c) Reporting Requirements. The Staff Services Manager shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that she or he knows or has reason to know has within the preceding two years contracted, or plans to contract, with the Division of Apprenticeship Standards to provide services, supplies, materials or machinery of any type to the Division, or has so contracted or plans to contract with the Department to so serve the Division.

(Labor Statistics and Research)

17260. Designated Employees. Persons holding the following positions within the Division of Labor Statistics and Research are designated employees and must file financial disclosure statements pursuant to this Code:

(a) Chief, Assistant Chief, Senior Research Analyst (Industrial Relations Research);

(b) Data Processing Manager, Associate Systems Analyst, Associate Programmer Analyst.

17261. Section 17260(a) Reporting Requirements. The Division Chief shall report, in the manner specified in Article 3 of this Code, any investments in a business entity and any source of income that she or he knows or has reason to know is directly and materially subject to regulation by the Department of Industrial Relations, engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business, or has within the preceding two years contracted or plans to contract with the Division of Labor Statistics and Research.

17262. Section 17260(b) Reporting Requirements. Employees designated in Sec. 17260(b) shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reasons to know has within the preceding two years contracted or plans to contract with the Division of Labor Statistics and Research to provide services, supplies, materials, or machinery or any type for purposes of data processing, reproduction, or microfilming, to the Division, or has so contracted or plans to contract with the Department to so serve the Division.

(Conciliation)

17270. Designated Employees. Persons holding the following positions within the State Conciliation Service are designated employees and must file financial disclosure statements pursuant to this Code: Supervisor of Conciliation, Conciliator.

17271. Section 17270 Reporting Requirements. Employees designated in Sec. 17270 shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know engages in or derives its income from, in whole or in part, a Transit District subject to the jurisdiction of the State Conciliation Service.

(Fair Employment Practices)

17280. Designated Employees. Persons holding the following positions within the Fair Employment Practices Commission and the Division of Fair Employment Practices are designated employees and must file financial disclosure statements pursuant to this Code:

Chairman and Members of Commission, Legal Affairs Officer (Commission), Chief, Assistant Chief, All Legal Classes.

17281. Section 17280 Reporting Requirements. Employees designated in Sec. 17280 shall report, in the manner specified in Article 3 of this Code, any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Fair Employment Practices Commission.

(New Positions)

17299. Designation of New Positions. It is expressly recognized that new employment positions will be created from time to time within the Department. With respect to each new position, the Director or his designee shall determine within 30 days of the filling of such position whether the employee is a designated employee for purposes of this Code. A copy of this determination shall be forwarded to the Fair Political Practices Commission. The Director or his designee shall make such determination in accord with the requirements and spirit of the Act and shall inform any employee so designated of the employee's disclosure obligations. An employee objecting to the designation shall be entitled to a hearing before the Director, whose decision shall be final for purposes of the grievance. Each employee so designated shall file reports and shall act as provided in the Code. Each February the Department shall amend its Code officially to include all such designations made in the previous year.

Article 3. Financial Disclosure Statements

(Contents of Statement)

17310. Contents of Initial Statement. The first statement filed under this Code shall disclose only reportable investments, not income.

17311. Investments. The term "investment" is defined in Section 17714 of this Code, consistent with Government Code Section 82034. Investments under $1,000 in market value need not be disclosed.

When an employee is required to disclose types of investments pursuant to Article 2 of this Code, the disclosure statement shall contain:

(a) A statement of the nature of the investment or interest;

(b) The name of the business entity in which each investment is held, and a general description of the business activity in which the business entity is engaged;

(c) A statement whether the fair market value of the investment exceeds ten thousand dollars ($10,000), and whether it exceeds one hundred thousand dollars ($100,000).

(d) In the case of an investment which constitutes fifty percent or more of the ownership interest in a business entity, a statement of the investments and interests in real property of the business entity;

(e) If the investment was partially or wholly acquired or disposed of during the period covered by the statement, the date of acquisition or disposal.

Title 8, CCR, Register 78-06

§§ 16000 - 16014

§§ 16100 - 16109

§§ 16200 - 16207.9

GROUP 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

Article 1. Definitions

16000. Director. The term "Director" means the Director of the Department of Industrial Relations or a duly authorized representative.

NOTE: Authority cited for Group 3: Sections 54 and 1773.5, Labor Code. Reference: Sections 1770–1773.8, Labor Code.

History: 1. Repealer of Group 3, (Articles 1–3, Sections 16000–16004, 16100–16101 and 16200–16205) and new Group 3 (Articles 1–4, Sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1-3-77 as an emergency; effective upon filing (Register 77, No. 2). For prior history, see Register 56, No. 8.

2. New Group 3 (Sections 16000–16014, 16100–16109, 16200–16207.9) filed 2-8-78; effective thirtieth day thereafter (Register 78, No. 6).

16001. Division. The term "DLSR" means the Division of Labor Statistics and Research within the Department of Industrial Relations. The term "DLSE" means the Division of Labor Standards Enforcement within the Department of Industrial Relations. The term "DAS" means the Division of Apprenticeship Standards within the Department of Industrial Relations.

16002. Chief. The term "Chief DLSR" means the Chief of the Division of Labor Statistics and Research or a duly authorized representative, within the Department of Industrial Relations. The term "Chief DLSE" means the Chief of the Division of Labor Standards Enforcement or a duly authorized representative within the Department of Industrial Relations. The term "Chief DAS" means the Chief of the Division of Apprenticeship Standards or a duly authorized representative within the Department of Industrial Relations.

16003. Person. The term "person" means any individual, partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

16004. Public Works. The term "public works" as used in these regulations shall be as defined in Sections 1720, 1720.2, 1720.3 and 1771 of the Labor Code.

16005. Political Subdivision. The term "political subdivision" includes any county, city, district, township, public housing authority, regional district, or public agency of the State, and assessment or improvement districts.

16006. Awarding Body. The term "awarding body" means any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer or agent awarding a contract for public work.

16007. Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these rules or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body or division upon actual delivery to and receipt by such person, awarding body, or division.

16008. Nearest Labor Market Area. The term "nearest labor market area", for the purpose of following the procedures specified in Section 1773 of the Labor Code, means the nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

16009. Locality. "Locality" or "locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

16010. Employer Payments. The term "employer payments" includes:

(a) The rate of contribution made by a contractor or subcontractor to employees, their families and dependents, or retirees.

(b) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees.

(c) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected.

(d) Notwithstanding subdivisions (a), (b) and (c) of this section, should there be any conflict, the express provisions of Labor Code Section 1777.5 regarding the wage rate of apprentices shall prevail.

16011. Prevailing Rate. The term "prevailing rate" shall have the following meaning:

(a) When applied to the basic hourly rate of pay, the term means the rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers be paid at a single rate; if there be no single rate being paid to a majority, then the single rate being paid the greater number.

(b) When applied to other employer payments included in per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16012 below, the term means, for each such type of payment, the single rate of contribution or cost being paid to or for the greater number of workers in the particular craft, classification or type of work who are paid the prevailing basic hourly rate of pay as defined in Section 16011(a), above.

(c) When applied to the rate for holiday or overtime work, the term means a single rate paid to or for the greater number of workers in the particular craft, classification or type of work who are paid the prevailing basic hourly rate of pay as defined in Section 16011(a) above.

(d) Notwithstanding subdivisions (a), (b) and (c) of this section, should there be any conflict, the express provisions of Labor Code Section 1777.5 regarding the wage rate of apprentices shall prevail.

16012. General Prevailing Rate of Per Diem Wages. (a) The term "general prevailing rate of per diem wages", and similar terms descriptive of determinations made by the Director pursuant to Sections 1773, 1773.1, 1773.8 and express provisions of 1777.5 of the Labor Code and these rules and regulations, includes:

(1) the prevailing basic straight-time hourly rate of pay; and

(2) the prevailing rate for holiday and overtime work; and

(3) the prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like;

(I) apprenticeship or other training programs authorized by Sections 3071 and/or 3093 of the Labor Code;

(J) other bona fide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) *Provided,* that the term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) job related expenses other than travel time and subsistence pay;

(2) contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above in Section 16012;

(3) union, organizational, professional or other dues except as they may be included in and withheld from the basic hourly wage rate;

(4) industry or trade promotion;
(5) political contributions or activities;
(6) any benefit for employees, their families and dependents, or retirees, including any benefit enumerated above in Section 16012, where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit;
(7) such other payments as the Director may determine to exclude.

16013. Interested Party. Except where otherwise specifically provided by these rules and regulations, the term "interested party" means, when used with reference to a particular prevailing wage determination made by the Director,

(1) any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determination, and/or
(2) any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work, and/or
(3) any awarding body concerned with the administration of a public works contract or proposed contract, which is subject to the particular prevailing wage determination.

16014. Issue Date-Issuance. The issue date (issuance as used in Section 16108 below) shall be the date upon which copies of the determinations of the Director are deposited in the mail.

Article 2. Determination of General Prevailing Rate of Per Diem Wages. Requesting and Publishing Determinations

16100. Recognized Crafts. The determinations of the Director will be limited to those crafts, classifications or types of workers employed in public works pursuant to Sections 1720, 1720.2, 1720.3 and 1771 of the Labor Code.

16101. Format. (a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.
(2) The formula or method for calculating the prevailing hourly wage rate for overtime and holiday work and determining the hours of work for which overtime is paid.
(3) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of worker employed on the project, which is on file with the Director of Industrial Relations."

(4) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16012 (3), of these rules and regulations.

(5) The following statement when applicable: "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8".

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may (1) express the rate in the determination by specifying the formula or method used, or (2) convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) The applicability of the apprentice rate of per diem wages shall be indicated and furnished upon request.

(d) The dates between which the applicable rate shall be paid for work performed in those periods shall be indicated.

(e) As a supplement to each determination the Director shall make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

16102. Method of Determination. The Director shall follow those procedures specified in Section 1773 and 1777.5 of the Labor Code and in these rules and regulations when making prevailing wage determinations.

16103. Collective Bargaining Agreements. Filing. (a) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all their collective bargaining agreements including any addenda which modify the agreements, as soon as practicable after their execution.

(b) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code, and Section 16103 (a) of these rules and regulations shall be filed with and addressed to: Chief, Division of Labor Statistics and Research, P. O. Box 603, San Francisco, CA 94101.

(c) Collective bargaining agreements filed with the DLSR must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

(1) certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or a photocopy thereof, or a printed copy of a fully executed agreement showing the names of the signatory parties, except in the case of a printed agreement the Director may require certification;

(2) names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement and provides any maps or additional information that may be needed to determine its precise geographical scope, if this is not clearly specified in the agreement;

(3) names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

(4) provides the number of workers currently employed, and employed within the past 6 months if different, under the terms of the agreement in California and, if practicable, in each county within the jurisdiction of the signatory local union or unions;

(5) provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

(d) Copies of collective bargaining agreements which are not bona fide shall not be deemed filed. The party filing a contract may be asked to substantiate the assertion that such collective bargaining agreement is bona fide.

16104. Consideration of Other Data. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider further data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include but not be limited to the following for each project:

(a) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16013;

(b) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16012 of these rules and regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(c) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(d) the location of the project;

(e) the name and address of the contractor or subcontractor making the payments; and of all other contractors or subcontractors on the project;

(f) the type of construction (e.g. residential, commercial building, etc.);

(g) the approximate cost of construction;

(h) the beginning date and completion date, or estimated completion date of the project;

(i) the source of data (e.g. "payroll records");
(j) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

16105. Collective Bargaining Agreements. Adoption. (a) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for each craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate in the form prescribed by these rules and regulations. Only those rates and employer payments specifically enumerated in Section 16012 of these rules and regulations shall be included in the rate adopted.

(b) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director shall incorporate such changes in the determination.

(c) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The determination of the Director will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when said changes become definite and determined. A statement must be filed in the same manner as collective bargaining agreements are filed under Section 16103 of these rules and regulations. The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

16106. Errors. Corrections. Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination. The Director may correct any error issued in a determination by reissuing such determination.

16107. Determinations and Mailing List Requests. (a) When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout a large geographical area, the Director shall issue an "area" determination. Area determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.

(b) An awarding body may request the Director to make a determination for particular crafts, classifications, or types of workers for which an area determination has not been made or issued, or has expired.

(c) An awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that a prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. All requests for prevailing wage determinations must be in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of workers for which a determination is needed.

16108. Effective Dates of Determinations. (a) All determinations issued will be effective ten (10) days after issuance, provided that requests for copies, reprints or reissuance of prior determinations shall not affect the original effective date unless a new effective date is reflected upon the determination (see subdivision (c) below). Any call for bids put out on or after the effective date of the determination must reflect that determination unless the Director determines that subdivision (d) of this section is applicable, after notification and request by an awarding body.

(b) Determinations issued by the Director will show an issue date and will ordinarily show an expiration date.

(c) All determinations will be effective until their expiration date unless earlier modified, corrected, rescinded or superseded by the Director.

(d) Determinations modified, corrected, rescinded or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which a call for bids takes place less than 30 days after the filing of the agreement (see Section 1773.1 of the Labor Code).

(e) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

16109. Publication of Prevailing Rates by Awarding Bodies.

(a) To the extent that an awarding body is required to publish the general prevailing rate of per diem wages pursuant to Section 1773.2 of the Labor Code, it must use the rates as determined by the Director for each craft, classification or type of worker needed to execute the contract and in the format adopted by the Director.

(b) The awarding body shall have on file, at its principal office, copies of all applicable determinations of the Director.

(c) The awarding body shall ensure that copies of the applicable rates are posted on the job site. If more than one location exists as to any project, then the applicable rates shall be posted at a location which is readily available to the workers.

Article 3. Delegation of Authority: Petition to Review

16200. Delegation of Authority. Chief, Division of Labor Statistics and Research. (a) The Chief of the Division of Labor Statistics and Research is the authorized representative of the Director for the purpose of receiving collective bargaining agreements and other documents and papers pertaining to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these rules and regulations.

(b) The Chief of DLSR is the authorized representative of the Director for the purpose of gathering information needed to make prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code or these rules and regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purposes of the law.

(c) The Chief of DLSR is an authorized representative of the Director for the purpose of responding to petitions regarding determinations.

(d) All final determinations shall be made by the Director.

16201. Petition to Review. Those interested parties enumerated in Section 1773.4 of the Labor Code may file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

16202. Manner of Filing. Petition to Review. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed in triplicate with the Director by delivery to the Director or to the Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. Petitions may be filed in person or by mail.

16203. Form. Every petition or other document filed or served pursuant to Section 1773.4 of the Labor Code and Article 3 of these rules and regulations shall be legibly presented and typed upon good white paper, except as such consists of exhibits. Exhibits must be identified properly. The name, address, job title and telephone number of the person filing the petition or other document, and the name of the attorney representing the person, if any, shall be included and the petition or document shall be verified at the end.

16204. Content. Petition to Review. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(a) The name, address, telephone number and job title of the person filing the petition, together with the name, address, telephone number and job title of the person verifying the petition, if different from the person filing the same.

(b) Whether the petitioner is an awarding body, a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public works contract. The petition shall also include the nature of petitioner's business, if a prospective bidder, and a designation of each craft, classification or type of worker represented, if the petitioner be a representative of one or more crafts, classifications or types of workers involved in the public works project.

(c) The official name of the awarding body, together with the date on which the call for bids was first published and the name and location of the newspaper in which such publication was made. An accurate copy of the call for bids as published shall be attached to the petition.

(d) If petitioner be an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city, township, or regional district, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works. If the petitioner be a prospective bidder, then the parent or subsidiary corporations or associations related to such craft, classification or type of work, if any, shall be specified.

(e) The manner in which the wage rate determined by the Director fails to comply with the provisions of Labor Code Section 1773.

(1) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

(A) Whenever such facts relate to a particular employer of such crafts, classifications or types of workers, the facts stated must identify the employer by name and address and give the number of workers involved.

(B) Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16103 of these rules and regulations.

(C) Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16104 of these rules and regulations.

(2) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(3) Where the rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is to be performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

16205. Failure to Include Copy of Call for Bids. If the petition fails to contain a copy of the call for bids as provided in Section 16204(c), the Director may dismiss the petition forthwith or may, if good cause is shown, permit the petition to be amended to include such copy.

16206. Filing Copy With Awarding Body. If the petitioner be other than an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, excluding Saturdays, Sundays and holidays, file a copy of the petition with the awarding body and not later than five days, excluding Saturdays, Sundays and holidays, after the filing of the original petition, the petitioner shall file with the Chief of DLSR an affidavit of the filing with the awarding body. The Director may waive this requirement upon receipt of written confirmation, including a copy of such notification by the petitioner.

Article 4. Hearing Procedures, Decision, Miscellaneous

16207. Director's Discretion to Act. The Director may in his or her discretion initiate an investigation or hold a hearing or take such other action as is reasonably necessary which would best effectuate the purposes of the law and of these rules and regulations, except as such action may be expressly prohibited by the law.

16207.1. Director's Choice of Action. In any matter or proceeding under these regulations, whether it be on the initiative of the Director, petition or request by an interested party, the Director shall take those actions he or she deems necessary in the best interest of the law and these regulations except as may be specifically provided otherwise by the law or these regulations.

16207.2. Hearings. When a hearing is held, it shall be in accordance with the following procedures:

(a) A time and place of the hearing shall be fixed.

(b) All interested parties made known to the Director shall be notified by registered or certified mail, return receipt requested, of the time and place of the hearing except that in the event of numerous interested parties or in the event that mailing notices by registered or certified mail could cause an undue delay adverse to the interest of the parties or a timely hearing, the Director may send certified or registered notice to the petitioner and other directly interested parties that have been made known to the Director and may mail notices to the other parties, and publish in newspapers.

(c) Notification shall be at least one week in advance.

(d) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions. The hearing officer may fairly allocate time for such witnesses' testimony according to the interests of receiving testimony from all who wish to be heard and in the interest of introducing relevant evidence.

(e) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(f) All witnesses testifying before the hearing officer shall testify under oath.

(g) A full transcript of the hearing shall be recorded.

16207.3. Hearing Officer. Decision. (a) The appointed hearing officer shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations. Either the appointed hearing officer or the Director may request documentation subsequent to the hearing to complete the record, and shall send copies of such additional information to the petitioner, awarding body or other designated interested party or parties.

(b) The decision of the Director shall reflect a summary of the evidence, findings, or matters of fact and/or law.

(c) The decision shall be sent, by certified or registered mail with return receipt requested, to all parties no later than 20 days after the hearing, except earlier or later as special circumstances warrant.

(d) The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may reconsider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given to all parties in the same manner as the notice of hearings as specified in Sections 16207.2 (b), (c) and (d) above and the decision upon reconsideration shall be as specified in subdivisions (b) and (c) of this section.

16207.4. Public Hearings. The hearing procedures enumerated in Sections 16207.2 and 16207.3, above, shall in no way be construed to affect the responsibilities or procedures pursuant to Title 2, Division 3, Part 1, Chapter 4.5 of the Government Code (commencing with Section 11371 pertaining to the adoption of rules and regulations).

Article 5. Department and Division Authority

16207.5. Department and Division Authority in Prevailing Wage Issues. The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the division of Labor Standards Enforcement. The lead agency for the coordination on Apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with the DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by law or these rules.

16207.6. Issuance of Prevailing Wage Guidelines. The Director shall issue periodically guidelines for the interpretation of the prevailing wage law, in consultation with the lead divisions involved in the administration of the law.

16207.7. Referral of Prevailing Wage Issues to Director's Office. Any issue as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party shall be referred to the Director, except that, if it involves an issue raised after a contract is let, DLSE shall exercise discretion in the enforcement of the law pursuant to the established guideline. DLSE shall refer any issue not falling within such guideline and any issue as to coverage which is not routine to the Director's office as soon as practical to coordinate with Departmental policy.

16207.8. Referral of Appeals to Director's Office. Appeals of any determination under Section 1773 of the Labor Code relating either to coverage or rate of the prevailing wage shall be referred to the Director. The form and content of such appeal shall include the information required under Sections 16203 and 16204 of these rules and regulations.

16207.9. Severability. If any provision of these rules and regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these rules and regulations which can be given effect without the invalid provision or application, and to this end the provisions of these rules and regulations are severable.

NOTE: Section 9 of Chapter 281, 1976 Stats., states:

"Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be an appropriation made by this act because the duties, obligations or responsibilities imposed on local governmental entities or school districts by this act are such that related costs are incurred as a part of their normal operating procedures."

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(c) When applied to the rate for holiday or overtime work, the term means a single rate paid to or for the greater number of workers in the particular craft, classification or type of work who are paid the prevailing basic hourly rate of pay as defined in Section 16011(a) above.

(d) Notwithstanding subdivisions (a), (b) and (c) of this section, should there be any conflict, the express provisions of Labor Code Section 1777.5 regarding the wage rate of apprentices shall prevail.

16012. General Prevailing Rate of Per Diem Wages.

(a) The term "general prevailing rate of per diem wages", and similar terms descriptive of determinations made by the Director pursuant to Sections 1773, 1773.1, 1773.8 and express provisions of 1777.5 of the Labor Code and these rules and regulations, includes:

(1) the prevailing basic straight-time hourly rate of pay; and

(2) the prevailing rate for holiday and overtime work; and

(3) the prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like;

(I) apprenticeship or other training programs authorized by Sections 3071 and/or 3093 of the Labor Code;

(J) other bona fide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) *Provided,* that the term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) job related expenses other than travel time and subsistence pay;

(2) contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above in Section 16012;

(3) union, organizational, professional or other dues except as they may be included in and withheld from the basic hourly wage rate;

(4) industry or trade promotion;

(5) political contributions or activities;

(6) any benefit for employees, their families and dependents, or retirees, including any benefit enumerated above in Section 16012, where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit;

(7) such other payments as the Director may determine to exclude.

16013. Interested Party.

Except where otherwise specifically provided by these rules and regulations, the term "interested party" means, when used with reference to a particular prevailing wage determination made by the Director,

(1) any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determination, and/or

(2) any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work, and/or

(3) any awarding body concerned with the administration of a public works contract or proposed contract, which is subject to the particular prevailing wage determination.

16014. Issue Date-Issuance.

The issue date (issuance as used in Section 16108 below) shall be the date upon which copies of the determinations of the Director are deposited in the mail.

16015. Maintenance.

(a) Section 1771 of the Labor Code provides that public works contracts for maintenance work are subject to prevailing wage rate payments under Section 1720 et seq. of the Labor Code. This Administrative Code section specifies types of work which may be considered maintenance work and are also public works for prevailing wage payment purposes. This section does not and is not intended to affect the classification and categories of workers for which appropriate wage rates are set. Rather, this section solely clarifies the fact that certain work is subject to prevailing wage payment requirements.

(b) Maintenance is defined as routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(c) This definition expressly includes but is not limited to:

(1) carpentry, electrical, plumbing, glazing, and other craft work designed, consistent with the definitions set forth above, to preserve the facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

(2) landscape maintenance such as mowing, watering, trimming, pruning, planting, replacement of plants, servicing of irrigation and sprinkler systems, repairing of equipment used in such landscape maintenance, and janitorial work incidental to such landscape maintenance.

(d) This definition does not cover, among other types of work:

(1) janitorial or custodial services of a routine, recurring or usual nature;

(2) protection of the sort provided by guards or other security forces;

(3) painting, repainting or decorating other than "touch-up". (These activities are excluded from the definition of maintenance solely because they are already included in the definition of a public work.)

NOTE: Authority cited: Labor Code Sections 54, 1773.5. Reference: Labor Code Section 1771.

HISTORY:

1. New section filed 5-11-79; effective thirtieth day thereafter (Register 79, No. 19).

Article 2. Determination of General Prevailing Rate of Per Diem Wages. Requesting and Publishing Determinations

16100. Recognized Crafts.

The determinations of the Director will be limited to those crafts, classifications or types of workers employed in public works pursuant to Sections 1720, 1720.2, 1720.3 and 1771 of the Labor Code.

16101. Format.

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The formula or method for calculating the prevailing hourly wage rate for overtime and holiday work and determining the hours of work for which overtime is paid.

(3) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of worker employed on the project, which is on file with the Director of Industrial Relations."

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(2) landscape maintenance such as mowing, watering, trimming, pruning, planting, replacement of plants, servicing of irrigation and sprinkler systems, repairing of equipment used in such landscape maintenance, and janitorial work incidental to such landscape maintenance.

(d) This definition does not cover, among other types of work:

(1) janitorial or custodial services of a routine, recurring or usual nature;

(2) protection of the sort provided by guards or other security forces;

(3) painting, repainting or decorating other than "touch-up". (These activities are excluded from the definition of maintenance solely because they are already included in the definition of a public work.)

NOTE: Authority cited: Sections 54, 1773.5, Labor Code. Reference: Section 1771, Labor Code.

HISTORY:

1. New section filed 5-11-79; effective thirtieth day thereafter (Register 79, No. 19).

16016. Payroll Records.

Payroll records shall mean all time cards, cancelled checks, cash receipt, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project (Labor Code Section 1720 *et seq.*).

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Sections 1776 and 1812, Labor Code.

HISTORY:

1. New section filed 2-8-80; effective thirtieth day thereafter (Register 80, No. 6).

16017. Certified.

Certified shall mean the affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

HISTORY:

1. New section filed 2-8-80; effective thirtieth day thereafter (Register 80, No. 6).

16018. Public Entity.

Public entity for the purpose of processing requests for inspection of payroll records or furnishing certified copies thereof, shall mean any of the following: the body awarding the contract; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE) within the Department of Industrial Relations.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

HISTORY:

1. New section filed 2-8-80; effective thirtieth day thereafter (Register 80, No. 6).

16019. Contractor—Subcontractor.

The terms "contractor" and "subcontractor" shall include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in such capacity, when working on public works pursuant to Article 1 (commencing with Section 1720) and Article 2 (commencing with Section 1770) of Chapter 1 of Part 7 of Division 2 of the Labor Code.

NOTE: Authority cited: Sections 54, 1722.1 and 1776, Labor Code. Reference: Sections 1722.1 and 1776, Labor Code.

HISTORY:

1. New section filed 2-8-80; effective thirtieth day thereafter (Register 80, No. 6).

Article 2. Determination of General Prevailing Rate of Per Diem Wages. Requesting and Publishing Determinations

16100. Recognized Crafts.

The determinations of the Director will be limited to those crafts, classifications or types of workers employed in public works pursuant to Sections 1720, 1720.2, 1720.3 and 1771 of the Labor Code.

16100.1. Determination.

The surveyor classifications of certified chief of party, chief of party, rodman/chainman and instrumentman are covered by the public works law by the determination of the Director (the determination of the Director of May 30, 1979 is hereby incorporated by reference). Copies of this document are available on request from:

Division of Labor Statistics and Research
Attention: James Roeckel
P.O. Box 603
San Francisco, CA 94101

NOTE: Authority cited: Sections 1720, 1723, 1770, 1771, 1772, 1773 and 1773.1, Labor Code. Reference: Sections 1720, 1723, 1770, 1771, 1772, 1773 and 1773.1, Labor Code.

HISTORY:

1. New section filed 6-13-79; designated effective 8-1-79 (Register 79, No. 24).

16101. Format.

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The formula or method for calculating the prevailing hourly wage rate for overtime and holiday work and determining the hours of work for which overtime is paid.

(3) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bar[illegible]g agreement applicable to the particular craft, classification or type of w[illegible]employed on the project, which is on file with the Director of Industrial Re[illegible]ions."

Article 5. Department and Division Authority

16207.5. Department and Division Authority in Prevailing Wage Issues.
The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the division of Labor Standards Enforcement. The lead agency for the coordination on Apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with the DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by law or these rules.

16207.6. Issuance of Prevailing Wage Guidelines.
The Director shall issue periodically guidelines for the interpretation of the prevailing wage law, in consultation with the lead divisions involved in the administration of the law.

16207.7. Referral of Prevailing Wage Issues to Director's Office.
Any issue as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party shall be referred to the Director, except that, if it involves an issue raised after a contract is let, DLSE shall exercise discretion in the enforcement of the law pursuant to the established guideline. DLSE shall refer any issue not falling within such guideline and any issue as to coverage which is not routine to the Director's office as soon as practical to coordinate with Departmental policy.

16207.8. Referral of Appeals to Director's Office.
Appeals of any determination under Section 1773 of the Labor Code relating either to coverage or rate of the prevailing wage shall be referred to the Director. The form and content of such appeal shall include the information required under Sections 16203 and 16204 of these rules and regulations.

16207.9. Severability.

NOTE: Authority cited: Sections 54 and 1776, Labor Code; Section 11421, Government Code; Section 2231, Revenue and Taxation Code. Reference: Section 11421, Government Code; Section 2237, Revenue and Taxation Code; Section 9, Chapter 281, 1976 Statutes.

HISTORY:
1. Repealer filed 2-8-80; effective thirtieth day thereafter (Register 80, No. 6).

Article 6. Payroll Records—Forms—Reporting

16207.10. Request for Payroll Records.
Requests from the public for certified copies of payroll records shall be made to any of the following:
(a) the body awarding the contract,
(b) any office of the Division of Labor Standards Enforcement, or
(c) any office of the Division of Apprenticeship Standards of the Department of Industrial Relations.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

HISTORY:
1. New Article 6 (Sections 16207.10–16207.19) filed 2-8-80; effective thirtieth day thereafter (Register 80, No. 6).

16207.11. Request in Writing.

Any request for payroll records pursuant to Section 1776 of the Labor Code shall be in writing and contain at least the following information:

(a) the body awarding the contract;
(b) the contract number and/or description;
(c) the particular job location if more than one;
(d) the name of the contractor;
(e) the regular business address, if known.

Requests for records of more than one contractor or subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be entertained unless the records are requested by each separate contractor employer with the information as outlined above provided for each.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.12. Acknowledgment of Request.

The public entity receiving a request for payroll records shall acknowledge receipt of such. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16207.13 below, to the person who requested said records.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.13. Request to Contractor.

The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(a) specify the records to be provided and the form upon which the information is to be provided;
(b) conspicuous notice of the following:
(1) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and
(2) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty-five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.14. Inspection of Payroll Records.

Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

NOTE: Authority cited: Sections 54, 1776, and 1812, Labor Code. Reference: Sections 1776 and 1812, Labor Code.

16207.15. Reporting Format.

The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research
Post Office Box 603
San Francisco, California 94101
ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be at the discretion of the public entity provided the form can be readily understood by the person requesting the copies of the payroll records and the privacy considerations pursuant to Section 16207.18 below are complied with.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.16. Words of Certification.

The form of certification shall be as follows:

I, _____ (Name—print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named.

Date: _____ Signature: _____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.17. Fees.

The public entity furnishing copies of payroll records to the person requesting them may charge no more than one ($1.00) dollar initial processing fee (per contractor) and twenty-five (25¢) cents per page side copied.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.18. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation including arbitration, mediation or other methods of dispute resolution are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number of each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code; Section 6250 et seq., Government Code; and Section 1798 et seq., Civil Code.

16207.19. Severability.

If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application, and to this end the provisions of these regulations are severable.

Pursuant to Section 9 of Chapter 281, Statutes 1976, and Chapter 1249, Statutes 1978, the Director has determined that the proposed action will create no additional costs to any local agency or school district as provided by Section 2231 of the Revenue and Taxation Code.

NOTE: Authority cited: Sections 54 and 1776, Labor Code; Section 9, Chapter 281, Statutes 1976; and Chapter 1249, Statutes 1978. Reference: Section 1776, Labor Code; Section 9, Chapter 281, Statutes 1976; and Chapter 1249, Statutes 1978 (8 Cal Admin. §16207.9. prior).

(Register 81, No. 9—2-28-81)

GROUP 5. DEPARTMENT OF INDUSTRIAL RELATIONS— CONFLICT OF INTEREST CODE

17000. General Provisions.

The Political Reform Act, Government Code Sections 81000, *et seq.*, requires state and local government agencies to adopt and promulgate Conflict of Interest Codes. The Fair Political Practices Commission has adopted a regulation, 2 Cal. Adm. Code Section 18730, which contains the terms of a standard Conflict of Interest Code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of 2 Cal. Adm. Code Section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission, along with the attached Appendix in which officials and employees are designated and disclosure categories are set forth, are hereby incorporated by reference and constitute the Conflict of Interest Code of the Department of Industrial Relations.

Pursuant to Section 4(A) of the standard Code, designated employees shall file statements of economic interests with the agency. Upon receipt of the statement of the Director, the agency shall make and retain a copy and forward the original of this statement to the Fair Political Practices Commission.

NOTE: Authority cited: Sections 87300 and 87304, Government Code. Reference: Section 87300, *et seq.*, Government Code.

HISTORY:

1. New Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) filed 12-2-77; effective thirtieth day thereafter. Approved by the Fair Political Practices Commission 1-19-77 (Register 77, No. 49).

2. Repealer of Group 5 (Articles 1–7, Sections 17000–17300, not consecutive) and new Group 5 (Section 17000 and Appendix) filed 2-26-81; effective thirtieth day thereafter. Approved by Fair Political Practices Commission 12-1-80 (Register 81, No. 9).

APPENDIX

Designated Positions	*Assigned Disclosure Categories*
OFFICE OF THE DIRECTOR	
Director, Chief Deputy Director, Deputy Director, all legal classes, Senior Management Analyst	1
Special consultant, Staff Services Manager III, (Fiscal Officer), Associate Budget Analyst, Business Service Officer I & III, Accounting Technician (procurement)	2
LABOR STANDARDS AND INDUSTRIAL WELFARE	
Chief, Deputy Chief, Assistant Chief, Staff Counsel I, II, and III, Legal Counsel	3
Deputy Labor Commissioner II, III and IV and Senior Special Investigator	4
Chairman, Commissioner, Executive Secretary, (Industrial Welfare Commission)	5
Public Member, wage board (Industrial Welfare Commission)	6

(Register 81, No. 6—2-28-81)

Designated Positions	*Assigned Disclosure Categories*
INDUSTRIAL ACCIDENTS AND WORKERS' COMPENSATION	
Administrative Director, Assistant Chief, Medical Director, Chief of Permanent Disability Rating Bureau, Chief, Rehabilitation Bureau, Permanent Disability Rating Specialist, (assigned to Benefit Notice Unit)	7
District Medical Director, Medical Examiner, P.D.R. Area Supervisor, P.D.R. Specialist, Information Attorney, Referee WCAB, Referee-in-Charge WCAB (also known as Worker Compensation Judge and Presiding Worker Compensation Judge)	8
Staff Services Manager, Administrative Assistant	9
INDUSTRIAL ACCIDENTS AND WORKERS' COMPENSATION	
Chairman, Commissioner, Secretary and Deputy Commissioner, Deputy Commissioner, Special Counsel, Staff Counsel	10
Program Manager, Consultant, and Field Representative of Office of Self-Insurance Plans	11
INDUSTRIAL SAFETY	
Chief, Deputy Chief, Assistant Chief for Consulting Education and Research, Administrative Assistant, Staff Services Manager	12
Staff Counsel (I, II, III), Senior Special Investigator, Special Investigator, Administrative Chief of Bureau of Investigation	13
Assistant Chief, Regional Manager, District Manager	14
Principal Engineer	15
Senior Safety Engineer, Safety Engineer, Senior Health Physicist, Associate Health Physicist	16
OCCUPATIONAL SAFETY AND HEALTH	
Standards Board: Chairman and members of the Board, Executive Officer, Senior Safety Engineer, Staff Services Analyst	17
Appeals Board: Chairman and members of the Board, Executive Officer, Staff Counsel I, II and III, Administrative Law Judge (Presiding, I, II), Forensic Engineer	17
APPRENTICESHIP	
Chief, Chief Deputy, Assistant Chief, Special Assistant to Chief	18
Intergroup Relations Coordinator, Area Administrator, Senior Consultant	19
Staff Services Manager	20
LABOR STATISTICS AND RESEARCH	
Chief, Assistant Chief, Senior Research Analyst (Industrial Relations Research)	21
Data Processing Manager, Associate Systems Analyst, Associate Programmer Analyst	22
CONCILIATION	
Supervisor of Conciliation, Conciliator	23
FAIR EMPLOYMENT PRACTICES	
Chairman and Members of Commission, Legal Affairs Officer (Commission), Chief, Assistant Chief, All Legal Classes	24

(Register 81, No. [illegible])

Disclosure Categories

Category 1

Designated employees assigned to this category must report:

All investments and sources of income.

Category 2

Designated employees assigned to this category must report:

Investments in business entities and sources of income which they know or have reason to know have within the preceding two years contracted, or plan to contract, with the Department of Industrial Relations to provide services, supplies, materials or machinery of any type to the Department.

Category 3

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by or has within the preceding 2 years contracted or plans to contract with the Division of Labor Standards Enforcement.

Category 4

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Labor Standards Enforcement within the geographic area over which they exercise jurisdiction.

Category 5

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Industrial Welfare Commission.

Category 6

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that he or she knows or has reason to know is directly and materially subject to regulation by the Industrial Welfare Commission based on consideration of the recommendations of the wage board to which the public member belongs.

Category 7

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know: (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business; or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents.

Category 8

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know: (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business; or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents, to the extent the business entity or source of income is subject to such regulation or engages in or derives its income from such insurance business within the geographic area over which the employee exercises jurisdiction. Workers' compensation judges performing judicial functions are also subject to the provisions of the California Code of Judicial Conduct.

Category 9

Designated employees assigned to this category must report:

Investments in business entities and sources of income which they know or have reason to know have within the preceding 2 years contracted, or plan to contract, with the Division of Industrial Accidents to provide services, supplies, materials, or machinery of any type to the Division, or have so contracted or plan to contract with the Department to serve the Division in said manner.

Category 10

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know: (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business; or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents.

Category 11

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is a Self-Insurer for purposes of workers' compensation liability, has applied in the last two years or plans to apply for self-insurer status, or engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business or the administration or operation of self-insurance plans.

Category 12

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety or has within the preceding two years contracted or plans to contract with the Division of Industrial Safety.

(Register 81, No. 8—2-28-81)

Category 13

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety.

Category 14

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the geographic area over which they exercise jurisdiction.

Category 15

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the subject matter area over which they exercise jurisdiction.

Category 16

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the subject matter and geographic area over which they exercise jurisdiction.

Category 17

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Board or Unit for which they work.

Category 18

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Apprenticeship Standards or has within the preceding two years contracted or plans to contract with the Division of Apprenticeship Standards.

Category 19

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Apprenticeship Standards within the geographic area over which they exercise jurisdiction.

Category 20

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that she or he knows or has reason to know has within the preceding 2 years contracted, or plans to contract, with the Division of Apprenticeship Standards to provide services, supplies, materials or machinery of any type to the Division, or has so contracted or plans to contract with the Department to so serve the Division.

Category 21

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that he or she knows or has reason to know is directly and materially subject to regulation by the Department of Industrial Relations, engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business, or has within the preceding two years contracted or plans to contract with the Division of Labor Statistics and Research.

Category 22

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know has within the preceding two years contracted or plans to contract with the Division of Labor Statistics and Research to provide services, supplies, materials, or machinery of any type for purposes of data processing, reproduction, or microfilming, to the Division, or has so contracted or plans to contract with the Department to so serve the Division.

Category 23

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know engages in or derives its income from, in whole or in part, a Transit District subject to the jurisdiction of the State Conciliation Service.

Category 24

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Fair Employment Practices Commission.

(Next page is 1001)

16207.15. Reporting Format.

The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research
Post Office Box 603
San Francisco, California 94101
ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be at the discretion of the public entity provided the form can be readily understood by the person requesting the copies of the payroll records and the privacy considerations pursuant to Section 16207.18 below are complied with.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.16. Words of Certification.

The form of certification shall be as follows:

I, _____ (Name—print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record (s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named.

Date: _____ Signature: _____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.17. Fees.

The public entity furnishing copies of payroll records to the person requesting them may charge no more than one ($1.00) dollar initial processing fee (per contractor) and twenty-five (25¢) cents per page side copied.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.18. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation including arbitration, mediation or other methods of dispute resolution are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number of each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code; Section 6250 et seq., Government Code; and Section 1798 et seq., Civil Code.

16207.19. Severability.

If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application, and to this end the provisions of these regulations are severable.

Pursuant to Section 9 of Chapter 281, Statutes 1976, and Chapter 1249, Statutes 1978, the Director has determined that the proposed action will create no additional costs to any local agency or school district as provided by Section 2231 of the Revenue and Taxation Code.

NOTE: Authority cited: Sections 54 and 1776, Labor Code; Section 9, Chapter 281, Statutes 1976; and Chapter 1249, Statutes 1978. Reference: Section 1776, Labor Code; Section 9, Chapter 281, Statutes 1976; and Chapter 1249, Statutes 1978 (8 Cal Admin. §16207.9. prior).

GROUP 4. EMPLOYMENT OF ALIENS NOT ENTITLED TO LAWFUL RESIDENCE

NOTE: Authority cited: Sections 55 and 59, Labor Code. Reference: Section 2805, Labor Code.

HISTORY:

1. New Group 4 (§§ 16209, 16209.1–16209.6) filed 3-24-72 as an emeregency; effective upon filing Register 72, o. 13.
2. Certificate of Compliance filed 6-2-72 (Register 72, No. 23).
3. Repealer of Group 4 (Article 1, Sections 16209, 16209.1–16209.6) filed 12-15-82 by OAL pursuant to Government Code Section 11349.7(j) (Register 82, No. 51).

GROUP 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

Article 1. Definitions

16000. Definitions.

The following terms are defined for general use in these regulations within Group 3, Payment of Prevailing Wages Upon Public Works:

Area of Determination. The area of determining the prevailing wage is the "locality" and/or the "nearest labor market area" as determined by the Director. In determining the area, the mobility of each craft, classification and type of work will be considered.

Awarding body. Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.

Bid. Any proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind.

Certified. The affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

Chief of DAS. Chief of Division of Apprenticeship Standards or a duly authorized representative.

Chief of DLSE/Labor Commissioner. Chief of the Division of Labor Standards Enforcement or a duly authorized representative.

Chief of DLSR. Chief of the Division of Labor Statistics and Research or a duly authorized representative.

Date of Notice or Call for Bids. The date the notice inviting bids was published in a newspaper of general circulation.

DAS. Division of Apprenticeship Standards.

DLSE. The Division of Labor Standards Enforcement.

DLSR. The Division of Labor Statistics and Research.

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight-time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude.

Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Issue Date-Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, stucture, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

EXCEPTION 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

EXCEPTION 2: Protection of the sort provided by guards or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Prevailing Rate. Includes:

(1) The basic hourly rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers is paid at a single rate; if there is no single rate being paid to a majority, then the single rate (modal rate) being paid to the greater number of workers is prevailing. If there is no modal rate, then an alternate rate will be established by considering the appropriate collective bargaining agreements, Federal rates, or other data such as wage survey data, including the nearest labor market area or expanded survey as provided in Article 4 of these regulations.

(2) Other employer payments as defined in Section 16000 of these regulations and as included as part of the total hourly wage rate from which the prevailing basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, then the Director may establish a prevailng employer payment rate by the same procedure outlined in subsection (1) above.

(3) The rate for holiday or overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, holidays and overtime (if any) included with the prevailing basic hourly rate of pay shall be prevailing.

Public Entity. For the purpose of processing requests for inspection of payroll records or furnishing certified copies thereof, "public entity" includes: the body awarding the contracts; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE).

Public Funds. Includes state, local and/or federal monies.

NOTE: Public funds do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body.

Public Works. See Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

Sheltered workshop. A nonprofit organization licensed by the Chief of DLSE employing mentally and/or physically handicapped workers.

Worker. See Labor Code Sections 1723 and 1772.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1191.5, 1720, 1720.2, 1720.3, 1721, 1722, 1722.1, 1723, 1724, 1770, 1771, 1772, 1773.5, 1776, 2750.5, 3071 and 3093, Labor Code; and Section 21002, Public Contract Code.

HISTORY:

1. Repealer of Group 3 (Articles 1–3, Sections 16000–16004, 16100–16101 and 16200–16205) and new Group 3 (Articles 1–4, Sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1-3-77 as an emergency; effective upon filing (Register 77, No 2). For prior history, see Register 56, No. 8.

2. New Group 3 (Sections 16000–16014, 16100–16109, 16200–16207.9) filed 2-8-78; effective thirtieth day thereafter (Register 78, No. 6).

3. Renumbering and amendment of former Sections 16000–16006 and 16008–16019 to Section 16000; renumbering and amendment of former Section 16100 to Section 16002; renumbering and amendment of former Section 16101 to Section 16203; renumbering and amendment of former Sections 16102–16105 to Section 16200; renumbering and amendment of former Section 16106 to Section 16206; renumbering and amendment of former Sections 16107(a), (b) and (c) to Sections 16201, 16202 and 16205; renumbering and amendment of former Section 16108 to Section 16204; renumbering and amendment of former Section 16200 to Section 16300; renumbering and amendment of former Sections 16007, 16201, 16202, 16204 and 16206 to Section 16302; renumbering and amendment of former Section 16207 to Section 16303; renumbering and amendment of former Sections 16207.2 and 16207.3 to Section 16304; renumbering and amendment of former Section 16207.5 to Section 16100; renumbering and amendment of former Section 16207.7 to Section 16301; renumbering and amendment of former Sections 16207.10–16207.14 to Section 16400; renumbering and amendment of former Sections 16207.15 and 16207.16 to Section 16401; renumbering and amendment of former Section 16207.17 to Section 16402; renumbering and amendment of former Section 16207.18 to Section 16403; renumbering and amendment of former Section 16207.19 to Section 16500; repealer of former sections 16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8; and new Sections 16001, 16101 and 16102 filed 2-11-86; effective thirtieth day thereafter (Register 86, No. 7). For prior history, see Registers 82, No. 51; 80, No. 6; 79, No. 19; 72, No. 23 and 72, No. 13.

Article 2. Work Subject to Prevailing Wages

16001. Public Works Subject to Prevailing Wage Law.

(a) General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, and 1771.

(b) Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

(c) Field Surveying Projects. Field survey work traditionally covered by collective bargaining agreements is subject to prevailng wage rates when it is integral to the specific public works project in the design, preconstruction, or construction phase.

(d) Residential Projects. Residential projects consisting of single family homes and apartments up to and including four stories are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally-funded or assisted residential projects controlled or carried out by an awarding body.

NOTE: Such projects may require a special determination by the Director which should be requested by the awarding body at least 45 days before the commencement of advertising of the call for bids by the awarding body.

(e) Maintenance. Public works contracts for maintenance are subject to prevailing wage rate payment as set forth in Section 1771 of the Labor Code.

NOTE: See Article 1 for definition of term "maintenance".

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3 and 1771, Labor Code.

16002. Coverage of Worker.

The determinations of the Director will cover those crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

NOTE: Authority cited: Sections 1723 and 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3 and 1771, Labor Code.

Article 3. Duties, Responsibilities, and Rights of Parties

16100. Duties, Responsibilities and Rights.

The parties listed in this section must comply with the provisions of the Labor Code applicable to the payment of prevailing wages on public works contracts.

(a) Department and Division Authority in Prevailing Wage Issues. The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the Division of Labor Standards Enforcement. The lead agency for the coordination on apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by the law or these regulations.

(b) The Awarding Body shall:

(1) Obtain the prevailing wage rate from the Director in accordance with Labor Code Sections 1771 and 1773.

(2) Specify the appropriate prevailing wage rates, in accordance with Labor Code Sections 1773.2 and 1777.5.

(A) The posting requirement is applicable for each job site.

EXCEPTION: If more than one worksite exists on any project, then the applicable rates may be posted at a single location which is readily available to all workers.

(B) If a wage rate for a craft, classification or [type of] worker is not published in the Director's general prevailing wage determinations, a request for a special determination should be made by the awarding body to Chief, Division of Labor Statistics and Research, P. O. Box 603, San Francisco, CA 94101, at least 45 days prior to the project bid advertisement date.

(3) Notify DAS. See Labor Code Section 1773.3.

(4) Inform prime contractors, to the extent feasible, of relevant public work requirements:

NOTE: Requirement information may be disseminated at a preacceptance of bid conference or in a call for bids or at an award of bid conference.

The public works requirements are:

(A) the appropriate number of apprentices are on the job site, as set forth in Labor Code Section 1777.5.

(B) worker's compensation coverage, as set forth in Labor Code Sections 1860 and 1861.

(C) keep accurate records of the work performed on the public works project, as set forth in Labor Code Section 1812.

(D) inspection of payroll records pursuant to Labor Code Section 1776, and as set forth in Section 16400 (e) of these regulations.

(E) and other requirements imposed by law.

(5) Withhold monies. See Labor Code Section 1727.

(6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771.

(7) Deny the right to bid on public work contracts to contractors or subcontractors who have violated public work laws, as set forth in Labor Code Section 1777.7.

(8) Not permit workers on public works to work more than eight hours a day or 40 hours in any one calendar week, unless compensated at not less than time and a half as set forth in Labor Code Section 1815.

EXCEPTION: If the prevailing wage determination requires a higher rate of pay for overtime work than is required under Labor Code Section 1815, then that higher overtime rate must be paid [, as specified in subsection 16200(a) (3) (F) of these regulations.]

(9) Not take or receive any portion of the workers' wages or accept a fee in connection with a public works project, as set forth in Labor Code Sections 1778 and 1779.

(10) Comply with those requirements as specified in Labor Code Sections 1776(g), 1777.5, 1810, 1813, and 1860.

(c) Contractor-subcontractor.

The contractor and subcontractor shall:

(1) Pay not less than the prevailing wage to all workers, as defined in Section 16000(a) of these regulations, and as set forth in Labor Code Sections 1771 and 1774;

(2) Comply with the provisions of Labor Code Sections 1773.5, 1775, and 1777.5 regarding public works jobsites;
(3) Provide workers' compensation coverage as set forth in Labor Code Section 1861;
(4) Comply with Labor Code Sections 1778 and 1779 regarding receiving a portion of wages or acceptance of a fee;
(5) Maintain and make available for inspection payroll records, as set forth in Labor Code Section 1776;
(6) Pay workers overtime pay, as set forth in Labor Code Section 1815 or as provided in the collective bargaining agreement adopted by the Director as set forth in Section 16200 (a) (3) of these regulations; and
(7) Comply with Section 16101 of these regulations regarding discrimination.
(8) Be subject to provisions of Labor Code Section 1777.7 which specifies the penalties imposed on a contractor who willfully fails to comply with provisions of Section 1777.5.
(9) Comply with those requirements as specified in Labor Code Sections 1810 and 1813.
(10) Comply with other requirements imposed by law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1726, 1727, 1728, 1729, 1771, 1773, 1773.2, 1773.3, 1773.4, 1773.5, 1774, 1775, 1776, 1777.5, 1777.7, 1778, 1779, 1810, 1811, 1812, 1813, 1815, 1860 and 1861, Labor Code.

16101. Discrimination.

See Labor Code Sections 1735, 1777.5, 1777.6, and 3077.5.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1735, 1777.5, 1777.6 and 3077.5, Labor Code.

16102. Interested Party.

An interested party, as defined in Section 16000 of these regulations, may be a source of wage data information, as provided in Section 16200(e) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

Article 4. Wage Determinations

16200. General; Basis For Determining Prevailing Wage Rate.

The Director shall follow those procedures specified in Sections 1773 and 1777.5 of the Labor Code and in these regulations when making a prevailing wage determination.
(a) Collective Bargaining Agreements.
(1) Filing of collective bargaining agreements.
(A) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all their collective bargaining agreements, including any addenda which modify the agreements, as soon as practicable after their execution.

(B) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code, and Section 16200(a)(1)(A) of these regulations shall be filed with and addressed to: Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101.

(C) Collective bargaining agreements filed with the Division of Labor Statistics and Research must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

1. certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or photocopy thereof, or a printed copy of a fully executed agreement showing the names of the signatory parties, except in the case of a printed agreement the Director may require certification;

2. names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement;

3. names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

4. provides the number of workers currently employed under the terms of the agreement and, if practicable, the number of workers in each county within the jurisdiction of the signatory local union or unions;

5. provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

(D) Copies of collective bargaining agreements which are not bona fide shall not be deemed filed. The party filing a contract may be asked to substantiate the assertion that such collective bargaining agreement is bona fide.

(2) Criteria for using collective bargaining agreement wage rates as basis of prevailing wage determinations. Before accepting the collective bargaining agreement wage rate for the applicable craft and locality, DLSR shall take the following factors into consideration:

(A) The geographical area(s) specified in the agreement;

(B) The number of workers covered by the agreement;

(C) If signatory parties to the agreement have workers in the geographical area(s);

(D) If work has been performed in the geographical area(s) specified in the agreement in the past 12 months;

(E) The wage rates determined by the federal government as set forth in Section 16200(b).

(3) Adoption of Collective Bargaining Agreements.

(A) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for each craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate. Only those rates and employer payments specifically enumerated in the definition of "general prevailing rate of per diem wages" in Section 16000 shall be included in the rate adopted.

(B) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director shall incorporate such changes in the determination.

NOTE: A statement must be filed with the Director for any adjustments made to a contract which are not contained in the agreement currently on file with DLSR.

(C) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

(D) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications, work rules, and manning requirements may be considered. In such cases, the Chief of DLSR may include such provisions in the prevailing wage determination.

(E) Holidays. Only Federal and/or State legally recognized holidays specifically named in the collective bargaining agreement or determined by wage surveys shall be included in the wage determination. Overtime pay may be required as provided in 16200(a)(3)(F) of these regulations.

(F) Overtime. Overtime will be paid as indicated in the wage determination.

EXCEPTION 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, or if the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday if approved in advance by the Director.

EXCEPTION 2: If work cannot be performed during normal business hours and work is necessary at off hours to avoid danger to life or property.

EXCEPTION 3: Nonwork days specified in collective bargaining agreements.

EXCEPTION 4: No overtime payment required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

(G) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(I) of these regulations.

(H) Rates for helpers. Rates for helpers will be published when the information available to the Director indicates that a practice of using such a subclassification prevails in a particular area, such as contained in a collective bargaining agreement, and within the parameters of the applicable collective bargaining agreement. In the absence of such determination, the helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor from the 1-5 apprentice-journeyman ratio requirements set forth in Labor Code Section 1777.5.

(I) Payment of cash in lieu of employer payments. A contractor that is nonsignatory to a collective bargaining agreement or does not contribute to a trust fund may pay that amount of fringe benefits required, either in cash to the employee, or pay the particular fringe benefit amount designated in the appropriate wage determination to a benefit plan on behalf of the worker. Under no circumstance shall the contractor pay any amount less than is established by the applicable wage determination for the particular fringe benefit to a benefit plan, account, trust fund, or cash payment to the employee.

(b) Federal rates. In reviewing rates predetermined for federal public works, the Director will consider those rates published in the Federal Register.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

NOTE: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12-month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other

means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(4) the location of the project;

(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(6) the type of construction (e.g. residential, commercial building, etc.);

(7) the approximate cost of construction;

(8) the beginning date and completion date, or estimated completion date of the project;

(9) the source of data (e.g. "payroll records");

(10) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

NOTE: Authority cited: Sections 1773 and 1773.5, Labor Code. Reference: Sections 1770, 1771, 1773, 1773.1, 1773.5, 1777.5, 1810 and 1815, Labor Code.

16201. General Area Determinations.

When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout an area, the Director shall issue a determination enumerated county by county, but covering the entire area. Such determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.

NOTE: General determinations are usually issued on a quarterly basis. However, the Director may issue an interim wage determination following the procedures set forth in Section 1773 of the Labor Code, and in these regulations. See Section 16000 as to issue date, and Section 16204 as to effective date of determination. The general determination usually applies where a collective bargaining agreement has been filed and adopted as the prevailing wage rate.

NOTE: Authority cited: Sections 1773.5 and 1773.6, Labor Code. Reference: Section 1773, Labor Code.

16202. Special Determinations.

(a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

(b) Department of Industrial Relations initiated determination. Where an awarding body does not specify the prevailing wage rate as set forth in Labor

Code Section 1773.2, any interested party (as defined in Section 16000 of these regulations) may petition the Director as set forth in Labor Code Section 1773.4 and Section 16302 of these regulations. The Labor Commissioner may, prior to the letting of the bid, request such a determination of the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.4, Labor Code.

16203. Format.

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workers employed on the project, which is on file with the Director of Industrial Relations."

(3) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16000 of these regulations.

(4) The following statement when applicable. "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8."

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) The applicability of the apprentice rate of per diem wages shall be indicated and furnished upon request.

(d) The dates between which the applicable rate shall be paid for work performed in those periods shall be indicated.

(e) As a supplement to each determination the Director shall make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.5, Labor Code.

16204. Effective Dates of Determination and of Rates Within Determination.

(a) Effective date of determination.

(1) All determinations issued will be effective ten (10) days after issuance, provided that requests for copies, reprints or reissuance of prior determinations shall not affect the original effective date unless a new effective date is reflected upon the determination (see subdivision (3) below). Any call for bids put out on or after the effective date of the determination must reflect that determination unless the Director determines that subdivision (4) of this section is applicable, after notification and request by an awarding body.

(2) Determinations issued by the Director will show an issue date and will ordinarily show an expiration date.

(3) All determinations will remain in effect until their expiration date unless earlier modified, corrected, rescinded or superseded by the Director.

(4) Determinations modified, corrected, rescinded or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which a call for bids takes place less than 30 days after the filing of the agreement.

NOTE: See Section 1773.1 of the Labor Code.

(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

(b) Modification of Effective Date of Determination by Asterisks. Meaning of single and double asterisks. Prevailing wage determinations with a single asterisk (*) after the expiration date are in effect on the date of advertisement for bids and are good for the life of the project. Prevailing wage determinations with double asterisks (**) after the expiration date indicate that the wage rate to be paid for work performed after this date has been determined. If work is to extend past this date, the new rate must be paid and should be incorporated in contracts entered into now. The contractor should contact the Prevailing Wage Unit, DLSR, to obtain predetermined wage changes. All determinations that do not have double asterisks (**) after the expiration date are good for the life of the project.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.1, Labor Code.

16205. Procedures for Obtaining Prevailing Wage Determinations.

An awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that a special or general prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. All requests for special prevailing wage determinations must be confirmed in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of workers for which a determination is needed.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

16206. Corrections.

Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination. The Director may correct any error issued in a determination by reissuing such determination.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

Article 5. Petitions to Review Prevailing Wage Determinations

16300. Delegation of Authority.

(a) The Chief of DLSR is the authorized representative of the Director for the purpose of:

(1) Receiving collective bargaining agreements and other documents and papers pertaining to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations;

(2) Gathering information needed to make prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purpose of the law;

(3) Issuing prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations; and

(4) Responding to petitions regarding determinations.

(b) The Director reserves the right to make all final determinations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1771, 1772, 1773 et seq., 1774, 1775, 1776, 1777, 1777.5 et seq., 1778, 1779 and 1780, Labor Code.

16301. Referral of Prevailing Wage Issues to Director's Office.

Any new or unresolved issue other than of a routine nature as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party may be referred to the Chief of DLSR as the Director's duly authorized representative for final determination, including appeals of any determination relating either to coverage or to the rate of the prevailing wage rate, subject only to Section 16300(b) of these regulations.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

16302. Petition to Review Prevailing Wage Determinations.

Those interested parties enumerated in Section 1773.4 of the Labor Code, and defined in Section 16000 of these regulations, may file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

(a) Manner of Filing. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed with the Director by mail to the Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101, or may be filed in person at 525 Golden Gate Avenue, 4th Floor, San Francisco, CA 94102.

(b) Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these regulations or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body or division upon actual delivery to and receipt by such person, awarding body, or division.

(c) Content of Petition. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(1) The name, address, telephone number and job title of:

(A) the person filing the petition;

(B) the person verifying the petition, if different from the person filing;

(C) if applicable, petitioner's attorney or authorized representative.

(2) Whether the petitioner is an awarding body, a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public works contract;

(3) The nature of petitioner's business, if a prospective bidder, and a designation of each craft, classification, or type of worker represented, or types of workers involved in the public works project.

(4) (A) the official name of the awarding body;
(B) the date on which the call for bids was first published;
(C) the name and location of the newspaper in which such publication was made. An accurate copy of the call for bids as published shall be attached to the petition.

(5) If petitioner is an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city, township, or regional district, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(6) If the petitioner is a prospective bidder, then the parent or subsidiary corporations or associations related to such craft, classification or type of work, if any, shall be specified.

(7) The manner in which the wage rate determined by the Director fails to comply with the provisions of Labor Code Section 1773.

(A) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

1. Whenever such facts relate to a particular employer of such crafts, classifications, or types of workers, the facts stated must identify the employer by name and address and give the number of workers involved.

2. Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16200(a)(1) of these regulations.

3. Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16200(e) of these regulations.

(B) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(C) Where rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

(d) Filing Copy With Awarding Body. If the petitioner is not an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, excluding Saturdays, Sundays and holidays, file a copy of the petition with the awarding body and not later than five days, excluding Saturdays, Sundays and holidays, after the filing of the original petition, the petitioner shall file with the Chief of DLSR an affidavit of the filing with the awarding body. The Director may waive this requirement upon receipt of written confirmation, including a copy of such notification by the petitioner.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773, 1773.1, 1773.4, 1773.5, 1773.8 and 1776, Labor Code.

16303. Quasi-Legislative Nature of Authority.

(a) The authority of the Director to establish the prevailing wage for any craft, classification, or type of worker is quasi-legislative. The Director has the discretion to establish these prevailing wages in a quasi-legislative manner which may include an investigation, hearing, or other action. Any hearing under this process is quasi-legislative and is subject to review pursuant to the Code of Civil Procedure Section 1085.

(b) The Director may in his or her discretion initiate an investigation or hold a hearing or take such other action as is reasonably necessary which would best effectuate the purposes of the law and of these regulations, except as such action may be expressly prohibited by law.

NOTE: Authority cited: Section 1773.5, Labor Code; and Winzler & Kelly (1981) 121 C.A. 3d 120; *Western Assn. of Engineers & Land Surveyors* v. *DIR*, Judicial Council Coord. Proceeding No. 449, Sac. Superior Court No. 285433. Reference: Sections 1770, 1773 and 1773.4, Labor Code; and Section 1085, Code of Civil Procedure.

16304. Hearings.

When a hearing is held, including a petition to review under Labor Code Section 1773.4, it shall be in accordance with the following procedures:

(a) Hearing Procedures.

(1) A time and place of the hearing shall be fixed.

(2) All interested parties made known to the Director shall be notified by registered or certified mail, return receipt requested, of the time and place of the hearing except that, in the event of numerous interested parties or in the event that mailing notices by registered or certified mail could cause an undue delay adverse to the interest of the parties or a timely hearing, the Director may send certified or registered notices to the petitioner and other directly interested parties that have been made known to the Director and mail notices to the other parties, and publish such notices in newspapers.

(3) Notification of the time and place of the hearing shall be at least one week in advance.

(4) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions. The hearing officer may fairly allocate time for such witnesses' testimony in the interest of introducing relevant evidence. Cross examination will be permitted at the discretion of the hearing officer.

(5) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(6) All witnesses testifying before the hearing officer shall testify under oath.

(7) A full transcript of the hearing shall be recorded.

(b) Hearing Officer. The Director may appoint a hearing officer(s). The appointed hearing officer(s) shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations. Either the appointed hearing officer(s) or the Director may request documentation subsequent to the hearing to complete the record, and shall send copies of such additional information to the petitioner, awarding body or other designated interested party or parties.

(c) Subject Matter. The subject matter of a hearing may be initiated by a petition to review, as set forth in Labor Code Section 1773.4.

(d) Decision. The decision of the Director shall reflect a summary of the evidence, findings, or matters of fact and/or law.

The decision shall be sent to all parties no later than 20 days after the hearing, except earlier or later as special circumstances warrant. The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may consider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given to all parties in the same manner as the notice of hearings as specified in Sections 16304(a)(2) and (a)(3) above and the decision upon reconsideration shall be as specified in subdivisions (a)(2) and (a)(3) of this section.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773.4 and 1773.5, Labor Code.

Article 6. Certified Payroll Records: Requests, Content, and Cost

16400. Request for Payroll Records.

(a) Requests may be made by any person for certified copies of payroll records. Requests shall be made to any of the following:

(1) the body awarding the contract, or

(2) any office of the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards.

(b) Requests for certified copies of payroll records pursuant to Section 1776 of the Labor Code may be made by any person. However, any such request shall be in writing and contain at least the following information:

(1) The body awarding the contract;

(2) The contract number and/or description;

(3) The particular job location if more than one;

(4) The name of the contractor;

(5) The regular business address, if known.

NOTE: Requests for records of more than one contractor of subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be accepted; unless contractor and subcontractor responsibilities regarding the project are not clearly defined.

(c) Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty-five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and
(4) Provide for inspection.
(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research
P.O. Box 603
San Francisco, CA 94101
ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A-1-131).

(b) Words of Certification. The form of certification shall be as follows:

I, _____ (Name-print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash. check, or whatever form to the individual or individuals named.

Date: _____ Signature: _____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed

unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Severability

16500. Severability.

If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application, and to this end the provisions of these regulations are severable.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

(Register 86, No. 7—2-15-86)

GROUP 5. DEPARTMENT OF INDUSTRIAL RELATIONS— CONFLICT OF INTEREST CODE

17000. General Provisions.

The Political Reform Act, Government Code Sections 81000, *et seq.*, requires state and local government agencies to adopt and promulgate Conflict of Interest Codes. The Fair Political Practices Commission has adopted a regulation, 2 Cal. Adm. Code Section 18730, which contains the terms of a standard Conflict of Interest Code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of 2 Cal. Adm. Code Section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission, along with the attached Appendix in which officials and employees are designated and disclosure categories are set forth, are hereby incorporated by reference and constitute the Conflict of Interest Code of the Department of Industrial Relations.

Pursuant to Section 4(A) of the standard Code, designated employees shall file statements of economic interests with the agency. Upon receipt of the statement of the Director, the agency shall make and retain a copy and forward the original of this statement to the Fair Political Practices Commission.

NOTE: Authority cited: Sections 87300 and 87304, Government Code. Reference: Section 87300, *et seq.*, Government Code.

HISTORY:

1. New Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) filed 12-2-77; effective thirtieth day thereafter. Approved by the Fair Political Practices Commission 1-19-77 (Register 77, No. 49).

2. Repealer of Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) and new Group 5 (Section 17000 and Appendix) filed 2-26-81; effective thirtieth day thereafter. Approved by Fair Political Practices Commission 12-1-80 (Register 81, No. 9).

APPENDIX

Designated Positions	*Assigned Disclosure Categories*
OFFICE OF THE DIRECTOR	
Director, Chief Deputy Director, Deputy Director, all legal classes, Senior Management Analyst	1
Special consultant, Staff Services Manager III, (Fiscal Officer), Associate Budget Analyst, Business Service Officer I & III, Accounting Technician (procurement)	2
LABOR STANDARDS AND INDUSTRIAL WELFARE	
Chief, Deputy Chief, Assistant Chief, Staff Counsel I, II, and III, Legal Counsel	3
Deputy Labor Commissioner II, III and IV and Senior Special Investigator	4
Chairman, Commissioner, Executive Secretary, (Industrial Welfare Commission)	5
Public Member, wage board (Industrial Welfare Commission)	6

(B) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director shall incorporate such changes in the determination.

NOTE: A statement must be filed with the Director for any adjustments made to a contract which are not contained in the agreement currently on file with DLSR.

(C) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

(D) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications, work rules, and manning requirements may be considered. In such cases, the Chief of DLSR may include such provisions in the prevailing wage determination.

(E) (Reserved)

(F) Overtime. Overtime will be paid as indicated in the wage determination.

EXCEPTION 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, or if the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday if approved in advance by the Director.

EXCEPTION 2: If work cannot be performed during normal business hours and work is necessary at off hours to avoid danger to life or property.

EXCEPTION 3: Nonwork days specified in collective bargaining agreements.

EXCEPTION 4: No overtime payment required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

(G) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(I) of these regulations.

(H) Rates for helpers. Rates for helpers will be published when the information available to the Director indicates that a practice of using such a subclassification prevails in a particular area, such as contained in a collective bargaining

agreement, and within the parameters of the applicable collective bargaining agreement. In the absence of such determination, the helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor from the 1-5 apprentice-journeyman ratio requirements set forth in Labor Code Section 1777.5.

(f) Payment of cash in lieu of employer payments. A contractor that is nonsignatory to a collective bargaining agreement or does not contribute to a trust fund may pay that amount of fringe benefits required, either in cash to the employee, or pay the particular fringe benefit amount designated in the appropriate wage determination to a benefit plan on behalf of the worker. Under no circumstance shall the contractor pay any amount less than is established by the applicable wage determination for the particular fringe benefit to a benefit plan, account, trust fund, or cash payment to the employee.

(b) Federal rates. In reviewing rates predetermined for federal public works, the Director will consider those rates published in the Federal Register.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

NOTE: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12-month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;
(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;
(4) the location of the project;
(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;
(6) the type of construction (e.g. residential, commercial building, etc.);
(7) the approximate cost of construction;
(8) the beginning date and completion date, or estimated completion date of the project;
(9) the source of data (e.g. "payroll records");
(10) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

NOTE: Authority cited: Sections 1773 and 1773.5, Labor Code. Reference: Sections 1770, 1771, 1773, 1773.1, 1773.5, 1777.5, 1810 and 1815, Labor Code.

HISTORY:

1. Order of Repeal of subsection (a) (3) (E) filed 8-24-88 by OAL pursuant to Government Code Section 11340.15 (Register 88, No. 35).

16201. General Area Determinations.

When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout an area, the Director shall issue a determination enumerated county by county, but covering the entire area. Such determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.

NOTE: General determinations are usually issued on a quarterly basis. However, the Director may issue an interim wage determination following the procedures set forth in Section 1773 of the Labor Code, and in these regulations. See Section 16000 as to issue date, and Section 16204 as to effective date of determination. The general determination usually applies where a collective bargaining agreement has been filed and adopted as the prevailing wage rate.

NOTE: Authority cited: Sections 1773.5 and 1773.6, Labor Code. Reference: Section 1773, Labor Code.

16202. Special Determinations.

(a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

(b) Department of Industrial Relations initiated determination. Where an awarding body does not specify the prevailing wage rate as set forth in Labor Code Section 1773.2, any interested party (as defined in Section 16000 of these regulations) may petition the Director as set forth in Labor Code Section 1773.4 and Section 16302 of these regulations. The Labor Commissioner may, prior to the letting of the bid, request such a determination of the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.4, Labor Code.

16203. Format.

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workers employed on the project, which is on file with the Director of Industrial Relations."

(3) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16000 of these regulations.

(4) The following statement when applicable. "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8."

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) The applicability of the apprentice rate of per diem wages shall be indicated and furnished upon request.

(d) The dates between which the applicable rate shall be paid for work performed in those periods shall be indicated.

(e) As a supplement to each determination the Director shall make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.5, Labor Code.

16204. Effective Dates of Determination and of Rates Within Determination.

(a) Effective date of determination.

(1) All determinations issued will be effective ten (10) days after issuance, provided that requests for copies, reprints or reissuance of prior determinations shall not affect the original effective date unless a new effective date is reflected upon the determination (see subdivision (3) below). Any call for bids put out on or after the effective date of the determination must reflect that determination unless the Director determines that subdivision (4) of this section is applicable, after notification and request by an awarding body.

(2) Determinations issued by the Director will show an issue date and will ordinarily show an expiration date.

ties or in the event that mailing notices by registered or certified mail could cause an undue delay adverse to the interest of the parties or a timely hearing, the Director may send certified or registered notices to the petitioner and other directly interested parties that have been made known to the Director and mail notices to the other parties, and publish such notices in newspapers.

(3) Notification of the time and place of the hearing shall be at least one week in advance.

(4) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions. The hearing officer may fairly allocate time for such witnesses' testimony in the interest of introducing relevant evidence. Cross examination will be permitted at the discretion of the hearing officer.

(5) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(6) All witnesses testifying before the hearing officer shall testify under oath.

(7) A full transcript of the hearing shall be recorded.

(b) Hearing Officer. The Director may appoint a hearing officer(s). The appointed hearing officer(s) shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations. Either the appointed hearing officer(s) or the Director may request documentation subsequent to the hearing to complete the record, and shall send copies of such additional information to the petitioner, awarding body or other designated interested party or parties.

(c) Subject Matter. The subject matter of a hearing may be initiated by a petition to review, as set forth in Labor Code Section 1773.4.

(d) Decision. The decision of the Director shall reflect a summary of the evidence, findings, or matters of fact and/or law.

The decision shall be sent to all parties no later than 20 days after the hearing, except earlier or later as special circumstances warrant. The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may consider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given to all parties in the same manner as the notice of hearings as specified in Sections 16304(a)(2) and (a)(3) above and the decision upon reconsideration shall be as specified in subdivisions (a)(2) and (a)(3) of this section.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773.4 and 1773.5, Labor Code.

Article 6. Certified Payroll Records: Requests, Content, and Cost

§ 16400. Request for Payroll Records.

(a) Requests may be made by any person for certified copies of payroll records. Requests shall be made to any of the following:

(1) the body awarding the contract, or

(2) any office of the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards.

(b) Requests for certified copies of payroll records pursuant to Section 1776 of the Labor Code may be made by any person. However, any such request shall be in writing and contain at least the following information:

(1) The body awarding the contract;

(2) The contract number and/or description;

(3) The particular job location if more than one;

(4) The name of the contractor;

(5) The regular business address, if known.

NOTE: Requests for records of more than one contractor of subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be accepted; unless contractor and subcontractor responsibilities regarding the project are not clearly defined.

(c) Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty–five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and

(4) Provide for inspection.

(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A–1–131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name–print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

o ...ority cited: Section 1776, Labor Code. Reference: Section 1776(h), ...bo... ...de.

16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on ... in the office or entity that processed the request for at least 6 months ...llowing completion and acceptance of the project. Thereafter, they may ... destroyed unless administrative, judicial or other pending litigation, ...cluding arbitration, mediation or other methods of dispute resolution, ... in process. Copies on file shall not be obliterated in the manner pre...ribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, ...literated or provided in such a manner that the name, address and So...l Security number, and other private information pertaining to each ...ployee cannot be identified. All other information including identifi...ion of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is ...ployed on a public works contract (by a specific contractor) when ...ed, so long as the entity requires such information of an identifying ...ure which will reasonably preclude release of private or confidential ...rmation.

TE: ...thority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: ...tio... ...5, Labor Code.

Article 7. Severability

6500. Severability.

If any provision of these regulations or the application thereof to any ...son, party or circumstances is held invalid, such invalidity shall not ...ect other provisions or applications of these regulations which can be ...en... ...without the invalid provisions or application, and to this end ...pr... ...ns of these regulations are severable.

...n... ...ority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: ...ti... ...73.5 and 1776, Labor Code.

Article 8. Debarment

6800. Definitions.

...n addition to the definitions of "Contractor," "Subcontractor," ...warding Body," "Political Subdivision," "Public Works," and any ...r applicable terms, found in Group 3, Payment of Prevailing Wages ...n Public Works, article 1, section 16000, the following terms are de...d ...neral use in this article.

"Su...ntial Interest" means an interest of twenty percent (20%) of a ...poration, limited partnership or similar entity and includes an individ...holding the position of responsible managing employee, qualifying ...onsible managing officer or general partner regardless of the per...inge interest in the entity.

"Fraud" means a suggestion, as a fact, of that which is not true, by one ... does not believe it to be true; or the assertion, as a fact, of that which ...t true, by one who has no reasonable ground for believing it to be true; ...he suppression of a fact, by one who is bound to disclose it, or who ...s information of other facts which are likely to mislead for want of ...municating that fact; or a promise, made without any intention of ...forming it.

"Person" means an individual or legal entity, including, but not limited ...ny firm, corporation, partnership, limited partnership, agency, asso...ion, organization or trust, and includes, where applicable, the public ...ncies, awarding bodies and any agent or officer thereof authorized to ...for or on behalf of any of the foregoing.

"Fi... ...means, but is not limited to, any individual, corporation, part...h... ...ited partnership, agency, association, organization or trust ...rating a business in the State of California whether or not licensed or ...i...d to do so.

"... ...o Defraud" means the intent to deceive another person or enti...s ...ned in this article, and to induce such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power reference to property of any kind.

"Deliberately" means premeditated and intentional and does not include inadvertent error.

"Respondent" means any person or entity subject to the proceedings set forth in this article.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.

§ 16801. Investigations: Duties, Responsibilities and Rights of the Parties.

(a) Division of Labor Standards Enforcement. The Division of Labor Standards Enforcement (hereinafter "DLSE") may investigate any alleged violation of the provisions of chapter 1, part 7 of the California Labor Code for purposes of enforcing Labor Code section 1777.1. Investigations pursuant to section 1777.1 are for the purpose of determining a Respondent's willful violation, or violation with the intent to defraud, of the provisions of chapter 1, part 7 of the California Labor Code, with the exception of section 1777.5.

(1) Where a preliminary investigation reveals that there is insufficient evidence to continue the investigation, DLSE may close the investigation and shall notify the Respondent and awarding body in writing.

(2) In the event an investigation of any Respondent reveals a violation of Labor Code section 1777.1, DLSE shall notify the awarding body in writing and shall serve upon the Respondent a Notice of Hearing together with a Statement of Alleged Violations, which shall specifically set forth DLSE's allegations against the Respondent.

(A) Service of both the Notice of Hearing and Statement of Alleged Violations shall be complete when mailed, by first class postage, to the last address of record for the Respondent listed with the State Contractors License Board or, in the event the Respondent is not licensed by the State Contractors License Board, the last known address of the Respondent available to the awarding body or, in the case of a subcontractor, the last known address available to the general contractor with whom the subcontractor contracted in the performance of the public works project under investigation. In the event there is neither an address of record with the State Contractors License Board or the awarding body or general contractor, the Notice of Hearing and Statement of Alleged Violations shall be served pursuant to the provisions of the Code of Civil Procedure concerning the service of civil summons.

(B) The Notice of Hearing shall list the date, time and place of the hearing which shall not be scheduled sooner than forty–five days after the date of the mailing of the Notice of Hearing and Statement of Alleged Violations.

(C) The Respondent shall have the opportunity to review and copy such records from the investigative file of DLSE which are not subject to either attorney—client or work product privileges. The Respondent shall be entitled to a reasonable number of subpoenas but shall be liable for any costs of service of the subpoenas, or any other witness or mileage fees incurred. In the exercise of his or her discretion, the Hearing Officer may limit the number of witnesses subpoenaed either for the purpose of corroboration or for establishing a single material fact in issue, or where the Respondent has not furnished satisfactory evidence that the witness will be able to give necessary and competent testimony material to the issue at the hearing.

(D) In presiding over a hearing conducted pursuant to section 1777.1(c), the Hearing Officer shall control the order of presentation of evidence, and shall direct and rule on matters concerning the conduct of the hearing and of those persons appearing. The hearing shall be conducted in an informal setting preserving the rights of the Respondent. The formal rules of evidence shall not apply and any relevant evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the

existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. However, no determination shall be made based solely upon any evidence which would not be admissible, over objection, in a court of law in this state.

(E) The hearing shall be phonographically recorded. The Respondent may request a copy of the recording, and shall bear all costs incidental to the preparation of same. The Respondent may arrange to have the hearing reported by a certified court reporter and shall bear all cost incidental thereto. If the record of the hearing is transcribed by the Respondent, a copy thereof shall be provided to the Labor Commissioner free of any cost within five (5) days of such transcription.

(F) Oral evidence at the hearing shall be taken only upon oath or affirmation. The Respondent shall have the right to call and examine witnesses, to introduce exhibits and to rebut the evidence against him or her.

(G) Any Respondent to a proceeding hereunder may, but need not, be represented by legal counsel during the entire course of the investigation, including the hearing.

(H) Continuances of hearings scheduled pursuant to Labor Code section 1777.1(c) ordinarily will not be granted. The Hearing Officer, in the exercise of his or her sound discretion, may grant a continuance of the hearing only upon a showing of extraordinary circumstances and good cause.

(I) At the conclusion of the hearing, the Hearing Officer may take the matter under submission or allow the introduction of post hearing briefs. The Hearing Officer shall prepare a Findings of Fact and Conclusions and a proposed Determination which shall contain the recommended penalty, if applicable. The Labor Commissioner or his designee shall have the right to modify, change or adopt the proposed Findings of Fact and Conclusions, the proposed Determination and any recommended penalty. No Determination or penalty shall be final until adopted by the State Labor Commissioner.

(J) The Determination of the Labor Commissioner after the hearing shall be served on the Respondent as provided in subdivision (A), above.

(K) In the event that the Determination of the Labor Commissioner results in an order to debar the Respondent, DLSE shall notify through the Division of Labor Statistics and Research all awarding bodies of such Determination immediately upon service of the Determination on the Respondent. In addition, DLSE shall maintain a record of each and every debarment under the provisions of Labor Code section 1777.1 for a period of 5 years from the date of the debarment, and shall list the name and last known address of the debarred contractor or subcontractor, the date of the debarment and the term of the debarment, and shall make that information available, upon written request, which encloses a self-addressed and stamped envelope.

(b) Awarding Bodies. Any awarding body which has awarded or let a contract or purchase order to be paid for in whole or in part from public funds calling for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind (including the laying of carpet and the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any state agency, including the California State University and University of California) shall, in accordance with Labor Code section 1776(g), inform prime contractors of the requirements of Labor Code section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code section 1777.1. The awarding body shall have the right to review the records from the investigative file of DLSE which are not covered by attorney-client or work product privileges, and which are not being utilized in the ongoing investigation of a criminal offense.

(c) Contractors and Subcontractors. All contractors and subcontractors, including Respondents, who have contracted to perform services on a public works project shall comply with Labor Code section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code section 1777.1.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4-5-90 as an emergency; operative 4-5-90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8-3-90.

§ 16802. Penalties.

In the event that the Labor Commissioner determines that a violation of chapter 1 of part 7 of the Labor Code has occurred, the Hearing Officer may recommend the penalty to be imposed on the Respondent.

(a) In setting a penalty, due consideration shall be given to the nature of the offense; the amount of underpayment of wages per worker; the experience of the Respondent in the area of public works; and the Respondent's compliance with Labor Code section 1776. The above considerations shall be based upon evidence presented at the hearing and made a part of the record.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4-5-90 as an emergency; operative 4-5-90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8-3-90.

Subchapter 4. Employment of Aliens Not Entitled to Lawful Residence

NOTE: Authority cited: Sections 55 and 59, Labor Code. Reference: Section 2805, Labor Code.

HISTORY

1. New Group 4 (§§ 16209, 16209.1-16209.6) filed 3-24-72 as an emergency; effective upon filing (Register 72, No. 13).
2. Certificate of Compliance filed 6-2-72 (Register 72, No. 23).
3. Repealer of Group 4 (Article 1, Sections 16209, 16209.1-16209.6) filed 12-15-82 by OAL pursuant to Government Code Section 11349.7(j) (Register 82, No. 51).

Subchapter 5. Department of Industrial Relations—Conflict of Interest Code

§ 17000. General Provisions.

The Political Reform Act, Government Code Sections 81000, et seq., requires state and local government agencies to adopt and promulgate Conflict of Interest Codes. The Fair Political Practices Commission has adopted a regulation, 2 Cal. Adm. Code Section 18730, which contains the terms of a standard Conflict of Interest Code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of 2 Cal. Adm. Code Section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission, along with the attached Appendix in which officials and employees are designated and disclosure categories are set forth, are hereby incorporated by reference and constitute the Conflict of Interest Code of the Department of Industrial Relations.

Pursuant to Section 4(A) of the standard Code, designated employees shall file statements of economic interests with the agency. Upon receipt of the statement of the Director, the agency shall make and retain a copy and forward the original of this statement to the Fair Political Practices Commission.

NOTE: Authority cited: Sections 87300 and 87304, Government Code. Reference: Section 87300, et seq., Government Code.

HISTORY

1. New Group 5 (Articles 1-7, Sections 17000-17800, not consecutive) filed 12-2-77; effective thirtieth day thereafter. Approved by the Fair Political Practices Commission 1-19-77 (Register 77, No. 49).
2. Repealer of Group 5 (Articles 1-7, Sections 17000-17800, not consecutive) and new Group 5 (Section 17000 and Appendix) filed 2-26-81; effective thirtieth day thereafter. Approved by Fair Political Practices Commission 12-1-80 (Register 81, No. 9).

ties or in the event that mailing notices by registered or certified mail could cause an undue delay adverse to the interest of the parties or a timely hearing, the Director may send certified or registered notices to the petitioner and other directly interested parties that have been made known to the Director and mail notices to the other parties, and publish such notices in newspapers.

(3) Notification of the time and place of the hearing shall be at least one week in advance.

(4) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions. The hearing officer may fairly allocate time for such witnesses' testimony in the interest of introducing relevant evidence. Cross examination will be permitted at the discretion of the hearing officer.

(5) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(6) All witnesses testifying before the hearing officer shall testify under oath.

(7) A full transcript of the hearing shall be recorded.

(b) Hearing Officer. The Director may appoint a hearing officer(s). The appointed hearing officer(s) shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations. Either the appointed hearing officer(s) or the Director may request documentation subsequent to the hearing to complete the record, and shall send copies of such additional information to the petitioner, awarding body or other designated interested party or parties.

(c) Subject Matter. The subject matter of a hearing may be initiated by a petition to review, as set forth in Labor Code Section 1773.4.

(d) Decision. The decision of the Director shall reflect a summary of the evidence, findings, or matters of fact and/or law.

The decision shall be sent to all parties no later than 20 days after the hearing, except earlier or later as special circumstances warrant. The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may consider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given to all parties in the same manner as the notice of hearings as specified in Sections 16304(a)(2) and (a)(3) above and the decision upon reconsideration shall be as specified in subdivisions (a)(2) and (a)(3) of this section.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773.4 and 1773.5, Labor Code.

Article 6. Certified Payroll Records: Requests, Content, and Cost

§ 16400. Request for Payroll Records.

(a) Requests may be made by any person for certified copies of payroll records. Requests shall be made to any of the following:

(1) the body awarding the contract, or

(2) any office of the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards.

(b) Requests for certified copies of payroll records pursuant to Section 1776 of the Labor Code may be made by any person. However, any such request shall be in writing and contain at least the following information:

(1) The body awarding the contract;

(2) The contract number and/or description;

(3) The particular job location if more than one;

(4) The name of the contractor;

(5) The regular business address, if known.

NOTE: Requests for records of more than one contractor of subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be accepted; unless contractor and subcontractor responsibilities regarding the project are not clearly defined.

(c) Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty–five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and

(4) Provide for inspection.

(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A–1–131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name–print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

Note: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Severability

§ 16500. Severability.

If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application, and to this end the provisions of these regulations are severable.

Note: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

Article 8. Debarment

§ 16800. Definitions.

In addition to the definitions of "Contractor," "Subcontractor," "Awarding Body," "Political Subdivision," "Public Works," and any other applicable terms, found in Group 3, Payment of Prevailing Wages on Public Works, article 1, section 16000, the following terms are defined for general use in this article.

"Substantial Interest" means an interest of twenty percent (20%) of a corporation, limited partnership or similar entity and includes an individual holding the position of responsible managing employee, qualifying responsible managing officer or general partner regardless of the percentage interest in the entity.

"Fraud" means a suggestion, as a fact, of that which is not true, by one who does not believe it to be true; or the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; or the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or a promise, made without any intention of performing it.

"Person" means an individual or legal entity, including, but not limited to, any firm, corporation, partnership, limited partnership, agency, association, organization or trust, and includes, where applicable, the public agencies, awarding bodies and any agent or officer thereof authorized to act for or on behalf of any of the foregoing.

"Firm" means, but is not limited to, any individual, corporation, partnership, limited partnership, agency, association, organization or trust operating a business in the State of California whether or not licensed or permitted to do so.

"Intent to Defraud" means the intent to deceive another person or entity, as defined in this article, and to induce such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power reference to property of any kind.

"Deliberately" means premeditated and intentional and does not include inadvertent error.

"Respondent" means any person or entity subject to the proceedings set forth in this article.

Note: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

History

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.

§ 16801. Investigations: Duties, Responsibilities and Rights of the Parties.

(a) Division of Labor Standards Enforcement. The Division of Labor Standards Enforcement (hereinafter "DLSE") may investigate any alleged violation of the provisions of chapter 1, part 7 of the California Labor Code for purposes of enforcing Labor Code section 1777.1. Investigations pursuant to section 1777.1 are for the purpose of determining a Respondent's willful violation, or violation with the intent to defraud, of the provisions of chapter 1, part 7 of the California Labor Code, with the exception of section 1777.5.

(1) Where a preliminary investigation reveals that there is insufficient evidence to continue the investigation, DLSE may close the investigation and shall notify the Respondent and awarding body in writing.

(2) In the event an investigation of any Respondent reveals a violation of Labor Code section 1777.1, DLSE shall notify the awarding body in writing and shall serve upon the Respondent a Notice of Hearing together with a Statement of Alleged Violations, which shall specifically set forth DLSE's allegations against the Respondent.

(A) Service of both the Notice of Hearing and Statement of Alleged Violations shall be complete when mailed, by first class postage, to the last address of record for the Respondent listed with the State Contractors License Board or, in the event the Respondent is not licensed by the State Contractors License Board, the last known address of the Respondent available to the awarding body or, in the case of a subcontractor, the last known address available to the general contractor with whom the subcontractor contracted in the performance of the public works project under investigation. In the event there is neither an address of record with the State Contractors License Board or the awarding body or general contractor, the Notice of Hearing and Statement of Alleged Violations shall be served pursuant to the provisions of the Code of Civil Procedure concerning the service of civil summons.

(B) The Notice of Hearing shall list the date, time and place of the hearing which shall not be scheduled sooner than forty–five days after the date of the mailing of the Notice of Hearing and Statement of Alleged Violations.

(C) The Respondent shall have the opportunity to review and copy such records from the investigative file of DLSE which are not subject to either attorney–client or work product privileges. The Respondent shall be entitled to a reasonable number of subpoenas but shall be liable for any costs of service of the subpoenas, or any other witness or mileage fees incurred. In the exercise of his or her discretion, the Hearing Officer may limit the number of witnesses subpoenaed either for the purpose of corroboration or for establishing a single material fact in issue, or where the Respondent has not furnished satisfactory evidence that the witness will be able to give necessary and competent testimony material to the issue at the hearing.

(D) In presiding over a hearing conducted pursuant to section 1777.1(c), the Hearing Officer shall control the order of presentation of evidence, and shall direct and rule on matters concerning the conduct of the hearing and of those persons appearing. The hearing shall be conducted in an informal setting preserving the rights of the Respondent. The formal rules of evidence shall not apply and any relevant evidence may

be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. However, no determination shall be made based solely upon any evidence which would not be admissible, over objection, in a court of law in this state.

(E) The hearing shall be phonographically recorded. The Respondent may request a copy of the recording, and shall bear all costs incidental to the preparation of same. The Respondent may arrange to have the hearing reported by a certified court reporter and shall bear all cost incidental thereto. If the record of the hearing is transcribed by the Respondent, a copy thereof shall be provided to the Labor Commissioner free of any cost within five (5) days of such transcription.

(F) Oral evidence at the hearing shall be taken only upon oath or affirmation. The Respondent shall have the right to call and examine witnesses, to introduce exhibits and to rebut the evidence against him or her.

(G) Any Respondent to a proceeding hereunder may, but need not, be represented by legal counsel during the entire course of the investigation, including the hearing.

(H) Continuances of hearings scheduled pursuant to Labor Code section 1777.1(c) ordinarily will not be granted. The Hearing Officer, in the exercise of his or her sound discretion, may grant a continuance of the hearing only upon a showing of extraordinary circumstances and good cause.

(I) At the conclusion of the hearing, the Hearing Officer may take the matter under submission or allow the introduction of post hearing briefs. The Hearing Officer shall prepare a Findings of Fact and Conclusions and a proposed Determination which shall contain the recommended penalty, if applicable. The Labor Commissioner or his designee shall have the right to modify, change or adopt the proposed Findings of Fact and Conclusions, the proposed Determination and any recommended penalty. No Determination or penalty shall be final until adopted by the State Labor Commissioner.

(J) The Determination of the Labor Commissioner after the hearing shall be served on the Respondent as provided in subdivision (A), above.

(K) In the event that the Determination of the Labor Commissioner results in an order to debar the Respondent, DLSE shall notify through the Division of Labor Statistics and Research all awarding bodies of such Determination immediately upon service of the Determination on the Respondent. In addition, DLSE shall maintain a record of each and every debarment under the provisions of Labor Code section 1777.1 for a period of 5 years from the date of the debarment, and shall list the name and last known address of the debarred contractor or subcontractor, the date of the debarment and the term of the debarment, and shall make that information available, upon written request, which encloses a self-addressed and stamped envelope.

(b) Awarding Bodies. Any awarding body which has awarded or let a contract or purchase order to be paid for in whole or in part from public funds calling for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind (including the laying of carpet and the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any state agency, including the California State University and University of California) shall, in accordance with Labor Code section 1776(g), inform prime contractors of the requirements of Labor Code section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code section 1777.1. The awarding body shall have the right to review the records from the investigative file of DLSE which are not covered by attorney-client or work product privileges, and which are not being utilized in the ongoing investigation of a criminal offense.

(c) Contractors and Subcontractors. All contractors and subcontractors, including Respondents, who have contracted to perform services on a public works project shall comply with Labor Code section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code section 1777.1.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4-5-90 as an emergency; operative 4-5-90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8-3-90.
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§ 16802. Penalties.

In the event that the Labor Commissioner determines that a violation of chapter 1 of part 7 of the Labor Code has occurred, the Hearing Officer may recommend the penalty to be imposed on the Respondent.

(a) In setting a penalty, due consideration shall be given to the nature of the offense; the amount of underpayment of wages per worker; the experience of the Respondent in the area of public works; and the Respondent's compliance with Labor Code section 1776. The above considerations shall be based upon evidence presented at the hearing and made a part of the record.

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Subchapter 4. Employment of Aliens Not Entitled to Lawful Residence

NOTE: Authority cited: Sections 55 and 59, Labor Code. Reference: Section 2805, Labor Code.

HISTORY

1. New Group 4 (§§ 16209, 16209.1-16209.6) filed 3-24-72 as an emergency; effective upon filing (Register 72, No. 13).
2. Certificate of Compliance filed 6-2-72 (Register 72, No. 23).
3. Repealer of Group 4 (Article 1, Sections 16209, 16209.1-16209.6) filed 12-15-82 by OAL pursuant to Government Code Section 11349.7(j) (Register 82, No. 51).

Subchapter 5. Department of Industrial Relations—Conflict of Interest Code

§ 17000. General Provisions.

The Political Reform Act, Government Code Sections 81000, et seq., requires state and local government agencies to adopt and promulgate Conflict of Interest Codes. The Fair Political Practices Commission has adopted a regulation, 2 Cal. Adm. Code Section 18730, which contains the terms of a standard Conflict of Interest Code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of 2 Cal. Adm. Code Section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission, along with the attached Appendix in which officials and employees are designated and disclosure categories are set forth, are hereby incorporated by reference and constitute the Conflict of Interest Code of the Department of Industrial Relations.

Pursuant to Section 4(A) of the standard Code, designated employees shall file statements of economic interests with the agency. Upon receipt of the statement of the Director, the agency shall make and retain a copy and forward the original of this statement to the Fair Political Practices Commission.

NOTE: Authority cited: Sections 87300 and 87304, Government Code. Reference: Section 87300, et seq., Government Code.

ties or in the event that mailing notices by registered or certified mail could cause an undue delay adverse to the interest of the parties or a timely hearing, the Director may send certified or registered notices to the petitioner and other directly interested parties that have been made known to the Director and mail notices to the other parties, and publish such notices in newspapers.

(3) Notification of the time and place of the hearing shall be at least one week in advance.

(4) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions. The hearing officer may fairly allocate time for such witnesses' testimony in the interest of introducing relevant evidence. Cross examination will be permitted at the discretion of the hearing officer.

(5) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(6) All witnesses testifying before the hearing officer shall testify under oath.

(7) A full transcript of the hearing shall be recorded.

(b) Hearing Officer. The Director may appoint a hearing officer(s). The appointed hearing officer(s) shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations. Either the appointed hearing officer(s) or the Director may request documentation subsequent to the hearing to complete the record, and shall send copies of such additional information to the petitioner, awarding body or other designated interested party or parties.

(c) Subject Matter. The subject matter of a hearing may be initiated by a petition to review, as set forth in Labor Code Section 1773.4.

(d) Decision. The decision of the Director shall reflect a summary of the evidence, findings, or matters of fact and/or law.

The decision shall be sent to all parties no later than 20 days after the hearing, except earlier or later as special circumstances warrant. The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may consider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given to all parties in the same manner as the notice of hearings as specified in Sections 16304(a)(2) and (a)(3) above and the decision upon reconsideration shall be as specified in subdivisions (a)(2) and (a)(3) of this section.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773.4 and 1773.5, Labor Code.

Article 6. Certified Payroll Records: Requests, Content, and Cost

§ 16400. Request for Payroll Records.

(a) Requests may be made by any person for certified copies of payroll records. Requests shall be made to any of the following:

(1) the body awarding the contract, or

(2) any office of the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards.

(b) Requests for certified copies of payroll records pursuant to Section 1776 of the Labor Code may be made by any person. However, any such request shall be in writing and contain at least the following information:

(1) The body awarding the contract;

(2) The contract number and/or description;

(3) The particular job location if more than one;

(4) The name of the contractor;

(5) The regular business address, if known.

NOTE: Requests for records of more than one contractor of subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be accepted; unless contractor and subcontractor responsibilities regarding the project are not clearly defined.

(c) Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty–five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and

(4) Provide for inspection.

(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A–1–131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name–print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Severability

§ 16500. Severability.

If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application, and to this end the provisions of these regulations are severable.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

Article 8. Debarment

§ 16800. Definitions.

In addition to the definitions of "Contractor," "Subcontractor," "Awarding Body," "Political Subdivision," "Public Works," and any other applicable terms, found in Group 3. Payment of Prevailing Wages upon Public Works, article 17 section 16000, the following terms are defined for general use in this article.

"Substantial Interest" means an interest of twenty percent (20%) of a corporation, limited partnership or similar entity and includes an individual holding the position of responsible managing employee, qualifying responsible managing officer or general partner regardless of the percentage interest in the entity.

"Fraud" means a suggestion, as a fact, of that which is not true, by one who does not believe it to be true; or the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; or the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or a promise, made without any intention of performing it.

"Person" means an individual or legal entity, including, but not limited to, any firm, corporation, partnership, limited partnership, agency, association, organization or trust, and includes, where applicable, the public agencies, awarding bodies and any agent or officer thereof authorized to act for or on behalf of any of the foregoing.

"Firm" means, but is not limited to, any individual, corporation, partnership, limited partnership, agency, association, organization or trust operating a business in the State of California whether or not licensed or permitted to do so.

"Intent to Defraud" means the intent to deceive another person or entity, as defined in this article, and to induce such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property of any kind.

"Deliberately" means premeditated and intentional and does not include inadvertent error.

"Respondent" means any person or entity subject to the proceedings set forth in this article.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

§ 16801. Investigations: Duties, Responsibilities and Rights of the Parties.

(a) Division of Labor Standards Enforcement. The Division of Labor Standards Enforcement (hereinafter "DLSE") may investigate any alleged violation of the provisions of chapter 1, part 7 of the California Labor Code for purposes of enforcing Labor Code section 1777.1. Investigations pursuant to section 1777.1 are for the purpose of determining a Respondent's willful violation, or violation with the intent to defraud, of the provisions of chapter 1, part 7 of the California Labor Code, with the exception of section 1777.5.

(1) Where a preliminary investigation reveals that there is insufficient evidence to continue the investigation, DLSE may close the investigation and shall notify the Respondent and awarding body in writing.

(2) In the event an investigation of any Respondent reveals a violation of Labor Code section 1777.1, DLSE shall notify the awarding body in writing and shall serve upon the Respondent a Notice of Hearing together with a Statement of Alleged Violations, which shall specifically set forth DLSE's allegations against the Respondent.

(A) Service of both the Notice of Hearing and Statement of Alleged Violations shall be complete when mailed, by first class postage, to the last address of record for the Respondent listed with the State Contractors License Board or, in the event the Respondent is not licensed by the State Contractors License Board, the last known address of the Respondent available to the awarding body or, in the case of a subcontractor, the last known address available to the general contractor with whom the subcontractor contracted in the performance of the public works project under investigation. In the event there is neither an address of record with the State Contractors License Board or the awarding body or general contractor, the Notice of Hearing and Statement of Alleged Violations shall be served pursuant to the provisions of the Code of Civil Procedure, sections 415.10 – 415.50. concerning the service of civil summons.

(B) The Notice of Hearing shall list the date, time and place of the hearing which shall not be scheduled sooner than forty–five days after the date of the mailing of the Notice of Hearing and Statement of Alleged Violations.

(C) The Respondent shall have the opportunity to review and copy such records from the investigative file of DLSE which are not subject to either attorney–client or work product privileges. The Respondent shall be entitled to a reasonable number of subpoenas but shall be liable for any costs of service of the subpoenas, or any other witness or mileage fees incurred.

Mileage and Witness fees shall be set as specified in Government Code section 68093. In the exercise of his or her discretion, the Hearing Officer may limit the number of witnesses subpoenaed either for the purpose of corroboration or for establishing a single material fact in issue, or where the Respondent has not furnished satisfactory evidence that the witness will be able to give necessary and competent testimony material to the issues at the hearing.

(D) In presiding over a hearing conducted pursuant to section 1777.1(c), the Hearing Officer shall control the order of presentation of evidence, and shall direct and rule on matters concerning the conduct of the hearing and of those persons appearing. The hearing shall be conducted in an informal setting preserving the rights of the Respondent. The formal rules of evidence shall not apply and any relevant evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. However, no determination shall be made based solely upon any evidence which would not be admissible, over objection, in a court of law in this state.

(E) The hearing shall be phonographically recorded. The Respondent may request a copy of the recording, and shall bear all costs incidental to the preparation of same. The Respondent may arrange to have the hearing reported by a certified court reporter and shall bear all cost incidental thereto. If the record of the hearing is transcribed by the Respondent, a copy thereof shall be provided to the Labor Commissioner free of any cost within five (5) days of such transcription.

(F) Oral evidence at the hearing shall be taken only upon oath or affirmation. The Respondent shall have the right to call and examine witnesses, to introduce exhibits and to rebut the evidence against him or her.

(G) Any Respondent to a proceeding hereunder may, but need not, be represented by legal counsel during the entire course of the investigation, including the hearing.

(H) Continuances of hearings scheduled pursuant to Labor Code section 1777.1(c) ordinarily will not be granted. The Hearing Officer, in the exercise of his or her sound discretion, may grant a continuance of the hearing only upon a showing of extraordinary circumstances and good cause.

(I) At the conclusion of the hearing the Hearing Officer may take the matter under submission or allow the introduction of post hearing briefs. The Hearing Officer shall prepare a Findings of Fact and Conclusions and a proposed Determination which shall contain the recommended penalty, if applicable. The Labor Commissioner or his designee shall have the right to modify, change or adopt the proposed Findings of Fact and Conclusions, the proposed Determination and any recommended penalty. No Determination or penalty shall be final until adopted by the State Labor Commissioner.

(J) The Determination of the Labor Commissioner after the hearing shall be served on the Respondent as provided in subdivision (A), above.

(K) In the event that the Determination of the Labor Commissioner results in an order to debar the Respondent, DLSE shall notify through the Division of Labor Statistics and Research all awarding bodies of such Determination immediately upon service of the Determination on the Respondent. In addition, DLSE shall maintain a record of each and every debarment under the provisions of Labor Code section 1777.1 for a period of 5 years from the date of the debarment, and shall list the name and last known address of the debarred contractor or subcontractor, the date of the debarment and the term of the debarment, and shall make that information available to the public, upon written request, which encloses a self-addressed and stamped envelope.

(b) Awarding Bodies. Any awarding body which has awarded or let a contract or purchase order to be paid for in whole or in part from public funds calling for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind (including the laying of carpet and the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any state agency, including the California State University and University of California) shall, in accordance with Labor Code section 1776(g), inform prime contractors of the requirements of Labor Code section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code 1777.1. The awarding body shall have the right to review the records, excluding any records which are protected by attorney–client or work product privileges, and which are not being utilized in the ongoing investigation of a criminal offense.

(c) Contractors and Subcontractors. All contractors and subcontractors, including Respondents, who have contracted to perform services on a public works project shall comply with Labor Code 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code section 1777.1.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, and Section 92, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

§ 16802. Penalties.

In the event that the Labor Commissioner determines that a violation of chapter 1 of part 7 of the Labor Code has occurred, the Hearing Officer may recommend the penalty to be imposed on the Respondent.

(a) In setting a penalty, due consideration shall be given to the nature of the offense; the amount of underpayment of wages per worker; the experience of the Respondent in the area of public works; and the Respondent's compliance with Labor Code section 1776. The above considerations shall be based upon evidence presented at the hearing and made a part of the record.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

Subchapter 4. Employment of Aliens Not Entitled to Lawful Residence

NOTE: Authority cited: Sections 55 and 59, Labor Code. Reference: Section 2805, Labor Code.

HISTORY

1. New Group 4 (§§ 16209, 16209.1–16209.6) filed 3–24–72 as an emergency; effective upon filing (Register 72, No. 13).
2. Certificate of Compliance filed 6–2–72 (Register 72, No. 23).
3. Repealer of Group 4 (Article 1, Sections 16209, 16209.1–16209.6) filed 12–15–82 by OAL pursuant to Government Code Section 11349.7(j) (Register 82, No. 51).

Subchapter 5. Department of Industrial Relations—Conflict of Interest Code

§ 17000. General Provisions.

The Political Reform Act, Government Code Sections 81000, et seq., requires state and local government agencies to adopt and promulgate Conflict of Interest Codes. The Fair Political Practices Commission has adopted a regulation, 2 Cal. Adm. Code Section 18730, which contains the terms of a standard Conflict of Interest Code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of 2 Cal. Adm.

cal Practices Commission, along with the attached Appendix in which officials and employees are designated and disclosure categories are set forth, are hereby incorporated by reference and constitute the Conflict of Interest Code of the Department of Industrial Relations.

Pursuant to Section 4(A) of the standard Code, designated employees shall file statements of economic interests with the agency. Upon receipt of the statement of the Director, the agency shall make and retain a copy and forward the original of this statement to the Fair Political Practices Commission.

NOTE: Authority cited: Sections 87300 and 87304, Government Code. Reference: Section 87300, et seq., Government Code.

HISTORY

1. New Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) filed 12–2–77; effective thirtieth day thereafter. Approved by the Fair Political Practices Commission 1–19–77 (Register 77, No. 49).
2. Repealer of Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) and new Group 5 (Section 17000 and Appendix) filed 2–26–81; effective thirtieth day thereafter. Approved by Fair Political Practices Commission 12–1–80 (Register 81, No. 9).

Appendix

Designated Positions	*Assigned Disclosure Categories*
OFFICE OF THE DIRECTOR	
Director, Chief Deputy Director, Deputy Director, all legal classes, Senior Management Analyst	1
Special consultant, Staff Services Manager III, (Fiscal Officer), Associate Budget Analyst, Business Service Officer I & III, Accounting Technician (procurement)	2
LABOR STANDARDS AND INDUSTRIAL WELFARE	
Chief, Deputy Chief, Assistant Chief, Staff Counsel I, II, and III, Legal Counsel	3
Deputy Labor Commissioner II, III and IV and Senior Special Investigator	4
Chairman, Commissioner, Executive Secretary, (Industrial Welfare Commission)	5
Public Member, wage board (Industrial Welfare Commission)	6
INDUSTRIAL ACCIDENTS AND WORKERS' COMPENSATION	
Administrative Director, Assistant Chief, Medical Director, Chief of Permanent Disability Rating Bureau, Chief, Rehabilitation Bureau, Permanent Disability Rating Specialist, (assigned to Benefit Notice Unit)	7
District Medical Director, Medical Examiner, P.D.R. Area Supervisor, P.D.R. Specialist, Information Attorney, Referee WCAB, Referee–in–Charge WCAB (also known as Worker Compensation Judge and Presiding Worker Compensation Judge)	8
Staff Services Manager, Administrative Assistant	9
INDUSTRIAL ACCIDENTS AND WORKERS' COMPENSATION	
Chairman, Commissioner, Secretary and Deputy Commissioner, Deputy Commissioner, Special Counsel, Staff Counsel	10
Program Manager, Consultant, and Field Representative of Office of Self–Insurance Plans	11
INDUSTRIAL SAFETY	
Chief, Deputy Chief, Assistant Chief for Consulting Education and Research, Administrative Assistant, Staff Services Manager	12
Staff Counsel (I, II, III), Senior Special Investigator, Special Staff Investigator, Administrative Chief of Bureau of Investigation	13
Assistant Chief, Regional Manager, District Manager	14
Principal Engineer	15
Senior Safety Engineer, Safety Engineer, Senior Health Physicist, Associate Health Physicist	16
OCCUPATIONAL SAFETY AND HEALTH	
Standards Board: Chairman and members of the Board, Executive Officer, Senior Safety Engineer, Staff Services Analyst	17
Appeals Board: Chairman and members of the Board, Executive Officer, Staff Counsel I, II and III, Administrative Law Judge (Presiding, I, II), Forensic Engineer	17
APPRENTICESHIP	
Chief, Chief Deputy, Assistant Chief, Special Assistant to Chief.	18
Intergroup Relations Coordinator, Area Administrator, Senior Consultant	19
Staff Services Manager	20
LABOR STATISTICS AND RESEARCH	
Chief, Assistant Chief, Senior Research Analyst (Industrial Relations Research)	21
Data Processing Manager, Associate Systems Analyst, Associate Programmer Analyst	22
CONCILIATION	
Supervisor of Conciliation, Conciliator	23
FAIR EMPLOYMENT PRACTICES	
Chairman and Members of Commission, Legal Affairs Officer (Commission), Chief, Assistant Chief, All Legal Classes	24

Disclosure Categories

Category 1

Designated employees assigned to this category must report:

All investments and sources of income.

Category 2

Designated employees assigned to this category must report:

Investments in business entities and sources of income which they know or have reason to know have within the preceding two years contracted, or plan to contract, with the Department of Industrial Relations to provide services, supplies, materials or machinery of any type to the Department.

Category 3

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regula-

Title 8, CCR, Register 92-13

§ 16000

§ 16001

§ 16002.5

§ 16003

§ 16100

§ 16200

§§ 16204 - 16205

§ 16302

§§ 16425 - 16433

§§ 16436 - 16439

§ 16500

been filed, and after consideration of such exceptions the director shall decide that the exceptions to the report of the service do raise substantial and material factual issues, he shall direct the hearing officer to issue a notice of hearing, whereupon the procedures for a hearing and the issuance of the hearing officer's report provided for in subsection (e) of this section (including the provision for filing exceptions to the hearing officer's report) shall be followed. The director may adopt the recommendations of the hearing officer issued under subsection (d) or the report of the hearing officer issued under subsection (e) as his own. The service shall thereafter promptly proceed to take such action as may be called for by the decision of the director, after which the proceedings will be closed.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875. Runoff Elections.

(a) The service shall conduct a runoff election, without further order of the director, when an election in which a ballot providing for not less than three choices (i.e. at least two representatives and "neither" or "none") results in no choice receiving a majority of the valid ballots cast, which runoff election shall be held promptly following final disposition of any challenges, objections or exceptions which followed the prior election as provided in Section 15870. Only one runoff election shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are employed in an eligible category on the date of the runoff election shall be the only employees eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and "neither" or "none" is equally divided among the several choices, or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the director shall declare the first election a nullity and shall conduct another election among the three choices which received the greatest number of ballots in the original election; provided that in the event there was a tie in the original election between the third and fourth choices or among the third, fourth and other choices, the director shall in the runoff election include on the ballot all such tied choices. In the event two or more choices receive the same number of ballots, and if either (1) there are no challenged ballots which would affect the results of the election, or (2) after all challenges have been disposed of it is found that all eligible voters have cast valid ballots, there shall be no runoff election and the petition shall be dismissed. Only one such further election pursuant to this subsection (d) may be held.

(e) The provisions of Section 15870 above shall be applicable to a runoff election.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875.1. Relevant Federal Law.

In resolving questions of representation, the Director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. New section filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 2.3. Election Procedure Under San Francisco Bay Area Rapid Transit District Law

NOTE: Authority cited for Group 2.3: Section 54, Labor Code and Section 28851, Public Utilities Code.

HISTORY

1. New Group 2.3 (§§ 15900–15926) filed 1–5–73; effective thirtieth day thereafter (Register 73, No. 1).
2. Repealer of Group 2.3 (Sections 15900–15926) filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 3. Payment of Prevailing Wages upon Public Works

Article 1. Definitions

§ 16000. Definitions.

The following terms are defined for general use in these regulations within Group 3, Payment of Prevailing Wages Upon Public Works and Group 4, Awarding Body Labor Compliance Programs:

Area of Determination. The area of determining the prevailing wage is the "locality" and/or the "nearest labor market area" as determined by the Director. In determining the area, the mobility of each craft, classification and type of work will be considered.

Awarding body. Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.

Bid. Any proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind.

Certified. The affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

Chief of DAS. Chief of Division of Apprenticeship Standards or a duly authorized representative.

Chief of DLSE/Labor Commissioner. Chief of the Division of Labor Standards Enforcement or a duly authorized representative.

Chief of DLSR. Chief of the Division of Labor Statistics and Research or a duly authorized representative.

Coverage. This means being subject to the requirements of Part 7, Chapter 1 of the Labor Code as a "public work." This includes all formal coverage determinations issued by the Director of Industrial Relations.

DAS. Division of Apprenticeship Standards.

Date of Notice or Call for Bids. The date the first notice inviting bids was published in a newspaper of general circulation or promulgated in a legally sufficient manner which results in a contract being awarded with or without competitive bidding. This may also be referred to as the Bid Advertisement Date.

Days. Unless otherwise specified means calendar days.

DLSE. The Division of Labor Standards Enforcement.

DLSR. The Division of Labor Statistics and Research.

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Effective Date. The date upon which the determinations of the Director go into effect. This date is ten days after the issue date of the determination.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

Expiration Date. The date upon which the determinations of the Director are subject to change.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight-time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Helper. Any subjourneyman classification traditionally used to assist a journeyman. Under no circumstance may the Helper classification be used to replace statutorily required Apprentices.

Identify or Give Notice of Identity. This means to state the name, job title, address and current telephone number of a person or entity.

Interim Determination. Those determinations of the Director issued between the quarterly updates.

Issue Date-Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

LCP. A labor compliance program initiated and enforced by an awarding body in accordance with these regulations.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

EXCEPTION 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

EXCEPTION 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded.

Mistake, Inadvertence, or Neglect. Mistake, inadvertence, or neglect in failing to pay the correct general rate of per diem wages means the lack of knowledge that any reasonable person would also be expected to have under the same or similar circumstances.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Predetermined Changes. Definite changes to the basic hourly wage rate, overtime, holiday pay rates, and employer payments which are known and enumerated in the applicable collective bargaining agreement

time of the bid advertisement date and which are referenced in the general prevailing rate of per diem wages as defined in Section 16000 of these regulations. Contractors are obligated to pay up to the amount that was predetermined if these changes are modified prior to their effective date. Predetermined changes which are rescinded prior to their effective date shall not be enforced.

Prevailing Rate. Includes:

(1) The basic hourly rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers is paid at a single rate; if there is no single rate being paid to a majority, then the single rate (modal rate) being paid to the greater number of workers is prevailing. If there is no modal rate, then an alternate rate will be established by considering the appropriate collective bargaining agreements, Federal rates, or other data such as wage survey data, including the nearest labor market area or expanded survey as provided in Article 4 of these regulations.

(2) Other employer payments as defined in Section 16000 of these regulations and as included as part of the total hourly wage rate from which the prevailing basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, then the Director may establish a prevailing employer payment rate by the same procedure outlined in subsection (1) above.

(3) The rate for holiday or overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, holidays and overtime (if any) included with the prevailing basic hourly rate of pay shall be prevailing.

Public Entity. For the purpose of processing requests for inspection of certified records or furnishing certified copies thereof, "public entity" includes the body awarding the contracts; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE).

Public Funds. Includes state, local and/or federal monies.

Note: Public funds do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body.

Public Works. See Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

Service upon a Contractor or Subcontractor. This is the process defined in Title 8, California Code of Regulations, (CCR) Section 16[illegible](a)(2)(A).

Serve upon the Labor Commissioner. Delivery of all documents including legal process to the Headquarters of the Labor Commissioner.

Sheltered workshop. A nonprofit organization licensed by the Chief of DLSE employing mentally and/or physically handicapped workers.

Wage Survey. An investigation conducted pursuant to Labor Code Sections 1773 and/or 1773.4 to determine the general prevailing rate of per diem wages for the crafts/classifications in the county(ies) for which the survey questionnaire was designed.

Willful. See Labor Code Section 1777.1(d).

Worker. See Labor Code Sections 1723 and 1772.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1191.5, 1720, 1720.2, 1720.3, 1721, 1722, 1722.1, 1723, 1724, 1770, 1771, 1772, 1773.5, 1776, 2750.5, 3071 and 3093, Labor Code; and Section 21002, Public Contract Code.

History

1. Repealer of group 3 (articles 1–3, sections 16000–16004, 16100–16101 and 16200–16205) and new group 3 (articles 1–4, sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1–3–77 as an emergency effective upon filing (Register 77, No 2). For prior history, see Register 56, [illegible] 8.
2. New group 3 (sections 16000–16014, 16100–16109, 16200–16207.9) filed [illegible]-78; effective thirtieth day thereafter (Register 78, No. 6).
3. Renumbering and amendment of former sections 16000–16006 and 16008–16019 to section 16000; renumbering and amendment of former section 16100 to section 16002; renumbering and amendment of former section 16101 to section 16203; renumbering and amendment of former sections 16102–16105 to section 16200; renumbering and amendment of former section 16106 to section 16206; renumbering and amendment of former sections 16107(a), (b) and (c) to sections 16201, 16202 and 16205; renumbering and amendment of former section 16108 to section 16204; renumbering and amendment of former section 16200 to section 16300; renumbering and amendment of former sections 16007, 16201, 16202, 16204 and 16206 to section 16302; renumbering and amendment of former section 16207 to section 16303; renumbering and amendment of former sections 16207.2 and 16207.3 to section 16304; renumbering and amendment of former section 16207.5 to section 16100; renumbering and amendment of former section 16207.7 to section 16301; renumbering and amendment of former sections 16207.10–16207.14 to section 16400; renumbering and amendment of former sections 16207.15 and 16207.16 to section 16401; renumbering and amendment of former section 16207.17 to section 16402; renumbering and amendment of former section 16207.18 to section 16403; renumbering and amendment of former section 16207.19 to section 16500; repealer of former sections 16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8; and new sections 16001, 16101 and 16102 filed 2–11–86; effective thirtieth day thereafter (Register 86, No. 7). For prior history, see Registers 82, No. 51; 80, No. 6; 79, No. 19; 72, No. 23 and 72, No. 13.
4. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 2. Work Subject to Prevailing Wages

§ 16001. Public Works Subject to Prevailing Wage Law.

(a) General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771.

(1) Any interested party enumerated in Section 16000 of these regulations may file with the Director of Industrial Relations or the Director's duly authorized representative, as set forth in Section 16301 of these regulations, a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code. If such a request is filed by any party other than the awarding body, a copy of the request must be served upon the awarding body, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, when it is filed with the Director.

(2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, any documents, arguments, or authorities it wishes to have considered in the coverage determination process.

(3) All parties to the coverage determination request shall have a continuing duty to provide the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, with relevant documents in their possession or control, until a determination is made. Where any party or parties' agent has a document in their possession, but refuses to release a copy, the Department shall consider that the documents, if released, would contain information adverse to the withholding party's position and may close the record and render a decision on the basis of that inference and the information received.

(b) Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

(c) Field Surveying Projects. Field survey work traditionally covered by collective bargaining agreements is subject to prevailing wage rates when it is integral to the specific public works project in the design, preconstruction, or construction phase.

(d) Residential Projects. Residential projects consisting of single family homes and apartments up to and including four stories are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally–funded or assisted residential projects controlled or carried out by an awarding body.

Note: Such projects may require a special determination by the Director which should be requested by the awarding body at least 45 days before the commencement of advertising of the call for bids by the awarding body.

(e) Commercial Projects. All non-residential construction projects including new work, additions, alterations, reconstruction and repairs. Includes residential projects over four stories.

(f) Maintenance. Public works contracts for maintenance are subject to prevailing wage rate payment as set forth in Section 1771 of the Labor Code.

NOTE: See Article 1 for definition of term "maintenance."

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. Amendment of subsection (a) and NOTE and adoption of subsections (a)(1)–(3) and (e) and relettering former subsection (e) to (f) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16002. Coverage of Worker.

The determinations of the Director will cover those crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

NOTE: Authority cited: Sections 1723 and 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3 and 1771, Labor Code.

§ 16002.5. Appeal of Public Work Coverage Determination.

(a) Those interested parties enumerated in Section 16000 of these regulations may appeal to the Director of Industrial Relations or the Director's duly authorized representative as set forth in Section 16301 of these regulations a determination of coverage under the public works laws (Labor Code Section 1720 et seq.) regarding either a specific project or type of work under Section 16001(a) of these regulations. Such notice of appeal must be served within 30 days of the issuance of the coverage determination. The party appealing the determination must, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, give written notification to the awarding body and any other identifiable parties.

(b) The notice of appeal shall state the full factual and legal grounds upon which the determination is appealed, and whether a hearing is desired. The decision to hold a hearing is within the Director's sole discretion. The Director may appoint a hearing officer to conduct the hearing and propose a decision on the appeal. The Director shall make the final decision on the appeal.

(c) The authority of the Director to determine coverage of projects under the prevailing wage laws is quasi–legislative, and a final determination on any appeal is subject to judicial review pursuant to the Code of Civil Procedure, Section 1085.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16003. Requests for Approval of Volunteer Labor.

(a) An awarding body wishing to use volunteer labor on what would otherwise be a public works project, pursuant to Labor Code Section 1720.4 shall serve a written request for approval on the Director, not less than 45 days prior to the commencement of work on the facilities or structures.

(b) The request for approval shall fully set forth the awarding body's grounds for belief that the requirements of Labor Code Section 1720.4(a), (b), and (c) are satisfied, and shall list all the crafts and classifications of workers that typically perform the types of work needed for the project.

(c) The request for approval shall identify the unions which represent workers in the crafts or classifications listed in (b) within the locality in which the public work is performed.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1720, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 3. Duties, Responsibilities, and Rights of Parties

§ 16100. Duties, Responsibilities and Rights.

The parties listed in this section must comply with the provisions of the Labor Code applicable to the payment of prevailing wages on public works contracts.

(a) Department and Division Authority in Prevailing Wage Issues. The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the Division of Labor Standards Enforcement. The lead agency for the coordination on apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by the law or these regulations.

(b) The Awarding Body shall:

(1) Obtain the prevailing wage rate from the Director in accordance with Labor Code Sections 1771 and 1773.

(2) Specify the appropriate prevailing wage rates, in accordance with Labor Code Sections 1773.2 and 1777.5.

(A) The posting requirement is applicable for each job site.

EXCEPTION: If more than one worksite exists on any project, then the applicable rates may be posted at a single location which is readily available to all workers.

(B) If a wage rate for a craft, classification or type of worker is not published in the Director's general prevailing wage determinations, a request for a special determination should be made by the awarding body to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, at least 45 days prior to the project bid advertisement date.

(3) Notify DAS. See Labor Code Section 1773.3.

(4) Inform prime contractors, to the extent feasible, of relevant public work requirements:

NOTE: Requirement information may be disseminated at a preacceptance of bid conference or in a call for bids or at an award of bid conference.

The public works requirements are:

(A) the appropriate number of apprentices are on the job site, as set forth in Labor Code Section 1777.5.

(B) worker's compensation coverage, as set forth in Labor Code Sections 1860 and 1861.

(C) keep accurate records of the work performed on the public works project, as set forth in Labor Code Section 1812.

(D) inspection of payroll records pursuant to Labor Code Section 1776, and as set forth in Section 16400 (e) of these regulations.

(E) and other requirements imposed by law.

(5) Withhold monies. See Labor Code Section 1727.

(6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771.

(7) Deny the right to bid on public work contracts to contractors or subcontractors who have violated public work laws, as set forth in Labor Code Section 1777.7.

(8) Not permit workers on public works to work more than eight hours a day or 40 hours in any one calendar week, unless compensated at not less than time and a half as set forth in Labor Code Section 1815.

EXCEPTION: If the prevailing wage determination requires a higher rate of pay for overtime work than is required under Labor Code Section 1815, then that higher overtime rate must be paid [, as specified in subsection 16200(a)(3)(F) of these regulations.]

(9) Not take or receive any portion of the workers' wages or accept a fee in connection with a public works project, as set forth in Labor Code Sections 1778 and 1779.

(10) Comply with those requirements as specified in Labor Code Sections 1776(g), 1777.5, 1810, 1813, and 1860.

(c) Contractor–subcontractor.

The contractor and subcontractor shall:

(1) Pay not less than the prevailing wage to all workers, as defined in Section 16000(a) of these regulations, and as set forth in Labor Code Sections 1771 and 1774;

(2) Comply with the provisions of Labor Code Sections 1773.5, 1775, and 1777.5 regarding public works jobsites;

(3) Provide workers' compensation coverage as set forth in Labor Code Section 1861;

(4) Comply with Labor Code Sections 1778 and 1779 regarding receiving a portion of wages or acceptance of a fee;

(5) Maintain and make available for inspection payroll records, as set forth in Labor Code Section 1776;

(6) Pay workers overtime pay, as set forth in Labor Code Section 1815 or as provided in the collective bargaining agreement adopted by the Director as set forth in Section 16200 (a) (3) of these regulations; and

(7) Comply with Section 16101 of these regulations regarding discrimination.

(8) Be subject to provisions of Labor Code Section 1777.7 which specifies the penalties imposed on a contractor who willfully fails to comply with provisions of Section 1777.5.

(9) Comply with those requirements as specified in Labor Code Sections 1810 and 1813.

(10) Comply with other requirements imposed by law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1726, 1727, 1728, 1729, 1770, 1771, 1773, 1773.2, 1773.3, 1773.5, 1774, 1775, 1776, 1777.5, 1777.7, 1778, 1779, 1810, 1811, 1812, 1815, 1860 and 1861, Labor Code.

HISTORY

Amendment of subsection (b)(2)(B) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16101. Discrimination.

See Labor Code Sections 1735, 1777.5, 1777.6, and 3077.5.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1735, 1777.5, 1777.6 and 3077.5, Labor Code.

§ 16102. Interested Party.

An interested party, as defined in Section 16000 of these regulations, may be a source of wage data information, as provided in Section 16000(e) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

Article 4. Wage Determinations

§ 16200. General; Basis for Determining Prevailing Wage Rate.

The Director shall follow those procedures specified in Sections 1773 and 1777.5 of the Labor Code and in these regulations when making a prevailing wage determination.

(a) Collective Bargaining Agreements or Wage Surveys.

(1) Filing of collective bargaining agreements.

(A) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all their collective bargaining agreements, including any and all addenda which modify the agreements, within 10 days of their execution and shall be considered as the basis for a prevailing wage determination whenever on file 30 days before the call for bids on a project.

(B) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code, and Section 16200(a)(1)(A) of these regulations shall be addressed to: Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142.

(C) Collective bargaining agreements filed with the Division of Labor Statistics and Research must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

1. certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or photocopy thereof, or a printed copy of a fully executed agreement showing the names of the signatory parties, except in the case of a printed agreement the Director may require certification;

2. names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement;

3. names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

4. provides the number of workers currently employed under the terms of the agreement and, if practicable, the number of workers in each county within the jurisdiction of the signatory local union or unions;

5. provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

(D) Copies of collective bargaining agreements which are not bona fide shall not be deemed filed. The party filing a contract may be asked to substantiate the assertion that such collective bargaining agreement is bona fide.

(2) Criteria for using collective bargaining agreement wage rates as basis of prevailing wage determinations. Before accepting the collective bargaining agreement wage rate for the applicable craft and locality, DLSR shall take the following factors into consideration:

(A) The geographical area(s) specified in the agreement;

(B) The number of workers covered by the agreement;

(C) If signatory parties to the agreement have workers in the geographical area(s);

(D) If work has been performed in the geographical area(s) specified in the agreement in the past 12 months;

(E) The wage rates determined by the federal government as set forth in Section 16200(b).

(3) Adoption of Collective Bargaining Agreements or Wage Surveys.

(A) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for each craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate. Only those rates and employer payments specifically enumerated in the definition of "general prevailing rate of per diem wages" in Section 16000 shall be included in the rate adopted.

(B) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director shall incorporate such changes in the determination.

NOTE: A statement must be filed with the Director for any adjustments made to a contract which are not contained in the agreement currently on file with DLSR.

(C) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost–of–living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under pen-

alty of perjury, as true and correct to the best of his or her knowledge and belief.

(D) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications may be considered.

(E) Holidays. Holidays specifically named in the collective bargaining agreement or determined by wage surveys shall be included in the wage determination. Overtime pay may be required as provided in Section 16200(a)(3)(F) of these regulations.

(F) Overtime. Overtime will be paid as indicated in the wage determination.

EXCEPTION 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 2: If the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 3: If the awarding body determines that work cannot be performed during normal business hours or work is necessary at off hours to avoid danger to life or property, no overtime is required for the first eight hours in any one calendar day, and 40 hours during any one calendar week.

EXCEPTION 4: No overtime payment is required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

(G) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(I) of these regulations.

(H) Rates for helpers. Rates for helpers will be published when the information available to the Director indicates that a practice of using such a subclassification prevails in a particular area, such as contained in a collective bargaining agreement, and within the parameters of the applicable collective bargaining agreement. In the absence of such determination, the helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor from the 1–5 apprentice–journeyman ratio requirements set forth in Labor Code Section 1777.5.

(I) Credit Available For Actual Payment of Fringe Benefit Costs up to the Prevailing Amount. The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)–(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

(b) Federal Rates. In reviewing rates predetermined for federal public works, the Director will consider those rates published pursuant to the Davis–Bacon Act.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

NOTE: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12–month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(4) the location of the project;

(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(6) the type of construction (e.g. residential, commercial building, etc.);

(7) the approximate cost of construction;

(8) the beginning date and completion date, or estimated completion date of the project;

(9) the source of data (e.g. "payroll records");

(10) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

NOTE: Authority cited: Sections 1773 and 1773.5, Labor Code. Reference: Sections 1770, 1771, 1773, 1773.1, 1773.5, 1773.8, 1777.5, 1810 and 1815, Labor Code.

HISTORY

1. Order of Repeal of subsection (a)(3)(E) filed 8–24–88 by OAL pursuant to Government Code section 11340.15 (Register 88, No. 35).

2. Amendment of subsections (a)(1), (a)(3) and (b) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16201. General Area Determinations.

When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout an area, the Director shall issue a determination enumerated county by county, but covering the entire area. Such determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geograph-

application of the determination may be specifically limited by the determination itself.

NOTE: General determinations are usually issued on a quarterly basis. However, the Director may issue an interim wage determination following the procedures set forth in Section 1773 of the Labor Code, and in these regulations. See Section 16000 as to issue date, and Section 16204 as to effective date of determination. The general determination usually applies where a collective bargaining agreement has been filed and adopted as the prevailing wage rate.

NOTE: Authority cited: Sections 1773.5 and 1773.6, Labor Code. Reference: Section 1773, Labor Code.

§ 16202. Special Determinations.

(a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

(b) Department of Industrial Relations initiated determination. Where an awarding body does not specify the prevailing wage rate as set forth in Labor Code Section 1773.2, any interested party (as defined in Section 16000 of these regulations) may petition the Director as set forth in Labor Code Section 1773.4 and Section 16302 of these regulations. The Labor Commissioner may, prior to the letting of the bid, request such a determination of the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.4, Labor Code.

§ 16203. Format.

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight–time hourly wage rate.

(2) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workers employed on the project, which is on file with the Director of Industrial Relations."

(3) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16000 of these regulations.

(4) The following statement when applicable. "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8."

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) The applicability of the apprentice rate of per diem wages shall be indicated and furnished upon request.

(d) The dates between which the applicable rate shall be paid for work performed in those periods shall be indicated.

(e) As a supplement to each determination the Director shall make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.5, Labor Code.

§ 16204. Effective Dates of Determination and of Rates Within Determination.

Effective Date of Determination.

(1) All determinations issued will be effective ten (10) days after issuance, provided that requests for copies, reprints or reissuance of prior determinations shall not affect the original effective date unless a new effective date is reflected upon the determination (see subdivision (3) below). Any call for bids put out on or after the effective date of the determination must reflect that determination unless the Director determines that subdivision (4) of this section is applicable, after notification and request by an awarding body.

(2) Determinations issued by the Director will show an issue date and will ordinarily show an expiration date.

(3) All determinations will remain in effect until their expiration date or until modified, corrected, rescinded or superseded by the Director.

(4) Determinations modified, corrected, rescinded or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which a call for bids takes place less than 30 days after the filing of the agreement.

NOTE: See Section 1773.1 of the Labor Code.

(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

(b) Modification of Effective Date of Determination by Asterisks. Meaning of single and double asterisks. Prevailing wage determinations with a single asterisk (*) after the expiration date which are in effect on the date of advertisement for bids remain in effect for the life of the project. Prevailing wage determinations with double asterisks (**) after the expiration date indicate that the basic hourly wage rate, overtime and holiday pay rates, and employer payments to be paid for work performed after this date have been predetermined. If work is to extend past this date, the new rate must be paid and should be incorporated in contracts entered into now. The contractor should contact the Prevailing Wage Unit, DLSR, or the awarding body to obtain predetermined wage changes. All determinations that do not have double asterisks (**) after the expiration date remain in effect for the life of the project.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.1, Labor Code.

HISTORY

1. Amendment of subsections (a)(3) and (b) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16205. Procedures for Obtaining Prevailing Wage Determinations.

An awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that a special or general prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142. All requests for special prevailing wage determinations must be confirmed in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of workers for which a determination is needed.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

HISTORY

1. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16206. Corrections.

Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination. The Director may correct any error issued in a determination by reissuing such determination.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

Article 5. Petitions to Review Prevailing Wage Determinations

§ 16300. Delegation of Authority.

(a) The Chief of DLSR is the authorized representative of the Director for the purpose of:

(1) Receiving collective bargaining agreements and other documents and papers pertaining to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations;

(2) Gathering information needed to make prevailing wage determinations under Part, Chapter 1, Article 2 of the Labor Code and these regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purpose of the law;

(3) Issuing prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations; and

(4) Responding to petitions regarding determinations.

(b) The Director reserves the right to make all final determinations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1771, 1772, 1773 et seq., 1774, 1775, 1776, 1777, 1777.5 et seq., 1778, 1779 and 1780, Labor Code.

§ 16301. Referral of Prevailing Wage Issues to Director's Office.

Any new or unresolved issue other than of a routine nature as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party may be referred to the Chief of DLSR as the Director's duly authorized representative for final determination, including appeals of any determination relating either to coverage or to the rate of the prevailing wage rate, subject only to Section 16300(b) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

§ 16302. Petition to Review Prevailing Wage Determinations.

Those interested parties enumerated in Section 1773.4 of the Labor Code, and defined in Section 16000 of these regulations, may file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

(a) Manner of Filing. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed with the Director by mail to the Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, or may be filed in person at 455 Golden Gate Avenue, 5th Floor, San Francisco, CA 94102.

(b) Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these regulations or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body or division upon actual delivery to and receipt by such person, awarding body, or division.

(c) Content of Petition. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(1) The name, address, telephone number and job title of:

(A) the person filing the petition;

(B) the person verifying the petition, if different from the person filing;

(C) if applicable, petitioner's attorney or authorized representative.

(2) Whether the petitioner is an awarding body, a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public works contract;

(3) The nature of petitioner's business, if a prospective bidder, and a designation of each craft, classification, or type of worker represented, or types of workers involved in the public works project.

(4) (A) the official name of the awarding body;

(B) the date on which the call for bids was first published;

(C) the name and location of the newspaper in which such publication was made. An accurate copy of the call for bids as published shall be attached to the petition.

(5) If petitioner is an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city, township, or regional district, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(6) If the petitioner is a prospective bidder, then the parent or subsidiary corporations or associations related to such craft, classification or type of work, if any, shall be specified.

(7) The manner in which the wage rate determined by the Director fails to comply with the provisions of Labor Code Section 1773.

(A) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

1. Whenever such facts relate to a particular employer of such crafts, classifications, or types of workers, the facts stated must identify the employer by name and address and give the number of workers involved.

2. Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16200(a)(1) of these regulations.

3. Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16200(e) of these regulations.

(B) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(C) Where rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

(d) Filing Copy With Awarding Body. If the petitioner is not an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, excluding Saturdays, Sundays and holidays, file a copy of the petition with the awarding body and not later than five days, excluding Saturdays, Sundays and holidays, after the filing of the original petition, the petitioner shall file with the Chief of DLSR an affidavit of the filing with the awarding body. The Director may waive this requirement upon receipt of written confirmation, including a copy of such notification by the petitioner.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773, 1773.1, 1773.4, 1773.5, 1773.8 and 1776, Labor Code.

HISTORY

1. Amendment of subsection (a) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16303. Quasi–Legislative Nature of Authority.

(a) The authority of the Director to establish the prevailing wage for any craft, classification, or type of worker is quasi–legislative. The Director has the discretion to establish these prevailing wages in a quasi–legislative manner which may include an investigation, hearing, or other action. Any hearing under this process is quasi–legislative and is subject to review pursuant to the Code of Civil Procedure Section 1085.

(b) The Director may in his or her discretion initiate an investigation or hold a hearing or take such other action as is reasonably necessary which would best effectuate the purposes of the law and of these regulations, except as such action may be expressly prohibited by law.

NOTE: Authority cited: Section 1773.5, Labor Code; and Winzler & Kelly (1981) 121 C.A. 3d 120; *Western Assn. of Engineers & Land Surveyors v. DIR*, Judicial Council Coord. Proceeding No. 449, Sac. Superior Court No. 285433. Reference:

S 1770, 1773 and 1773.4, Labor Code; and Section 1085, Code of Civil P .e.

§ 16304. Hearings.

When a hearing is held, including a petition to review under Labor Code Section 1773.4, it shall be in accordance with the following procedures:

(a) Hearing Procedures.

(1) A time and place of the hearing shall be fixed.

(2) All interested parties made known to the Director shall be notified by registered or certified mail, return receipt requested, of the time and place of the hearing except that, in the event of numerous interested parties or in the event that mailing notices by registered or certified mail could cause an undue delay adverse to the interest of the parties or a timely hearing, the Director may send certified or registered notices to the petitioner and other directly interested parties that have been made known to the Director and mail notices to the other parties, and publish such notices in newspapers.

(3) Notification of the time and place of the hearing shall be at least one week in advance.

(4) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions. The officer may fairly allocate time for such witnesses' testimony in the interest of introducing relevant evidence. Cross examination will be permitted at the discretion of the hearing officer.

(5) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(6) All witnesses testifying before the hearing officer shall testify under oath.

(7) A full transcript of the hearing shall be recorded.

(aring Officer. The Director may appoint a hearing officer(s). The ointed hearing officer(s) shall conduct the hearing and submit to h tor the entire record of the hearing together with written recommendations. Either the appointed hearing officer(s) or the Director may equest documentation subsequent to the hearing to complete the record, nd shall send copies of such additional information to the petitioner, warding body or other designated interested party or parties.

(c) Subject Matter. The subject matter of a hearing may be initiated by petition to review, as set forth in Labor Code Section 1773.4.

(d) Decision. The decision of the Director shall reflect a summary of he evidence, findings, or matters of fact and/or law.

The decision shall be sent to all parties no later than 20 days after the e except earlier or later as special circumstances warrant. The decision of the Director shall be final, for the purposes of judicial review, xcept that the Director upon his or her initiative only, may consider and ake whatever action is appropriate or necessary to facilitate a decision n reconsideration. Notice of reconsideration shall be given to all parties n the same manner as the notice of hearings as specified in Sections 6304(a)(2) and (a)(3) above and the decision upon reconsideration shall e as specified in subdivisions (a)(2) and (a)(3) of this section.

lote: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773.4 nd 1773.5, Labor Code.

Article 6. Certified Payroll Records: Requests, Content, and Cost

16400. Request for Payroll Records.

(a) Requests may be made by any person for certified copies of payroll ec Requests shall be made to any of the following:

(body awarding the contract, or

(2) any office of the Division of Labor Standards Enforcement, or the ivi on of Apprenticeship Standards.

quests for certified copies of payroll records pursuant to Section 776 of the Labor Code may be made by any person. However, any such quest shall be in writing and contain at least the following information:

(1) The body awarding the contract;

(2) The contract number and/or description;

(3) The particular job location if more than one;

(4) The name of the contractor;

(5) The regular business address, if known.

Note: Requests for records of more than one contractor of subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be accepted; unless contractor and subcontractor responsibilities regarding the project are not clearly defined.

(c) Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty–five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and

(4) Provide for inspection.

(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

Note: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

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Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A–1–131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name–print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209-16209.6), see Register 82, No. 51.

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval.

awarding body bears the burden of producing evidence that it meets criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

) Cause for revocation of final approval includes, but is not limited

A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(B) Failure of the awarding body to file timely, complete, and accurate reports to the Director as required by Section 16431 or elsewhere in these regulations.

(b) Interested parties may request the Director revoke final approval of a LCP. A request for revocation shall include evidence of failure of the arding body to monitor compliance with the requirements of the Labor le and these regulations or to take enforcement action after becoming cognizant of a violation of the Labor Code or these regulations. A request for revocation shall also include any other relevant evidence.

(1) Final approval of a LCP may be revoked by the Director based on a request by an interested party after a proceeding conducted as provided in subdivision (a). A copy of the request for revocation shall be provided to the awarding body as part of the notice required under subdivision (a).

(2) As part of a proceeding for revocation of final approval based on a request by an interested party, the Director may require the awarding body to furnish a supplemental report for the period between the ending date of the last annual report filed by the awarding body pursuant to Section 16431 and the date of notice by the Director, and containing the information listed in subdivision (a) of said Section 16431.

(3) Revocation of final approval of a LCP based on a request by an interested party is solely within the discretion of the Director. The duty of an awarding body to carry out its LCP runs solely to the Director and not to any worker, contractor, or interested party. The sole remedy for failure n awarding body's duty is revocation of approval by the Director.

) Upon determining that the request for revocation will be denied without hearing, the Director shall notify the LCP, awarding body and re- esting party of the decision and of the reasons therefore by mail.

) Upon determining that a hearing is necessary, the parties will be ified and a hearing on cause for revocation of final LCP approval will be held in accordance with the procedures for notice and hearing proceedings set forth in 8 CCR Section 16304.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 3. Notice and Components of LCP

§ 16429. Notice of LCP Approval.

(a) Notice of initial or final approval of an awarding body's LCP shall be given in the Call for Bids and in the contract or purchase order and shall also be posted at the job site. If more than one job site exists or where such posting would endanger public safety, the notice may be posted in the manner prescribed by 8 CCR Section 16100(b).

(b) Notice of an approved LCP shall contain, at the minimum, the effective date of the Director's initial or final approval, a statement that the limited exemption from prevailing wages pursuant to Labor Code Section 1771.5(a) applies to the contract, a telephone number to call for inquiries, questions, or assistance with regard to the LCP, and the name of the agent or office administering the LCP, if different from the awarding body.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16430. Components of LCP.

(a) In accordance with Labor Code Section 1771.5(b), a LCP shall include, but not be limited to, the following requirements:

(1) The Call for Bids and the contract or purchase order shall contain appropriate language concerning the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(2) A prejob conference shall be conducted before commencement of the work with contractors and subcontractors listed in the bid, at which time federal and state labor law requirements applicable to the contract shall be discussed, and copies of suggested reporting forms furnished. A checklist, showing which federal and state labor law requirements were discussed, shall be kept for each conference. A checklist in the format of Appendix A presumptively meets this requirement;

(3) A requirement that certified payroll records be kept by the contractor in accordance with Labor Code Section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body. The awarding body may create a form meeting the minimum requirements of (a) hereinafter "Certified Weekly Payroll." Use of the current version of DIR's "Public Works Payroll Reporting Form" (A–1–131) (New 2–80) constitutes full compliance with this requirement by the awarding body. A copy of this suggested form follows Title 8 CCR Section 16500;

(4) A program for orderly review of payroll records and, if necessary, for audits to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(5) A prescribed routine for withholding penalties, forfeitures, and underpayment of wages for violations of the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(6) All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5(b), Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix A

Suggested Checklist of Labor Law Requirements to Review at Prejob Conference, Section 16430.

The federal and state labor law requirements applicable to the contract are composed of but not limited to the following items:

(1) The contractor's duty to pay prevailing wages under Labor Code Section 1770 et seq., should the project exceed the exemption amounts;

(2) The contractor's duty to employ registered apprentices on the public works project under Labor Code Section 1777.5;

(3) The penalties for failure to pay prevailing wages (for non-exempt projects) and employ apprentices including forfeitures and debarment under Labor Code Sections 1775 and 1777.7;

(4) The requirement to keep and submit copies upon request of certified payroll records under Labor Code Section 1776, and penalties for failure to do so under Labor Code Section 1776(f);

(5) The prohibition against employment discrimination under Labor Code Section 1777.6; the Government Code, and Title VII of the Civil Rights Act of 1964;

(6) The prohibition against accepting or extracting kickback from employee wages under Labor Code Section 1778;

(7) The prohibition against accepting fees for registering any person for public work under Labor Code 1779; or for filling work orders on public works under Labor Code Section 1780;

(8) The requirement to list all subcontractors under Government Section 4100 et seq;

(9) The requirement to be properly licensed and to require all subcontractors to be properly licensed and the penalty for employing workers while unlicensed under Labor Code Section 1021 and under the California Contractors License Law, found at Business and Professions Code Section 7000 et seq;

(10) The prohibition against unfair competition under Business and Professions Code Section 17200–17208;

(11) The requirement that the contractor be properly insured for Workers Compensation under Labor Code Section 1861;

(12) The requirement that the contractor abide by the Occupational, Safety and Health laws and regulations that apply to the particular construction project;

(13) The requirement to provide affirmative action for women and minorities as required in the Public Contracts Code and in the contract;

(14) The prohibition against hiring undocumented workers, and the requirement to secure proof of eligibility/citizenship from all workers.

§ 16431. Annual Report.

The awarding body shall submit to the Director an annual report on the operation of its LCP within 60 days after the close of its fiscal year, or accompany its request for an extension of initial approval, whichever comes first. The annual report shall contain, at the minimum, the following information:

(1) Number of contracts awarded, and their total value;

(2) The number, description, and total value of contracts awarded which were exempt from the requirement of payment of prevailing wages pursuant to Labor Code Section 1771.5(a);

(3) A summary of penalties and forfeitures imposed and withheld, or recovered in a court of competent jurisdiction;

(4) A summary of wages due to employees resulting from failure by contractors to pay prevailing wage rates, the amount withheld from money due the contractors, and the amount recovered by action in any court of competent jurisdiction.

(b) A LCP whose contract responsibilities are statewide, or which involves widely dispersed and numerous contracts, or which is required to report contract enforcement to federal authorities in a federal format, may adopt a summary reporting format to aggregate small contracts and estimate numbers and dollar values required by (a)(1) and (2). A summary reporting format may be adopted by agreement with the Director after advance notice to interested parties, and a list of parties requesting such notice shall be kept by the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16432. Audits.

(a) Audits may be conducted when deemed necessary by the awarding body and shall be conducted upon request of the Labor Commissioner.

(1) An audit consists of a comparison of payroll records to the best available information as to the actual hours worked and classifications of workers employed on the contract. An audit is sufficiently detailed when it enables the LCP, and the Labor Commissioner in reviewing proposed penalties, to draw reasonable conclusions as to compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code, and to enable accurate computation of underpayment of wages to workers and of applicable penalties and forfeitures. Records shall be made available to show that the audits conducted are sufficiently detailed to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2. An audit record in the form set out in Appendix B presumptively demonstrates sufficiency.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 224, 226, 1773.2, 1776, 1777.5, 1778, 1810, 1815, 1860 and 1861, Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix B

Audit Record Form (suggested for use with Section 16432 audits)

An audit record is sufficiently detailed to "verify compliance with the requirements of Chapter"1, Public Works, of Part 7 of Division 2, when the audit record displays that the following procedures were accomplished:

(1) Audits of the obligation to secure workers' compensation means demanding written evidence of a binder issued by the carrier, or telephone or written inquiry to the Workers' Compensation Insurance Rating Bureau;

(2) Audits of the obligations to employ and train apprentices means inquiry to the program sponsor for the apprenticeable craft or trade in the area of the public works as to: whether contract award information was received, including an estimate of journeyperson hours to be performed and the number of apprentices to be employed; whether apprentices have been requested, and whether the request has been met; whether the program sponsor knows of any amounts sent by the contractor or subcontractor to it for the training trust, or the California Apprenticeship Council; and whether persons listed on the certified payroll in that craft or trade as being paid less than the journeyperson rate are apprentices registered with that program and working under apprentice agreements approved by the Division of Apprenticeship Standards;

(3) Audits of the obligation to pass through amounts made part of the bid for apprenticeship training contributions, to either the training trust or the California Apprenticeship Council, means asking for copies of checks sent, or when the audit occurs more than 30 days after the month in which payroll has been paid, copies of canceled checks;

(4) Audits of "illegal taking of wages" means inspection of written authorizations for deductions (listed in Labor Code Section 224) in the contractor or subcontractor's files and comparison to wage deduction statements furnished employees (Labor Code Section 226), together with an interview of several employees as to any payments not shown on the wage deduction statements;

(5) Audits of the obligation to keep records of working hours, and pay not less than required by Title 8 CCR Section 16200(a)(3)(F) for hours worked in excess of 8 hours are the steps for review and audit of Certified Weekly Payrolls under Title 8 CCR Section 16432;

(6) Audits of the obligations to pay the prevailing per diem wage, means such steps for review and audit of Certified Weekly Payrolls which will produce a report covering compliance in the areas of:

(A) All elements defined as the "General Prevailing Rate of Per Diem Wages" in Title 8 CCR Section 16000, which were determined to be prevailing in the Director's determination which was in effect on the date of the call for bids, available in its principal office, and posted;

elements defined as "Employer Payments" set forth in Section 16. these regulations, which were determined to be prevailing in the Director's determination which was in effect on the date of the call for bids, and pursuant to Labor Code Section 1773.2 was to be specified in the call for bids, made available in its principal office and posted.

Article 4. Limited Exemption from the Requirement to Pay Prevailing Wages

16433. Limited Exemption.

(a) As provided in Labor Code Section 1771.5, an awarding body having a LCP approved by the Director in accordance with these regulations shall not require payment of the general rate of per diem wages or the general rate of per diem wages for holiday and overtime work for any public works project of $25,000 or less when the project is for construction work, or of $15,000 or less when the project is for alteration, demolition, repair, or maintenance work.

(b) A project for construction, alteration, demolition, repair, or maintenance work shall be identified as such in the call for bids, and in the contract or purchase order.

(e amount of a contract subject to subdivision (a) is changed and, a result, exceeds the applicable limit under which the payment of the neral rate of per diem wages is not required, workers employed on the ntract after the amount due the contractor has reached the applicable nit shall be paid the general rate of per diem wages for regular, holiday overtime work, as the case may be.

ote: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, bor Code.

History

Ne on filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 5. Enforcement

16434. Duty of Awarding Body.

(a) An awarding body having an initially or finally approved LCP shall ve a duty to the Director to enforce the requirements of Chapter 1 of rt 7 of Division 2 of the Labor Code and these regulations in a manner nsistent with the practice of DLSE, as set forth in Divisions 2 and 3 of Labor Code, and published regulations thereunder, where substantive n are not set out by regulations under this Title 8, group 4.

te. thority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 1771.6, Labor Code.

History

New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

16435. Withholding Contract Payments When Payroll Records are Delinquent or Inadequate.

(a) "Withhold" means to cease payments by the awarding body, or others who pay on its behalf, or agents, to the general contractor. Where the olation is by a subcontractor, the general contractor shall be notified of nature of the violation and reference made to its rights under Labor de Section 1729.

(b) "Contracts." Except as otherwise provided by agreement, only ntracts under a single master contract, or contracts entered into as ges of a single project, may be the subject of withholding.

(c) "Delinquent payroll records" means those not submitted on the date in the contract.

(d) " dequate payroll records" are any one of the following:

(1) ord lacking the information required by Labor Code Section 76;

(2) ecord which contains the required information but not certified, c by someone not an agent of the contractor or subcontractor;

(3) A record remaining uncorrected for one payroll period, after the arding body has given the contractor notice of inaccuracies detected udit or record review. Provided, however, that prompt correction will stop any duty to withhold if such inaccuracies do not amount to 1 percent of the entire Certified Weekly Payroll in dollar value and do not affect more than half the persons listed as workers employed on that Certified Weekly Payroll, as defined in Labor Code Section 1776 and Title 8 CCR Section 16401.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1729, 1776, 1777.5, 1778, 1813 and 1815, Labor Code.

History

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16435.5. Withholding Contract Payments Equal to the Amount of Underpayment and Applicable Penalties When, After Investigation, It Is Established That Underpayment Has Occurred.

(a) "Withhold" as defined in Section 16435(a) of these regulations.

(b) "Contracts" as defined in Section 16435(b) of these regulations.

(c) "Amount equal to the underpayment" is the total of the following determined by payroll review, audit, or admission of contractor or subcontractor:

(1) The difference between amounts paid workers and the correct General Prevailing Rate of Per Diem Wages, as defined in Title 8 CCR Section 16000, and determined to be the prevailing rate due workers in such craft, classification or trade in which they were employed and the amounts paid;

(2) The difference between amounts paid on behalf of workers and the correct amounts of Employer Payments, as defined in Title 8 CCR Section 16000 and determined to be part of the prevailing rate costs of contractors due for employment of workers in such craft, classification or trade in which they were employed and the amounts paid;

(3) Estimated amounts of "illegal taking of wages";

(4) Amounts of apprenticeship training contributions paid to neither the program sponsor's training trust nor the California Apprenticeship Council;

(5) Estimated penalties under Labor Code Sections 1775, 1776, 1777.7 and 1813.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1729, 1775, 1776, 1777.5, 1777.7, 1778, 1813 and 1815, Labor Code.

History

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16436. Forfeitures Requiring Approval by the Labor Commissioner.

(a) "Forfeitures" are the amounts of unpaid penalty and wage money assessed by the awarding body for violations of the prevailing wage laws, whether collected by withholding from the contract amount or by suit under the contract, or provisions of this Chapter.

(b) "Failing to pay the correct rate of prevailing wages" means those public works violations which the Labor Commissioner has exclusive authority to approve before they are recoverable by the Labor Compliance Program, and which are appealable by the contractor in court or before the Director under Labor Code Section 1771.7. Regardless of what are defined as "prevailing wages" in contract terms, non–compliance with the following are failures to pay prevailing wages.

(1) Nonpayment of items defined as "Employer Payments" and "General Prevailing Rate of Per Diem Wages" in Title 8 CCR Section 16000 and Labor Code Section 1771.

(2) Payroll records required by Labor Code Section 1776.

(3) Labor Code Section 1777.5, but only insofar as the failure consisted of paying apprentice wages lower than the journeyperson rate to a person who is not an apprentice as defined in Labor Code Section 3077, working under an apprentice agreement in a recognized program.

(4) Labor Code Section 1778, Kickbacks.

(5) Labor Code Section 1779, Fee for registration.

(6) Labor Code Sections 1813, 1815, and Title 8 CCR Section 16200(a)(3)(F) overtime for work over 8 hours in any one day or 40 hours in any one week.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771, 1771.5, 1777.5, 1776, 1779, 1813, 1815 and 3077, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16437. Determination of Amount of Forfeiture by the Labor Commissioner.

(a) Where the LCP of the awarding body requests a determination of the amount of forfeiture, the request shall include a file or report to the Labor Commissioner which contains at least the following information:

(1) The deadline by which contract acceptance of filing of a notice of completion, under Labor Code Section 1775, plus 90 days, will occur;

(2) Any other deadline which if missed would impede collection;

(3) Evidence of violation, in narrative form;

(4) Evidence that an "audit" or "investigation," as defined in Section 16432 of these regulations, occurred;

(5) Evidence that the contractor was given the opportunity to explain why there was no violation, or that any violation was caused by mistake, inadvertence, or neglect, before the forfeiture was sent to the Labor Commissioner, and the contractor either did not do so, or failed to convince the awarding body of its position;

(6) Where the LCP of the awarding body seeks not only amounts of wages but also a penalty as part of the forfeiture, and the contractor has unsuccessfully contended that the cause of violation was mistake, inadvertence, or neglect, a short statement should accompany the proposal for a forfeiture, with a recommended penalty amount pursuant to Labor Code Section 1775;

(7) Where the LCP of the awarding body seeks only wages or a penalty less than $50 per day as part of the forfeiture, and the contractor has successfully contended that the cause of the violation was mistake, inadvertence, or neglect, then the file should include the evidence as to the contractor's knowledge of his or her obligation, including the program's communication to the contractor of the obligation in the bid invitations, at the prejob conference agenda and records, and any other notice given as part of the contracting process. With the file should be a statement, similar to that described in (6), and recommended penalty amounts, pursuant to Labor Code Section 1775;

(8) The previous record of the contractor in meeting his or her prevailing wage obligations.

(9) Whether the LCP has been granted initial, extended initial or final approval.

(b) The file or report shall be served on the Labor Commissioner not less than 30 days before the final payment or, if that deadline has passed, not less than 90 days before the expiration of the deadline to file suit under Labor Code Section 1775.

(c) A copy of the recommended forfeiture and the file or report shall be served on the contractor at the same time as it is sent to the Labor Commissioner. The awarding body may exclude from the documents served on the contractor copies of documents secured from the contractor during an audit, investigation, or meeting if those are clearly referenced in the file or report. Along with the copy served on the contractor shall be a notice stating all deadlines and rights of the contractor to contest the amount of forfeiture. A Notice of Deadlines in the format set out in Appendix C will presumptively fulfill the requirements of this subsection;

(d) The Labor Commissioner shall affirm, reject, or modify the forfeiture in whole or in part as to penalty, and/or wages due.

(e) The Labor Commissioner's determination of the forfeiture is effective on one of the two following dates:

(1) For programs with initial approval or an extension of initial approval pursuant to Section 16426 of these regulations, on the date the Labor Commissioner serves by first class mail, on the political subdivision and on the contractor, an endorsed copy of the proposed forfeiture, or a newly drafted forfeiture statement which sets out the amount of forfeiture approved. Service on the contractor is effective if made on the last address supplied by the contractor in the record. The Labor Commissioner's approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed.

(2) For programs with final approval, approval is effective 20 days after the requested forfeitures are served upon the Labor Commissioner, unless the Labor Commissioner serves a notice upon the parties, within that time period, that this forfeiture request is subject to further review. For such programs, a notice that approval will follow such a procedure will be included in the transmittal of the forfeiture request to the contractor. The Labor Commissioner's final approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of the date of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed, unless some other procedure has been adopted pursuant to 8 CCR Section 16427(d).

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1775, Labor Code.

HISTORY

1. New section and Appendix filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Appendix C

Notice of Deadlines

(To Go to Contractor for Forfeitures under Section 16437)

"This document requests the Labor Commissioner of California to approve a forfeiture of money you otherwise would be paid. The [name of the labor compliance program] for the [name of the awarding body having this work done] is asking the Labor Commissioner of California to agree, in 20 days, that the enclosed package of materials indicates that you have violated the law."

"Failure to respond to the [name of the labor compliance program's] request that the Labor Commissioner approve a forfeiture by writing to the Labor Commissioner within 20 days of the date of service (date of postmark) of this document on you may lead the Labor Commissioner to affirm the proposed forfeiture, and may also end your right to contest those amounts further. You must serve any written response on the Labor Commissioner, the [name of the labor compliance program] and [name of the awarding body] by return receipt requested/certified mail. If you serve a written explanation, with evidence, as to why the violation did not occur, or why the penalties should not be assessed, within the 20 day period, it will be considered,"

and

"If you change address, or decide to hire an attorney, it is your responsibility to advise both the [name of the Labor Compliance Program] and the Labor Commissioner by certified mail. Otherwise, notices will be served at your last address on file, and deadlines might pass before you receive such notices."

§ 16438. Deposits of Penalties and Forfeitures Withheld.

(a) Where the involvement of the Labor Commissioner has been limited to a determination of the actual amount of penalty, forfeiture or underpayment of wages, and the matter has been resolved without litigation by or against the Labor Commissioner, the awarding body having a LCP shall deposit penalties and forfeitures in its general fund. If an approved LCP is operated through an agent, penalties and forfeitures shall be deposited as provided in the agreement designating the agent for the awarding bodies involved.

(b) Where collection of fines, penalties or forfeitures results from court action to which the Labor Commissioner and awarding body are both parties, the fines, penalties or forfeitures shall be divided between the general funds of the state and the awarding body, as the court may decide.

(c) All amounts recovered by suit brought by the Labor Commissioner and to which the awarding body is not a party, shall be deposited in the general fund of the state.

(d) All wages and benefits which belong to an employee and are withheld or collected from a contractor or sub-contractor, either by withholding or as a result of court action pursuant to Labor Code Section 1775, and which have not been paid to the employee or irrevocably committed

...e employee's behalf to a benefit fund, shall be deposited with the Labor Commissioner, who shall handle such wages and benefits in accordance with Labor Code Section 96.7.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.6 and 1775, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16439. Appeals of a Labor Compliance Program Enforcement Action.

(a) A contractor may appeal the result of a LCP enforcement action by serving a notice of appeal on the Director of Industrial Relations as an alternative to going to court under Labor Code Section 1732. Such notice must be served within 20 days of the date a determination of forfeiture has been approved by the Labor Commissioner. A copy of the notice of appeal shall be served on the awarding body and the LCP at the same time as it is sent to the Director. Appeal of a LCP enforcement action to the Director of Industrial Relations waives the contractor's right to file suit pursuant to Labor Code Section 1732.

(b) The notice shall state the grounds for the appeal, and whether a hearing is desired. The decision to hold a hearing is within the sole discretion of the Director and shall be dependent upon whether the appeal is timely, the matter is within the scope of Labor Code Section 1732, and the material furnished by the record already in the file is insufficient for a fully informed decision. The Director may appoint a hearing officer to review the record below (subsection (c)), hold a hearing and recommend a decision. The Director shall make the final decision on the appeal.

(c) Upon receipt of a copy of the notice of appeal, the awarding body within 30 days, forward to the Director a full copy of the record of enforcement proceedings and any further documents, arguments, or ...rities it wishes to have considered in the appeals process. Accompanying those materials shall be a declaration of service on the contractor although materials already served in the process of seeking Labor Commissioner approval may be listed rather than re–served.

(d) The Director may request a supplemental report on the activities of the Labor Compliance Program. This report will be an update of the annual report required in 8 CCR Section 16431.

(e) Upon receipt of the notice of appeal, and all documentation referred to in section (c) above, the Director shall have 90 days in which to issue ...termination. If additional time is required due to the complexity of ...sues, or for other good cause, the Director shall have the right, upon notice to the parties to one 30 day extension of the time in which to issue the determination.

(f) The Director's ruling on the appeal shall be final.

NOTE: Authority cited: Sections 54, 55 and 1773.5, Labor Code. Reference: Section 1771.7, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 6. Severability

§ 16500. Severability.

If any provision of the regulations in Group 3 or Group 4 or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regula... which can be given effect without the invalid provisions or ...ations, and to this end the provisions of these regulations are severable.

... Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section ..., Labor Code.

HISTORY

1. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 8. Debarment

§ 16800. Definitions.

In addition to the definitions of "Contractor," "Subcontractor," "Awarding Body," "Political Subdivision," "Public Works," and any other applicable terms, found in Group 3. Payment of Prevailing Wages upon Public Works, article 17 section 16000, the following terms are defined for general use in this article.

"Substantial Interest" means an interest of twenty percent (20%) of a corporation, limited partnership or similar entity and includes an individual holding the position of responsible managing employee, qualifying responsible managing officer or general partner regardless of the percentage interest in the entity.

"Fraud" means a suggestion, as a fact, of that which is not true, by one who does not believe it to be true; or the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; or the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or a promise, made without any intention of performing it.

"Person" means an individual or legal entity, including, but not limited to, any firm, corporation, partnership, limited partnership, agency, association, organization or trust, and includes, where applicable, the public agencies, awarding bodies and any agent or officer thereof authorized to act for or on behalf of any of the foregoing.

"Firm" means, but is not limited to, any individual, corporation, partnership, limited partnership, agency, association, organization or trust operating a business in the State of California whether or not licensed or permitted to do so.

"Intent to Defraud" means the intent to deceive another person or entity, as defined in this article, and to induce such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property of any kind.

"Deliberately" means premeditated and intentional and does not include inadvertent error.

"Respondent" means any person or entity subject to the proceedings set forth in this article.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

§ 16801. Investigations: Duties, Responsibilities and Rights of the Parties.

(a) Division of Labor Standards Enforcement. The Division of Labor Standards Enforcement (hereinafter "DLSE") may investigate any alleged violation of the provisions of chapter 1, part 7 of the California Labor Code for purposes of enforcing Labor Code section 1777.1. Investigations pursuant to section 1777.1 are for the purpose of determining a Respondent's willful violation, or violation with the intent to defraud, of the provisions of chapter 1, part 7 of the California Labor Code, with the exception of section 1777.5.

(1) Where a preliminary investigation reveals that there is insufficient evidence to continue the investigation, DLSE may close the investigation and shall notify the Respondent and awarding body in writing.

(2) In the event an investigation of any Respondent reveals a violation of Labor Code section 1777.1, DLSE shall notify the awarding body in writing and shall serve upon the Respondent a Notice of Hearing together

with a Statement of Alleged Violations, which shall specifically set forth DLSE's allegations against the Respondent.

(A) Service of both the Notice of Hearing and Statement of Alleged Violations shall be complete when mailed, by first class postage, to the last address of record for the Respondent listed with the State Contractors License Board or, in the event the Respondent is not licensed by the State Contractors License Board, the last known address of the Respondent available to the awarding body or, in the case of a subcontractor, the last known address available to the general contractor with whom the subcontractor contracted in the performance of the public works project under investigation. In the event there is neither an address of record with the State Contractors License Board or the awarding body or general contractor, the Notice of Hearing and Statement of Alleged Violations shall be served pursuant to the provisions of the Code of Civil Procedure, sections 415.10 – 415.50. concerning the service of civil summons.

(B) The Notice of Hearing shall list the date, time and place of the hearing which shall not be scheduled sooner than forty–five days after the date of the mailing of the Notice of Hearing and Statement of Alleged Violations.

(C) The Respondent shall have the opportunity to review and copy such records from the investigative file of DLSE which are not subject to either attorney–client or work product privileges. The Respondent shall be entitled to a reasonable number of subpoenas but shall be liable for any costs of service of the subpoenas, or any other witness or mileage fees incurred.

Mileage and Witness fees shall be set as specified in Government Code section 68093. In the exercise of his or her discretion, the Hearing Officer may limit the number of witnesses subpoenaed either for the purpose of corroboration or for establishing a single material fact in issue, or where the Respondent has not furnished satisfactory evidence that the witness will be able to give necessary and competent testimony material to the issues at the hearing.

[The next page is 1415.]

been filed, and after consideration of such exceptions the director shall decide that the exceptions to the report of the service do raise substantial and material factual issues, he shall direct the hearing officer to issue a notice of hearing, whereupon the procedures for a hearing and the issuance of the hearing officer's report provided for in subsection (e) of this section (including the provision for filing exceptions to the hearing officer's report) shall be followed. The director may adopt the recommendations of the hearing officer issued under subsection (d) or the report of the hearing officer issued under subsection (e) as his own. The service shall thereafter promptly proceed to take such action as may be called for by the decision of the director, after which the proceedings will be closed.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875. Runoff Elections.

(a) The service shall conduct a runoff election, without further order of the director, when an election in which a ballot providing for not less than three choices (i.e. at least two representatives and "neither" or "none") results in no choice receiving a majority of the valid ballots cast, which runoff election shall be held promptly following final disposition of any challenges, objections or exceptions which followed the prior election as provided in Section 15870. Only one runoff election shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are employed in an eligible category on the date of the runoff election shall be the only employees eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and "neither" or "none" is equally divided among the several choices, or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the director shall declare the first election a nullity and shall conduct another election among the three choices which received the greatest number of ballots in the original election; provided that in the event there was a tie in the original election between the third and fourth choices or among the third, fourth and other choices, the director shall in the runoff election include on the ballot all such tied choices. In the event two or more choices receive the same number of ballots, and if either (1) there are no challenged ballots which would affect the results of the election, or (2) after all challenges have been disposed of it is found that all eligible voters have cast valid ballots, there shall be no runoff election and the petition shall be dismissed. Only one such further election pursuant to this subsection (d) may be held.

(e) The provisions of Section 15870 above shall be applicable to a runoff election.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875.1. Relevant Federal Law.

In resolving questions of representation, the Director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. New section filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 2.3. Election Procedure Under San Francisco Bay Area Rapid Transit District Law

NOTE: Authority cited for Group 2.3: Section 54, Labor Code and Section 28851, Public Utilities Code.

HISTORY

1. New Group 2.3 (§§ 15900–15926) filed 1–5–73; effective thirtieth day thereafter (Register 73, No. 1).
2. Repealer of Group 2.3 (Sections 15900–15926) filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 3. Payment of Prevailing Wages upon Public Works

Article 1. Definitions

§ 16000. Definitions.

The following terms are defined for general use in these regulations within Group 3, Payment of Prevailing Wages Upon Public Works and Group 4, Awarding Body Labor Compliance Programs:

Area of Determination. The area of determining the prevailing wage is the "locality" and/or the "nearest labor market area" as determined by the Director. In determining the area, the mobility of each craft, classification and type of work will be considered.

Awarding body. Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.

Bid. Any proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind.

Certified. The affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

Chief of DAS. Chief of Division of Apprenticeship Standards or a duly authorized representative.

Chief of DLSE/Labor Commissioner. Chief of the Division of Labor Standards Enforcement or a duly authorized representative.

Chief of DLSR. Chief of the Division of Labor Statistics and Research or a duly authorized representative.

Coverage. This means being subject to the requirements of Part 7, Chapter 1 of the Labor Code as a "public work." This includes all formal coverage determinations issued by the Director of Industrial Relations.

DAS. Division of Apprenticeship Standards.

Date of Notice or Call for Bids. The date the first notice inviting bids was published in a newspaper of general circulation or promulgated in a legally sufficient manner which results in a contract being awarded with or without competitive bidding. This may also be referred to as the Bid Advertisement Date.

Days. Unless otherwise specified means calendar days.

DLSE. The Division of Labor Standards Enforcement.

DLSR. The Division of Labor Statistics and Research.

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Effective Date. The date upon which the determinations of the Director go into effect. This date is ten days after the issue date of the determination.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

Expiration Date. The date upon which the determinations of the Director are subject to change.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight-time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Helper. Any subjourneyman classification traditionally used to assist a journeyman. Under no circumstance may the Helper classification be used to replace statutorily required Apprentices.

Identify or Give Notice of Identity. This means to state the name, job title, address and current telephone number of a person or entity.

Interim Determination. Those determinations of the Director issued between the quarterly updates.

Issue Date–Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

LCP. A labor compliance program initiated and enforced by an awarding body in accordance with these regulations.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

EXCEPTION 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

EXCEPTION 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded.

Mistake, Inadvertence, or Neglect. Mistake, inadvertence, or neglect in failing to pay the correct general rate of per diem wages means the lack of knowledge that any reasonable person would also be expected to have under the same or similar circumstances.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Prevailing Rate. Includes:

(1) The basic hourly rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality

and in the nearest labor market area to the public work, if a majority of such workers is paid at a single rate; if a single wage rate is not paid to a majority then the average of the wages paid, weighted by the total employed in the craft, classification or type of worker, is prevailing. If a single wage rate is not paid to a majority, the average wage, weighted as set forth above, may be established by considering one or more of the following: the payments made under appropriate collective bargaining agreements, rates paid to workers on federal public works jobs, other data such as wage survey data, including the nearest labor market area to the public work, or expanded survey as provided in Article 4 of these regulations; or by adopting federal rates which have been obtained by procedures of similar accuracy to ones provided under Article 4 of these regulations.

(2) Other employer payments as defined in Section 16000 of these regulations are included as part of the total hourly wage rate, only if a majority of workers engaged in the particular craft, classification or type of work are receiving such payments. When such employer payments are included as part of the total hourly wage rate, the employer payment rate for the particular craft, classification or type of work shall be determined as follows:

(A) If, among those workers who receive employer payments, a majority receives the same employer payments, then those payments prevail.

(B) If, among those workers who receive employer payments, there is no majority receiving the same employer payments, then the average of the employer payments, weighted by the total employees receiving such payments, is prevailing; or

(C) When federal basic hourly rates have been adopted as provided for in subsection (1), by adopting federal employer payments which have been obtained by procedures of similar accuracy to ones provided under Article 4 of these regulations.

(3) The rate for holiday or overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, holidays and overtime (if any) included with the prevailing basic hourly rate of pay shall be prevailing.

Public Entity. For the purpose of processing requests for inspection of payroll records or furnishing certified copies thereof, "public entity" includes: the body awarding the contracts; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE).

Public Funds. Includes state, local and/or federal monies.

NOTE: Public funds do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body.

Public Works. See Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

Service upon a Contractor or Subcontractor. This is the process defined in Title 8, California Code of Regulations, (CCR) Section 16801(a)(2)(A).

Serve upon the Labor Commissioner. Delivery of all documents including legal process to the Headquarters of the Labor Commissioner.

Sheltered workshop. A nonprofit organization licensed by the Chief of DLSE employing mentally and/or physically handicapped workers.

Wage Survey. An investigation conducted pursuant to Labor Code Sections 1773 and/or 1773.4 to determine the general prevailing rate of per diem wages for the crafts/classifications in the county(ies) for which the survey questionnaire was designed.

Willful. See Labor Code Section 1777.1(d).

Worker. See Labor Code Sections 1723 and 1772.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1191.5, 1720, 1720.2, 1720.3, 1721, 1722, 1722.1, 1723, 1724, 1770, 1771, 1772, 1773.5, 1776, 2750.5, 3071 and 3093, Labor Code; and Section 21002, Public Contract Code.

HISTORY

1. Repealer of group 3 (articles 1–3, sections 16000–16004, 16100–16101 and 16200–16205) and new group 3 (articles 1–4, sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1–3–77 as an emergency; effective upon filing (Register 77, No 2). For prior history, see Register 56, No. 8.
2. New group 3 (sections 16000–16014, 16100–16109, 16200–16207.9) filed 2–8–78; effective thirtieth day thereafter (Register 78, No. 6).
3. Renumbering and amendment of former sections 16000–16006 and 16008–16019 to section 16000; renumbering and amendment of former section 16100 to section 16002; renumbering and amendment of former section 16101 to section 16203; renumbering and amendment of former sections 16102–16105 to section 16200; renumbering and amendment of former section 16106 to section 16206; renumbering and amendment of former sections 16107(a), (b) and (c) to sections 16201, 16202 and 16205; renumbering and amendment of former section 16108 to section 16204; renumbering and amendment of former section 16200 to section 16300; renumbering and amendment of former sections 16007, 16201, 16202, 16204 and 16206 to section 16302; renumbering and amendment of former section 16207 to section 16303; renumbering and amendment of former sections 16207.2 and 16207.3 to section 16304; renumbering and amendment of former section 16207.5 to section 16100; renumbering and amendment of former section 16207.7 to section 16301; renumbering and amendment of former sections 16207.10–16207.14 to section 16400; renumbering and amendment of former sections 16207.15 and 16207.16 to section 16401; renumbering and amendment of former section 16207.17 to section 16402; renumbering and amendment of former section 16207.18 to section 16403; renumbering and amendment of former section 16207.19 to section 16500; repealer of former sections 16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8; and new sections 16001, 16101 and 16102 filed 2–11–86; effective thirtieth day thereafter (Register 86, No. 7). For prior history, see Registers 82, No. 51; 80, No. 6; 79, No. 19; 72, No. 23 and 72, No. 13.
4. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
5. Repealer of definition of "Predetermined Changes" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
6. Amendment of definition of "Prevailing Rate" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).

Article 2. Work Subject to Prevailing Wages

§ 16001. Public Works Subject to Prevailing Wage Law.

(a) General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771.

(1) Any interested party enumerated in Section 16000 of these regulations may file with the Director of Industrial Relations or the Director's duly authorized representative, as set forth in Section 16301 of these regulations, a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code. If such a request is filed by any party other than the awarding body, a copy of the request must be served upon the awarding body, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, when it is filed with the Director.

(2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, any documents, arguments, or authorities it wishes to have considered in the coverage determination process.

(3) All parties to the coverage determination request shall have a continuing duty to provide the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, with relevant documents in their possession or control, until a determination is made. Where any party or parties' agent has a document in their possession, but refuses to release a copy, the Department shall consider that the documents, if released, would contain information adverse to the withholding party's position and may close the record and render a decision on the basis of that inference and the information received.

(b) Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort, unless applicable federal law does not permit payment of state rates in excess of federal prevailing rates.

(c) Field Surveying Projects. Field survey work traditionally covered by collective bargaining agreements is subject to prevailing wage rates when it is integral to the specific public works project in the design, preconstruction, or construction phase.

(d) Residential Projects. Residential projects consisting of single family homes and apartments up to and including four stories are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally-funded or assisted residential projects controlled or carried out by an awarding body, unless applicable federal law does not permit payment of state rates in excess of the residential construction rates determined by the federal Department of Housing and Urban Development.

NOTE: Such projects may require a special determination by the Director which should be requested by the awarding body at least 45 days before the commencement of advertising of the call for bids by the awarding body.

(e) Commercial Projects. All non-residential construction projects including new work, additions, alterations, reconstruction and repairs. Includes residential projects over four stories.

(f) Maintenance. Public works contracts for maintenance are subject to prevailing wage rate payment as set forth in Section 1771 of the Labor Code.

NOTE: See Article 1 for definition of term "maintenance."

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code; and 24 CFR Section 941.503.

HISTORY

1. Amendment of subsection (a) and NOTE and adoption of subsections (a)(1)-(3) and (e) and relettering former subsection (e) to (f) filed 2-20-92; operative 3-23-92 (Register 92, No. 13).
2. Amendment of subsection (b) and (d) and NOTE filed 12-27-96; operative 1-26-97 (Register 96, No. 52).

§ 16002. Coverage of Worker.

The determinations of the Director will cover those crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

NOTE: Authority cited: Sections 1723 and 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3 and 1771, Labor Code.

§ 16002.5. Appeal of Public Work Coverage Determination.

(a) Those interested parties enumerated in Section 16000 of these regulations may appeal to the Director of Industrial Relations or the Director's duly authorized representative as set forth in Section 16301 of these regulations a determination of coverage under the public works laws (Labor Code Section 1720 et seq.) regarding either a specific project or type of work under Section 16001(a) of these regulations. Such notice of appeal must be served within 30 days of the issuance of the coverage determination. The party appealing the determination must, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, give written notification to the awarding body and any other identifiable parties.

(b) The notice of appeal shall state the full factual and legal grounds upon which the determination is appealed, and whether a hearing is desired. The decision to hold a hearing is within the Director's sole discretion. The Director may appoint a hearing officer to conduct the hearing and propose a decision on the appeal. The Director shall make the final decision on the appeal.

(c) The authority of the Director to determine coverage of projects under the prevailing wage laws is quasi-legislative, and a final determination on any appeal is subject to judicial review pursuant to the Code of Civil Procedure, Section 1085.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16003. Requests for Approval of Volunteer Labor.

(a) An awarding body wishing to use volunteer labor on what would otherwise be a public works project, pursuant to Labor Code Section 1720.4 shall serve a written request for approval on the Director, not less than 45 days prior to the commencement of work on the facilities or structures.

(b) The request for approval shall fully set forth the awarding body's grounds for belief that the requirements of Labor Code Section 1720.4(a), (b), and (c) are satisfied, and shall list all the crafts and classifications of workers that typically perform the types of work needed for the project.

(c) The request for approval shall identify the unions which represent workers in the crafts or classifications listed in (b) within the locality in which the public work is performed.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1720.4, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Article 3. Duties, Responsibilities, and Rights of Parties

§ 16100. Duties, Responsibilities and Rights.

The parties listed in this section must comply with the provisions of the Labor Code applicable to the payment of prevailing wages on public works contracts.

(a) Department and Division Authority in Prevailing Wage Issues. The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the Division of Labor Standards Enforcement. The lead agency for the coordination on apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by the law or these regulations.

(b) The Awarding Body shall:

(1) Obtain the prevailing wage rate from the Director in accordance with Labor Code Sections 1771 and 1773.

(2) Specify the appropriate prevailing wage rates, in accordance with Labor Code Sections 1773.2 and 1777.5.

(A) The posting requirement is applicable for each job site.

EXCEPTION: If more than one worksite exists on any project, then the applicable rates may be posted at a single location which is readily available to all workers.

(B) If a wage rate for a craft, classification or type of worker is not published in the Director's general prevailing wage determinations, a request for a special determination should be made by the awarding body to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, at least 45 days prior to the project bid advertisement date.

(3) Notify DAS. See Labor Code Section 1773.3.

(4) Inform prime contractors, to the extent feasible, of relevant public work requirements:

NOTE: Requirement information may be disseminated at a preacceptance of bid conference or in a call for bids or at an award of bid conference.

The public works requirements are:

(A) the appropriate number of apprentices are on the job site, as set forth in Labor Code Section 1777.5.

(B) worker's compensation coverage, as set forth in Labor Code Sections 1860 and 1861.

(C) keep accurate records of the work performed on the public works project, as set forth in Labor Code Section 1812.

(D) inspection of payroll records pursuant to Labor Code Section 1776, and as set forth in Section 16400 (e) of these regulations.

(E) and other requirements imposed by law.

(5) Withhold monies. See Labor Code Section 1727.

(6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771.

(7) Deny the right to bid on public work contracts to contractors or subcontractors who have violated public work laws, as set forth in Labor Code Section 1777.7.

(8) Not permit workers on public works to work more than eight hours a day or 40 hours in any one calendar week, unless compensated at not less than time and a half as set forth in Labor Code Section 1815.

EXCEPTION: If the prevailing wage determination requires a higher rate of pay for overtime work than is required under Labor Code Section 1815, then that higher overtime rate must be paid [, as specified in subsection 16200(a)(3)(F) of these regulations.]

(9) Not take or receive any portion of the workers' wages or accept a fee in connection with a public works project, as set forth in Labor Code Sections 1778 and 1779.

(10) Comply with those requirements as specified in Labor Code Sections 1776(g), 1777.5, 1810, 1813, and 1860.

(c) Contractor–subcontractor.

The contractor and subcontractor shall:

(1) Pay not less than the prevailing wage to all workers, as defined in Section 16000(a) of these regulations, and as set forth in Labor Code Sections 1771 and 1774;

(2) Comply with the provisions of Labor Code Sections 1773.5, 1775, and 1777.5 regarding public works jobsites;

(3) Provide workers' compensation coverage as set forth in Labor Code Section 1861;

(4) Comply with Labor Code Sections 1778 and 1779 regarding receiving a portion of wages or acceptance of a fee;

(5) Maintain and make available for inspection payroll records, as set forth in Labor Code Section 1776;

(6) Pay workers overtime pay, as set forth in Labor Code Section 1815 or as provided in the collective bargaining agreement adopted by the Director as set forth in Section 16200 (a) (3) of these regulations; and

(7) Comply with Section 16101 of these regulations regarding discrimination.

(8) Be subject to provisions of Labor Code Section 1777.7 which specifies the penalties imposed on a contractor who willfully fails to comply with provisions of Section 1777.5.

(9) Comply with those requirements as specified in Labor Code Sections 1810 and 1813.

(10) Comply with other requirements imposed by law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1726, 1727, 1728, 1729, 1770, 1771, 1773, 1773.2, 1773.3, 1773.4, 1773.5, 1774, 1775, 1776, 1777.5, 1777.7, 1778, 1779, 1810, 1811, 1812, 1813, 1815, 1860 and 1861, Labor Code.

HISTORY

1. Amendment of subsection (b)(2)(B) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16101. Discrimination.

See Labor Code Sections 1735, 1777.5, 1777.6, and 3077.5.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1735, 1777.5, 1777.6 and 3077.5, Labor Code.

§ 16102. Interested Party.

An interested party, as defined in Section 16000 of these regulations, may be a source of wage data information, as provided in Section 16200(e) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

Article 4. Wage Determinations

§ 16200. General; Basis for Determining Prevailing Wage Rate.

The Director shall follow those procedures specified in Sections 1773 and 1777.5 of the Labor Code and in these regulations when making a prevailing wage determination.

(a) Collective Bargaining Agreements or Wage Surveys.

(1) Filing of collective bargaining agreements.

(A) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all their collective bargaining agreements, including any and all addenda which modify the agreements, within 10 days of their execution and shall be considered as the basis for a prevailing wage determination whenever on file 30 days before the call for bids on a project.

(B) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code, and Section 16200(a)(1)(A) of these regulations shall be addressed to: Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142.

(C) Collective bargaining agreements filed with the Division of Labor Statistics and Research must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

1. certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or photocopy thereof, or a printed copy of a fully executed agreement showing the names of the signatory parties, except in the case of a printed agreement the Director may require certification;

2. names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement;

3. names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

4. provides the number of workers currently employed under the terms of the agreement and, if practicable, the number of workers in each county within the jurisdiction of the signatory local union or unions;

5. provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

(D) Copies of collective bargaining agreements which are not bona fide shall not be deemed filed. The party filing a contract may be asked to substantiate the assertion that such collective bargaining agreement is bona fide.

(2) Criteria for using collective bargaining agreement wage rates as basis of prevailing wage determinations. Before accepting the collective bargaining agreement wage rate for the applicable craft and locality, DLSR shall take the following factors into consideration:

(A) The geographical area(s) specified in the agreement;

(B) The number of workers covered by the agreement;

(C) If signatory parties to the agreement have workers in the geographical area(s);

(D) If work has been performed in the geographical area(s) specified in the agreement in the past 12 months;

The wage rates determined by the federal government as set forth in section 16200(b).

(3) Adoption of Collective Bargaining Agreements or Wage Surveys.

(A) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for each craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate. Only those rates and employer payments specifically enumerated in the definition of "general prevailing rate of per diem wages" in Section 16000 shall be included in the rate adopted.

NOTE: A statement must be filed with the Director for any adjustments made to a contract which are not contained in the agreement currently on file with DLSR.

(B) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other rele- changes which will affect the prevailing wage rate adopted by the ctor. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

(C) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications may be considered.

(D) Holidays. Holidays specifically named in the collective bargaining agreement or determined by wage surveys shall be included in the w determination. Overtime pay may be required as provided in Sec- 5200(a)(3)(E) of these regulations.

) Overtime. Overtime will be paid as indicated in the wage determi- n.

XCEPTION: 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION: 2: If the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION: 3: If the awarding body determines that work cannot be performed during normal business hours or work is necessary at off hours to avoid danger to life or property, no overtime is required for the first eight hours in any one calendar day, and 40 hours during any one calendar week.

EPTION: 4: No overtime payment is required for less than 40 hours in a stan- work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

(F) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(H) of these regulations.

(G) Rates for helpers. Rates for helpers will be published when the in- ation available to the Director indicates that a practice of using such oclassification prevails in a particular area, such as contained in a collective bargaining agreement, and within the parameters of the applicable llective bargaining agreement. In the absence of such determination, helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor from the 1-5 apprentice-journeyman ratio requirements set forth in Labor Code Section 1777.5.

(H) Credit Available For Actual Payment of Fringe Benefit Costs up to the Prevailing Amount. The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)-(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

(b) Federal Rates and Surveys. In reviewing rates predetermined for federal public works, the Director shall consider those rates published pursuant to the Davis-Bacon Act. For purposes of establishing state prevailing wage rates, the Director may, in his or her discretion, adopt the results of wage surveys conducted by the United States Department of Labor in lieu of conducting separate state surveys.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

NOTE: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12-month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(4) the location of the project;

(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(6) the type of construction (e.g. residential, commercial building, etc.);

(7) the approximate cost of construction;

(8) the beginning date and completion date, or estimated completion date of the project;

(9) the source of data (e.g. "payroll records");

(10) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

NOTE: Authority cited: Sections 1773 and 1773.5, Labor Code. Reference: Sections 1770, 1771, 1773, 1773.1, 1773.5, 1773.8, 1777.5, 1810 and 1815, Labor Code.

HISTORY

1. Order of Repeal of subsection (a)(3)(E) filed 8–24–88 by OAL pursuant to Government Code section 11340.15 (Register 88, No. 35).
2. Amendment of subsections (a)(1), (a)(3) and (b) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
3. Repealer of subsection (a)(3)(B), subsection relettering, and amendment of newly designated subsections (a)(3)(B), (a)(3)(D), and (a)(3)(F)(3) filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
4. Amendment of subsection (b) filed 12–27–96; operative 1–26–97 (Register 96, No. 52).

§ 16201. General Area Determinations.

When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout an area, the Director shall issue a determination enumerated county by county, but covering the entire area. Such determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.

NOTE: General determinations are usually issued on a quarterly basis. However, the Director may issue an interim wage determination following the procedures set forth in Section 1773 of the Labor Code, and in these regulations. See Section 16000 as to issue date, and Section 16204 as to effective date of determination. The general determination usually applies where a collective bargaining agreement has been filed and adopted as the prevailing wage rate.

NOTE: Authority cited: Sections 1773.5 and 1773.6, Labor Code. Reference: Section 1773, Labor Code.

§ 16202. Special Determinations.

(a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

(b) Department of Industrial Relations initiated determination. Where an awarding body does not specify the prevailing wage rate as set forth in Labor Code Section 1773.2, any interested party (as defined in Section 16000 of these regulations) may petition the Director as set forth in Labor Code Section 1773.4 and Section 16302 of these regulations. The Labor Commissioner may, prior to the letting of the bid, request such a determination of the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.4, Labor Code.

§ 16203. Format.

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight–time hourly wage rate.

(2) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workers employed on the project, which is on file with the Director of Industrial Relations."

(3) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16000 of these regulations.

(4) The following statement when applicable. "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8."

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) The applicability of the apprentice rate of per diem wages shall be indicated and furnished upon request.

(d) The dates between which the applicable rate shall be paid for work performed in those periods shall be indicated.

(e) As a supplement to each determination the Director shall make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.5, Labor Code.

§ 16204. Effective Dates of Determination and of Rates Within Determination.

(a) Effective Date of Determination.

(1) All determinations issued will be effective ten (10) days after issuance, provided that requests for copies, reprints or reissuance of prior determinations shall not affect the original effective date unless a new effective date is reflected upon the determination (see subdivision (3) below). Any call for bids put out on or after the effective date of the determination must reflect that determination unless the Director determines that subdivision (4) of this section is applicable, after notification and request by an awarding body.

(2) Determinations issued by the Director will show an issue date and will ordinarily show an expiration date.

(3) All determinations will remain in effect until their expiration date or until modified, corrected, rescinded or superseded by the Director. New determinations are not applicable to contracts upon which the notice to bidders has been published, unless the determination is issued pursuant to Labor Code Section 1773.4.

(4) Determinations modified, corrected, rescinded or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which a call for bids takes place less than 30 days after the filing of the agreement.

NOTE: See Section 1773.1 of the Labor Code.

(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

(b) No Adoption of Predetermined Changes in Collective Bargaining Agreements. The rate fixed for each craft, classification, or type of worker as prevailing in a determination shall remain in effect for the life of the project. When the rate is based on a collective bargaining agreement, it does not include predetermined changes in the basic hourly wages, overtime, holiday pay rates, or amounts of employer payments, even if known and enumerated in the applicable collective bargaining agreement.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773, 1773.1, 1773.4 and 1773.6, Labor Code.

HISTORY

1. Amendment of subsections (a)(3) and (b) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
2. Amendment of subsection (a)(3), repealer and new subsection (b) and amendment of NOTE filed 12–27–96; operative 1–26–97 (Register 96, No. 52).

§ 16205. Procedures for Obtaining Prevailing Wage Determinations.

An awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that

a special or general prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142. All requests for special prevailing wage determinations must be confirmed in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of workers for which a determination is needed.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

HISTORY

1. Amendment filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16206. Corrections.

Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination. The Director may correct any error issued in a determination by reissuing such determination.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

Article 5. Petitions to Review Prevailing Wage Determinations

§ 16300. Delegation of Authority.

(a) The Chief of DLSR is the authorized representative of the Director for the purpose of:

(1) Receiving collective bargaining agreements and other documents and papers pertaining to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations;

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§ 16000

§ 16001

§ 16200

§ 16204

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ed, and after consideration of such exceptions the director shall d. that the exceptions to the report of the service do raise substantial and material factual issues, he shall direct the hearing officer to issue a notice of hearing, whereupon the procedures for a hearing and the issuance of the hearing officer's report provided for in subsection (e) of this section (including the provision for filing exceptions to the hearing officer's report) shall be followed. The director may adopt the recommendations of the hearing officer issued under subsection (d) or the report of the hearing officer issued under subsection (e) as his own. The service shall thereafter promptly proceed to take such action as may be called for by the decision of the director, after which the proceedings will be closed.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875. Runoff Elections.

(a) The service shall conduct a runoff election, without further order of director, when an election in which a ballot providing for not less th. ree choices (i.e. at least two representatives and "neither" or "none") results in no choice receiving a majority of the valid ballots cast, which runoff election shall be held promptly following final disposition of any challenges, objections or exceptions which followed the prior election as provided in Section 15870. Only one runoff election shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are em d in an eligible category on the date of the runoff election shall be ly employees eligible to vote in the runoff election.

The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and "neither" or "none" is equally divided among the several choices, or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the director shall declare the first election a nullity and shall conduct another election among the three c s which received the greatest number of ballots in the original election. rovided that in the event there was a tie in the original election between the third and fourth choices or among the third, fourth and other choices, the director shall in the runoff election include on the ballot all such tied choices. In the event two or more choices receive the same number of ballots, and if either (1) there are no challenged ballots which would affect the results of the election, or (2) after all challenges have been disposed of it is found that all eligible voters have cast valid ballots, there shall be no runoff election and the petition shall be dismissed. Only one such further election pursuant to this subsection (d) may be held.

(e) The provisions of Section 15870 above shall be applicable to a runoff election.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No.

§ 15875.1. Relevant Federal Law.

esolving questions of representation, the Director shall apply the nt federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. New section filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 2.3. Election Procedure Under San Francisco Bay Area Rapid Transit District Law

NOTE: Authority cited for Group 2.3: Section 54, Labor Code and Section 28851, Public Utilities Code.

HISTORY

1. New Group 2.3 (§§ 15900–15926) filed 1–5–73; effective thirtieth day thereafter (Register 73, No. 1).
2. Repealer of Group 2.3 (Sections 15900–15926) filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 3. Payment of Prevailing Wages upon Public Works

Article 1. Definitions

§ 16000. Definitions.

The following terms are defined for general use in these regulations within Group 3, Payment of Prevailing Wages Upon Public Works and Group 4, Awarding Body Labor Compliance Programs:

Area of Determination. The area of determining the prevailing wage is the "locality" and/or the "nearest labor market area" as determined by the Director. In determining the area, the mobility of each craft, classification and type of work will be considered.

Awarding body. Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.

Bid. Any proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind.

Certified. The affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

Chief of DAS. Chief of Division of Apprenticeship Standards or a duly authorized representative.

Chief of DLSE/Labor Commissioner. Chief of the Division of Labor Standards Enforcement or a duly authorized representative.

Chief of DLSR. Chief of the Division of Labor Statistics and Research or a duly authorized representative.

Coverage. This means being subject to the requirements of Part 7, Chapter 1 of the Labor Code as a "public work." This includes all formal coverage determinations issued by the Director of Industrial Relations.

DAS. Division of Apprenticeship Standards.

Date of Notice or Call for Bids. The date the first notice inviting bids was published in a newspaper of general circulation or promulgated in a legally sufficient manner which results in a contract being awarded with or without competitive bidding. This may also be referred to as the Bid Advertisement Date.

Days. Unless otherwise specified means calendar days.

DLSE. The Division of Labor Standards Enforcement.

DLSR. The Division of Labor Statistics and Research.

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Effective Date. The date upon which the determinations of the Director go into effect. This date is ten days after the issue date of the determination.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

Expiration Date. The date upon which the determinations of the Director are subject to change.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight-time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. In-

ited Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Helper. Any subjourneyman classification traditionally used to assist a journeyman. Under no circumstance may the Helper classification be used to replace statutorily required Apprentices.

Identify or Give Notice of Identity. This means to state the name, job title, address and current telephone number of a person or entity.

Interim Determination. Those determinations of the Director issued between the quarterly updates.

Issue Date–Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

LCP. A labor compliance program initiated and enforced by an awarding body in accordance with these regulations.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded.

Mistake, Inadvertence, or Neglect. Mistake, inadvertence, or neglect in failing to pay the correct general rate of per diem wages means the lack of knowledge that any reasonable person would also be expected to have under the same or similar circumstances.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Predetermined Changes. Definite changes to the basic hourly wage rate, overtime, holiday pay rates, and employer payments which are known and enumerated in the applicable collective bargaining agreement

it ' ie of the bid advertisement date and which are referenced in the ic. prevailing rate of per diem wages as defined in Section 16000 of nese regulations. Contractors are obligated to pay up to the amount that vas predetermined if these changes are modified prior to their effective ate. Predetermined changes which are rescinded prior to their effective ate shall not be enforced.

Prevailing Rate. Includes:

(1) The basic hourly rate being paid to a majority of workers engaged i the particular craft, classification or type of work within the locality nd in the nearest labor market area, if a majority of such workers is paid : a single rate; if there is no single rate being paid to a majority, then the ngle rate (modal rate) being paid to the greater number of workers is revailing. If there is no modal rate, then an alternate rate will be estabshed by considering the appropriate collective bargaining agreements, ederal rates or other data such as wage survey data, including the nearest bor market area, or expanded survey as provided in Article 4 of these gulations;

(2) Other employer payments as defined in Section 16000 of these regations and as included as part of the total hourly wage rate, from which e prevailing basic hourly wage rate was derived. In the event the total ourly wage rate does not include any employer payments, then the Di- cl y establish a prevailing employer payment rate by the same pro- edure outlined in subsection (1) above.

(3) The rate for holiday or overtime work shall be those rates specified the collective bargaining agreement when the basic hourly rate is based i a collective bargaining agreement rate. In the event the basic hourly te is not based on a collective bargaining agreement, holidays and over- me (if any) included with the prevailing basic hourly rate of pay shall e prevailing.

P Entity. For the purpose of processing requests for inspection of ayr cords or furnishing certified copies thereof, "public entity" in- u e body awarding the contracts; the Division of Apprenticeship ai s (DAS), or the Division of Labor Standards Enforcement DLSE).

Public Funds. Includes state, local and/or federal monies.

OTE: Public funds do not include money loaned to a private entity where work to be performed under private contract, and where no portion of the work is su- rvised, owned, utilized, or managed by an awarding body.

Public Works. See Sections 1720, 1720.2, 1720.3, and 1771 of the La- or Code.

Service upon a Contractor or Subcontractor. This is the process de- ne Title 8, California Code of Regulations, (CCR) Section 58((2)(A).

Serve upon the Labor Commissioner. Delivery of all documents in- uding legal process to the Headquarters of the Labor Commissioner.

Sheltered workshop. A nonprofit organization licensed by the Chief DLSE employing mentally and/or physically handicapped workers.

Wage Survey. An investigation conducted pursuant to Labor Code ections 1773 and/or 1773.4 to determine the general prevailing rate of r diem wages for the crafts/classifications in the county(ies) for which e survey questionnaire was designed.

Willful. See Labor Code Section 1777.1(d).

Worker. See Labor Code Sections 1723 and 1772.

OTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1191.5, 20, 1720.2, 1720.3, 1721, 1722, 1722.1, 1723, 1724, 1770, 1771, 1772, 1773.5, 76, 2750.5, 3071 and 3093, Labor Code; and Section 21002, Public Contract ode.

HISTORY

Repealer of group 3 (articles 1–3, sections 16000–16004, 16100–16101 and 16200–16205) and new group 3 (articles 1–4, sections 16000–16013, If 16109, 16200–16206 and 16300–16305) filed 1–3–77 as an emergen- cy tive upon filing (Register 77, No 2). For prior history, see Register 56, No. .

New group 3 (sections 16000–16014, 16100–16109, 16200–16207.9) filed ; effective thirtieth day thereafter (Register 78, No. 6).

mbering and amendment of former sections 16000–16006 and 16008–16019 to section 16000; renumbering and amendment of former section 16100 to section 16002; renumbering and amendment of former section 16101 to section 16203; renumbering and amendment of former sections 16102–16105 to section 16200; renumbering and amendment of former section 16106 to section 16206; renumbering and amendment of former sections 16107(a), (b) and (c) to sections 16201, 16202 and 16205; renumbering and amendment of former section 16108 to section 16204; renumbering and amendment of former section 16200 to section 16300; renumbering and amendment of former sections 16007, 16201, 16202, 16204 and 16206 to section 16302; renumbering and amendment of former section 16207 to section 16303; renumbering and amendment of former sections 16207.2 and 16207.3 to section 16304; renumbering and amendment of former section 16207.5 to section 16100; renumbering and amendment of former section 16207.7 to section 16301; renumbering and amendment of former sections 16207.10–16207.14 to section 16400; renumbering and amendment of former sections 16207.15 and 16207.16 to section 16401; renumbering and amendment of former section 16207.17 to section 16402; renumbering and amendment of former section 16207.18 to section 16403; renumbering and amendment of former section 16207.19 to section 16500; repealer of former sections 16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8; and new sections 16001, 16101 and 16102 filed 2–11–86; effective thirtieth day thereafter (Register 86, No. 7). For prior history, see Registers 82, No. 51; 80, No. 6; 79, No. 19; 72, No. 23 and 72, No. 13.

4. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
5. Repealer of definition of "Predetermined Changes" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
6. Amendment of definition of "Prevailing Rate" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
7. Change without regulatory effect restoring definition of "Predetermined Changes" and repealing amendments to definition of "Prevailing Rate" filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

Article 2. Work Subject to Prevailing Wages

§ 16001. Public Works Subject to Prevailing Wage Law.

(a) General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771.

(1) Any interested party enumerated in Section 16000 of these regulations may file with the Director of Industrial Relations or the Director's duly authorized representative, as set forth in Section 16301 of these regulations, a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code. If such a request is filed by any party other than the awarding body, a copy of the request must be served upon the awarding body, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, when it is filed with the Director.

(2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, any documents, arguments, or authorities it wishes to have considered in the coverage determination process.

(3) All parties to the coverage determination request shall have a continuing duty to provide the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, with relevant documents in their possession or control, until a determination is made. Where any party or parties' agent has a document in their possession, but refuses to release a copy, the Department shall consider that the documents, if released, would contain information adverse to the withholding party's position and may close the record and render a decision on the basis of that inference and the information received.

(b) Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

(c) Field Surveying Projects. Field survey work traditionally covered by collective bargaining agreements is subject to prevailing wage rates when it is integral to the specific public works project in the design, preconstruction, or construction phase.

(d) Residential Projects. Residential projects consisting of single family homes and apartments up to and including four stories are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally-funded or assisted residential projects controlled or carried out by an awarding body.

NOTE: Such projects may require a special determination by the Director which should be requested by the awarding body at least 45 days before the commencement of advertising of the call for bids by the awarding body.

(e) Commercial Projects. All non-residential construction projects including new work, additions, alterations, reconstruction and repairs. Includes residential projects over four stories.

(f) Maintenance. Public works contracts for maintenance are subject to prevailing wage rate payment as set forth in Section 1771 of the Labor Code.

NOTE: See Article 1 for definition of term "maintenance."

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. Amendment of subsection (a) and NOTE and adoption of subsections (a)(1)-(3) and (c) and relettering former subsection (c) to (f) filed 2-20-92; operative 3-23-92 (Register 92, No. 13).
2. Amendment of subsection (b) and (d) and NOTE filed 12-27-96; operative 1-26-97 (Register 96, No. 52).
3. Change without regulatory effect repealing amendments to subsections (b) and (d) and NOTE filed 2-19-99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6-4-97 in Case 97CS 00471 the amendments filed 12-27-96 and effective 1-27-97 were invalidated and the prior regulations were reinstated.

§ 16002. Coverage of Worker.

The determinations of the Director will cover those crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

NOTE: Authority cited: Sections 1723 and 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3 and 1771, Labor Code.

§ 16002.5. Appeal of Public Work Coverage Determination.

(a) Those interested parties enumerated in Section 16000 of these regulations may appeal to the Director of Industrial Relations or the Director's duly authorized representative as set forth in Section 16301 of these regulations a determination of coverage under the public works laws (Labor Code Section 1720 et seq.) regarding either a specific project or type of work under Section 16001(a) of these regulations. Such notice of appeal must be served within 30 days of the issuance of the coverage determination. The party appealing the determination must, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, give written notification to the awarding body and any other identifiable parties.

(b) The notice of appeal shall state the full factual and legal grounds upon which the determination is appealed, and whether a hearing is desired. The decision to hold a hearing is within the Director's sole discretion. The Director may appoint a hearing officer to conduct the hearing and propose a decision on the appeal. The Director shall make the final decision on the appeal.

(c) The authority of the Director to determine coverage of projects under the prevailing wage laws is quasi-legislative, and a final determination on any appeal is subject to judicial review pursuant to the Code of Civil Procedure, Section 1085.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16003. Requests for Approval of Volunteer Labor.

(a) An awarding body wishing to use volunteer labor on what would otherwise be a public works project, pursuant to Labor Code Section 1720.4 shall serve a written request for approval on the Director, not less than 45 days prior to the commencement of work on the facilities or structures.

(b) The request for approval shall fully set forth the awarding body's grounds for belief that the requirements of Labor Code Section 1720.4(a), (b), and (c) are satisfied, and shall list all the crafts and classifications of workers that typically perform the types of work needed for the project.

(c) The request for approval shall identify the unions which represent workers in the crafts or classifications listed in (b) within the locality in which the public work is performed.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1720.4, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Article 3. Duties, Responsibilities, and Rights of Parties

§ 16100. Duties, Responsibilities and Rights.

The parties listed in this section must comply with the provisions of the Labor Code applicable to the payment of prevailing wages on public works contracts.

(a) Department and Division Authority in Prevailing Wage Issues. The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the Division of Labor Standards Enforcement. The lead agency for the coordination on apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by the law or these regulations.

(b) The Awarding Body shall:

(1) Obtain the prevailing wage rate from the Director in accordance with Labor Code Sections 1771 and 1773.

(2) Specify the appropriate prevailing wage rates, in accordance with Labor Code Sections 1773.2 and 1777.5.

(A) The posting requirement is applicable for each job site.

EXCEPTION: If more than one worksite exists on any project, then the applicable rates may be posted at a single location which is readily available to all workers.

(B) If a wage rate for a craft, classification or type of worker is not published in the Director's general prevailing wage determinations, a request for a special determination should be made by the awarding body to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, at least 45 days prior to the project bid advertisement date.

(3) Notify DAS. See Labor Code Section 1773.3.

(4) Inform prime contractors, to the extent feasible, of relevant public work requirements:

NOTE: Requirement information may be disseminated at a preacceptance of bid conference or in a call for bids or at an award of bid conference.

The public works requirements are:

(A) the appropriate number of apprentices are on the job site, as set forth in Labor Code Section 1777.5.

(B) worker's compensation coverage, as set forth in Labor Code Sections 1860 and 1861.

(C) keep accurate records of the work performed on the public works project, as set forth in Labor Code Section 1812.

(D) inspection of payroll records pursuant to Labor Code Section 1776, and as set forth in Section 16400 (e) of these regulations.

(E) and other requirements imposed by law.

(5) Withhold monies. See Labor Code Section 1727.

(6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771.

') Deny the right to bid on public work contracts to contractors or subcontractors who have violated public work laws, as set forth in Labor Code Section 1777.7.

(8) Not permit workers on public works to work more than eight hours a day or 40 hours in any one calendar week, unless compensated at not less than time and a half as set forth in Labor Code Section 1815.

EXCEPTION: If the prevailing wage determination requires a higher rate of pay for overtime work than is required under Labor Code Section 1815, then that higher overtime rate must be paid [, as specified in subsection 16200(a)(3)(F) of these regulations.]

(9) Not take or receive any portion of the workers' wages or accept a fee in connection with a public works project, as set forth in Labor Code Sections 1778 and 1779.

(10) Comply with those requirements as specified in Labor Code Sections 1776(g), 1777.5, 1810, 1813, and 1860.

(c) Contractor–subcontractor.

The contractor and subcontractor shall:

(1) Pay not less than the prevailing wage to all workers, as defined in Section 16000(a) of these regulations, and as set forth in Labor Code Sections 1771 and 1774;

(2) Comply with the provisions of Labor Code Sections 1773.5, 1775, [1777.5 regarding public works jobsites;

(3) Provide workers' compensation coverage as set forth in Labor Code Section 1861;

(4) Comply with Labor Code Sections 1778 and 1779 regarding receiving a portion of wages or acceptance of a fee;

(5) Maintain and make available for inspection payroll records, as set forth in Labor Code Section 1776;

(6) Pay workers overtime pay, as set forth in Labor Code Section 1815 [provided in the collective bargaining agreement adopted by the Director as set forth in Section 16200 (a) (3) of these regulations; and

7) Comply with Section 16101 of these regulations regarding discrimination.

(8) Be subject to provisions of Labor Code Section 1777.7 which specifies the penalties imposed on a contractor who willfully fails to comply with provisions of Section 1777.5.

(9) Comply with those requirements as specified in Labor Code Sections 1810 and 1813.

(10) Comply with other requirements imposed by law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1726, 1727, 1728, 1729, 1770, 1771, 1773, 1773.2, 1773.3, 1773.4, 1773.5, 1774, 1775, 1776, 1777.5, 1777.7, 1778, 1779, 1810, 1811, 1812, [], 1815, 1860 and 1861, Labor Code.

HISTORY

1. Amendment of subsection (b)(2)(B) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16101. Discrimination.

See Labor Code Sections 1735, 1777.5, 1777.6, and 3077.5.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1735, 1777.5, 1777.6 and 3077.5, Labor Code.

§ 16102. Interested Party.

An interested party, as defined in Section 16000 of these regulations, may be a source of wage data information, as provided in Section 16200(e) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

Article 4. Wage Determinations

16200. General; Basis for Determining Prevailing Wage Rate.

The Director shall follow those procedures specified in Sections 1773 [1777.5 of the Labor Code and in these regulations when making a prevailing wage determination.

(a) Collective Bargaining Agreements or Wage Surveys.

(1) Filing of collective bargaining agreements.

(A) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all their collective bargaining agreements, including any and all addenda which modify the agreements, within 10 days of their execution and shall be considered as the basis for a prevailing wage determination whenever on file 30 days before the call for bids on a project.

(B) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code, and Section 16200(a)(1)(A) of these regulations shall be addressed to: Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142.

(C) Collective bargaining agreements filed with the Division of Labor Statistics and Research must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

1. certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or photocopy thereof, or a printed copy of a fully executed agreement showing the names of the signatory parties, except in the case of a printed agreement the Director may require certification;

2. names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement;

3. names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

4. provides the number of workers currently employed under the terms of the agreement and, if practicable, the number of workers in each county within the jurisdiction of the signatory local union or unions;

5. provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

(D) Copies of collective bargaining agreements which are not bona fide shall not be deemed filed. The party filing a contract may be asked to substantiate the assertion that such collective bargaining agreement is bona fide.

(2) Criteria for using collective bargaining agreement wage rates as basis of prevailing wage determinations. Before accepting the collective bargaining agreement wage rate for the applicable craft and locality, DLSR shall take the following factors into consideration:

(A) The geographical area(s) specified in the agreement;

(B) The number of workers covered by the agreement;

(C) If signatory parties to the agreement have workers in the geographical area(s);

(D) If work has been performed in the geographical area(s) specified in the agreement in the past 12 months;

(E) The wage rates determined by the federal government as set forth in Section 16200(b).

(3) Adoption of Collective Bargaining Agreements.

(A) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for each craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate. Only those rates and employer payments specifically enumerated in the definition of "general prevailing rate of per diem wages" in Section 16000 shall be included in the rate adopted.

(B) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director shall incorporate such changes in the determination.

NOTE: A statement must be filed with the Director for any adjustments made to a contract which are not contained in the agreement currently on file with DLSR.

(C) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

(D) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications may be considered.

(E) Holidays. Holidays specifically named in the collective bargaining agreement or determined by wage surveys shall be included in the wage determination. Overtime pay may be required as provided in Section 16200(a)(3)(F) of these regulations.

(F) Overtime. Overtime will be paid as indicated in the wage determination.

EXCEPTION 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 2: If the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 3: If the awarding body determines that work cannot be performed during normal business hours or work is necessary at off hours to avoid danger to life or property, no overtime is required for the first eight hours in any one calendar day, and 40 hours during any one calendar week.

EXCEPTION 4: No overtime payment is required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

(G) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(I) of these regulations.

(H) Rates for helpers. Rates for helpers will be published when the information available to the Director indicates that a practice of using such a subclassification prevails in a particular area, such as contained in a collective bargaining agreement, and within the parameters of the applicable collective bargaining agreement. In the absence of such determination, the helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor from the 1-5 apprentice-journeyman ratio requirements set forth in Labor Code Section 1777.5.

(I) Credit Available For Actual Payment of Fringe Benefit Costs up to the Prevailing Amount. The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)-(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

(b) Federal Rates. In reviewing rates predetermined for federal public works, the Director will consider those rates published pursuant to the Davis-Bacon Act.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

NOTE: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12-month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(4) the location of the project;

(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(6) the type of construction (e.g. residential, commercial building, etc.);

(7) the approximate cost of construction;

(8) the beginning date and completion date, or estimated completion date of the project;

(9) the source of data (e.g. "payroll records");

(10) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

NOTE: Authority cited: Sections 1773 and 1773.5, Labor Code. Reference: Sections 1770, 1771, 1773, 1773.1, 1773.5, 1773.8, 1777.5, 1810 and 1815, Labor Code.

History

...der of Repeal of subsection (a)(3)(E) filed 8-24-88 by OAL pursuant to Government Code section 11340.15 (Register 88, No. 35).

2. Amendment of subsections (a)(1), (a)(3) and (b) filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

3. Repealer of subsection (a)(3)(B), subsection relettering, and amendment of newly designated subsections (a)(3)(B), (a)(3)(D), and (a)(3)(F)(3) filed 12-27-96; operative 1-26-97 (Register 96, No. 52).

4. Amendment of subsection (b) filed 12-27-96; operative 1-26-97 (Register 96, No. 52).

5. Change without regulatory effect repealing 12-27-96 amendments filed 2-19-99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6-4-97 in Case 97CS 00471 the amendments filed 12-27-96 and effective 1-27-97 were invalidated and the prior regulations were reinstated.

§ 16201. General Area Determinations.

When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout an area, the Director shall issue a determination enumerated county by county, but covering the entire area. Such determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public ... is performed within that county or counties except as the geograph... plication of the determination may be specifically limited by the determination itself.

Note: General determinations are usually issued on a quarterly basis. However, the Director may issue an interim wage determination following the procedures set forth in Section 1773 of the Labor Code, and in these regulations. See Section 16000 as to issue date, and Section 16204 as to effective date of determination. The general determination usually applies where a collective bargaining agreement has been filed and adopted as the prevailing wage rate.

Note: Authority cited: Sections 1773.5 and 1773.6, Labor Code. Reference: Sec... 773, Labor Code.

...202. Special Determinations.

... Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

(b) Department of Industrial Relations initiated determination. Where an awarding body does not specify the prevailing wage rate as set forth in Labor Code Section 1773.2, any interested party (as defined in Section 16000 of these regulations) may petition the Director as set forth in Labor Code Section 1773.4 and Section 16302 of these regulations. The Labor ... missioner may, prior to the letting of the bid, request such a determi...on of the Director.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.4, Labor Code.

§ 16203. Format.

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workers employed on the project, which is on file with the Director of Industrial Relations."

(3) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the ... Code and enumerated in Section 16000 of these regulations.

... The following statement when applicable. "The contractor shall make travel and subsistence payments to each worker needed to execute ... work, as such travel and subsistence payments are defined in the ...icable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8."

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) The applicability of the apprentice rate of per diem wages shall be indicated and furnished upon request.

(d) The dates between which the applicable rate shall be paid for work performed in those periods shall be indicated.

(e) As a supplement to each determination the Director shall make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.5, Labor Code.

§ 16204. Effective Dates of Determination and of Rates Within Determination.

(a) Effective Date of Determination.

(1) All determinations issued will be effective ten (10) days afte... issuance, provided that requests for copies, reprints or reissuance of prior determinations shall not affect the original effective date unless a new effective date is reflected upon the determination (see subdivision (3) below). Any call for bids put out on or after the effective date of the determination must reflect that determination unless the Director determines that subdivision (4) of this section is applicable, after notification and request by an awarding body.

(2) Determinations issued by the Director will show an issue date and will ordinarily show an expiration date.

(3) All determinations will remain in effect until their expiration date or until modified, corrected, rescinded or superseded by the Director.

(4) Determinations modified, corrected, rescinded or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which a call for bids takes place less than 30 days after the filing of the agreement.

Note: See Section 1773.1 of the Labor Code.

(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

(b) Modification of Effective Date of Determination by Asterisks. Meaning of single and double asterisks. Prevailing wage determinations with a single asterisk (*) after the expiration date which are in effect on the date of advertisement for bids remain in effect for the life of the project. Prevailing wage determinations with double asterisks (**) after the expiration date indicate that the basic hourly wage rate, overtime and holiday pay rates, and employer payments to be paid for work performed after this date have been predetermined. If work is to extend past this date, the new rate must be paid and should be incorporated in contracts entered into now. The contractor should contact the Prevailing Wage Unit, DLSR, or the awarding body to obtain predetermined wage changes. All determinations that do not have double asterisks (**) after the expiration date remain in effect for the life of the project.

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.1, Labor Code.

History

1. Amendment of subsections (a)(3) and (b) filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

2. Amendment of subsection (a)(3), repealer and new subsection (b) and amendment of Note filed 12-27-96; operative 1-26-97 (Register 96, No. 52).

3. Change without regulatory effect repealing 12-27-96 amendments to section and Note filed 2-19-99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6-4-97 in Case 97CS 00471 the amendments filed 12-27-96 and effective 1-27-97 were invalidated and the prior regulations were reinstated.

§ 16205. Procedures for Obtaining Prevailing Wage Determinations.

An awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that a special or general prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142. All requests for special pre-

vailing wage determinations must be confirmed in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of workers for which a determination is needed.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

HISTORY

1. Amendment filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16206. Corrections.

Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination. The Director may correct any error issued in a determination by reissuing such determination.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

Article 5. Petitions to Review Prevailing Wage Determinations

§ 16300. Delegation of Authority.

(a) The Chief of DLSR is the authorized representative of the Director for the purpose of:

(1) Receiving collective bargaining agreements and other documents and papers pertaining to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations;

(2) Gathering information needed to make prevailing wage determinations under Part, Chapter 1, Article 2 of the Labor Code and these regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purpose of the law;

(3) Issuing prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations; and

(4) Responding to petitions regarding determinations.

(b) The Director reserves the right to make all final determinations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1771, 1772, 1773 et seq., 1774, 1775, 1776, 1777, 1777.5 et seq., 1778, 1779 and 1780, Labor Code.

§ 16301. Referral of Prevailing Wage Issues to Director's Office.

Any new or unresolved issue other than of a routine nature as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party may be referred to the Chief of DLSR as the Director's duly authorized representative for final determination, including appeals of any determination relating either to coverage or to the rate of the prevailing wage rate, subject only to Section 16300(b) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

§ 16302. Petition to Review Prevailing Wage Determinations.

Those interested parties enumerated in Section 1773.4 of the Labor Code, and defined in Section 16000 of these regulations, may file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

(a) Manner of Filing. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed with the Director by mail to the Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, or may be filed in person at 455 Golden Gate Avenue, 5th Floor, San Francisco, CA 94102.

(b) Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these regulations or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body or division upon actual delivery to and receipt by such person, awarding body, or division.

(c) Content of Petition. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(1) The name, address, telephone number and job title of:

(A) the person filing the petition;

(B) the person verifying the petition, if different from the person filing;

(C) if applicable, petitioner's attorney or authorized representative.

(2) Whether the petitioner is an awarding body, a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public works contract;

(3) The nature of petitioner's business, if a prospective bidder, and a designation of each craft, classification, or type of worker represented, or types of workers involved in the public works project.

(4) (A) the official name of the awarding body;

(B) the date on which the call for bids was first published;

(C) the name and location of the newspaper in which such publication was made. An accurate copy of the call for bids as published shall be attached to the petition.

(5) If petitioner is an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city, township, or regional district, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(6) If the petitioner is a prospective bidder, then the parent or subsidiary corporations or associations related to such craft, classification or type of work, if any, shall be specified.

(7) The manner in which the wage rate determined by the Director fails to comply with the provisions of Labor Code Section 1773.

(A) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

1. Whenever such facts relate to a particular employer of such crafts, classifications, or types of workers, the facts stated must identify the employer by name and address and give the number of workers involved.

2. Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16200(a)(1) of these regulations.

3. Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16200(e) of these regulations.

(B) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(C) Where rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

(d) Filing Copy With Awarding Body. If the petitioner is not an awarding body, the petitioner may concurrently with the filing of the original

on, or otherwise shall within two days thereafter, excluding Saturdays, Sundays and holidays, file a copy of the petition with the awarding body and not later than five days, excluding Saturdays, Sundays and holidays, after the filing of the original petition, the petitioner shall file with the Chief of DLSR an affidavit of the filing with the awarding body. The Director may waive this requirement upon receipt of written confirmation, including a copy of such notification by the petitioner.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773, 1773.1, 1773.4, 1773.5, 1773.8 and 1776, Labor Code.

HISTORY

1. Amendment of subsection (a) filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16303. Quasi-Legislative Nature of Authority.

(a) The authority of the Director to establish the prevailing wage for any craft, classification, or type of worker is quasi-legislative. The Director has the discretion to establish these prevailing wages in a quasi-legislative manner which may include an investigation, hearing, or other action. Any hearing under this process is quasi-legislative and is subject to review pursuant to the Code of Civil Procedure Section 1085.

(b) The Director may in his or her discretion initiate an investigation or hold a hearing or take such other action as is reasonably necessary which would best effectuate the purposes of the law and of these regulations, except as such action may be expressly prohibited by law.

NOTE: Authority cited: Section 1773.5, Labor Code; and Winzler & Kelly (1981) 121 C.A. 3d 120; *Western Assn. of Engineers & Land Surveyors v. DIR*, Judicial Council Coord. Proceeding No. 449, Sac. Superior Court No. 285433. Reference: Sections 1770, 1773 and 1773.4, Labor Code; and Section 1085, Code of Civil Procedure.

§ 16304. Hearings.

When a hearing is held, including a petition to review under Labor Code Section 1773.4, it shall be in accordance with the following procedures:

(a) Hearing Procedures.

(1) A time and place of the hearing shall be fixed.

(2) All interested parties made known to the Director shall be notified by registered or certified mail, return receipt requested, of the time and place of the hearing except that, in the event of numerous interested parties or in the event that mailing notices by registered or certified mail would cause an undue delay adverse to the interest of the parties or a timely hearing, the Director may send certified or registered notices to the petitioner and other directly interested parties that have been made known to the Director and mail notices to the other parties, and publish such notices in newspapers.

(3) Notification of the time and place of the hearing shall be at least one week in advance.

(4) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions. The hearing officer may fairly allocate time for such witnesses' testimony in the interest of introducing relevant evidence. Cross examination will be permitted at the discretion of the hearing officer.

(5) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(6) All witnesses testifying before the hearing officer shall testify under oath.

(7) A full transcript of the hearing shall be recorded.

(b) Hearing Officer. The Director may appoint a hearing officer(s). The appointed hearing officer(s) shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations. Either the appointed hearing officer(s) or the Director may request documentation subsequent to the hearing to complete the record, and shall send copies of such additional information to the petitioner, awarding body or other designated interested party or parties.

(c) Subject Matter. The subject matter of a hearing may be initiated by a petition to review, as set forth in Labor Code Section 1773.4.

(d) Decision. The decision of the Director shall reflect a summary of the evidence, findings, or matters of fact and/or law.

The decision shall be sent to all parties no later than 20 days after the hearing, except earlier or later as special circumstances warrant. The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may consider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given to all parties in the same manner as the notice of hearings as specified in Sections 16304(a)(2) and (a)(3) above and the decision upon reconsideration shall be as specified in subdivisions (a)(2) and (a)(3) of this section.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773.4 and 1773.5, Labor Code.

Article 6. Certified Payroll Records: Requests, Content, and Cost

§ 16400. Request for Payroll Records.

(a) Requests may be made by any person for certified copies of payroll records. Requests shall be made to any of the following:

(1) the body awarding the contract, or

(2) any office of the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards.

(b) Requests for certified copies of payroll records pursuant to Section 1776 of the Labor Code may be made by any person. However, any such request shall be in writing and contain at least the following information:

(1) The body awarding the contract;

(2) The contract number and/or description;

(3) The particular job location if more than one;

(4) The name of the contractor;

(5) The regular business address, if known.

NOTE: Requests for records of more than one contractor of subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be accepted; unless contractor and subcontractor responsibilities regarding the project are not clearly defined.

(c) Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty-five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and

(4) Provide for inspection.

(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

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Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A–1–131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name–print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Withholding of Funds from Contractor—Hearing Procedure

§ 16410. Definitions.

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720–1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New article 7 (sections 16410–16414) and section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.

§ 16411. Notice to Contractor and Affected Subcontractor.

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.

§ 16412. Withholding, Retention, or Forfeiture.

(a) When notice has been sent as provided in section 16411, above, the awarding body shall proceed to withhold, retain, or forfeit the amount stated in the notice, pursuant to Labor Code § 1727. Such withholding, retention, or forfeiture shall be subject to the right of a contractor or affected subcontractor to request a hearing, as provided in section 16413, below, and further subject to the right of a contractor or a contractor's assignee to bring suit against the awarding body as provided by Labor Code §§ 1731–1733.

(b) Nothing in these regulations shall extend, or affect in any way, the statutory time limits provided by Labor Code §§ 1731–1733.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.

§ 16413. Request for Hearing.

(a) A contractor or subcontractor desiring a hearing regarding the withholding, retention, or forfeiture of an amount may request such a hearing by letter postmarked within 30 days of the date of the mailing of

he notice provided by section 16411, above, mailed to the awarding body, and to:

DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 GOLDEN GATE AVENUE, 9TH FLOOR
SAN FRANCISCO, CALIFORNIA 94102

(b) A request for hearing shall contain a statement of all factual and legal grounds upon which the withholding is contested, identifying the specific element or elements, issue or issues, being contested, including, but not limited to:

(1) the classification of workers included in the computation of wages found to be due;

(2) the hours worked by such workers;

(3) the prevailing wage requirements applicable to such classifications;

(4) the amounts paid to such workers;

(5) the assessment and computation of statutory penalties;

(6) any erroneous mathematical calculations.

Assertions of fact included in the statement shall be supported by documentary evidence, e.g., time cards, canceled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidence which reflect job assignments, work schedules by days and hours, and evidence of the disbursement by way of cash, check, or in whatever form or manner, of funds to a person or persons by job classification and/or skill, and, if appropriate, declarations under penalty of perjury.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99,). A Certificate of Compliance must be transmitted to OAL by 6-16-99 emergency language will be repealed by operation of law on the following

§ 16414. Hearing.

(a) Upon receipt of a timely request for a hearing, the Labor Commissioner, or his or her deputy or agent shall, within 30 days, hold a hearing to determine whether reasonable cause exists to withhold and retain the funds identified in the notice provided under section 16411, above.

(b) The hearing date may be continued at the request of the party seeking the hearing upon a showing of good cause.

The burden of proof at such hearing shall be as provided in Labor C. § 1733.

(d) The decision of the Labor Commissioner shall consist of a notice of findings, findings, and an order, which shall be served on the awarding body and all parties to the hearing within 15 days after the conclusion of the hearing by regular first class mail at the last known address of the party on file with the Labor Commissioner. The awarding body shall promptly abide by any decision of the Labor Commissioner with respect to the notice to withhold.

(e) The hearing pursuant to this section shall only determine whether reasonable cause exists for the withholding, retention, or forfeiture of funds pursuant to Labor Code § 1727. A hearing pursuant to this section shall not be deemed to be dispositive as to the contractor's (or affected subcontractor's) compliance with prevailing wage laws. Any decision rendered shall have no res judicata or collateral estoppel effect, and will not preclude the Labor Commissioner from pursuing any action provided by Labor Code § 1775 or any other statutory or common law remedy against any party. Neither the failure of a party to request a hearing nor Labor Commissioner's decision after a hearing shall preclude the contractor or affected subcontractor from pursuing any other remedy provided by existing law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209-16209.6), see Register 82, No. 51.

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval. The awarding body bears the burden of producing evidence that it meets the criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

(1) Cause for revocation of final approval includes, but is not limited to:

(A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(B) Failure of the awarding body to file timely, complete, and accurate reports to the Director as required by Section 16431 or elsewhere in these regulations.

(b) Interested parties may request the Director revoke final approval of a LCP. A request for revocation shall include evidence of failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take enforcement action after becoming cognizant of a violation of the Labor Code or these regulations. A request for revocation shall also include any other relevant evidence.

(1) Final approval of a LCP may be revoked by the Director based on a request by an interested party after a proceeding conducted as provided in subdivision (a). A copy of the request for revocation shall be provided to the awarding body as part of the notice required under subdivision (a).

(2) As part of a proceeding for revocation of final approval based on a request by an interested party, the Director may require the awarding body to furnish a supplemental report for the period between the ending date of the last annual report filed by the awarding body pursuant to Section 16431 and the date of notice by the Director, and containing the information listed in subdivision (a) of said Section 16431.

(3) Revocation of final approval of a LCP based on a request by an interested party is solely within the discretion of the Director. The duty of an awarding body to carry out its LCP runs solely to the Director and not to any worker, contractor, or interested party. The sole remedy for failure of an awarding body's duty is revocation of approval by the Director.

(c) Upon determining that the request for revocation will be denied without hearing, the Director shall notify the LCP, awarding body and requesting party of the decision and of the reasons therefore by mail.

(d) Upon determining that a hearing is necessary, the parties will be notified and a hearing on cause for revocation of final LCP approval will be held in accordance with the procedures for notice and hearing proceedings set forth in 8 CCR Section 16304.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Article 3. Notice and Components of LCP

§ 16429. Notice of LCP Approval.

(a) Notice of initial or final approval of an awarding body's LCP shall be given in the Call for Bids and in the contract or purchase order and shall also be posted at the job site. If more than one job site exists or where such posting would endanger public safety, the notice may be posted in the manner prescribed by 8 CCR Section 16100(b).

(b) Notice of an approved LCP shall contain, at the minimum, the effective date of the Director's initial or final approval, a statement that the limited exemption from prevailing wages pursuant to Labor Code Section 1771.5(a) applies to the contract, a telephone number to call for inquiries, questions, or assistance with regard to the LCP, and the name of the agent or office administering the LCP, if different from the awarding body.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16430. Components of LCP.

(a) In accordance with Labor Code Section 1771.5(b), a LCP shall include, but not be limited to, the following requirements:

(1) The Call for Bids and the contract or purchase order shall contain appropriate language concerning the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(2) A prejob conference shall be conducted before commencement of the work with contractors and subcontractors listed in the bid, at which time federal and state labor law requirements applicable to the contract shall be discussed, and copies of suggested reporting forms furnished. A checklist, showing which federal and state labor law requirements were

discussed, shall be kept for each conference. A checklist in the format of Appendix A presumptively meets this requirement;

(3) A requirement that certified payroll records be kept by the contractor in accordance with Labor Code Section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body. The awarding body may create a form meeting the minimum requirements of (a) hereinafter "Certified Weekly Payroll." Use of the current version of DIR's "Public Works Payroll Reporting Form" (A-1-131) (Nov 2-80) constitutes full compliance with this requirement by the awarding body. A copy of this suggested form follows Title 8 CCR Section 16500;

(4) A program for orderly review of payroll records and, if necessary, for audits to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(5) A prescribed routine for withholding penalties, forfeitures, and underpayment of wages for violations of the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(6) All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5(b), Labor Code.

HISTORY

1. New section and Appendix filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Appendix A

Suggested Checklist of Labor Law Requirements to Review at Prejob Conference, Section 16430.

The federal and state labor law requirements applicable to the contract are composed of but not limited to the following items:

[The next page is 1414.3.]

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1775, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A-1-131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name-print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____ Signature:_____

public entity may require a more strict and/or more extensive form of tification.

OTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of sh, check or certified money order shall be made prior to release of the cuments to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(b), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Withholding of Funds from Contractor—Hearing Procedure

§ 16410. Definitions.

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720–1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New article 7 (sections 16410–16414) and section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New article 7 (sections 16410–16414) and section refiled 6-14-99 as an emergency, operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.

§ 16411. Notice to Contractor and Affected Subcontractor.

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.

§ 16412. Withholding, Retention, or Forfeiture.

(a) When notice has been sent as provided in section 16411, above, the awarding body shall proceed to withhold, retain, or forfeit the amount stated in the notice, pursuant to Labor Code § 1727. Such withholding, retention, or forfeiture shall be subject to the right of a contractor or affected subcontractor to request a hearing, as provided in section 16413, below, and further subject to the right of a contractor or a contractor's assignee to bring suit against the awarding body as provided by Labor Code §§ 1731–1733.

(b) Nothing in these regulations shall extend, or affect in any way, the statutory time limits provided by Labor Code §§ 1731–1733.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency, operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99

or emergency language will be repealed by operation of law on the following day.

2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-1-99 or emergency language will be repealed by operation of law on the following day

§ 16413. Request for Hearing.

(a) A contractor or subcontractor desiring a hearing regarding the withholding, retention, or forfeiture of an amount may request such a hearing by letter postmarked within 30 days of the date of the mailing of the notice provided by section 16411, above, mailed to the awarding body, and to:

DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 GOLDEN GATE AVENUE, 9TH FLOOR
SAN FRANCISCO, CALIFORNIA 94102

(b) A request for hearing shall contain a statement of all factual and legal grounds upon which the withholding is contested, identifying the specific element or elements, issue or issues, being contested, including, but not limited to:

(1) the classification of workers included in the computation of wages found to be due;

(2) the hours worked by such workers;

(3) the prevailing wage requirements applicable to such classifications;

(4) the amounts paid to such workers;

(5) the assessment and computation of statutory penalties;

(6) any erroneous mathematical calculations.

Assertions of fact included in the statement shall be supported by documentary evidence, e.g., time cards, canceled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidence which reflect job assignments, work schedules by days and hours, and evidence of the disbursement by way of cash, check, or in whatever form or manner, of funds to a person or persons by job classification and/or skill, and, if appropriate, declarations under penalty of perjury.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day

2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.

16414. Hearing.

(a) Upon receipt of a timely request for a hearing, the Labor Commissioner, or his or her deputy or agent shall, within 30 days, hold a hearing determine whether reasonable cause exists to withhold and retain the nds identified in the notice provided under section 16411, above.

(b) The hearing date may be continued at the request of the party seeking the hearing upon a showing of good cause.

(c) The burden of proof at such hearing shall be as provided in Labor ode § 1733.

(d) The decision of the Labor Commissioner shall consist of a notice findings, findings, and an order, which shall be served on the awarding dy and all parties to the hearing within 15 days after the conclusion of hearing by regular first class mail at the last known address of the rty on file with the Labor Commissioner. The awarding body shall mptly abide by any decision of the Labor Commissioner with respect the notice to withhold.

(e) The hearing pursuant to this section shall only determine whether asonable cause exists for the withholding, retention, or forfeiture of nds pursuant to Labor Code § 1727. A hearing pursuant to this section ll not be deemed to be dispositive as to the contractor's (or affected tor's) compliance with prevailing wage laws. Any decision rendered shall have no res judicata or collateral estoppel effect, and will not preclude the Labor Commissioner from pursuing any action provided by Labor Code § 1775 or any other statutory or common law remedy against any party. Neither the failure of a party to request a hearing nor the Labor Commissioner's decision after a hearing shall preclude the contractor or affected subcontractor from pursuing any other remedy provided by existing law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.

2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209-16209.6), see Register 82, No. 51

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13)

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval. The awarding body bears the burden of producing evidence that it meets the criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13)

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

(1) Cause for revocation of final approval includes, but is not limited to:

(A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(B) Failure of the awarding body to file timely, complete, and accurate reports to the Director as required by Section 16431 or elsewhere in these regulations.

(b) Interested parties may request the Director revoke final approval of a LCP. A request for revocation shall include evidence of failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take enforcement action after becoming cognizant of a violation of the Labor Code or these regulations. A request for revocation shall also include any other relevant evidence.

(1) Final approval of a LCP may be revoked by the Director based on a request by an interested party after a proceeding conducted as provided in subdivision (a). A copy of the request for revocation shall be provided to the awarding body as part of the notice required under subdivision (a).

(2) As part of a proceeding for revocation of final approval based on a request by an interested party, the Director may require the awarding body to furnish a supplemental report for the period between the ending date of the last annual report filed by the awarding body pursuant to Section 16431 and the date of notice by the Director, and containing the information listed in subdivision (a) of said Section 16431.

(3) Revocation of final approval of a LCP based on a request by an interested party is solely within the discretion of the Director. The duty of an awarding body to carry out its LCP runs solely to the Director and not to any worker, contractor, or interested party. The sole remedy for failure of an awarding body's duty is revocation of approval by the Director.

(c) Upon determining that the request for revocation will be denied without hearing, the Director shall notify the LCP, awarding body and requesting party of the decision and of the reasons therefore by mail.

(d) Upon determining that a hearing is necessary, the parties will be notified and a hearing on cause for revocation of final LCP approval will be held in accordance with the procedures for notice and hearing proceedings set forth in 8 CCR Section 16304.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13)

Article 3. Notice and Components of LCP

§ 16429. Notice of LCP Approval.

(a) Notice of initial or final approval of an awarding body's LCP shall be given in the Call for Bids and in the contract or purchase order and shall also be posted at the job site. If more than one job site exists or where such posting would endanger public safety, the notice may be posted in the manner prescribed by 8 CCR Section 16100(b).

(b) Notice of an approved LCP shall contain, at the minimum, the effective date of the Director's initial or final approval, a statement that the limited exemption from prevailing wages pursuant to Labor Code Section 1771.5(a) applies to the contract, a telephone number to call for inquiries, questions, or assistance with regard to the LCP, and the name of the agent or office administering the LCP, if different from the awarding body.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

History

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13)

§ 16430. Components of LCP.

(a) In accordance with Labor Code Section 1771.5(b), a LCP shall include, but not be limited to, the following requirements:

(1) The Call for Bids and the contract or purchase order shall contain appropriate language concerning the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(2) A prejob conference shall be conducted before commencement of the work with contractors and subcontractors listed in the bid, at which time federal and state labor law requirements applicable to the contract shall be discussed, and copies of suggested reporting forms furnished. A checklist, showing which federal and state labor law requirements were discussed, shall be kept for each conference. A checklist in the format of Appendix A presumptively meets this requirement;

(3) A requirement that certified payroll records be kept by the contractor in accordance with Labor Code Section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body. The awarding body may create a form meeting the minimum requirements of (a) hereinafter "Certified Weekly Payroll." Use of the current version of DIR's "Public Works Payroll Reporting Form" (A-1-131) (New 2-80) constitutes full compliance with this requirement by the awarding body. A copy of this suggested form follows Title 8 CCR Section 16500;

(4) A program for orderly review of payroll records and, if necessary, for audits to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(5) A prescribed routine for withholding penalties, forfeitures, and underpayment of wages for violations of the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(6) All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5(b), Labor Code.

History

1. New section and Appendix filed 2-20-92; operative 3-23-92 (Register 92, No. 13)

Appendix A

Suggested Checklist of Labor Law Requirements to Review at Prejob Conference, Section 16430.

The federal and state labor law requirements applicable to the contract are composed of but not limited to the following items:

[The next page is 1414.3.]

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A-1-131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name-print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Withholding of Funds from Contractor—Hearing Procedure

§ 16410. Definitions.

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720–1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New article 7 (sections 16410–16414) and section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New article 7 (sections 16410–16414) and section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.
3. New article 7 (sections 16410–16414) and section refiled 10-4-99 as an emergency; operative 10-4-99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2-1-2000 or emergency language will be repealed by operation of law on the following day.

§ 16411. Notice to Contractor and Affected Subcontractor.

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10-4-99 as an emergency; operative 10-4-99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2-1-2000 or emergency language will be repealed by operation of law on the following day.

§ 16412. Withholding, Retention, or Forfeiture.

(a) When notice has been sent as provided in section 16411, above, the awarding body shall proceed to withhold, retain, or forfeit the amount stated in the notice, pursuant to Labor Code § 1727. Such withholding, retention, or forfeiture shall be subject to the right of a contractor or affected subcontractor to request a hearing, as provided in section 16413, below, and further subject to the right of a contractor or a contractor's assignee to bring suit against the awarding body as provided by Labor Code §§ 1731–1733.

(b) Nothing in these regulations shall extend, or affect in any way, the ory time limits provided by Labor Code §§ 1731–1733.

... Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, ...0, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10-4-99 as an emergency; operative 10-4-99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2-1-2000 or emergency language will be repealed by operation of law on the following day.

§ 16413. Request for Hearing.

(a) A contractor or subcontractor desiring a hearing regarding the withholding, retention, or forfeiture of an amount may request such a hearing by letter postmarked within 30 days of the date of the mailing of the notice provided by section 16411, above, mailed to the awarding body, and to:

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

455 GOLDEN GATE AVENUE, 9TH FLOOR

SAN FRANCISCO, CALIFORNIA 94102

(b) A request for hearing shall contain a statement of all factual and legal grounds upon which the withholding is contested, identifying the specific element or elements, issue or issues, being contested, including, but not limited to:

(1) the classification of workers included in the computation of wages f... to be due;

...he hours worked by such workers;

... the prevailing wage requirements applicable to such classifica-

(4) the amounts paid to such workers;

(5) the assessment and computation of statutory penalties;

(6) any erroneous mathematical calculations.

Assertions of fact included in the statement shall be supported by documentary evidence, e.g., time cards, canceled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidence which reflect job assignments, work schedules by days and hours, and evidence of the disbursement by way of cash, check, or in ...hatever form or manner, of funds to a person or persons by job classifi... and/or skill, and, if appropriate, declarations under penalty of perjury.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the fo... day.
3. New section refiled 10-4-99 as an emergency; operative 10-4-99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2-1-2000 or emergency language will be repealed by operation of law on the following day.

§ 16414. Hearing.

(a) Upon receipt of a timely request for a hearing, the Labor Commis... or, or his or her deputy or agent shall, within 30 days, hold a hearing ...ermine whether reasonable cause exists to withhold and retain the funds identified in the notice provided under section 16411, above.

(b) The hearing date may be continued at the request of the party seek... he hearing upon a showing of good cause.

(c) The burden of proof at such hearing shall be as provided in Labor Code § 1733.

(d) Within 15 days after the conclusion of the Hearing the Hearing Officer shall issue a decision which affirms, modifies or dismisses the Notice to Withhold. This decision shall consist of a notice of findings, findings, and an order which shall be served on the awarding and on all parties to the hearing by first class mail at the last known address of the party on file with the Labor Commissioner. The awarding body shall promptly abide by any decision of the Labor Commissioner with respect to the notice to withhold.

(e) The hearing pursuant to this section shall only determine whether reasonable cause exists for the withholding, retention, or forfeiture of funds pursuant to Labor Code § 1727. A hearing pursuant to this section shall not be deemed to be dispositive as to the contractor's (or affected subcontractor's) compliance with prevailing wage laws. Any decision rendered shall have no res judicata or collateral estoppel effect, and will not preclude the Labor Commissioner from pursuing any action provided by Labor Code § 1775 or any other statutory or common law remedy against any party. Neither the failure of a party to request a hearing nor the Labor Commissioner's decision after a hearing shall preclude the contractor or affected subcontractor from pursuing any other remedy provided by existing law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10-4-99 as an emergency, including amendment of subsection (d); operative 10-4-99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2-1-2000 or emergency language will be repealed by operation of law on the following day.

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(c) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209-16209.6), see Register 82, No. 51.

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval. The awarding body bears the burden of producing evidence that it meets the criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

(1) Cause for revocation of final approval includes, but is not limited to:

(A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(B) Failure of the awarding body to file timely, complete, and accurate reports to the Director as required by Section 16431 or elsewhere in these regulations.

(b) Interested parties may request the Director revoke final approval of a LCP. A request for revocation shall include evidence of failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take enforcement action after becoming cognizant of a violation of the Labor Code or these regulations. A request for revocation shall also include any other relevant evidence.

(1) Final approval of a LCP may be revoked by the Director based on a request by an interested party after a proceeding conducted as provided in subdivision (a). A copy of the request for revocation shall be provided to the awarding body as part of the notice required under subdivision (a).

(2) As part of a proceeding for revocation of final approval based on a request by an interested party, the Director may require the awarding body to furnish a supplemental report for the period between the ending date of the last annual report filed by the awarding body pursuant to Section 16431 and the date of notice by the Director, and containing the information listed in subdivision (a) of said Section 16431.

(3) Revocation of final approval of a LCP based on a request by an interested party is solely within the discretion of the Director. The duty of an awarding body to carry out its LCP runs solely to the Director and not to any worker, contractor, or interested party. The sole remedy for failure of an awarding body's duty is revocation of approval by the Director.

(c) Upon determining that the request for revocation will be denied without hearing, the Director shall notify the LCP, awarding body and requesting party of the decision and of the reasons therefore by mail.

(d) Upon determining that a hearing is necessary, the parties will be notified and a hearing on cause for revocation of final LCP approval will be held in accordance with the procedures for notice and hearing proceedings set forth in 8 CCR Section 16304.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Article 3. Notice and Components of LCP

§ 16429. Notice of LCP Approval.

(a) Notice of initial or final approval of an awarding body's LCP shall be given in the Call for Bids and in the contract or purchase order and shall also be posted at the job site. If more than one job site exists or where such posting would endanger public safety, the notice may be posted in the manner prescribed by 8 CCR Section 16100(b).

(b) Notice of an approved LCP shall contain, at the minimum, the effective date of the Director's initial or final approval, a statement that the limited exemption from prevailing wages pursuant to Labor Code Section 1771.5(a) applies to the contract, a telephone number to call for inquiries, questions, or assistance with regard to the LCP, and the name of the agent or office administering the LCP, if different from the awarding body.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16430. Components of LCP.

(a) In accordance with Labor Code Section 1771.5(b), a LCP shall include, but not be limited to, the following requirements:

(1) The Call for Bids and the contract or purchase order shall contain appropriate language concerning the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(2) A prejob conference shall be conducted before commencement of the work with contractors and subcontractors listed in the bid, at which time federal and state labor law requirements applicable to the contract shall be discussed, and copies of suggested reporting forms furnished. A checklist, showing which federal and state labor law requirements were discussed, shall be kept for each conference. A checklist in the format of Appendix A presumptively meets this requirement;

(3) A requirement that certified payroll records be kept by the contractor in accordance with Labor Code Section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body. The awarding body may create a form meeting the minimum requirements of (a) hereinafter "Certified Weekly Payroll." Use of the current version of DIR's "Public Works Payroll Reporting Form" (A-1-131) (New 2-80) constitutes full compliance with this requirement by the awarding body. A copy of this suggested form follows Title 8 CCR Section 16500;

(4) A program for orderly review of payroll records and, if necessary, for audits to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(5) A prescribed routine for withholding penalties, forfeitures, and underpayment of wages for violations of the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(6) All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5(b), Labor Code.

HISTORY

1. New section and Appendix filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Appendix A

Suggested Checklist of Labor Law Requirements to Review at Prejob Conference, Section 16430.

The federal and state labor law requirements applicable to the contract are composed of but not limited to the following items:

[The next page is 1414.3.]

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A-1-131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name-print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Withholding of Funds from Contractor—Hearing Procedure

§ 16410. Definitions.

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720–1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New article 7 (sections 16410–16414) and section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New article 7 (sections 16410–16414) and section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New article 7 (sections 16410–16414) and section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New article 7 (sections 16410–16414) and section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

§ 16411. Notice to Contractor and Affected Subcontractor.

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

§ 16412. Withholding, Retention, or Forfeiture.

(a) When notice has been sent as provided in section 16411, above, the awarding body shall proceed to withhold, retain, or forfeit the amount

stated in the notice, pursuant to Labor Code § 1727. Such withholding, retention, or forfeiture shall be subject to the right of a contractor or affected subcontractor to request a hearing, as provided in section 16413, below, and further subject to the right of a contractor or a contractor's assignee to bring suit against the awarding body as provided by Labor Code §§ 1731–1733.

(b) Nothing in these regulations shall extend, or affect in any way, the statutory time limits provided by Labor Code §§ 1731–1733.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

§ 16413. Request for Hearing.

(a) A contractor or subcontractor desiring a hearing regarding the withholding, retention, or forfeiture of an amount may request such a hearing by letter postmarked within 30 days of the date of the mailing of the notice provided by section 16411, above, mailed to the awarding body, and to:

DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 GOLDEN GATE AVENUE, 9TH FLOOR
SAN FRANCISCO, CALIFORNIA 94102

(b) A request for hearing shall contain a statement of all factual and legal grounds upon which the withholding is contested, identifying the specific element or elements, issue or issues, being contested, including, but not limited to:

(1) the classification of workers included in the computation of wages found to be due;

(2) the hours worked by such workers;

(3) the prevailing wage requirements applicable to such classifications;

(4) the amounts paid to such workers;

(5) the assessment and computation of statutory penalties;

(6) any erroneous mathematical calculations.

Assertions of fact included in the statement shall be supported by documentary evidence, e.g., time cards, canceled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidence which reflect job assignments, work schedules by days and hours, and evidence of the disbursement by way of cash, check, or in whatever form or manner, of funds to a person or persons by job classification and/or skill, and, if appropriate, declarations under penalty of perjury.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

§ 16414. Hearing.

(a) Upon receipt of a timely request for a hearing, the Labor Commissioner, or his or her deputy or agent shall, within 30 days, hold a hearing to determine whether reasonable cause exists to withhold and retain the funds identified in the notice provided under section 16411, above.

(b) The hearing date may be continued at the request of the party seeking the hearing upon a showing of good cause.

(c) The burden of proof at such hearing shall be as provided in Labor Code § 1733.

(d) Within 15 days after the conclusion of the Hearing the Hearing Officer shall issue a decision which affirms, modifies or dismisses the Notice to Withhold. This decision shall consist of a notice of findings, findings, and an order which shall be served on the awarding and on all parties to the hearing by first class mail at the last known address of the party on file with the Labor Commissioner. The awarding body shall promptly abide by any decision of the Labor Commissioner with respect to the notice to withhold.

(e) The hearing pursuant to this section shall only determine whether reasonable cause exists for the withholding, retention, or forfeiture of funds pursuant to Labor Code § 1727. A hearing pursuant to this section shall not be deemed to be dispositive as to the contractor's (or affected subcontractor's) compliance with prevailing wage laws. Any decision rendered shall have no res judicata or collateral estoppel effect, and will not preclude the Labor Commissioner from pursuing any action provided by Labor Code § 1775 or any other statutory or common law remedy against any party. Neither the failure of a party to request a hearing nor the Labor Commissioner's decision after a hearing shall preclude the contractor or affected subcontractor from pursuing any other remedy provided by existing law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency, including amendment of subsection (d); operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209-16209.6), see Register 82, No. 51.

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval. The awarding body bears the burden of producing evidence that it meets the criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

(1) Cause for revocation of final approval includes, but is not limited to:

(A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(B) Failure of the awarding body to file timely, complete, and accurate reports to the Director as required by Section 16431 or elsewhere in these regulations.

(b) Interested parties may request the Director revoke final approval of a LCP. A request for revocation shall include evidence of failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take enforcement action after becoming cognizant of a violation of the Labor Code or these regulations. A request for revocation shall also include any other relevant evidence.

(1) Final approval of a LCP may be revoked by the Director based on a request by an interested party after a proceeding conducted as provided in subdivision (a). A copy of the request for revocation shall be provided to the awarding body as part of the notice required under subdivision (a).

(2) As part of a proceeding for revocation of final approval based on a request by an interested party, the Director may require the awarding body to furnish a supplemental report for the period between the ending date of the last annual report filed by the awarding body pursuant to Section 16431 and the date of notice by the Director, and containing the information listed in subdivision (a) of said Section 16431.

(3) Revocation of final approval of a LCP based on a request by an interested party is solely within the discretion of the Director. The duty of an awarding body to carry out its LCP runs solely to the Director and not to any worker, contractor, or interested party. The sole remedy for failure of an awarding body's duty is revocation of approval by the Director.

(c) Upon determining that the request for revocation will be denied without hearing, the Director shall notify the LCP, awarding body and requesting party of the decision and of the reasons therefore by mail.

(d) Upon determining that a hearing is necessary, the parties will be notified and a hearing on cause for revocation of final LCP approval will be held in accordance with the procedures for notice and hearing proceedings set forth in 8 CCR Section 16304.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 3. Notice and Components of LCP

§ 16429. Notice of LCP Approval.

(a) Notice of initial or final approval of an awarding body's LCP shall be given in the Call for Bids and in the contract or purchase order and shall also be posted at the job site. If more than one job site exists or where such posting would endanger public safety, the notice may be posted in the manner prescribed by 8 CCR Section 16100(b).

(b) Notice of an approved LCP shall contain, at the minimum, the effective date of the Director's initial or final approval, a statement that the limited exemption from prevailing wages pursuant to Labor Code Section 1771.5(a) applies to the contract, a telephone number to call for inquiries, questions, or assistance with regard to the LCP, and the name of the agent or office administering the LCP, if different from the awarding body.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16430. Components of LCP.

(a) In accordance with Labor Code Section 1771.5(b), a LCP shall include, but not be limited to, the following requirements:

(1) The Call for Bids and the contract or purchase order shall contain appropriate language concerning the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(2) A prejob conference shall be conducted before commencement of the work with contractors and subcontractors listed in the bid, at which time federal and state labor law requirements applicable to the contract shall be discussed, and copies of suggested reporting forms furnished. A checklist, showing which federal and state labor law requirements were discussed, shall be kept for each conference. A checklist in the format of Appendix A presumptively meets this requirement;

(3) A requirement that certified payroll records be kept by the contractor in accordance with Labor Code Section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body. The awarding body may create a form meeting the minimum requirements of (a) hereinafter "Certified Weekly Payroll." Use of the current version of DIR's "Public Works Payroll Reporting Form" (A–1–131) (New 2–80) constitutes full compliance with this requirement by the awarding body. A copy of this suggested form follows Title 8 CCR Section 16500;

(4) A program for orderly review of payroll records and, if necessary, for audits to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(5) A prescribed routine for withholding penalties, forfeitures, and underpayment of wages for violations of the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(6) All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5(b), Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix A

Suggested Checklist of Labor Law Requirements to Review at Prejob Conference, Section 16430.

The federal and state labor law requirements applicable to the contract are composed of but not limited to the following items:

[The next page is 1414.3.]

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A-1-131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name-print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Withholding of Funds from Contractor—Hearing Procedure

§ 16410. Definitions.

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720–1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New article 7 (sections 16410–16414) and section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New article 7 (sections 16410–16414) and section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New article 7 (sections 16410–16414) and section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New article 7 (sections 16410–16414) and section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16411. Notice to Contractor and Affected Subcontractor.

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

5. Certificate of Compliance as to 1-20-2000 order transmitted to OAL 3-29-2000 and filed 5-4-2000 (Register 2000, No. 18).

§ 16412. Withholding, Retention, or Forfeiture.

(a) When notice has been sent as provided in section 16411, above, the awarding body shall proceed to withhold, retain, or forfeit the amount stated in the notice, pursuant to Labor Code § 1727. Such withholding, retention, or forfeiture shall be subject to the right of a contractor or affected subcontractor to request a hearing, as provided in section 16413, below, and further subject to the right of a contractor or a contractor's assignee to bring suit against the awarding body as provided by Labor Code §§ 1731–1733.

(b) Nothing in these regulations shall extend, or affect in any way, the statutory time limits provided by Labor Code §§ 1731–1733.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10-4-99 as an emergency; operative 10-4-99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2-1-2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1-20-2000 as an emergency; operative 2-2-2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6-1-2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1-20-2000 order transmitted to OAL 3-29-2000 and filed 5-4-2000 (Register 2000, No. 18).

§ 16413. Request for Hearing.

(a) A contractor or subcontractor desiring a hearing regarding the withholding, retention, or forfeiture of an amount may request such a hearing by letter postmarked within 30 days of the date of the mailing of the notice provided by section 16411, above, mailed to the awarding body, and to:

DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 GOLDEN GATE AVENUE, 9TH FLOOR
SAN FRANCISCO, CALIFORNIA 94102

(b) A request for hearing shall contain a statement of all factual and legal grounds upon which the withholding is contested, identifying the specific element or elements, issue or issues, being contested, including, but not limited to:

(1) the classification of workers included in the computation of wages found to be due;

(2) the hours worked by such workers;

(3) the prevailing wage requirements applicable to such classifications;

(4) the amounts paid to such workers;

(5) the assessment and computation of statutory penalties;

(6) any erroneous mathematical calculations.

Assertions of fact included in the statement shall be supported by documentary evidence, e.g., time cards, canceled checks, cash receipts, trust and forms, books, documents, schedules, forms, reports, receipts or other evidence which reflect job assignments, work schedules by days and overtime evidence of the disbursement by way of cash, check, or in whatever form or manner, of funds to a person or persons by job classification and/or skill, and, if appropriate, declarations under penalty of perjury.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10-4-99 as an emergency; operative 10-4-99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2-1-2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1-20-2000 as an emergency; operative 2-2-2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6-1-2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1-20-2000 order transmitted to OAL 3-29-2000 and filed 5-4-2000 (Register 2000, No. 18).

§ 16414. Hearing.

(a) Upon receipt of a timely request for a hearing, the Labor Commissioner, or his or her deputy or agent shall, within 30 days, hold a hearing to determine whether reasonable cause exists to withhold and retain the funds identified in the notice provided under section 16411, above.

(b) The hearing date may be continued at the request of the party seeking the hearing upon a showing of good cause.

(c) The burden of proof at such hearing shall be as provided in Labor Code § 1733.

(d) Within 15 days after the conclusion of the Hearing the Hearing Officer shall issue a decision which affirms, modifies or dismisses the Notice to Withhold. This decision shall consist of a notice of findings, findings, and an order which shall be served on the awarding body and on all parties to the hearing by first class mail at the last known address of the parties on file with the Labor Commissioner. The awarding body shall promptly abide by any decision of the Labor Commissioner with respect to the notice to withhold.

(e) The hearing pursuant to this section shall only determine whether reasonable cause exists for the withholding, retention, or forfeiture of funds pursuant to Labor Code § 1727. A hearing pursuant to this section shall not be deemed to be dispositive as to the contractor's (or affected subcontractor's) compliance with prevailing wage laws. Any decision rendered shall have no res judicata or collateral estoppel effect, and will not preclude the Labor Commissioner from pursuing any action provided by Labor Code § 1775 or any other statutory or common law remedy against any party. Neither the failure of a party to request a hearing nor the Labor Commissioner's decision after a hearing shall preclude the contractor or affected subcontractor from pursuing any other remedy provided by existing law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6-14-99 as an emergency; operative 6-14-99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10-12-99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10-4-99 as an emergency, including amendment of subsection (d); operative 10-4-99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2-1-2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1-20-2000 as an emergency; operative 2-2-2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6-1-2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1-20-2000 order, including amendment of subsection (d), transmitted to OAL 3-29-2000 and filed 5-4-2000 (Register 2000, No. 18).

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209-16209.6), see Register 82, No. 51.

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval. The awarding body bears the burden of producing evidence that it meets the criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

(1) Cause for revocation of final approval includes, but is not limited to:

(A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(B) Failure of the awarding body to file timely, complete, and accurate reports to the Director as required by Section 16431 or elsewhere in these regulations.

(b) Interested parties may request the Director revoke final approval of a LCP. A request for revocation shall include evidence of failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take enforcement action after becoming cognizant of a violation of the Labor Code or these regulations. A request for revocation shall also include any other relevant evidence.

(1) Final approval of a LCP may be revoked by the Director based on a request by an interested party after a proceeding conducted as provided in subdivision (a). A copy of the request for revocation shall be provided to the awarding body as part of the notice required under subdivision (a).

(2) As part of a proceeding for revocation of final approval based on a request by an interested party, the Director may require the awarding body to furnish a supplemental report for the period between the ending date of the last annual report filed by the awarding body pursuant to Section 16431 and the date of notice by the Director, and containing the information listed in subdivision (a) of said Section 16431.

(3) Revocation of final approval of a LCP based on a request by an interested party is solely within the discretion of the Director. The duty of an awarding body to carry out its LCP runs solely to the Director and not to any worker, contractor, or interested party. The sole remedy for failure of an awarding body's duty is revocation of approval by the Director.

(c) Upon determining that the request for revocation will be denied without hearing, the Director shall notify the LCP, awarding body and requesting party of the decision and of the reasons therefore by mail.

(d) Upon determining that a hearing is necessary, the parties will be notified and a hearing on cause for revocation of final LCP approval will be held in accordance with the procedures for notice and hearing proceedings set forth in 8 CCR Section 16304.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Article 3. Notice and Components of LCP

§ 16429. Notice of LCP Approval.

(a) Notice of initial or final approval of an awarding body's LCP shall be given in the Call for Bids and in the contract or purchase order and shall also be posted at the job site. If more than one job site exists or where such posting would endanger public safety, the notice may be posted in the manner prescribed by 8 CCR Section 16100(b).

(b) Notice of an approved LCP shall contain, at the minimum, the effective date of the Director's initial or final approval, a statement that the limited exemption from prevailing wages pursuant to Labor Code Section 1771.5(a) applies to the contract, a telephone number to call for inquiries, questions, or assistance with regard to the LCP, and the name of the agent or office administering the LCP, if different from the awarding body.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16430. Components of LCP.

(a) In accordance with Labor Code Section 1771.5(b), a LCP shall include, but not be limited to, the following requirements:

(1) The Call for Bids and the contract or purchase order shall contain appropriate language concerning the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(2) A prejob conference shall be conducted before commencement of the work with contractors and subcontractors listed in the bid, at which time federal and state labor law requirements applicable to the contract shall be discussed, and copies of suggested reporting forms furnished. A checklist, showing which federal and state labor law requirements were discussed, shall be kept for each conference. A checklist in the format of Appendix A presumptively meets this requirement;

(3) A requirement that certified payroll records be kept by the contractor in accordance with Labor Code Section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body. The awarding body may create a form meeting the minimum requirements of (a) hereinafter "Certified Weekly Payroll." Use of the current version of DIR's "Public Works Payroll Reporting Form" (A-1-131) (New 2-80) constitutes full compliance with this requirement by the awarding body. A copy of this suggested form follows Title 8 CCR Section 16500;

(4) A program for orderly review of payroll records and, if necessary, for audits to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(5) A prescribed routine for withholding penalties, forfeitures, and underpayment of wages for violations of the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(6) All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5(b), Labor Code.

HISTORY

1. New section and Appendix filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Appendix A

Suggested Checklist of Labor Law Requirements to Review at Prejob Conference, Section 16430.

The federal and state labor law requirements applicable to the contract are composed of but not limited to the following items:

[The next page is 1414.3.]

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tion by or has within the preceding 2 years contracted or plans to contract with the Division of Labor Standards Enforcement.

Category 4

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Labor Standards Enforcement within the geographic area over which they exercise jurisdiction.

Category 5

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Industrial Welfare Commission.

Category 6

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that he or she knows or has reason to know is directly and materially subject to regulation by the Industrial Welfare Commission based on consideration of the recommendations of the wage board to which the public member belongs.

Category 7

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know: (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business; or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents.

Category 8

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know: (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business; or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents, to the extent the business entity or source of income is subject to such regulation or engages in or derives its income from such insurance business within the geographic area over which the employee exercises jurisdiction. Workers' compensation judges performing judicial functions are also subject to the provisions of the California Code of Judicial Conduct.

Category 9

Designated employees assigned to this category must report:

Investments in business entities and sources of income which they know or have reason to know have within the preceding 2 years contracted, or plan to contract, with the Division of Industrial Accidents to provide services, supplies, materials, or machinery of any type to the Division, or have so contracted or plan to contract with the Department to serve the Division in said manner.

Category 10

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know: (1) is directly subject to regulation by the Division of Industrial Accidents; (2) engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business; or (3) has within the preceding 2 years contracted or plans to contract with the Division of Industrial Accidents.

Category 11

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is a Self–Insurer for purposes of workers' compensation liability, has applied in the last two years or plans to apply for self–insurer status, or engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business or the

Category 12

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety or has within the preceding two years contracted or plans to contract with the Division of Industrial Safety.

Category 13

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety.

Category 14

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the geographic area over which they exercise jurisdiction.

Category 15

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the subject matter area over which they exercise jurisdiction.

Category 16

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Industrial Safety within the subject matter and geographic area over which they exercise jurisdiction.

Category 17

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Board or Unit for which they work.

Category 18

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Apprenticeship Standards or has within the preceding two years contracted or plans to contract with the Division of Apprenticeship Standards.

Category 19

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Division of Apprenticeship Standards within the geographic area over which they exercise jurisdiction.

Category 20

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that she or he knows or has reason to know has within the preceding 2 years contracted, or plans to contract, with the Division of Apprenticeship Standards to provide services, supplies, materials or machinery of any type to the Division, or has so contracted or plans to contract with the Department to so serve the Division.

Category 21

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that he or she knows or has reason to know is directly and materially subject to regulation by the Department of Industrial Relations, engages in or derives its income from, in whole or in part, the workers' compensation liability insurance business, or has within the preceding two years contracted or plans to contract with the Division of Labor Statistics and Re-

Category 22
Designated employees assigned to this category must report:
Any investment in a business entity and any source of income that they ow or have reason to know has within the preceding two years cted or plans to contract with the Division of Labor Statistics and Re- arch to provide services, supplies, materials, or machinery of any type purposes of data processing, reproduction, or microfilming, to the Di- ion, or has so contracted or plans to contract with the Department to serve the Division.
Category 23
Designated employees assigned to this category must report:
Any investment in a business entity and any source of income that they ow or have reason to know engages in or derives its income from, in ole or in part, a Transit District subject to the jurisdiction of the State nciliation Service.
Category 24
Designated employees assigned to this category must report:
Any investment in a business entity and any source of income that they w or have reason to know is directly and materially subject to regula- by the Fair Employment Practices Commission.

Subchapter 6. Prevailing Wage Hearings

Article 1. General

7201. Scope and Application of Rules.
a) These Rules govern proceedings for review of civil wage and pen- assessments and the withholding of contract payments under Ar- s 1 and 2 of Division 2, Part 7, Chapter 1 (commencing with section) of the Labor Code, as well as any notice assessing penalties for compliance with payroll record obligations under Labor Code sec- 1776. The provisions of Labor Code section 1742 and these Rules y to all such assessments and notices served on a contractor or sub- ractor on or after July 1, 2001 and provide the exclusive method for ffected Contractor or Subcontractor to obtain review of any such no- or assessment. These Rules also apply to transitional cases in which es were served but no court action was filed under Labor Code sec- 1731–1733 prior to July 1, 2001, in accordance with Section 17270 70) below.
) These Rules do not govern debarment proceedings under Labor section 1777.1, nor proceedings to review determinations with re- to the violation of apprenticeship obligations under Labor Code ns 1777.5 and 1777.7, nor any criminal prosecution.
) These Rules do not preclude any remedies otherwise authorized by remedy violations of Division 2, Part 7, Chapter 1 of the Labor .
For easier reference, individual sections within these prevailing hearing regulations are referred to as "Rules" using only their last igits. For example, this Section 17201 may be referred to as Rule

Authority cited: sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer- Sections 1742, 1771.5, 1771.6(b), 1773.5, 1776 and 1777.1–1777.7, Labor and Stats. 2000, Chapter 954, §1.

HISTORY

w subchapter 6 (articles 1–7, sections 17201–17270), article 1 (sections 01–17212) and section filed 1–15–2002; operative 1–15–2002 pursuant to vernment Code section 11343.4 (Register 2002, No. 3).

202. Definitions.
the purpose of these Rules:
1850ed Contractor or Subcontractor" means a contractor or sub- ctor (as defined under Labor Code section 1722.1) to whom the La- mmissioner has issued a civil wage and penalty assessment pur- Code section 1771.6, or to whom the Labor Commissioner or the Division of Apprentice Standards has issued a notice assessing penalties for noncompliance with payroll record obligations under Labor Code section 1776;
(b) "Assessment" means a civil wage and penalty assessment issued by the Labor Commissioner or his or her designee pursuant to Labor Code section 1741, and it also includes a notice issued by either the Labor Commissioner or the Division of Apprenticeship Standards pursuant to Labor Code section 1776;
(c) "Awarding Body" means an awarding body or body awarding the contract (as defined in Labor Code section 1722) that exercises enforcement authority under Labor Code section 1726 or 1771.5;
(d) "Department" means the Department of Industrial Relations;
(e) "Director" means the Director of the Department of Industrial Relations;
(f) "Enforcing Agency" means the entity which has issued an Assessment or Notice of Withholding of Contract Payments and with which a Request for Review has been filed; *i.e.*, it refers to the Labor Commissioner when review is sought from an Assessment, the Awarding Body when review is sought from a Notice of Withholding of Contract Payments, and the Division of Apprenticeship Standards when review is sought from a notice issued by that agency that assesses penalties under Labor Code section 1776;
(g) "Hearing Officer" means any person appointed by the Director pursuant to Labor Code section 1742(b) to conduct hearings and other proceedings under Labor Code section 1742 and these Rules;
(h) "Joint Labor–Management Committee" means a joint labor–management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (section 175a of Title 29 of the United States Code).
(i) "Labor Commissioner" means the Chief of the Division of Labor Standards Enforcement and includes his or her designee who has been authorized to carry out the Labor Commissioner's functions under Chapter 1, Part 7 of Division 2 (commencing with section 1720) of the Labor Code;
(j) "Party" means an Affected Contractor or Subcontractor who has requested review of either an Assessment or a Notice of Withholding of Contract Payments, the Enforcing Agency that issued the Assessment or the Notice of Withholding of Contract Payments from which review is sought, and any other Person who has intervened under subparts (a), (b), or (c) of Rule 08 [Section 17208];
(k) "Person" means an individual, partnership, limited liability company, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character;
(l) "Representative" means a person authorized by a Party to represent that Party in a proceeding before a Hearing Officer or the Director, and includes the Labor Commissioner when the Labor Commissioner has intervened to represent the Awarding Body in a review proceeding pursuant to Labor Code section 1771.6(b).
(m) "Rule" refers to a section within this subchapter 6. The Rule number corresponds to the last two digits of the full section number. (For example, Rule 08 is the same as section 17208.)
(n) "Surety" has the meaning set forth in Civil Code section 2787 and refers to the entity that issues the public works bond provided for in Civil Code sections 3247 and 3248 or any other surety bond that guarantees the payment of wages for labor.
(o) "Working Day" means any day that is not a Saturday, Sunday, or State holiday, as determined with reference to Code of Civil Procedure sections 12(a) and 12(b) and Government Code sections 6700 and 6701.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 2787, 3247 and 3248, Civil Code; Sections 12a and 12b, Code of Civil Procedure; Sections 6700, 6701, 11405.60 and 11405.70, Government Code; Sections 1720 et seq., 1722, 1722.1, 1726, 1741, 1742, 1742(b), 1771.5, 1771.6, 1771.6(b) and 1776, Labor Code; and 29 U.S.C. §175a.

§ 17203. Computation of Time and Extensions of Time to Respond or Act.

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

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

(c) Where service of any notice, decision, pleading or other document is by first class mail, and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed is extended five days if the place of address is within the State of California, and 10 days if the place of address is outside the State of California but within the United States. However, this Rule shall not extend the time within which the Director may reconsider or modify a decision to correct an error (other than a clerical error) under Labor Code section 1742(b).

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1010–1013, Code of Civil Procedure; and Section 1742(b), Labor Code.

HISTORY

New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17204. Appointment of Hearing Officers; Delegation of Appointment Authority to Chief Counsel.

(a) Upon receipt of a Request for Review of an Assessment or of a Notice of Withholding of Contract Payments, the Director, acting through the Chief Counsel (*see* subpart (c) below), shall appoint an impartial Hearing Officer to conduct the review proceeding.

(b) The appointed Hearing Officer shall be an attorney employed by the Office of the Director — Legal Unit. However, if no attorney employed by the Office of the Director — Legal Unit is available or qualified to serve in a particular matter, the appointed Hearing Officer may be any attorney or administrative law judge employed by the Department, other than an employee of the Division of Labor Standards Enforcement.

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

(d) The Director's authority under Labor Code section 1742(b) to appoint an impartial Hearing Officer, is delegated in all cases to the Chief Counsel of the Office of the Director or to the Chief Counsel's designated Assistant or Acting Chief Counsel when the Chief Counsel is unavailable or disqualified from participating in a particular matter. This delegation includes all related authority under Rule 40 [Section 17240] below to appoint a different Hearing Officer to conduct all or any part of a review proceeding as well as the authority to consider and decide or to assign to another Hearing Officer for consideration and decision any motion to disqualify an appointed Hearing Officer.

NOTE: Authority cited: Sections 7, 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 11425.30 and 11502(b), Government Code; and Sections 7, 55, 59 and 1742(b), Labor Code.

HISTORY

§ 17205. Authority of Hearing Officers.

(a) In any proceeding assigned for hearing and decision under the provisions of Labor Code section 1742, the appointed Hearing Officer shall have full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Director, to hold a prehearing conference, to issue a subpoena and subpoena duces tecum for the attendance of a Person and the production of testimony, books, documents, or other things, to compel the attendance of a Person residing anywhere in the state, to certify official acts, to regulate the course of a hearing, to grant a withdrawal, disposition or amendment, to order a continuance, to approve a stipulation voluntarily entered into by the Parties, to administer oaths and affirmations, to rule on objections, privileges, defenses, and the receipt of relevant and material evidence, to call and examine a Party or witness and introduce into the hearing record documentary or other evidence, to request a Party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding, to extend the submittal date of any proceeding, to exercise such other and additional authority as is delegated to Hearing Officers under these Rules or by an express written delegation by the Director, and to prepare a recommended decision, including a notice of findings, findings, and an order for approval by the Director.

(b) There shall be no right of appeal to or review by the Director of any decision, order, act, or refusal to act by an appointed Hearing Officer other than through the Director's review of the record in issuing or reconsidering a written decision under Rules 60 [Section 17260] and 61 [Section 17261] below.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11512, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17206. Access to Hearing Records.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 6250 et seq. Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17207. Ex Parte Communications.

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

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

(c) A communication concerning a matter of procedure or practice is presumed to be permissible, unless the topic of the communication appears to the Hearing Officer to be controversial in the context of the specific case. If so, the Hearing Officer shall so inform the other participant and may terminate the communication or continue it until after giving all Parties notice and an opportunity to participate. Any written communication concerning a matter of procedure or practice, and any written response, or a written memorandum identifying the participants and stating the substance of any such oral communication or response, shall be added

earing Officer may determine a matter of procedure or practice based on a permissible ex-parte communication. The term "matters of procedure or practice" shall be liberally construed.

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

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

(f) To the extent not inconsistent with Labor Code section 1742, the provisions of Article 7 of Chapter 4.5 of Title 2, Division 3, Part 1 (commencing with section 11430.10) of the Government Code governing ex parte communications in administrative adjudication proceedings shall apply to review proceedings conducted under these Rules.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 11430.10–11430.80, Government Code, and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

17208. Intervention and Participation by Other Interested Persons.

(a) The Labor Commissioner may intervene as a matter of right in any review from a Notice of Withholding of Contract Payments, either as the representative of the Awarding Body or as an interested third Party.

(b) A bonding company and any Surety on a bond that secures the payment of wages covered by the Assessment or Notice of Withholding of Contract Payments shall be permitted to intervene as a matter of right in a pending review filed by the contractor or subcontractor from the Assessment or Withholding of Contract Payments in question; *provided* that intervention is sought at or before the first prehearing conference held pursuant to Rule 31 [Section 17231] below and within either 30 days after the bonding company or Surety was served with a copy of the Assessment or Notice of Withholding of Contract Payments or 30 days after the filing of the Request for Review, whichever is later. Thereafter, any request to intervene by such a bonding company or Surety shall be treated as a motion for permissive participation under subpart (d) of this Rule. The bonding company or Surety shall have the burden of proof with respect to its claim that it did not receive notice of the Assessment or Notice of Withholding of Contract Payments until after the filing of the Request for Review.

(c) The employee(s), labor union, or Joint Labor–Management Committee who filed the formal complaint which led the Enforcing Agency to issue the Assessment or Notice of Withholding of Contract payments may be permitted to intervene in a pending review filed by the contractor or subcontractor from the Assessment or Withholding of Contract Payments in question; *provided that*, intervention is sought at or before the first prehearing conference held pursuant to Rule 31 [Section 17231] below and there is no good cause to deny the request. Thereafter, any request to intervene by such employee(s), labor union, or Joint Labor–Management Committee shall be treated as a motion for permissive participation as an interested Person under subpart (d) of this Rule.

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

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

(f) No Person shall be required to seek intervention in a review proceeding as a condition for pursuing any other remedy available to that Person for the enforcement of the prevailing wage requirements of Division 2, Part 7, Chapter 1 (starting with section 1720) of the Labor Code.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11440.50(c), Government Code; and Sections 1720 et seq., 1741, 1742 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17209. Representation at Hearing.

(a) A Party may appear in person or through an authorized Representative, who need not be an attorney at law; *however*, a Party shall use the form Authorization for Representation by Non–Attorney [8 CCR 17209(b) (New 1/15/02)] to authorize representation by any non–attorney who is not an owner, officer, or managing agent of that Party.

(b) Upon formal notification that a Party is being represented by a particular individual or firm, service of subsequent notices in the matter shall be made on the Representative, either in addition to or instead of the Party, unless and until such authorization is terminated or withdrawn by further written notice. Service upon an authorized Representative shall be effective for all purposes and shall control the determination of any notice period or the running of any time limit for the performance of any acts, regardless of whether or when such notice may also have been served directly on the represented Party.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section and new form 17209(b) filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

AUTHORIZED REPRESENTATIVE OR PARTY WITHOUT ATTORNEY (Name, Address, and Telephone):	*For ODL use only:*
STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS	
In the matter of the Request for Review of: Requesting Party, vs. Enforcing Agency.	
AUTHORIZATION FOR REPRESENTATION BY NON-ATTORNEY (Rule 9(b))	Case No.: - PWH

(Name of Party) _____ designates the following individual or firm, who is not an attorney at law,* to serve as our authorized representative in this matter and to receive all notices in our behalf unless and until this Authorization is terminated or withdrawn by further written notice.

Specify Name, Address, and Telephone Number of Representative: _____

_____

_____

_____

Date: _____

_____

(TYPE OR PRINT NAME OF ! OWNER, ! OFFICER, OR ! MANAGING AGENT WHO IS MAKING THIS DESIGNATION)

_____

(SIGNATURE)

Owner, Officer, or Managing Agent of Party

I accept this authorization.

Date: _____

_____

Authorized Representative

* *This form is not required for an authorized representative who is an Owner, Officer, or Managing Agent of the Party*

17210. Proper Method of Service.

(a) Unless a particular method of service is specifically prescribed by atute or these Rules, service may be made by: (1) personal delivery; (2) iority or first class mailing postage prepaid through the U. S. Postal Ser- ce; (3) any other means authorized under Code of Civil Procedure sec- on 1013; or (4) if authorized by the Hearing Officer pursuant to Rule 11 ection 17211] below, by facsimile or other electronic means.

(b) Service is complete at the time of personal delivery or mailing, or the time of transmission as determined under Rule 11 [Section 17211] low.

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

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

(e) In each proceeding, the Hearing Officer shall maintain an official dress record which shall contain the names and addresses of all Parties d their Representatives, agents, or attorneys of record. Any change or stitution in such information must be communicated promptly in ting to the Hearing Officer. The official address record may also in- de the names and addresses of interested Persons who have been per- ted to participate under Rule 08(d) [Section 17208].

TE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer- e: Section 1013, Code of Civil Procedure; and Section 1742(b), Labor Code.

HISTORY

lew section filed 1–15–2002; operative 1–15–2002 pursuant to Government ode section 11343.4 (Register 2002, No. 3).

7211. Filing and Service of Documents by Facsimile or Other Electronic Means.

a) In individual cases the Hearing Officer may authorize the filing and ice of documents by facsimile or by other electronic means, subject easonable restrictions on the time of transmission and the page length ny document or group of documents that may be transmitted by fac- le or other electronic means, and subject to any further requirements ne use of cover sheets or the subsequent filing and service of originals ard copies of documents as the Hearing Officer deems appropriate. g and service by facsimile or other electronic means shall not be au- zed under terms that substantially disadvantage any Party appearing rticipating in the proceeding as a matter of right. A document trans- ed by facsimile or other electronic means shall not be considered re- ed until the next Working Day following transmission unless it is mitted on a Working Day and the entire transmission is completed later than 4:00 p.m. Pacific Time.

) Filings and service by facsimile or other electronic means shall not rized or accepted as a substitute for another method of service that uired by statute or these Rules, unless the Party served has expressly ed its right to be served in the required manner.

: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer- Section 1742(b), Labor Code.

HISTORY

w section filed 1–15–2002; operative 1–15–2002 pursuant to Government le section 11343.4 (Register 2002, No. 3).

12. Administrative Adjudication Bill of Rights.

The provisions of the Administrative Adjudication Bill of Rights in Article 6 of Chapter 4.5 of Title 2, Division 3, Part 1 (commenc- h section 11425.10) of the Government Code shall apply to these proceedings to the extent not inconsistent with a state or federal ral regulation, or a court decision which applies specifically plement. The enumeration of certain rights in these Rules may but shall not be construed as limiting the same or similar provi-

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 11415.20, 11425.10 et seq. and 11430.80(b), Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 2. Assessment or Notice and Request for Review

§ 17220. Service and Contents of Assessment or Notice of Withholding of Contract Payments.

(a) An Assessment, a Notice of Withholding of Contract Payments, or a notice assessing penalties under Labor Code section 1776 shall be served on the contractor and subcontractor, if applicable, by first class and certified mail pursuant to the requirements of Code of Civil Procedure section 1013. A copy of the notice shall also be served by certified mail on any bonding company issuing a bond that secures the payment of the wages covered by the Assessment or Notice and to any Surety on a bond, if the identities of such companies are known or reasonably ascertainable. The identity of any Surety issuing a bond for the benefit of an Awarding Body as designated obligee, shall be deemed "known or reasonably ascertainable," and the Surety shall be deemed to have received the notice required under this subpart if sent to the address appearing on the face of the bond.

(b) An Assessment or Notice of Withholding of Contract Payments shall be in writing and shall include the following information:

(1) a description of the nature of the violation and basis for the Assessment or Notice; and

(2) the amount of wages, penalties, and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the Enforcing Agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1.

(c) An Assessment or Notice of Withholding of Contract Payments shall also include the following information:

(1) the name and address of the office to whom a Request for Review may be sent;

(2) information on the procedures for obtaining review of the Assessment or Withholding of Contract Payments;

(3) notice of the Opportunity to Request a Settlement Meeting under Rule 21 [Section 17221] below; and

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

Failure by a contractor or subcontractor to submit a timely Request for Review will result in a final order which shall be binding on the contractor and subcontractor, and which shall also be binding, with respect to the amount due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. Labor Code section 1743.

HISTORY

1. New article 2 (sections 17220–17229) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17221. Opportunity for Early Settlement.

(a) The Affected Contractor or Subcontractor may, within 30 days following the service of an Assessment or Notice of Withholding of Contract Payments, request a meeting with the Enforcing Agency for the purpose of attempting to settle the dispute regarding the Assessment or Notice.

(b) Upon receipt of a timely written request for a settlement meeting, the Enforcing Agency shall afford the Affected Contractor or Subcontractor a reasonable opportunity to meet for such purpose. The settlement meeting may be held in person or by telephone and shall take place before expiration of the 60–day limit for filing a Request for Review under Rule 22 [Section 17222].

(c) Nothing herein shall preclude the Parties from meeting or attempting to settle a dispute after expiration of the time for making a request or after the filing of a Request for Review.

(d) Neither the making or pendency of a request for a settlement meeting, nor the fact that the Parties have met or have failed or refused to meet as required by this Rule shall serve to extend the time for filing a Request for Review under Rule 22 [Section 17222] below.

(e) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, such a settlement meeting shall be admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, such a settlement meeting, other than a final settlement agreement, shall be admissible or subject to discovery in any administrative or civil proceeding.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742, 1742.1 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17222. Filing of Request for Review.

(a) Any Request for Review of an Assessment or of a Notice of Withholding of Contract Wages shall be transmitted in writing to the Enforcing Agency within 60 days after service of the Assessment or Notice. Failure to request review within 60 days shall result in the Assessment or the Withholding of Contract Wages becoming final and not subject to further review under these Rules.

(b) A Request for Review shall be transmitted to the office of the Enforcing Agency designated on the Assessment or Notice of Withholding of Contract Payments from which review is sought.

(c) A Request for Review shall be deemed filed on the date of mailing, as determined by the U.S. Postal Service postmark date on the envelope or the overnight carrier's receipt in accordance with Rule 03(b) [Section 17203(b)] above, or on the date of receipt by the designated office of the Enforcing Agency, whichever is earlier.

(d) An additional courtesy copy of the Request for Review may be served on the Department by mailing to the address specified in Rule 23 [Section 17223] below at any time on or after the filing of the Request for Review with the Enforcing Agency. The service of a courtesy copy on Department shall *not* be effective for invoking the Director's review thority under Labor Code section 1742; however, it may determine the time within which the hearing shall be commenced under Rule 41(a) ction 17241(a)] below.

e) A Request for Review either shall clearly identify the Assessment or Notice from which review is sought, including the date of the Assessment or Notice, or it shall include a copy of the Assessment or Notice as an attachment. A Request for Review shall also set forth the basis upon which the Assessment or Notice is being contested. A Request for Review shall include a specification of the issues or claims being contested and a specification of the basis for contesting those matters.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742 and 1771.6(a), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17223. Transmittal of Request for Review to Department.

Within ten (10) days followings its receipt of a Request for Review, the Enforcing Agency shall transmit to the Office of the Director – Legal Unit, the Request for Review and copies of the Assessment or Notice of Withholding of Contract Wages, any Audit Summary that accompanied the Assessment or Notice, and a Proof of Service or other document showing the name and address of any bonding company or Surety entitled to notice under Rule 20(a) [Section 17220(a)] above. The Enforcing Agency shall transmit these items to the following address.

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR - LEGAL UNIT
ATTENTION: LEAD HEARING OFFICER
P.O. BOX 420603
SAN FRANCISCO, CA 94142–0603

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(a) and 1771.6(a), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17224. Disclosure of Evidence.

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

(b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor or Subcontractor the option, at the Affected Contractor or Subcontractor's own expense, to either (A) obtain copies of all such evidence through a commercial copying service or (B) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the Affected Contractor or Subcontractor.

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

(d) The Enforcing Agency shall make evidence available for review as specified in subparts (a) through (c) within 20 days of its receipt of the Request for Review; *provided that*, this deadline may be extended by written request or agreement of the Affected Contractor or Subcontractor. The Enforcing Agency's failure to make evidence available for review as required by Labor Code section 1742(b) and this Rule, shall preclude the Enforcing Agency from introducing such evidence in proceedings before the Hearing Officer or the Director.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(b) and 1771.6, Labor Code.

17225. Withdrawal of Request for Review; Reinstatement.

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

(b) For good cause, a Request for Review so dismissed may be reinated by the Hearing Officer or the Director upon a showing that the ithdrawal resulted from misinformation given by the Enforcing gency or otherwise from fraud or coercion. A motion for reinstatement ust be filed within 60 days of service of the letter, order or decision anting withdrawal of the Request for Review or, in the event of fraud hich could not have been suspected or discovered with the exercise of asonable diligence, within 60 days of discovery of such fraud. The mo-ın shall be accompanied by a declaration containing a statement that y facts therein are based upon the personal knowledge of the declarant.

(c) Notwithstanding any application or showing made under subpart) of this Rule, neither the Hearing Officer nor the Director may reinstate y Request for Review where the underlying Assessment or Withhold-; of Contract Payments has become final and entered as a court judg-ınt.

ITE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer-e: Sections 1742 and 1771.6, Labor Code.

HISTORY

New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

7226. Dismissal or Amendment of Assessment or of Notice of Withholding of Contract Payments.

a) Upon motion to the appointed Hearing Officer, an Enforcing ency may dismiss or amend an Assessment or Notice of Withholding Contract Payments as follows:

1) An Assessment or Notice of Withholding may be dismissed or ended to eliminate or reduce all or part of any claim for wages, dam-s, or penalties that has been satisfied or that is not warranted under the s and circumstances of the case or to conform to an order of the Hear-Officer or the Director.

2) An Assessment or Notice of Withholding may be amended to elim-e a claim for penalties as to the affected contractor upon a determina-that the affected contractor is not liable for same under either Labor e section 1775(b) [subcontractor's failure to pay prevailing rate] or or Code section 1776 (g) [failure to comply with request for certified oll records].

) For good cause, an Assessment or Notice of Withholding of Con-Payments may be amended to revise or increase any claim for es, damages, or penalties based upon a recomputation or the discov-of new evidence subsequent to the issuance of the original Assess-t or Notice.

) The Hearing Officer shall grant any motion to dismiss or amend an ssment or Notice of Withholding downward under subparts (a)(1))(2) absent a showing that such dismissal or amendment will result e forfeiture of substantial substantive rights of another Party to the eeding. The Hearing Officer may grant a motion to amend an As-nent or Notice of Withholding upward under subpart (a)(3) under terms as are just, including where appropriate the extension of an ional opportunity for early settlement under Rule 21 [Section 1]. Unless the Hearing Officer determines otherwise, an amended ssment or Notice of Withholding shall be deemed fully controverted ut need for filing an additional or amended Request for Review.

: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer-Sections 1742, 1771.6, 1775(b) and 1776(g), Labor Code.

HISTORY

New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17227. Early Disposition of Untimely Assessment, Withholding, or Request for Review.

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

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1741, 1742, 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17228. Finality of Assessment or of Withholding of Contract Payments When No Timely Request for Review is Filed; Authority of Awarding Body to Disburse Withheld Funds.

(a) Upon the failure of an Affected Contractor or Subcontractor to file a timely Request for Review under Labor Code section 1742(a) and Rule 22(a) [Section 17222(a)] above, the Assessment or Notice of Withholding of Contract Payments shall become a "final order" as to the Affected Contractor or Subcontractor that the Labor Commissioner may certify and file with the superior court in accordance with Labor Code section 1742(d).

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1727, 1742 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17229. Finality of Notice of Withholding of Contract Payments; Authority of Awarding Body to Recover Additional Funds.

Where a Notice of Withholding of Contract Payments seeks to recover wages, penalties, or damages in excess of the amounts withheld from available contract payments (*see* Rule 20(b)(2) [Section 17220(b)(2)] above), an Awarding Body may recover any excess amounts that become or remain due when the Notice of Withholding of Contract Payments has become final under Labor Code section 1771.6. To recover the excess amounts, the Awarding Body shall transmit to the Labor Commissioner the Notice together with any decision of the Director or court that has become final and not subject to further review. The Labor Commissioner in turn shall certify and file the final order with the superior court in accordance with Labor Code section 1742(d).

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(d) and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 3. Prehearing Procedures

§ 17230. Scheduling of Hearing; Continuances and Tolling.

(a) The appointed Hearing Officer shall establish the place and time of the hearing on the merits, giving due consideration to the needs of all Parties and the statutory time limits for hearing and deciding the matter. rties are encouraged to communicate scheduling needs to the Hearing fficer and all other Parties at the earliest opportunity. It shall not be a olation of Rule 07 [Section 17207]'s prohibition on ex parte communications for the Hearing Officer or his or her designee to communicate with Parties individually for purposes of clearing dates and times and proposing locations for the hearing. The Hearing Officer may also conduct a prehearing conference by telephone or any other expeditious means for purposes of establishing the time and place of the hearing.

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

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

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

) The time limits for hearing and deciding a review proceeding shall be deemed tolled (1) when proceedings are suspended to seek judicial enforcement of a subpoena or other order to compel the attendance, mony, or production of evidence by a necessary witness; (2) when proceedings are stayed or enjoined by any court order; (3) between the time that a proceeding is dismissed and then ordered reinstated under Rule 25 [Section 17225] above; (4) upon the order of a court reinstating or requiring rehearing of the merits of a proceeding; or (5) during the pen- tor or any appointed Hearing Officer from carrying out his or her responsibilities under these Rules.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New article 3 (sections 17230–17237) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17231. Prehearing Conference.

(a) Upon the application of any Party or upon his or her own motion, the appointed Hearing Officer may conduct a prehearing conference for any purpose that may expedite or assist the preparation of the matter for hearing or the disposition of the Request for Review. The prehearing conference may be conducted by telephone or other means that is convenient to the Hearing Officer and the Parties.

(b) The Hearing Officer shall provide reasonable advance notice of any prehearing conference conducted pursuant to this Rule. The Notice shall advise the Parties of the matters which the Hearing Officer intends to cover in the prehearing conference, but the failure of the Notice to enumerate some matter shall not preclude its discussion or consideration at the conference.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11511.5, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17232. Consolidation and Severance.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11507.3, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17233. Prehearing Motions; Cut Off Date.

(a) Any motion made in advance of the hearing on the merits, any opposition thereto, and any further reply shall be in writing and directed to the appointed Hearing Officer. No particular format shall be required; however, the following information shall appear prominently on the first page: (1) the case name (*i.e.*, names of the Parties); (2) any assigned case number; (3) the name of the Hearing Officer to whom the paper is being submitted; (4) the identity of the Party submitting the paper; (5) the nature of the relief sought; and (6) the scheduled date, if any, for the hearing on the merits of the Request for Review. The motion shall also include a Proof of Service, as defined in Rule 10 [Section 17210] above, showing that copies have been served on all other Parties to the proceeding.

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

(c) There shall be no right to a separate oral hearing on any prehearing

; Officer determines that such an oral hearing is necessary or propriate, it may be conducted by telephone or other manner that is nvenient to the Parties.

(d) With the exception of timeliness challenges under Rule 27 [Section 227], prehearing motions which seek to dispose of a Request for Review or any related claim or defense are disfavored and ordinarily will be considered prior to the hearing on the merits.

TE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refere: Section 1742(b); Labor Code.

HISTORY

New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

7234. Evidence by Affidavit or Declaration.

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

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

The accompanying affidavit or declaration of [name of affiant or declarant] will be introduced as evidence at the hearing in [title and other rmation identifying the proceeding]. [Name of affiant or declarant] not be called to testify orally, and you will not be entitled to question affiant or declarant unless you notify [name of the proponent, Representative, agent or attorney] at [address] that you wish to cross–examine affiant or declarant. Your request must be mailed or delivered to ne of proponent, Representative, agent or attorney] on or before cify date *at least* 10 days after anticipated date of service of this no- on the other Parties]."

) If a timely request is made to cross–examine an affiant or declarant r this Rule, the burden of producing that witness at the hearing shall pon the proponent of the witness. If the proponent fails to produce witness, the affidavit or declaration may be introduced in evidence, hall be given only the same effect as other hearsay evidence under 44 [Section 17244].

E: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer- Rule 1613, California Rules of Court; Section 11514, Government Code; ection 1742(b), Labor Code.

HISTORY

w section filed 1–15–2002; operative 1–15–2002 pursuant to Government de section 11343.4 (Register 2002, No. 3).

235. Subpoena and Subpoena Duces Tecum.

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

Subpoenas and subpoenas duces tecum shall be issued by the Hearfficer at the request of a Party, or by the attorney of record for a in accordance with sections 1985 to 1985.6, inclusive, of the Code vil Procedure. The burden of serving a subpoena that has been isby the Hearing Officer shall be upon the Party who requested the ena.

1858 e of subpoenas and subpoenas duces tecum, objections o, and mileage and witness fees shall be governed by the provisions [illegible] Code sections 11450.20 through 11450.40.

al of any witness to obey a subpoena or subpoena duces tecum shall have the burden of showing to the satisfaction of the Hearing Officer that the subpoena or subpoena duces tecum was properly issued and served and that the testimony or evidence sought was necessary to prove or disprove a significant claim or defense in the proceeding.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1985–1988, Code of Civil Procedure; Section 1563, Evidence Code; Sections 11450.20–11455.30, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17236. Written Notice to Party in Lieu of Subpoena.

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

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

(c) The Hearing Officer shall have authority under Rule 47 [Section 17247] below to sanction a Party who fails or refuses to comply with a written notice to attend that meets the requirements of this Rule and has been timely served in accordance with section 1987 of the Code of Civil Procedure. However, the Hearing Officer may not initiate contempt proceedings against the witness for failing to appear based solely on non–compliance with a written notice to attend served on the Party's attorney. A Party seeking sanctions for another Party's failure or refusal to comply with a written notice to attend shall have the burden of showing to the satisfaction of the Hearing Officer that the written notice to attend was properly issued and timely served and that the testimony or evidence sought was necessary to prove or disprove a significant claim or defense in the proceeding.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1987, Code of Civil Procedure; Sections 11450.50–11455.30, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17237. Depositions and Other Discovery.

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1987, Code of Civil Procedure; Sections 11450.50–11455.30, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 4. Hearings

§ 17240. Notice of Appointment of Hearing Officer;

cable and no later than when the matter is noticed for a prehearing conference or hearing.

(b) The Director may appoint a different Hearing Officer to conduct and hear the review or to conduct and dispose of any preliminary or procedural matter in a given case.

(c) A Party wishing to object to the appointment of a particular Hearing Officer, including for any one or more of the grounds specified in sections 11425.30 and 11425.40 of the Government Code or section 1742(b) of the Labor Code, shall within 10 days after receiving notice of the appointment and no later than the start of any hearing on the merits, *whichever is earlier*, file a motion to disqualify the appointed Hearing Officer together with a supporting affidavit or declaration. The motion shall be filed with the Chief Counsel of the Office of the Director at the address indicated in Rule 23 [Section 17223] above. Notwithstanding the foregoing time limits, if a Party subsequently discovers facts constituting grounds for the disqualification of the appointed Hearing Officer, including but not limited to that the Hearing Officer has received a prohibited ex parte communication in the pending case, the motion shall be filed as soon as practicable after the facts constituting grounds for disqualification are discovered.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 170.3(c)(1), Code of Civil Procedure; Sections 11425.30 and 11425.40, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New article 4 (sections 17240–17249) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17241. Time and Place of Hearing.

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

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

(c) A suitable location under this section means one that is open and accessible to members of the public and which includes appropriate facilities for the recording of testimony. Any facility that is regularly used by any state agency or by the Awarding Body for public hearings and that will reasonably accommodate the anticipated number of Parties and witnesses involved in the proceeding, is presumed suitable in the absence of a contrary showing. Parties seeking to change the location of a hearing under subpart (b) shall make reasonable efforts to identify, agree upon, and arrange for the availability of a suitable location within a county specified in subpart (b)(1) or (b)(2).

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11425.20, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17242. Open Hearing; Confidential Evidence and

television, or other electronic means, the Hearing Officer shall conduct the hearing from a location where members of the public may be physically present, and members of the public shall also have a reasonable right of access to the hearing record and any transcript of the proceedings.

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 777, Evidence Code, Section 11425.20, Government Code, and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17243. Conduct of Hearing.

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

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

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11513, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17244. Evidence Rules; Hearsay.

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

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

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

(d) Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it either would be admissible over objection in a civil action or no Party raises an objection to such use. Unless pre-

OTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer-ce: Section 11513, Government Code; and Section 1742(b), Labor Code.

HISTORY

New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

7245. Official Notice.

a) A Hearing Officer may take official notice of (1) the Director's neral Prevailing Wage Determinations, the Director's Precedential verage Decisions, and wage data, studies, and reports issued by the Di-ion of Labor Statistics and Research; (2) any other generally accepted hnical fact within the fields of labor and employment that are regu-d by the Director under Divisions 1, 2, and 3 of the Labor Code; and any fact which either must or may be judicially noticed by the courts his state under Evidence Code sections 451 and 452.

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

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

TE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer-: Sections 451, 452 and 455, Evidence Code; Section 11515, Government e; and Section 1742(b), Labor Code.

HISTORY

ew section filed 1–15–2002; operative 1–15–2002 pursuant to Government ode section 11343.4 (Register 2002, No. 3).

7246. Failure to Appear; Relief from Default.

.) Upon the failure of any Party to appear at a duly noticed hearing, Hearing Officer may proceed in that Party's absence and may recom-d whatever decision is warranted by the available evidence, includ-ny lawful inferences that can be drawn from an absence of proof by non–appearing Party.

) For good cause and under such terms as are just, the appointed ing Officer or the Director may relieve a Party from the effects of ailure to appear and order that a review proceeding be reinstated or rd. A Party seeking relief from non–appearance shall file a written on at the earliest opportunity and no later than 10 days following a eding of which the Party had actual notice. Such application shall pported by an affidavit or declaration based on the personal knowl-of the declarant, and copies of the application and any supporting ials shall be served on all other Parties to the proceeding. No ap-ion shall be granted unless and until the other Parties have been af-d a reasonable opportunity to make a showing in opposition. An Or-einstating a proceeding or granting a rehearing under this section e conditioned upon providing reimbursement to the Department ie other Parties for the costs associated with the prior non–appear-

Notwithstanding any application or showing made under subpart this Rule, neither the Hearing Officer nor the Director may reinstate equest for Review where the underlying Assessment or Withhold-Contract Payments has become final and entered as a court judg-

Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer-ection 473, Code of Civil Procedure; and Section 1742(b), Labor Code.

HISTORY

section filed 1–15–2002; operative 1–15–2002 pursuant to Government section 11343.4 (Register 2002, No. 3).

47. Contempt and Monetary Sanctions.

f any Person in proceedings before an appointed Hearing Officer ys or resists any lawful order or refuses, without substantial justifi-1860 ond to a subpoena, subpoena duces tecum, or refuses to e oath or affirmation as a witness or thereafter refuses to be ex-l or is guilty of misconduct during a hearing or so near the place facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20; (2) exclude the Person from the hearing room; (3) prohibit the Person from testifying or introducing certain matters in evidence; and/or (4) establish certain facts, claims, or defenses if the Person in contempt is a Party.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 128.5, Code of Civil Procedure; Sections 11455.10–11455.30, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17248. Interpreters.

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

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

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

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

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

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

tial communications, or has engaged in conduct which, in the judgment of the Hearing Officer, creates an appearance of bias, prejudice, or partiality.

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 754, Evidence Code; Sections 11435.05–11435.65 and 68560–68566, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17249. Hearing Record; Recording of Testimony and Other Proceedings.

(a) The Hearing Officer and the Director shall maintain an official record of all proceedings conducted under these Rules. In the absence of a determination under subpart (b) below, all testimony and other proceedings at any hearing shall be recorded by audiotape. Recorded testimony or other proceedings need not be transcribed unless requested for purposes of further court review of a decision or order in the same case.

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

(c) The Parties may, at their own expense, arrange for the recording of testimony and other proceedings through a different means other than the one authorized by the Hearing Officer, *provided that* it does not in any ay interfere with the Hearing Officer's control and conduct of the proedings, and *further provided that*, it shall not be regarded as an official record for any purpose absent a stipulation by all of the Parties or order of the Hearing Officer.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17250. Burdens of Proof on Wages and Penalties.

(a) The Enforcing Agency has the burden of coming forward with evidence that the Affected Contractor or Subcontractor (1) was served with an Assessment or Notice of Withholding of Contract Payments in accordance with Rule 20 [Section 17220]; (2) was provided a reasonable opportunity to review evidence to be utilized at the hearing in accordance with Rule 24 [Section 17224]; and (3) that such evidence provides prima facie support for the Assessment or Withholding of Contract Payments.

(b) If the Enforcing Agency meets its initial burden under (a), the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment or for the Withholding of ntract Payments is incorrect.

(c) With respect to any civil penalty established under Labor Code section 1775, the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the Code, and the quantum of proof required to establish the existence or non–existence of any fact shall be by a preponderance of the evidence, unless a higher standard is prescribed by law.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 500, 502 and 550, Evidence Code; and Sections 1742(b) and 1775, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17251. Liquidated Damages.

(a) With respect to any liquidated damages for which an Affected Contractor, Subcontractor, or Surety on a bond becomes liable under Labor Code section 1742.1, the Enforcing Agency shall have a further burden of coming forward with evidence to show the amount of wages that remained unpaid as of 60 days following the service of the Assessment or Notice of Withholding of Contract Payments. The Affected Contractor or Subcontractor shall have the burden of demonstrating that he or she had substantial grounds for believing the Assessment or Notice to be in error.

(b) To demonstrate "substantial grounds for believing the Assessment or Notice to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment or Notice was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment or Notice.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(b), 1742.1 and 1773.5, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17252. Oral Argument and Briefs.

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

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

(c) In addition to or as an alternative to post–hearing briefs, the Hearing Officer may also prepare proposed findings or a tentative decision or may designate a Party to prepare proposed findings and thereafter give the Parties a reasonable opportunity to present arguments in support of or opposition to any proposed findings or tentative decision prior to the issuance of a decision by the Director under Rule 60 [Section 17260] below.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17253. Conclusion of Hearing; Time for Decision.

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

(b) For good cause, the Hearing Officer may vacate the submission

DTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer-ce: Section 1742(b), Labor Code.

HISTORY

New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 6. Decision of the Director

17260. Decision.

(a) The appointed Hearing Officer shall prepare a recommended deci-n for the Director's review and approval. The decision shall consist of notice of findings, findings, and an order, and shall be in writing and lude a statement of the factual and legal basis for the decision, consis-t with the requirements of Labor Code section 1742 and Government de section 11425.50.

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

c) A copy of the decision shall be served by first class mail on all Par-in accordance with the requirements of Code of Civil Procedure sec-1013. If a Party has appeared through an authorized Representative, vice shall be made on that Party at the last known address on file with Enforcing Agency in addition to service on the authorized Represen-ve.

TE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer-e: Section 1013, Code of Civil Procedure; Section 11425.50, Government e; and Section 1742(b), Labor Code.

HISTORY

ew article 6 (sections 17260–17264) and section filed 1–15–2002; operative -15–2002 pursuant to Government Code section 11343.4 (Register 2002, No.

7261. Reconsideration.

a) Upon the application of any Party or upon his or her own motion; Director may reconsider or modify a decision issued under Rule 60 tion 17260] above for the purpose of correcting any error therein.

b) The decision must be reconsidered or modified within 15 days after ate of issuance pursuant to Rule 60(c) [Section 17260(c)]. Thereaf-he decision may not be reconsidered or modified, except that a cleri-rror may be corrected at any time.

c) The modified or reconsidered decision shall be served on the Par-in the same manner as a decision issued under Rule 60 [Section 0].

d) A Party is not required to apply for reconsideration before seeking ial review of a decision of the Director. An application for reconsid-on made by any Party shall *not* extend the time for seeking judicial w pursuant to Labor Code section 1742(c) unless the Director issues dified or reconsidered decision within the 15–day time limit pre-ed in subpart (b) of this section.

E: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Refer-Section 1742, Labor Code.

HISTORY

w section filed 1–15–2002; operative 1–15–2002 pursuant to Government de section 11343.4 (Register 2002, No. 3).

262. Final Decision; Time for Seeking Review.

The decision of the Director issued pursuant to Section Rule 60 ion 17260] above shall be the final decision of the Director from any Party may seek judicial review pursuant to the provisions of Code section 1742(c) and Code of Civil Procedure section 1094.5; *ded however,* that if the Director has issued a modified decision pur-to and within the 15–day limit of the Director's reconsideration au-y under Section Rule 61 [Section 17261] above and Labor Code 1862(b), the right of review and time for seeking such review extend from the date of service of the modified decision rather than the original decision.

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

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

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5. Reference: Sections 1013 and 1094.5, Code of Civil Procedure; and Section 1742, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17263. Preparation of Record for Review.

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

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

(c) The pendency of any request for the Department to prepare a hearing record shall *not* extend the time limits for filing a petition for review under Labor Code section 1742(c) and Code of Civil Procedure section 1094.5.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1094.5, Code of Civil Procedure; California Rule of Court 985; Section 68511.3, Government Code; and Section 1742(c), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17264. Request for Participation by Director in Judicial Review Proceeding.

Although the Director should be named as the Respondent in any action seeking judicial review of a final decision, the Director ordinarily will rely upon the Parties to the hearing (as Petitioner and Real Party in Interest) to litigate the correctness of the final decision in the writ proceeding and on any appeal. The Director may participate actively in proceedings raising issues that specifically concern the Director's authority under the statutes and regulations governing the payment of prevailing wages on public work contracts, or the validity of related laws, regulations, or the Director's decisions as to public works coverage or generally applicable prevailing wage rates. Any Party may request the Director to file a response in the action by including a separate written request with any court pleading being served on the Director in accordance with Rule

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1094.5, Code of Civil Procedure; and Section 1742(c), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 7. Transitional Rule

§ 17270. Applicability of These Rules to Notices Issued Between April 1, 2001 and June 30, 2001.

(a) These Rules shall apply to any notice issued by the Labor Commissioner or an Awarding Body with respect to the withholding or forfeiture of contract payments for unpaid wages or penalties under the prevailing wage laws in effect prior to July 1, 2001; *provided that,* the party seeking review has not commenced a civil action with respect to such notice under the provisions of Labor Code sections 1731–1733 [repealed effective July 1, 2001].

(b) An Affected Contractor or Subcontractor may appeal any such notice served between April 1, 2001 and June 30, 2001 by filing a Request for Review with the Enforcing Agency that issued the notice, in the manner and form specified in Rule 22 [Section 17222] above. Any such Request for Review shall be in writing and shall include a statement indicating the date upon which the contractor or subcontractor was served with the notice of withholding or forfeiture.

(c) This Rule shall *not* extend the time available to appeal the notice under the former law. A Request for Review of a notice issued prior to July 1, 2001 must be filed with the Enforcing Agency within ninety (90) days after service of the notice.

(d) A contractor or subcontractor who has sought review of a notice issued prior to July 1, 2001 by filing a court action under the repealed provisions of Labor Code sections 1731–1733 on or after July 1, 2001, shall, if said action would have been timely under those sections, be afforded the opportunity to dismiss the action without prejudice, after entering into a stipulation that the proceeding be transferred to the Director for hearing in accordance with these Rules. The stipulation shall also provide that the time for commencing a hearing under Rule 41 [Section 17241] shall not begin to run until the case has been formally transferred to and received by the Office of the Director.

(e) Any hearing request made pursuant to Labor Code section 1771.7 [repealed effective July 1, 2001] that has not been heard and decided by a Hearing Officer prior to July 1, 2001 shall be handled in accordance with these Rules.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New article 7 (section 17270) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

* * *

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

EXHIBIT T

March 11, 2008

Mr. Keith Peterson
SixTen & Associates
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: **Draft Staff Analysis and Hearing Date**
Prevailing Wage Rate, 01-TC-28
Clovis Unified School District
Labor Code Sections 1720,1720.2,1720.3,1726,1727,1733,1735,1741,1742, 1742.1,1743,1750,1770,1771,1771.5,1771.6,1772,1773,1773.1,1773.2,1773.3, 1773.5,1773.6,1775,1776,1777.1,1777.5,1777.6,1777.7,1812,1813,1861;
Public Contract Code, Section 22002;
Statutes 1976, Ch. 281; Statutes 1976, Ch. 538; Statutes 1976, Ch. 599; Statutes 1976, Ch. 861; Statutes 1976, Ch. 1174; Statutes 1976, Ch. 1179; Statutes 1977, Ch. 423; Statutes 1978, Ch. 1249; Statutes 1979, Ch. 373; Statutes 1980, Ch 962; Statutes 1980, Ch. 992; Statutes 1981, Ch 449; Statutes 1983, Ch. 681; Statutes 1983, Ch. 1054; Statutes 1988, Ch. 160; Statutes 1989, Ch. 278; Statutes 1989, Ch. 1224; Statutes 1992, Ch. 913; Statutes 1992, Ch. 1342; Statutes 1993, Ch.589; Statutes 1997, Ch. 17; Statutes 1997, Ch. 757; Statutes 1998, Ch. 443; Statutes 1998, Ch. 485; Statutes 1999, Ch. 30; Statutes 1999, Ch. 83; Statutes 1999, Ch. 220; Statutes 1999, Ch. 903; Statutes 2000, Ch. 135; Statutes 2000, Ch. 875; Statutes 2000, Ch. 881; Statutes 2000, Ch. 920; Statutes 2000, Ch. 954; Statutes 2001, Ch. 804; Statutes 2001, Ch. 938;
Title 8, CCR, Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802,17201-17212, 17220-17229, 17230-17237,17240-17253, 17260-17264

Dear Mr. Peterson:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **Tuesday, April 1, 2008**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you

would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on **Thursday, May 29, 2008** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about May 16, 2008. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Deborah Borzelleri at (916) 322-4230 with any questions regarding the above.

Sincerely,

Paula Higashi
Executive Director

Enc. Draft Staff Analysis

ITEM ____

TEST CLAIM
DRAFT STAFF ANALYSIS

Labor Code Sections 1720, 1720.2, 1720.3, 1726, 1727, 1733, 1735, 1741, 1742, 1742.1, 1743, 1750, 1770, 1771, 1771.5, 1771.6, 1771.7, 1772, 1773, 1773.1, 1773.2, 1773.3, 1773.5, 1773.6, 1775, 1776, 1777.1, 1777.5, 1777.6, 1777.7, 1812, 1813, 1861

Public Contract Code Section 22002

Statutes 2002, Chapter 868 (AB 1506); Statutes 2001, Chapter 938 (SB 975); Statutes 2001, Chapter 804 (SB 588); Statutes 2000, Chapter 954 (AB 1646); Statutes 2000, Chapter 920 (AB 1883); Statutes 2000, Chapter 881 (SB 1999); Statutes 2000, Chapter 875 (AB 2481); Statutes 2000, Chapter 135 (AB 2539); Statutes 1999, Chapter 903 (AB 921); Statutes 1999, Chapter 220 (AB 302); Statutes 1999, Chapter 83 (SB 966); Statutes 1999, Chapter 30 (SB 16); Statutes 1998, Chapter 485 (AB 2803); Statutes 1998, Chapter 443 (AB 1569); Statutes 1997, Chapter 757 (SB 1328); Statutes 1997, Chapter 17 (SB 947); Statutes 1993, Chapter 589 (AB 2211); Statutes 1992, Chapter 1342 (SB 222); Statutes 1992, Chapter 913 (AB 1077); Statutes 1989, Chapter 1224 (AB 114); Statutes 1989, Chapter 278 (AB 2483); Statutes 1988, Chapter 160 (SB 2637); Statutes 1983, Chapter 1054 (AB 1666); Statutes 1983, Chapter 681 (AB 2037); Statutes 1981, Chapter 449 (AB 1242); Statutes 1980, Chapter 992 (AB 3165); Statutes 1980, Chapter 962 (BA 2557); Statutes 1979, Chapter 373 (SB 925); Statutes 1978, Chapter 1249 (AB 3174); Statutes 1977, Chapter 423 (SB 406); Statutes 1976, Chapter 1179 (AB 3676); Statutes 1976, Chapter 1174 (AB 3365); Statutes 1976, Chapter 861 (SB 1953); Statutes 1976, Chapter 599 (AB 1125); Statutes 1976, Chapter 538 (AB 2466); Statutes 1976, Chapter 281 (AB 2363)

Title 8, California Code of Regulations Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802, 17201-17212, 17220-17229, 17230-17237, 17240-17253, 17260-17264

School Facility Program Substantial Progress and Expenditure Audit Guide – May 2003
(Prepared by the Office of Public School Construction)

AB 1506 Labor Compliance Program Guidebook – February 2003
(Prepared by the Division of Labor Standards Enforcement)

Antioch Unified School District Labor Compliance Program
January 17, 2003

Prevailing Wage Rate

01-TC-28

Clovis Unified School District, Claimant

EXECUTIVE SUMMARY

This test claim addresses changes to the California Prevailing Wage Law (CPWL), which is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds." Contractors for public works projects that exceed $1,000 are required to pay local prevailing wages to construction workers on those projects. The requirement to pay prevailing wages is only applicable to work performed under contract, and is not applicable to work carried out by a public agency with its own forces; the requirement is applicable to contracts let for maintenance work. Local prevailing wage rates are set by the Director of the Department of Industrial Relations.

The Test Claim Statutes, Regulations and Alleged Executive Orders Impose a Partially Reimbursable State-Mandated Program on K-12 School Districts or Community College Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution

The provisions of the CPWL are only applicable when a district contracts with a private entity to carry out a public works project. The cases have consistently held that when a district makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed. The underlying decision to undertake a public works project is mandated by the state only when the public works project is for the purpose of repair or maintenance of school buildings or property. The underlying decision to contract for such a project is mandated by the state under the Public Contract Code, only when the project is not an emergency as defined and under other specified conditions related to the size of the student body and cost of the project.

The test claim statutes and regulations mandate certain activities when the CPWL provisions are triggered under the above circumstances, and some of those activities impose a new program or higher level of service on districts within the meaning of article XIII B, section 6 of the California Constitution. For some of those activities, however, the test claim statutes and regulations allow the districts to levy fees sufficient to pay for the costs of the newly-mandated activities, and Government Code section 17556, subdivision (d), is applicable to deny reimbursement for them. The remaining three activities do impose costs mandated by the state, thus imposing a partially reimbursable state-mandated program on K-12 school districts and community college districts.

Conclusion

Staff concludes that Labor Code section 1776, subdivisions (g) and (h), and section 16403, subdivision (a), of the Department of Industrial Relations' regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, but only when those activities are triggered by projects for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and

    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or

b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000. (Pub. Contract Code, § 20114.)

2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and

   a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

   b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000. (Pub. Contract Code, § 20655.)

3. For any K-12 school district or community college district that is subject to the Uniform Public Contract Cost Accounting Act (UPCCAA), when a public project, as defined, is not an emergency as set forth in Public Contract Code section 20113 or 20654, and the project cost will exceed $30,000.[1] (Pub. Contract Code, § 22032.)

Only the following activities for the foregoing projects are reimbursable:

1. Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)

2. Withhold penalties from contractor progress payments for noncompliance with Labor Code section 1776, upon request of the Department of Industrial Relations' Division of Apprenticeship Standards or Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)

3. Insert in the contract stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).)

None of the other test claim statutes, regulations or alleged executive orders that were pled mandate a new program or higher level of service subject to article XIII B, section 6.

Recommendation

Staff recommends the Commission adopt this analysis to partially approve the test claim.

[1] Prior to January 1, 2007, the dollar limit for public projects that could be performed by the district with its own forces was $25,000.

STAFF ANALYSIS

Claimant

Clovis Unified School District

Chronology

06/28/02	Clovis Unified School District ("Claimant") filed test claim with the Commission on State Mandates ("Commission")
07/08/02	Commission staff deemed the test claim complete
08/14/02	The Department of Industrial Relations requested an extension of time, for an additional 90 days, to file comments on the test claim
08/15/02	Commission staff approved extension of time, to November 13, 2002, to file comments on the test claim
08/19/02	Claimant filed missing pages of the test claim with the Commission
11/05/02	The Department of Finance requested an extension of time, for an additional 60 days, to file comments on the test claim
11/06/02	Commission staff approved extension of time, to January 15, 2003, to file comments on the test claim
01/13/03	The Department of Finance requested an extension of time to file comments on the test claim
01/15/03	Commission staff approved extension of time, to January 31, 2003, to file comments on the test claim
01/15/03	The Department of Industrial Relations filed comments on the test claim
01/15/03	The State Building and Construction Trades Council of California, AFL-CIO, filed comments on the test claim
01/29/03	The Department of Finance requested an extension of time to file comments on the test claim
01/30/03	Commission staff approved extension of time, to February 18, 2003, to file comments on the test claim
02/18/03	Claimant filed rebuttal comments on the test claim
02/18/03	The Department of Finance filed comments on the test claim
03/20/03	Claimant filed comments on the test claim
04/02/03	The Department of Industrial Relations filed comments on the test claim
07/31/03	Claimant filed amendment to the test claim
08/14/03	Commission staff deemed the amendment to the test claim complete
08/18/03	The Department of Industrial Relations filed comments on the test claim
09/05/03	The Department of Finance requested a 30-day extension to file comments on the test claim

09/12/03	The Department of Industrial Relations requested an extension of time, for an additional 21 days, to file comments on the test claim
09/15/03	The Department of General Services, Office of Public School Construction, filed comments on the test claim
09/16/03	Commission staff approved extension of time, to October 6, 2003, for the Department of Industrial relations to file comments on the test claim
09/18/03	Claimant filed rebuttal comments on the test claim
10/07/03	The Department of Industrial Relations filed comments on the test claim
10/09/03	The Department of Industrial Relations filed a verification for its August 18, 2003 comments on the test claim
10/14/03	The Department of Finance requested an extension of time, for an additional 30 days, to file comments on the test claim
10/15/03	Commission staff approved extension of time, to November 5, 2003, to file comments on the test claim
10/20/03	Claimant filed rebuttal comments on the test claim
11/06/03	Claimant filed rebuttal comments on the test claim
11/05/03	The Department of Finance filed comments on the test claim
12/08/03	Claimant filed rebuttal comments on the test claim
01/28/04	The Department of Industrial Relations requested an extension of time, for an additional 30 days, to file comments on the test claim
01/30/04	Commission staff approved extension of time, to March 3, 2004, to file comments on the test claim
07/11/07	Commission staff requested claimant to provide specific versions of regulations claimed
07/23/07	The Department of Industrial Relations requested postponement of the December 6, 2007 hearing on the test claim
07/26/07	Commission staff denied the request to postpone hearing the test claim
07/25/07	Claimant requested an extension of time, for an additional four weeks, to file regulations information requested by Commission staff
08/01/07	Commission staff approved extension of time, to August 29, 2007, to file the information requested
08/30/07	Claimant submitted additional regulations information requested by Commission staff
03/11/08	Commission staff issued draft staff analysis

Background

This test claim addresses changes to the California Prevailing Wage Law (CPWL),[2] which is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds."[3] Contractors for public works projects that exceed $1,000 are required to pay local prevailing wages to construction workers on those projects.[4] The requirement to pay prevailing wages is only applicable to work performed under contract, and is not applicable to work carried out by a public agency with its own forces; the requirement is applicable to contracts let for maintenance work.[5] Local prevailing wage rates are set by the Director of the Department of Industrial Relations.[6]

In addition to state agencies, the CPWL applies to "political subdivisions," which include any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.[7] Thus, the CPWL applies to both school districts and community college districts. The agency or authority awarding the contract for public work is known as the "awarding body."[8]

The overall purpose of the CPWL is to benefit and protect employees on public works projects.[9] Its specific goals are to: 1) protect employees from substandard wages that might be paid if contractors could recruit from cheap-labor areas; 2) permit union contractors to compete with nonunion contractors; 3) benefit the public through the superior efficiency of well-paid employees; and 4) compensate nonpublic employees with higher wages for the absence of job security and benefits enjoyed by public employees.[10]

The CPWL does not generally cover federal projects. Those projects are addressed in the federal Davis-Bacon Act (40 USC § 276a(a)), which was enacted for a similar purpose, i.e., to protect local wage standards by preventing federal contractors from basing their bids on wages lower than those prevailing in the area.[11] However, the application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies.[12]

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[2] Labor Code sections 1720 et seq.

[3] *Road Sprinkler Fitters, Local Union 669 v. G & G Fire Sprinkler, Inc.* (2002) 102 Cal.App.4th 765, 776.

[4] Labor Code section 1771.

[5] *Ibid.*

[6] Labor Code section 1770.

[7] Labor Code section 1721.

[8] Labor Code section 1720.

[9] *Lusardi Construction Co. v. Aubry* (1992) 1 Cal 4th 976, 987.

[10] *Ibid.*

[11] *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883.

[12] Title 8, California Code of Regulations, section 16001, subdivision (b).

Public Works Defined

The Labor Code generally defines "public works" as construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds,[13] and includes: 1) design and preconstruction work;[14] 2) work done for irrigation, utility, reclamation and improvement districts;[15] 3) street, sewer, or other improvement work for public agencies;[16] 4) laying of carpet;[17] 5) certain public transportation demonstration projects;[18] and 6) hauling of refuse from a public works site to an outside disposal location.[19] Public works projects also include maintenance,[20] as defined.[21]

The Labor Code also defines "paid for in whole or in part out of public funds" as payment of funds directly to or on behalf of a public works contractor, subcontractor or developer,[22] including various other types of payments,[23] and provides several types of projects that are excluded from that definition.[24]

Prevailing Wage Rates

Prevailing wage rates are set by the Director of the Department of Industrial Relations (DIR),[25] generally by reviewing local wage rates established by collective bargaining agreements and

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[13] Labor Code section 1720, subdivision (a)(1).

[14] *Ibid.*

[15] Labor Code section 1720, subdivision (a)(2).

[16] Labor Code section 1720, subdivision (a)(3).

[17] Labor Code section 1720, subdivisions (a)(4) and (a)(5).

[18] Labor Code section 1720, subdivision (a)(6).

[19] Labor Code section 1720.3.

[20] Labor Code section 1771; Title 8, California Code of Regulations, section 16001, subdivision (f).

[21] "Maintenance" is defined as: (1) routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system, or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired; and (2) carpentry, electrical, plumbing, glazing, touchup painting, and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures. Janitorial services of a routine, recurring or usual nature is excluded. (tit. 8, Cal. Code Regs., § 16000)

[22] Labor Code section 1720, subdivision (b)(1).

[23] Labor Code section 1720, subdivisions (b)(2) through (b)(6).

[24] Labor Code section 1720, subdivision (c).

[25] Labor Code section 1770.

rates that may have been predetermined for federal public works.[26] The awarding body for any contract for public works is required to specify in the call for bids, the bid specifications and the contract itself, what the prevailing wage rate is for each craft, classification or type of worker needed to execute the contract.[27] In lieu of specifying the wage rates in the call for bids, bid specifications and the contract itself, the awarding body may include a statement in those documents that copies of the prevailing wage rates are on file at its principal office, which shall be made available to any interested party on request.[28] The awarding body is required to post at each job site a copy of the determination by the DIR Director of the prevailing wage rates.[29]

Prospective bidders, representatives of any craft classification or type of worker involved, or the awarding body may challenge the declared prevailing wage rates with DIR within 20 days after commencement of advertising of the bids.[30] The Director of DIR begins an investigation and within 20 days, or longer if agreed upon by all the parties, makes a determination and transmits it in writing to the awarding body and the interested parties, which delays the closing date for submitting bids or starting of work until five days after the determination.[31] The Director's determination is final, and shall be considered the determination of the awarding body.[32]

Payroll Records

Contractors and subcontractors subject to the CPWL are required to keep accurate payroll records showing name, address, social security number, work classification, straight time and overtime hours worked each day and week and actual wages paid to each worker in connection with the public work,[33] and provide certified copies or make such records available for inspection, upon request of the employee, the awarding body, Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards.[34] Requests by the public are required to be made through the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement,[35] and shall be redacted to prevent disclosure of an individual's name, address and social security number.[36] The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the entity

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[26] Labor Code section 1773.

[27] Labor Code section 1773.2.

[28] *Ibid.*

[29] *Ibid.*

[30] Labor Code section 1773.4.

[31] *Ibid.*

[32] *Ibid.*

[33] Labor Code section 1776, subdivision (a).

[34] Labor Code section 1776, subdivision (b).

[35] Labor Code section 1776, subdivision (b)(3).

[36] Labor Code section 1776, subdivision (e).

through which the request was made.[37] The awarding body is required to insert stipulations in the contract to effectuate these provisions.[38]

Discrimination on Public Works Employment Prohibited

Labor Code section 1735 prohibits contractors from discriminating on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for a violation of the CPWL.

Enforcement of CPWL

The awarding body is required to "take cognizance" of violations of the CPWL committed in the course of the public works contract, and shall promptly report any suspected violations to the Labor Commissioner.[39]

The Labor Commissioner is charged with enforcing the CPWL.[40] If the Labor Commissioner determines after an investigation that there has been a violation of the CPWL, the Labor Commissioner issues a civil wage and penalty assessment to the contractor or subcontractor or both.[41] Prior to July 1, 2001, the only way to challenge such an assessment was in court. On and after July 1, 2001, contractors or subcontractors may obtain review of a civil wage and penalty assessment through an informal settlement meeting with the Labor Commissioner,[42] or via an administrative hearing.[43] Until January 1, 2009, hearings are conducted before the DIR Director with an impartial hearing officer; thereafter the hearing will be conducted by an administrative law judge.[44] An affected contractor or subcontractor may appeal the administrative decision within 45 days of service of the decision by filing a petition for writ of mandate under Code of Civil Procedure section 1094.5.[45] This process provides the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner.[46]

When the Labor Commissioner issues a civil wage and penalty assessment, the awarding body is required to withhold and retain such moneys from contractor payments sufficient to satisfy the assessment.[47] The amounts withheld cannot be disbursed until receipt of a final order that is no longer subject to judicial review.[48] The awarding body that has withheld funds in

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[37] Labor Code section 1776, subdivision (b)(3).

[38] Labor Code section 1776, subdivision (h).

[39] Labor Code section 1726.

[40] Labor Code section 1741.

[41] *Ibid.*

[42] Labor Code section 1742.1, subdivision (b).

[43] Labor Code section 1742, subdivisions (a) and (b).

[44] Labor Code section 1742, as amended by Statutes 2004, chapter 685.

[45] Labor Code section 1742, subdivision (c).

[46] Labor Code section 1742, subdivision (g).

[47] Labor Code section 1727, subdivision (a).

[48] Labor Code section 1727, subdivision (b).

response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner.[49]

Labor Compliance Program

The awarding body can avoid paying prevailing wages for public works projects of $25,000 or less when the project is for construction, and $15,000 or less when the project is for alteration, demolition, repair or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program (LCP) for all of its public works projects.[50] As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.[51]

If the awarding body enforces the CPWL as an LCP, the awarding body is entitled to keep any penalties assessed. Before taking any action, the awarding body is required to provide notice of the withholding of any contract payments to the contractor and any subcontractor.[52] The same process for review of a civil wage and penalty assessment made by the Labor Commissioner, as set forth in Labor Code sections 1742 and 1742.1, is invoked.[53] Any amount recovered from the contractor shall first satisfy the wage claim, before being applied to penalties, and if insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.[54] Wages for workers who cannot be located are placed in the Industrial Relations Unpaid Wage Fund and held in trust.[55] Penalties of not more than $50 per day for each worker paid less than the prevailing wage rates[56] are paid into the general fund of the awarding body that enforced the CPWL.[57]

Awarding bodies that choose to use funds derived from the Kindergarten-University Public Education Facilities Bond Acts of 2002[58] or 2004[59] for public works projects are required to

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[49] Labor Code section 1742, subdivision (f).

[50] Labor Code section 1771.5, subdivision (a).

[51] Labor Code section 1771.5, subdivision (b).

[52] Labor Code section 1771.6, subdivision (a).

[53] Labor Code section 1771.6, subdivisions (b) and (c).

[54] Labor Code section 1771.6, subdivision (d).

[55] Labor Code section 1771.6, subdivision (e).

[56] Labor Code section 1775.

[57] Labor Code section 1771.6, subdivision (e).

[58] Proposition 47, approved by the voters at the November 5, 2002 statewide general election.

[59] Proposition 55, approved by the voters at the March 2004 statewide direct primary election.

adopt and enforce an LCP or contract with a third party to adopt and enforce an LCP.[60] These funds are allocated through the School Facility Program established by Chapter 12.5 of the Education Code. The State Allocation Board was required to increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the LCP.[61] Awarding bodies that choose to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of 2006,[62] however, are not subject to this requirement.

Employment of Apprentices on Public Works Projects

Properly registered apprentices are allowed to work on public works projects and must be paid prevailing wages for apprentices in the trade.[63] Apprenticeship standards are established by the DIR Division of Apprenticeship Standards,[64] and ratios of apprentices to journey level workers in a particular craft or trade on the public work are established by the particular apprenticeship program.[65] Contractors must meet various requirements with regard to employing apprentices, and the awarding body is required to include stipulations to that effect in the contract.[66]

School Facility Construction, Repairs and Funding

Beginning in 1947, the Legislature authorized the State Allocation Board to allocate funds for building and repairing schools. Legislation enacted in the late 1940s and early 1950s established a loan-grant program "to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the public school system..."[67] The State Department of General Services[68] administers and the State Allocation Board (SAB) allocates and apportions the funds made available to the districts with priority given to districts where the children will benefit most from additional facilities.[69]

The School Facilities Act[70] establishes a state program to provide state per pupil funding for new construction and modernization of existing school facilities[71] to be administered by the SAB.[72]

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[60] Labor Code section 1771.7, subdivision (a).

[61] Labor Code section 1771.7, subdivision (e).

[62] Proposition 1D, approved by the voters at the November 7, 2006 statewide general election.

[63] Labor Code section 1777.5, subdivisions (a) and (b).

[64] Labor Code section 1777.5, subdivision (c).

[65] Labor Code section 1777.5, subdivision (g).

[66] Labor Code section 1777.5, subdivision (n).

[67] Education Code sections 15700, et seq.

[68] Education Code section 15702.

[69] Education Code section 15704.

[70] Education Code sections 17070.10 et seq.

The Education Code sets out requirements that potential school building sites must meet.[73] Prior to commencing acquisition of real property for a new schoolsite or addition to an existing schoolsite, the governing board of a school district is required to evaluate property at a public hearing using the site selection standards established by the Department of Education.[74] Moreover, in the exercise of its police power, the state may through legislative action control the protection of public health, safety, and comfort in the erection of school buildings.[75] The Department of General Services is generally required to supervise the design and construction of any school building or the reconstruction or alteration of or addition to any school building.[76] Nevertheless, *whether* a school district decides to engage in a project to construct a school building is within the discretion of its governing board.[77]

Education Code section 17366 states the Legislature's intent to provide safe educational facilities for California schoolchildren as follows:

> [T]he Legislature intends that the governing board of each school district adopt a plan for the orderly repair, reconstruction, or replacement of school buildings not repaired, reconstructed, or replaced in accordance with this article.

Whenever the structural condition of any school building has been examined by designated entities or under the authorization of law and a report of the examination has been made to the governing board showing the building is unsafe for use, the governing board is required to immediately prepare an estimate of the cost necessary to make such repairs to the building(s) as are necessary, or, if necessary, to reconstruct or replace the building so that the building when repaired or reconstructed, or any building erected to replace it, shall meet such standards of structural safety as are established in accordance with law.[78] Using the information from the examination and report, the governing board is required to establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings.[79] If the governing board of the school district complies with these provisions, no member of that governing board may be held personally liable for injury to persons or damage to property resulting from the fact that a school building was not constructed under the requirements of Education Code sections 17280 et seq.[80]

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[71] Title 2, California Code of Regulations, section 1859.

[72] Education Code section 17070.35.

[73] Education Code sections 17210, et seq.

[74] Education Code sections 17211 and 17251.

[75] *Hall v. City of Taft* (1956) 47 Cal.2d 177, 184.

[76] Education Code section 17280.

[77] *People v. Oken* (1958) 159 Cal.App.2d 456, 460.

[78] Education Code section 17367.

[79] *Ibid.*

[80] Education Code section 17371

Education Code section 17593 requires K-12 school districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Education Code section 17002 defines "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction. The instrument shall not require capital enhancements beyond the standards for which the facility was designed and constructed.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. ...

Thus, both K-12 school districts and community college districts are required by statute to repair the school property of their districts.

The Education Code authorizes the County Superintendent of Schools to provide for the maintenance and repair of the property of school districts under his or her jurisdiction that elect to take advantage of this service by paying into the school maintenance and repair fund established for this purpose.[81] The superintendent is authorized to hire labor for such maintenance and repair:

> The superintendent of schools of the county may employ such extra help as is necessary to perform the labor for the maintenance and repair work, as well as to provide for the supervision and transportation of the labor together with the equipment and materials for the work. The cost price of the maintenance and repair services to any school district is the original cost thereof and in addition a sum sufficient to reimburse the county superintendent of schools for all supervision, transportation, equipment, and other expenses, but the sum added shall not in any case exceed 10 percent of the cost of labor and supplies.[82]

Contracting Out for Public Works Projects

The Public Contract Code establishes contracting requirements for school districts and community college districts.[83] Depending on the purpose of the project and estimated dollar

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[81] Education Code section 1266.

[82] Education Code section 1269.

[83] Public Contract Code sections 20110 et seq. and 20650 et seq.

amount, the district may be required to contract out to the lowest responsible bidder to accomplish the project. The major requirements are outlined below.

The governing board of any school district or any community college district shall let any contracts involving an expenditure of more than $50,000[84] to the lowest responsible bidder,[85] for any of the following: 1) the purchase of equipment, materials, or supplies to be furnished, sold or leased to the district; 2) services, except construction services; or 3) repairs, including maintenance,[86] that are not a public project as defined in section 22002, subdivision (c).[87, 88] Any contract for a public project, as defined, involving an expenditure of $15,000 or more shall be let to the lowest responsible bidder who shall give security as required by the board or the board shall reject all bids.[89]

Notwithstanding the preceding requirements, in the case of an emergency when any repairs, alterations, work, or improvement is necessary to any facility of the college or public schools to permit the continuance of existing classes, or to avoid danger to life or property, the governing board of a school district or community college district may, by unanimous vote, with the approval of the county superintendent of schools, either: 1) make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing materials or

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[84] Adjusted annually for inflation pursuant to Public Contract Code sections 20111, subdivision (d), and 20651, subdivision (d).

[85] The lowest responsible bidder shall provide security as the board requires, or all bids shall be rejected. (Pub. Contract Code, § 20111 and 20651.)

[86] Public Contract Code sections 21115 and 20656 define "maintenance" as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." It includes but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." It does not include, among other types of work: "janitorial or custodial services and protection of the sort provided by guards or other security forces." It further does not include painting, repainting, or decorating other than touchup, but instead it is the intent of the Legislature that such activities be controlled directly by the provisions of section 20114 or 20655.

[87] Public Contract Code sections 20111, subdivision (a), and 20651, subdivision (a).

[88] Section 22002, subdivision (c) defines "public project" as:
(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
(2) Painting or repainting of any publicly owned, lease, or operated facility.
(3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

[89] Public Contract Code sections 20111, subdivision (b), and 20651, subdivision (b).

supplies without advertising for or inviting bids; or 2) without regard to the number of hours needed for the job, authorize the use of day labor or force account to carry out the project.[90]

Moreover, the governing board of a school district or community college district may make repairs, alteration, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance by day labor or by force account[91] whenever the total number of hours on the job does not exceed 350 hours; for any school district having an average daily attendance of 35,000 or more, or for any community college district whose number of full-time equivalent students is 15,000 or greater, the governing board may perform the above activities by day labor or force account whenever the total number of hours on the job does not exceed 750 hours or when the cost of material for the job does not exceed $21,000.[92]

The Uniform Public Construction Cost Accounting Act (UPCCAA)[93]

The Uniform Public Construction Cost Accounting Act was enacted to "promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state."[94] The Act provides for developing such cost accounting standards by the California Uniform Construction Cost Accounting Commission, and an alternative method for the bidding of public works projects by public entities.[95] A public agency whose governing board has by resolution elected to become subject to this Act may use its own employees to perform public projects of $30,000 or less.[96]

Test Claim Statutes, Regulations and Alleged Executive Orders

Statutes

The test claim statutes encompass changes to the CPWL in the Labor Code beginning in 1976. The relevant provisions are summarized below.

Labor Code Sections 1720, 1720.2 and 1720.3: New types of public works projects were added with these sections:

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[90] Public Contract Code sections 20113 and 20654.

[91] In the context of the CPWL, work done by "force account" means work done by the local agency's own employees as distinguished from work performed pursuant to contract with a commercial firm for similar services. (70 Ops.Cal.Atty.Gen. 92, 97 (1987).)

[92] Public Contract Code sections 20114 and 20655.

[93] Public Contract Code sections 22000 et seq.

[94] Public Contract Code section 22001.

[95] *Ibid.*

[96] Public Contract Code section 22032; prior to January 1, 2007, the dollar limit for public projects that could be performed by the district was $25,000.

- Section 1720 was modified to add public transportation demonstration projects, design and preconstruction, including land surveying,[97] and installation projects.
- Section 1720.2 was amended to include projects done under private contract where the property subject to the contract is privately owned but upon completion of the construction work more than 50 percent of the property is leased to the state or a political subdivision for its use, and the construction work is performed according to plans or specifications furnished by the state or a political subdivision with a lease agreement that is entered into between a lessor and the state or political subdivision as lessee, during or upon completion of the project.
- Section 1720.3 was amended to include the removal of refuse from the public works construction site.

Labor Code Section 1726: A requirement was added for the awarding body, which was already required to "take cognizance" of violations, to promptly *report* suspected violations to the Labor Commissioner. The section was further amended to state that if the awarding body determines as a result of its own investigation (under a Labor Compliance Program) that there has been a violation and withholds contract payments, the Labor Compliance Program procedures in section 1771.6 shall be followed.

Labor Code Section 1727: This section was amended to state that if the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a *subcontractor's* violations, the *contractor* is required to withhold money upon request of the Labor Commissioner and transfer that money to the awarding body. In either case, the awarding body is limited to disbursing such withheld assessments until after receipt of a final order that is no longer subject to judicial review.

Labor Code Section 1735: This section, as added and amended, prohibits discrimination on public works employment for specified categories of persons, and every contractor violating the section is subject to all the penalties imposed for violations of the chapter.

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[97] Design and preconstruction was added by Statutes 2000, Chapter 881. The Senate Rules Committee Analysis stated that the bill codified current DIR practice and regulation by including construction inspectors and land surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project. (Senate Rules Committee, Office of Senate Floor Analyses, SB 1999, August 29, 2000, page 2.) On June 9, 2000, the DIR issued a decision (Public Works Case No. 99-046) finding that construction inspectors hired to do inspection for compliance with applicable building codes and other standards for a public works project were deemed to be employed upon public works and therefore entitled to prevailing wage. This DIR decision was the subject of a lawsuit, *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, which held that even though the DIR had interpreted preexisting statute to include the pre-construction activities as public works and argued that the new statute merely clarified existing law, the Supreme Court found the change in the statute operated prospectively only.

Labor Code Sections 1733, 1741, 1742, 1742.1 and 1743: These sections provide for an administrative process to challenge wage and penalty assessments as set forth:

- Section 1733, relating to court challenges to wage and penalty assessments, was repealed since a new administrative procedure was established.
- Section 1741 established that the Labor Commissioner, after an investigation, shall issue a civil wage and penalty assessment on contractors and/or subcontractors that violate the CPWL, and sets for the procedures for issuing the assessment.
- Section 1742 provided that contractors or subcontractors may obtain review of a civil wage and penalty assessment by the Labor Commissioner, and established procedures and additional appeal provisions. The hearing is conducted before the DIR Director with an impartial hearing officer until January 1, 2009; thereafter the hearing is conducted by an administrative law judge. Subdivision (f) provides that the awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner. Subdivision (g) provides that the section is the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner or the awarding body when it acts under a Labor Compliance Program pursuant to section 1771.5.
- Section 1742.1 established procedures to allow for the contractor or subcontractor to meet with the Labor Commissioner to settle a dispute over the civil wage and penalty assessment without the need for formal proceedings. Additional procedures were established to require the awarding body, when enforcing under a Labor Compliance Program, to afford the contractor or subcontractor, upon request of such contractor or subcontractor, the opportunity to meet with the awarding body to attempt to settle any dispute without the need for formal proceedings.
- Section 1743 provided that the contractor and subcontractor shall be joint and severally liable for all amounts due pursuant to a final order, but the Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

Labor Code Section 1750: This section allows the second lowest bidder a right of action against a successful bidder, when the successful bidder has violated the Unemployment Insurance Code. It does not require any activities of awarding bodies.

Labor Code Sections 1770, 1773, 1773.1, 1773.2, 1773.5 and 1773.6: These sections were amended to require the Director of the Department of Industrial Relations to determine the general prevailing rate of per diem wages, using specified criteria, rather than the pre-1975 requirement of having this responsibility rest with the awarding body. Section 1773.2 was thus amended to remove the requirement that the awarding body annually publish prevailing wage rate determinations in the newspaper. Section 1773.5, which previously gave the Director of DIR authority to establish rules and regulations, was amended to add "including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

Labor Code Section 1771: This section was amended to establish the threshold dollar amount for contracts subject to prevailing wages at $1,000.

Labor Code Sections 1771.5, 1771.6 and 1771.7: These new sections established the ability of an awarding body to elect to initiate and enforce a Labor Compliance Program (LCP). In

exchange, payment of prevailing wages is not required for any public works project of $25,000 or less when the project is for construction, or for any public works project of $15,000 or less when the project is for alteration, demolition, repair or maintenance work. An awarding body that establishes an LCP is also allowed to keep any fines or penalties assessed when it takes enforcement action. As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred. A contractor may appeal an enforcement action by a political subdivision to the Director of DIR.

Section 1771.6 was repealed and added to establish notice and withholding procedures for an awarding body that elects to enforce the CPWL under an LCP.

Section 1771.7 was repealed and later added to require that an awarding body that chooses to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or 2004 for a public works project shall initiate and enforce, or contract with a third party to initiate and enforce, an LCP with respect to that public works project. The provision applies to public works that commence on or after April 1, 2003.

Any awarding body choosing to use such bond funds is required to make a written finding that the awarding body has initiated and enforced, or has contracted with a third party to initiate and enforce, the Labor Compliance Program. If the awarding body is a school district, the governing body of that district shall transmit to the State Allocation Board a copy of the finding. If the awarding body is a community college district, that awarding body shall transmit a copy of the written finding to the Director of the Department of Industrial Relations.

Labor Code Section 1772: This section, which existed prior to 1975, establishes that workers employed by contractors or subcontractors in the execution of any public works project are deemed to be employed on the public work.

Labor Code Section 1775: This section was amended to increase penalty amounts assessed by the Labor Commissioner to be paid by contractors and/or subcontractors for violations of the requirement to pay prevailing wages, and to delete a requirement that the awarding body provide notice to a worker making a wage claim that there is insufficient money available from the contractor to pay such claim. Additionally, the section was changed to extend to subcontractors the liability for insufficient wage payments, and to require contractors to withhold monies due a subcontractor for such insufficient payments that are the subject of a claim filed with the Division of Labor Standards Enforcement.

Labor Code Section 1776: This section was amended to expand the requirements for contractors and subcontractors to keep certified payroll records for public works projects and furnish copies of those records to the awarding body, the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards. The amendments also require that copies of such payroll records be made available to the public through the awarding body, the Division of Labor Standards Enforcement or the Division of Apprenticeship Standards (but not by the contractor or subcontractor); if the records have not already been made available to

those entities, then the requesting party is required to reimburse the costs of preparation by the contractor, subcontractors and the entity through which the request was made. Any records made available to the public must be marked or obliterated to prevent disclosure of an individual's name, address or social security number. Any records made available to a joint labor-management committee must be marked or obliterated to prevent disclosure of an individual's social security number. The body awarding the contract is required to place stipulations to effectuate these provisions in the contract. In addition, the Director of the Department of Industrial Relations was required to adopt regulations consistent with the California Public Records Act and the Information Practices Act of 1977 governing release of the records including establishment of reasonable fees to be charged for reproducing copies of the records.

Labor Code Section 1777.1: This section was added and amended to deny a contractor or subcontractor the ability to bid on or be awarded a contract for a public works project, or perform work as a subcontractor on a public works project, when the contractor or subcontractor is found by the Labor Commissioner to be in violation of prevailing wage requirements with intent to defraud or in willful violation of the requirements. The section was also modified to require the Labor Commissioner to semi-annually publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project.

Labor Code Sections 1773.3, 1777.5, 1777.6 and 1777.7: These sections generally address apprenticeship requirements that must be met by contractors, and penalties that may be assessed for violation of those requirements. Section 1773.3, a renumbered version of pre-1975 Labor Code section 3098, requires an awarding body whose public works contract will employ apprentices to send a copy of the award to the Division of Apprenticeship Standards within five days of the award.

Labor Code Sections 1812 and 1813: These provisions, which existed prior to 1975, deal with contractor violations of the 8-hour work day limit and 40-hour work week limit. Section 1813 requires the awarding body to cause stipulations regarding these requirements to be placed in the contract, to take cognizance of violations and to report such violations to the Division of Labor Standards Enforcement.

Labor Code Section 1861: This section, which existed prior to 1975, requires contractors to sign and file with the awarding body a certification that the contractor will provide workers' compensation or equivalent insurance.

Public Contract Code Section 22002 (previously section 21002): For purposes of contracting by public agencies and school districts, this section added a definition of "public project:"

> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, lease, or operated facility.
> (2) Painting or repainting of any publicly owned, leased, or operated facility.
> (3) Construction, erection, improvement or repair of dams, reservoirs, powerplants and electrical transmission lines of 230,000 volts or higher that are publicly owned utility systems.

"Public project" does not include maintenance work; for purposes of the section, "maintenance work" includes:

> (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
> (2) Minor repainting.
> (3) Resurfacing of streets and highways at less than one inch.
> (4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

For purposes of the chapter, "facility" is defined as any plant, building, structure, ground facility, publicly owned utility system as limited above, real property, streets and highways, or other public work improvement.

Regulations

California Code of Regulations, Title 8, sections 16000 through 17264, as pled in the test claim, implement and make specific the statutory provisions cited above.

Alleged Executive Orders

School Facility Program Substantial Progress and Expenditure Audit Guide (May 2003): This document, prepared by the Department of General Services' Office of Public School Construction (OPSC), was developed to assist school districts in meeting program reporting requirements for the School Facilities Program (SFP).

Section 3.9 of the document states that for SFP projects that require the district to implement a Labor Compliance Program, the district must submit a copy of the Department of Industrial Relations approved Labor Compliance Program to which the project conformed and, if applicable, a copy of the third party provider contract. The district must also be prepared to submit, upon request: 1) all bid invitation and contracts that must contain language alluding to Labor Code section 1770 through 1780 compliance and verification; 2) evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set in Labor Code section 1770 through 1780; and 3) evidence of weekly submittals of certified copies of payroll for all contractors and subcontractors. If the district uses its own employees to implement and administer the Labor Compliance Program, the district must account for the name of the district employee performing the Labor Compliance Program duties, the salary and benefits of that employee including transportation costs, and a specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

AB 1506 Labor Compliance Program Guidebook (February 2003): The guidebook was issued by the DIR to address newly enacted Labor Code section 1771.7. Page 3 of the document states:

> This guidebook was prepared by the [Division of Labor Standards Enforcement] and knowledgeable individuals in the private and public sector with a wide range of experience in school district issues, construction projects, public works and labor compliance. This guidebook was intended to facilitate requests to the DIR director from awarding

bodies seeking approval of their own LCPs to conform to the requirements of Labor Code section 1771.7.

This guidebook is not intended to be used as a substitute for the full text of statutes and regulations which comprise the prevailing wage system, or the continually developing body of law which prevailing wage enforcement has generated over the past six decades and will continue to generate in the future. Rather, this information should be viewed as a framework for implementation of an effective LCP designed to enforce prevailing wage requirements consistent with the practice of DLSE.

The guidebook summarizes the relevant provisions of the Labor Code and Title 8, California Code of Regulations, provides instructional materials and practical advice for implementing an LCP, identifies contact and resource information, includes appendices with recommended forms, commonly used terms and a checklist of labor law requirements.

Antioch Unified School District Labor Compliance Program (January 17, 2003): This document was provided as an example of a recently approved LCP, and the DIR stated in its transmittal of the document that Antioch's LCP manual "could be a model for other districts because it contains the most up-to-date information about compliance with labor standards on public works projects."

Prior Test Claim

On December 6, 2007, the Commission heard and denied the *Prevailing Wages (03-TC-13)* test claim, filed by the City of Newport Beach. This test claim alleged various changes to the CPWL, but was applicable only to local agencies and did not show that the underlying decisions to undertake public works projects subject to the CPWL are mandated by the state. The Statement of Decision found the following:

> The provisions of the CPWL are only applicable when a local agency contracts with a private entity to carry out a public works project. The test claim statutes and regulations modified several provisions of the CPWL, and local agencies that contract out for their public works projects are affected by these changes. However, the cases have consistently held that when a local agency makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed.
>
> Public works projects can arise in a myriad of ways, but there is no evidence in the record or in law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. In fact, like the exercise of eminent domain in *City of Merced*, the local agency has discretion to undertake public works projects. The courts have underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision that requires the costs to be incurred. Therefore, the Commission finds that the test claim statutes and regulations do not mandate a new program or higher level of service, and thus do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6.

Claimant's Position

Claimant asserts that the test claim statutes and regulations result in school districts and community college districts incurring costs mandated by the state by creating new state-mandated duties related to the uniquely governmental function of providing for public works. When contracting with third parties for public works as an awarding body, school districts, county offices of education and community colleges are required to do the following:

1. Obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for public works, pursuant to Labor Code section 1773 and Title 8, California Code of Regulations, section 16202.
2. Ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations, pursuant to Title 8, California Code of Regulations, section 16204.
3. Request from the Director of Industrial Relations a coverage determination regarding a specific project or type of work to be performed, pursuant to Title 8, California Code of Regulations, section 16001.
4. File a petition for review of a determination of the Director of Industrial Relations of any rate or rates, pursuant to Title 8, California Code of Regulations, section 16302.
5. Appeal an incorrect determination made by the Director of Industrial Relations, pursuant to Labor Code section 1773.4 and Title 8, California Code of Regulations, section 16002.5.
6. Pursuant to Labor Code section 1773.2, include a statement of prevailing rates of per diem wages in the call and advertisements for bids, the bid specifications and in the public works contract itself, or, in lieu of those requirements, the district may include in the call for bids, bid specifications and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in its principal office, and in that case the district must post the statement of prevailing wages at all job sites.
7. Maintain records of ineligible contractors and subcontractors and refuse to grant them public works projects of the district, pursuant to Labor Code section 1777.1 and Title 8, California Code of Regulations, sections 16800 through 16802.
8. Send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies, pursuant to Labor Code section 1777.3.
9. Inspect and audit payroll records of contractors and subcontractors working on district public works projects, when necessary or requested by the Director of Industrial Relations, pursuant to Labor Code section 1776.
10. Obtain and provide copies of the payroll records of the contractors and subcontractors working on district public works projects, when requested by appropriate parties; the records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number, pursuant to Labor Code section 1776 and Title 8, California Code of Regulations, section 16402.

11. Pay the reasonable fees of a third party when contracting with that third party to initiate and enforce a Labor Compliance Program (LCP), pursuant to Labor Code sections 1771.5 and 1771.7.

12. For works commencing on or after April 1, 2003, oversee compliance with all the requirements of Labor Code sections 1771.5 and 1771.7, Title 8, California Code of Regulations, sections 16425 through16439, and Chapters 2, 3 and 5 of the AB 1506 Labor Compliance Program Guidebook ("Program Guidebook") when contracting with a third party to initiate and enforce an LCP, including but not necessarily limited to the withholding of contract payments and collecting and disbursing penalties and wages at the direction of the third party LCP.

13. Pursuant to Title 8, California Code of Regulations, section 16426, subdivision (a), when seeking approval of an LCP, submit evidence of the district's ability to operate its LCP and offering evidence on the following factors:

    a. Experience and training of the awarding body's personnel on public works labor compliance issues.

    b. The average number of public works contracts the awarding body annually administers.

    c. Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved.

    d. The awarding body's record of taking cognizance of Labor Code violations and withholding in the preceding five years.

    e. The availability of legal support for the LCP.

    f. The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body.

    g. The method by which the awarding body will transmit notices to the Labor Commissioner of willful violations as defined in Labor Code section 1777.1, subdivision (d).

14. Complete a request for approval deemed by the Director of DIR to be deficient, or make other corrections as required, and resubmitting the request for approval of a LCP, pursuant to Title 8, California Code of Regulations, section 16426, subdivision (b).

15. Submit a request for an extension of an LCP at least 30 days prior to the anniversary date of the initial approval, pursuant to Title 8, California Code of Regulations,
section 16426, subdivision (c).

16. Make a written finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, an LCP as described in Labor Code section 1771.5, subdivision (b), pursuant to Labor Code section 1771.7, subdivision (d)(1). Transmit a copy of such written finding for school districts to the State Allocation Board, in the manner determined by that board, pursuant to

Labor Code section 1771.7, subdivision (d)(2)(A). Transmit a copy of such written finding for community college districts to the Director of DIR, in the manner determined by DIR, pursuant to Labor Code section 1771.7, subdivision (d)(3).

17. Comply with all the requirements of an LCP, when initiated and enforced by the district, pursuant to Labor Code sections 1771.5 or 1771.7 (for works commencing on or after April 1, 2003), Title 8, California Code of Regulations, sections 16425 through 16439, and Chapters 2, 3, and 5 of the Program Guidebook. These requirements include:

    a. Place in all bid invitations and public works contracts appropriate language concerning the requirements of the prevailing wage laws comprising Labor Code sections 1720 through 1861.

    b. Conduct a pre-job conference with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract.

    c. Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

    d. Review and, if appropriate, audit payroll records to verify compliance with prevailing wage laws. These investigations shall be conducted by monitoring certified payroll records, investigating complaints from workers, and monitoring agencies and contractors, pursuant to the Program Guidebook, Chapter 4, Parts (A) and (B). Upon conclusion of the audit, prepare audits and findings and obtain the approval of recommended forfeitures from the Labor Commissioner.

    e. Withhold contract payments when payroll records are delinquent or inadequate.

    f. Withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred. Withhold contract payments when payroll records are delinquent or inadequate, pursuant to Chapter 3 of the Program Guidebook.

    g. Serve on the contractor, any affected subcontractor, and any bonding company issuing a bond securing the payment of wages, a Notice of Withholding of Contract Payments using the form attached in Appendix 2 of the Program Guidebook.

    h. Mail a notice to DIR on a form titled Notice of Transmittal, found in Appendix 3 of the Program Guidebook, pursuant to Chapter 4 of the Program Guidebook.

    i. When a party requests review, mail a form titled Notice of Opportunity to Review Evidence, found in Appendix 4 of the Program Guidebook, pursuant to Chapter 4 of the Program Guidebook.

18. Provide contractors and subcontractors, bonding companies and sureties with Notice of Withholding of Contract Payments, using the form found in Appendix 2 of the Program Guidebook, when minimum wage law violations are discovered by the district, pursuant to Labor Code section 1771.6 and Title 8, California Code of

Regulations, section 17220. The notice shall be in writing and include the following information:

a. a description of the nature of the violation and basis for the notice;

b. the amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1, using the form found in Appendix 4 of the Program Guidebook;

c. the name and address of the office to whom a Request for Review may be sent;

d. information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments;

e. Notice of Opportunity to request a settlement meeting under Title 8, California Code of Regulations, section 17221; and

f. a statement appearing in bold, or another type face that makes it stand out from other text, to the effect that failure to submit a timely request for review will result in a final order that is binding on the contractor and subcontractor, and on the bonding company.

19. Complete and mail a Notice of Transmittal, as found in Appendix 3 of the Program Guidebook, to the DIR to begin the administrative review process.

20. Defend Notices to Withhold Contract Payments in administrative review proceedings and in court, pursuant to Chapter 4, paragraph iv(d) of the Program Guidebook.

21. Pursuant to Chapter 6 of the Program Guidebook, when investigating worker complaints of underpayment of prevailing wage rates: a) gather supporting documents from all available sources and analyze them for authenticity; and b) conduct a complete certified payroll record and/or project audit. This includes reviewing certified payroll records for errors, inconsistencies, discrepancies, falsification, misclassification, under-reporting, and any other omissions that render the records inaccurate where needed by comparing the inspector of records' daily log with all available records.

22. Pursuant to Chapter 6 of the Program Guidebook, conduct investigations on an as-needed basis by:

a. Calculating back wages and penalties.

b. Reviewing findings with the contractor and any subcontractor.

c. Writing a complete summary of the investigation with a statement of findings and recommended action for submission to DIR's Division f Labor Standards Enforcement for approval of withholdings.

d. Conducting settlement negotiations.

e. Testifying on behalf of the school district in appeal hearings and litigation.

f. Attending pre-bid and job-start meetings and monitoring active construction projects.

g. Interviewing workers to validate complaints.

23. Pursuant to Chapter 9 of the Program Guidebook, conduct audits on a random or as-needed basis, to include comparing certified payroll records to source documents such as front and back copies of canceled checks, time cards, copies of pay check stubs, payroll registers, personnel sign in sheets, daily logs and any other document which authenticates or corroborates that which has been reported.

24. Pursuant to Chapter 9 of the Program Guidebook, prepare cases and documentation to include:

a. Copies of workers' complaints.

b. Copies of all correspondence to the contractor.

c. Certified payroll records.

d. Inspector's daily log.

e. Correct prevailing wage determination and applicable increases.

f. Scope of work for trade classifications used.

g. Tabulation of bids.

h. Notice to proceed.

i. Notice of Completion (if applicable).

j. Surety company information.

k. Contractor's previous record of violations (if applicable).

l. The Notice of Withholding of Contract Payments (if applicable).

m. Release of Notice of Withholding of Contract Payments (if applicable).

n. Memo(s) to file.

25. Pursuant to Section 3.9 of the School Facility Program Substantial Progress and Expenditure Audit Guide ("Audit Guide"), in the event of any postaward audit of a school district by the State Allocation Board, pursuant to Labor Code section 1771.7, subdivision (d)(2)(C), submit a copy of the DIR approved LCP to which the project conformed and a copy of any third party provider contract.

26. Pursuant to Section 3.9 of the Audit Guide, at the time of an OSPC audit, be prepared to submit, upon request, the following:

a. All bid invitations and contracts that must contain language alluding to Labor Code sections 1770 through 1780 compliance and verification.

b. Evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set forth in Labor Code sections 1770 through 1780.

c. Evidence of weekly submittals of certified copies of payrolls for all contractors and subcontractors.

27. Pursuant to Section 3.9 of the Audit Guide, if a district elects to use its own employees for its LCP, provide the following additional information:

    a. The name of the district employee performing the LCP duties.

    b. The salary and benefits of the employee including transportation costs.

    c. A specific breakdown of hours spent by project subject to the LCP requirements.

28. Report any suspected violations of the prevailing wage laws to the Labor Commissioner, pursuant to Labor Code section 1726.

29. Withhold contract payments for underpaid wages and for penalties when, through the district's own investigation, the district determines a violation of prevailing wage laws has occurred, pursuant to Labor Code section 1726.

30. Withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner, pursuant to Labor Code section 1727.

31. Retain amounts withheld to satisfy a Civil Wage and Penalty Assessment until receiving a final order no longer subject to judicial review, pursuant to Labor Code section 1727.

32. After July 1, 2001, comply with all due process requirements for the benefit of contractors and subcontractors when amounts are withheld pursuant to a Civil Wage and Penalty Assessment or a Notice of Withholding of Contract Payments, including the providing of proper and timely notices, allowing review of evidence relied upon, appearance and participation at hearings and the appeals therefrom, pursuant to Labor Code section 1742 and Title 8, California Code of Regulations, section 17220.

33. After July 1, 2001, respond to petitions for writs of mandate filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including the retention of counsel to file timely responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment, pursuant to Labor Code section 1742.

34. Grant and participate in settlement meetings requested by contractors or subcontractors in an attempt to settle any disputed issue before formal hearing procedures, pursuant to Labor Code section 1742.1 and Title 8, California Code of Regulations, section 16413.

35. As a necessary party, appear and participate in legal proceedings resulting from any action against contractor or subcontractor filed by a joint labor-management committee for failure to pay prevailing wages, pursuant to Labor Code section 1771.2.

36. Furnish copies of payroll records of a contractor or subcontractor to a joint labor-management committee, when requested, obliterated only to prevent disclosure of social security numbers, pursuant to Labor Code section 1776.

Claimant stated in the original test claim it is estimated that the district has incurred, or will incur, in excess of $200 in staffing and other costs in excess of revenues annually, for the period from July 1, 2000 through June 2002, to implement the new duties mandated by the state, for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement. In an amendment filed on July 31, 2003, page 7 of the Second Declaration of William McGuire states:

> To the extent that Clovis Unified School District commences a public works project subject to Labor Code Section 1771.7, it is estimated that Clovis Unified School District will incur in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

In that amendment, an additional declaration was provided by Thomas J. Donner from the Santa Monica Community College District alleging costs mandated by the state.

Claimant filed rebuttal comments to the comments submitted by the Department of Finance, the Department of Industrial Relations, and the Department of General Services, Office of Public School Construction. These rebuttal comments are addressed, as necessary, in the following analysis.

Position of Department of Finance

The Department of Justice filed comments on behalf of the Department of Finance, generally stating that the test claim statutes do not impose a new program or higher level of service on school districts or community college districts since there is no reimbursable mandate for costs of programs or services incurred as a result of the exercise of local discretion, citing *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783. The Department then provides a specific response to each claim; those responses are addressed, as necessary, in the following analysis.

With regard to the test claim amendment addressing Labor Code section 1771.7, the Department states the section does not create a state mandate because districts voluntarily participate in the underlying program, i.e., the construction of schools with state bond money, citing *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 740. Even assuming there was a mandate, the Department points out that the state has provided additional funds for the costs of LCPs, and LCPs also generate revenues and costs savings. The Department argues that the claimant has not shown that it has any costs above these additional funds, revenues and cost savings.

Position of Department of Industrial Relations (DIR)

The DIR states that, since 1975, the state has taken on more of local agencies' historic responsibilities for determining and enforcing prevailing wages to make the prevailing wage duties clearer and less onerous, and leaving behind only minimal recordkeeping tasks. This type of shift from local agencies to the state does not trigger reimbursement under the requirements of article XIII B of the California Constitution. DIR points out that to the extent there has been any expansion in the scope of public works, the consequent obligation to pay prevailing wages directly affects private contractors and only indirectly affects local

governments. DIR then provides specific responses to each claim, which are addressed, as necessary, in the following analysis.

In additional comments, DIR applies the principles of the *Department of Finance v. Commission on State Mandates* case to the test claim, concluding that claimant has not met its burden of showing districts are compelled to participate in the underlying programs, i.e., either engage in construction of school facilities or engage in such projects via contract. DIR further notes that state funding for school construction is already provided through the State Allocation Board, which allocates money to districts based on formulas that pay between 40% to 80% of the cost of construction. DIR argues that the claimant has not made a credible case that such funding does not take care of whatever costs they have incurred.

With regard to the test claim amendment addressing Labor Code section 1771.7, the DIR states that no reimbursement is required because the newly created LCPs are voluntary programs for local school districts, and districts already receive state construction bond funding for their activities from the State Allocation Board. DIR further points out that district LCPs also are allowed to retain any penalties assessed and collected while enforcing the CPWL.

Position of Department of General Services, Office of Public School Construction

The Office of Public School Construction (OSPC), in commenting on the test claim amendment addressing Labor Code section 1771.7, states that participation by a school district in the School Facility Program (SFP), established by Chapter 12.5 of the Education Code, is voluntary:

> The Education Code does not compel a district to obtain funding from the State through the SFP as a condition of building schools. School districts may choose to build facilities through the use of district raised funds. Program elements are only required if a district chooses to participate in the program. Additionally, Labor Code … Section 1771.7 states "an awarding body that *chooses* to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 … for a public works project, shall initiate and enforce … a labor compliance program".[98]

The OSPC further states that the State Allocation Board (SAB) has authority to increase the per pupil grant amount to accommodate the State's share for the additional costs due to the initiation and enforcement of an LCP; the increases were approved by the SAB on July 2, 2003, and are currently being provided.

Interested Person -- State Building and Construction Trades Council of California (AFL-CIO)

The State Building and Construction Trades Council (SBCTC) filed comments on the test claim as an interested person, pursuant to Title 2, California Code of Regulations, section 1181.1, subdivision (*l*). The SBCTC states that the test claim should be denied for the following reasons:

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[98] Comments from Department of General Services, Office of Public School Construction, Luisa M. Park, Executive Officer, September 15, 2003, page 1.

1. Any "mandate" imposed by the CPWL is on private contractors, not the local agency. It is possible that if private contractors have higher labor costs, such costs might be passed on to their customers; however, the contractor's cost of paying higher wages to workers on a project may well be offset by the increased skill and productivity of those workers. Several recent studies conclude that the prevailing wage law does not actually increase total school construction costs, and the claimant has presented no evidence to the contrary. SBCTC provided a copy of one study: "A Comparison of Public School Construction Costs" by Peter Philips, Ph.D., Professor of Economics, University of Utah, February, 2001.
2. Although the CPWL does impose minor direct costs on school districts to administer and enforce the law, what has occurred since 1975 is the opposite of an unfunded state mandate since the state has taken upon itself responsibilities that were formerly borne by local agencies — i.e., determining prevailing wage rates and enforcing the CPWL.
3. It is correct to state that there has been some expansion in the definition of "public work" since 1975; however, many of the changes to that definition were actually clarifications of the pre-1975 statutory language and claimant has not presented any evidence that these minor changes have had any practical effect on school district construction projects.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[99] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[100] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[101]

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[102] In

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[99] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[100] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735.

[101] *County of San Diego v. State of California* (*County of San Diego*) (1997) 15 Cal.4th 68, 81.

[102] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[103]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[104] To determine if the program is new or imposes a higher level of service, the test claim requirements must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes.[105] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[106]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[107]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[108] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[109]

The analysis addresses the following issues:

- Do the test claim statutes, regulations or alleged executive orders impose a state-mandated program on K-12 school districts or community college districts within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes or regulations impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?

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[103] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[104] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[105] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[106] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

[107] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[108] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[109] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817 (*City of San Jose*).

- Do the test claim statutes or regulations impose costs mandated by the state within the meaning of Government Code section 17514 and article XIII B, section 6 of the California Constitution?

Issue 1: Do the test claim statutes, regulations or alleged executive orders impose a state-mandated program on K-12 school districts or community college districts within the meaning of article XIII B, section 6 of the California Constitution?

For the test claim statutes, regulations or alleged executive orders to impose a state-mandated program, the language must order or command a school district or community college district to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the district has made an underlying discretionary decision causing the requirements to apply, or where participation in the underlying program is voluntary, courts have held that resulting new requirements do not constitute a reimbursable state mandate.[110] Stated another way, a reimbursable state mandate is created when the test claim statutes or regulations establish conditions under which the state, rather than a local entity, has made the decision requiring the district to incur the costs of the new program.[111]

The claimant asserts the test claim statutes, regulations and alleged executive orders require districts to perform new activities to comply with state prevailing wage requirements, the costs of which are reimbursable under article XIII B, section 6. Since the provisions of the CPWL are only applicable to public works projects performed under contract, and not to work carried out by a public agency with its own forces,[112] the analysis must first address whether the state is requiring a school district or community college district to engage in any public works projects or to contract out for such projects. Then, the alleged new activities must be analyzed to determine whether they are required or mandated by the plain language of the test claim statutes, regulations, or alleged executive orders.

Do Districts Have Discretion to Undertake Public Works Projects?

Types of Public Works Projects Subject to CPWL

The Labor Code sets forth the types of projects that are considered "public works," subject to the CPWL. Prior to 1975, public works projects subject to prevailing wages generally included: 1) construction; 2) alteration; 3) demolition; 4) repair work; 5) work done for irrigation, utility, reclamation and improvement districts; 6) street, sewer or other improvement work; 7) laying of carpet; and 8) maintenance work.[113] Since 1975, the test claim statutes added new types of public works projects:

- Labor Code section 1720 was modified to add:

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[110] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[111] *San Diego Unified School Dist., supra* (2004) 33 Cal.4th 859, 880.

[112] Labor Code section 1771.

[113] Labor Code sections 1720 and 1771 in effect as of January 1, 1975.

- public transportation demonstration projects (effective August 7, 1989);
- design and preconstruction, including land surveying (effective January 1, 2001); and
- installation projects (effective January 1, 2002).

- Effective January 1, 1981, Labor Code section 1720.2 was amended to include projects done under private contract where the property subject to the contract is privately owned but upon completion of the construction work more than 50 percent of the property is leased to the state or a political subdivision for its use *and* the construction work is performed according to plans or specifications furnished by the state or a political subdivision with a lease agreement that is entered into between a lessor and the state or political subdivision as lessee during or upon completion of the project.
- Effective January 1, 2000, Labor Code section 1720.3 was amended to state that contracts for the removal of refuse from a public works construction site entered into by "any political subdivision" – which includes K-12 school districts and community college districts – are public works projects.

Each of these new types of public works projects is now subject to the CPWL.[114] The timing for CPWL coverage is significant here for purposes of the mandates analysis. The pre-existing public works projects were already subject to the pre-existing CPWL administrative requirements, while the new public works projects only became subject to and therefore triggered the pre-existing requirements at the time they were enacted.[115] Thus, for pre-existing public works projects, only the *newly-imposed* CPWL administrative requirements that are claimed could be subject to reimbursement. For *newly-covered* public works projects, however, all CPWL administrative requirements *that are claimed*, both pre-existing and new, could be subject to reimbursement.

Discretion to Undertake Public Works Projects

The foregoing provisions show that the CPWL covers a broad range of public works projects. The decision to undertake such projects could arise in a myriad of ways, from a district-level decision to an initiative enacted by the voters.

With regard to K-12 school districts, Education Code section 17593 requires those districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

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[114] Labor Code section 1771: "... not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed ... shall be paid to all workers employed on public works."

[115] See footnote 97 regarding effective date for CPWL coverage of design and pre-construction, including land surveying.

Moreover, Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Education Code section 17002 defines "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction. The instrument shall not require capital enhancements beyond the standards for which the facility was designed and constructed.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. ...

Thus, both K-12 school districts and community college districts are required by statute to repair the school property of their districts. Since "property" includes "any external thing over which the rights of possession, use, and enjoyment are exercised,"[116] the requirement to repair includes real property as well as facilities owned by the district. Moreover, because the term "repair" is defined as "to restore to sound condition after damage or injury" and "to renew or refresh,"[117] staff finds that "repair" includes "maintenance" for purposes of these provisions.

These statutes, therefore, constitute legal compulsion for K-12 school districts and community college districts to repair and maintain their facilities and property.

Aside from the above statutory requirements, however, there is no evidence in the test claim statutes, regulations, alleged executive orders, or in the record that the state has legally compelled districts to undertake other public works projects that *do not* involve repair or maintenance, including the newly-covered public works projects. In fact, with regard to new construction of school buildings, the Second District Court of Appeal has stated: "Where, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[118]

Absent such legal compulsion, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[119]

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[116] Black's Law Dictionary, Seventh Edition, 1999, page 1232, column 2.

[117] Webster's II, New Collegiate Dictionary, 1999, page 939, column 2.

[118] *People v. Oken, supra,* 159 Cal.App.2d 456, 460.

[119] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

In the case of *San Diego Unified School Dist.*, the test claim statutes required school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[120] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[121] Regarding expulsion recommendations that were discretionary on the part of the district, the court stated that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[122] Ultimately, however, the Supreme Court decided the discretionary expulsion issue on an alternative basis.[123]

There is no evidence in the record to indicate that failure to undertake public works projects that are not otherwise legally compelled would result in certain and severe penalties such as double taxation or other draconian consequences as set out in the *Kern* case. Nor does the record show that the circumstances here are similar to those faced by the *San Diego* court regarding school safety. Although school safety was mentioned in the context of the statutory repair and maintenance requirements, nothing in the record indicates that failure to undertake *other* public works projects that are not required in statute would result in unsafe schools.

Instead, staff finds that public works projects that are entered into for purposes other than repair and maintenance are discretionary, analogous to the situation in *City of Merced*. There, the issue before the court was whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill, when a local agency exercised the power of eminent domain.[124] The court stated:

> Whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[125]

The Supreme Court in *Kern High School District* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a

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[120] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[121] *Id.* at pages 881-882.

[122] *Id.* at page 887, footnote 22.

[123] *Id.* at page 888.

[124] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

[125] *Id.* at 783.

> reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[126]

The Code of Civil Procedure provision that was cited in *City of Merced* states:

> Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.[127]

The Law Revision Commission's comment on this provision stated:

> Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. ...[128]

The holding in *City of Merced* applies in this instance. A K-12 school district's or community college district's decision to undertake a public works project, other than for repair or maintenance of school buildings and property, is analogous to the discretionary decision to acquire property via eminent domain, and there is no evidence in the law or in the record that districts are practically compelled to engage in such public works projects.

Therefore, staff finds that the state has required K-12 school districts and community college districts to undertake public works projects to repair or maintain facilities and property of K-12 school districts and community college districts. The state has *not* required these districts to undertake any other public works projects. Consequently, any prevailing wage requirements, *when triggered by a public works project that does not address repair or maintenance*, are not mandated by the state and are not subject to article XIII B, section 6.

Moreover, since repair and maintenance types of public works projects were covered by the CPWL prior to 1975, only those CPWL administrative requirements claimed that were imposed *on or after January 1, 1975*, could be subject to reimbursement.

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[126] *Kern High School District, supra,* 30 Cal.4th 727, 743.

[127] Code of Civil Procedure section 1230.030.

[128] California Law Revision Commission comment, 19 West's Annotated Code of Civil Procedure (1982 ed.) following section 1230.030, p. 414.

Do Districts Have Discretion to Contract Out for Repair or Maintenance Public Works Projects?

Since the requirement to pay prevailing wages is limited to work performed under contract, the next question is whether the state requires K-12 school districts or community college districts to contract out for public works projects for repair or maintenance of school facilities or property, or whether the district can use its own forces for the project. As more fully described below, staff finds there are some circumstances under which K-12 school districts and community college districts cannot use their own forces and are required to contract out for maintenance and repair public works projects.

The Public Contract Code governs when districts are required to contract out, and sets forth various definitions for projects that encompass repair and maintenance public works projects. Section 22002, subdivision (c), defines "public project" as:

> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and *repair* work involving any publicly owned, leased, or operated facility.[129]
> (2) Painting or repainting of any publicly owned, lease, or operated facility.
> (3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher. (Emphasis added.)

Subdivision (d) of section 22002 states that "public project" does not include "maintenance work" which includes all of the following:

> (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
> (2) Minor repainting.
> (3) Resurfacing of streets and highways at less than one inch.
> (4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.
> (5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

Thus, "public project" for purposes of the Public Contract Code is generally characterized as construction work on public property. Public projects are clearly distinguished from "maintenance."

The Public Contract Code generally requires school districts and community college districts to contract out with the lowest responsible bidder for construction, repairs and maintenance.[130]

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[129] Public Contract Code section 22002, subdivision (e), defines "facility" as "any plant, building, structure, ground facility, utility system, subject to the limitation found in paragraph (3) of subdivision (c), real property, streets and highways, or other public work improvement.

[130] Public Contract Code sections 20111 and 20651.

There are exceptions, however. For instance, when emergency repairs are needed for any facility to permit the continuance of existing classes or to avoid danger to life or property, the governing board of a school district or community college district is allowed to use its own forces to make such repairs.[131] In addition, the governing board of a school district or community college district is allowed to use its own forces to make repairs and other improvements under certain "work limits." For K-12 school districts, Public Contract Code section 20114 provides the following work limits:

> (a) In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20115[132, 133] by day labor, or by force account, whenever the total number of hours on the job

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[131] Public Contract Code sections 20113 and 20654.

[132] Public Contract Code section 20115 defines "maintenance" in this instance as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purpose in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." This includes, but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." These provisions express the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20114.

[133] For purposes of the Labor Code, "maintenance" is similarly defined:

> (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
> (2) Carpentry, electrical, plumbing, glazing, touchup painting, and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continually usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.
> EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.
> EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.
> (3) Landscape maintenance. See Public Contract Code Section 21002 [subsequently renumbered to section 22002].
> EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded. (Title 8, Cal. Code Regs., tit. 8, § 16000.)

does not exceed 350 hours. Moreover, in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20115, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of material does not exceed twenty-one thousand dollars ($21,000).
(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

For community college districts, Public Contract Code section 20655 provides the following work limits:

(a) In each community college district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20656[134] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any district whose number of full-time equivalent students is 15,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20656, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of materials does not exceed twenty-one thousand dollars ($21,000).
(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

Notwithstanding the above provisions, the limits can be *increased* for public projects when a K-12 school district or community college district operates under the Uniform Public Construction Cost Accounting Act (UPCCAA).[135] The UPCCAA provides that public projects, which exclude maintenance, of $30,000 or less may be performed by a school district or community college district by its own forces.[136] Thus, for those districts subject to the UPCCAA, when the project is not an emergency as set forth in sections 20113 or 20654, contracting out is only required for a public project, as defined, when the cost of such project will exceed $30,000.

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[134] Public Contract Code section 20656 defines "maintenance" for this purpose in the same manner as Public Contract Code section 20115. Section 20656 expresses the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20655.

[135] Public Contract Code sections 22000 et seq.

[136] Public Contract Code section 22032; prior to January 1, 2007, the dollar limit for public projects that could be performed by the district was $25,000.

In summary, school districts and community college districts are required by state statute to contract out for repairs or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.
3. For any K-12 school district or community college district that is subject to the UPCCAA, when a public project, as defined, is not an emergency as set forth in Public Contract Code section 20113 or 20654, and the project cost will exceed $30,000.

Staff finds these requirements constitute legal compulsion since the state, through the Education Code and Public Contract Code, requires K-12 school districts and community college districts to undertake public works projects to repair or maintain their facilities and property via contract under the circumstances specified above.

Thus, repair or maintenance public works projects, when contracted for under the circumstances set forth above, are not discretionary. Moreover, since repair and maintenance public works projects were covered by the CPWL prior to 1975, only those CPWL administrative requirements claimed, that were imposed *on or after January 1, 1975*, could be subject to reimbursement.

Do the Test Claim Statutes, Regulations and Alleged Executive Orders Mandate Any Activities When a District is Required to Contract Out for Repairs or Maintenance of School Buildings or Property?

The next question is whether the plain language of the test claim statutes, regulations or alleged executive orders, on or after January 1, 1975, mandates any activities on K-12 school districts or community college districts when a district is required by law to contract out for repair or maintenance public works projects.

A. Determining Prevailing Wage Coverage and Rates

1. Obtain Correct Prevailing Wage Rates – Labor Code Section 1773 and Title 8, California Code of Regulations, Sections 16202 and 16204

Labor Code section 1773 states in relevant part:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director of Industrial Relations.

Section 16202 of the regulations states in relevant part:

> (a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

Section 16204 of the regulations, dealing with effective dates of rate determinations and rates, states in relevant part:

> (a)(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

The plain language of this regulation requires the awarding body to "ensure" that the correct determination is used. This provision does not impose the activity of ensuring that the Director of Industrial Relations made a correct determination, as claimant asserts; rather it imposes the activity of ensuring that the appropriate wage rates, as determined by Director of Industrial Relations and as obtained by the awarding body, are properly used in the contract.

Thus, the plain language of the statute and regulations cited require the awarding body to obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract.

2. Coverage Determinations – Title 8, California Code of Regulations, Section 16001

Section 16001 of the regulations states in relevant part:

> (a)(1) Any interested party ... *may* file with the Director of Industrial Relations ... a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as a public works under the Labor Code. ...
>
> (2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director ... any documents, arguments, or authorities it *wishes* to have considered in the coverage determination process. (Emphasis added.)

Thus, the plain language of this provision shows that an awarding body may, but is not required to, request a coverage determination from the Director of Industrial Relations. The

awarding body must provide documentation to the Director by a date certain if it *wishes* to have that documentation considered. Thus, no activities are required of the awarding body by this regulation.

3. Review of Prevailing Wage Rate Determination – Title 8, California Code of Regulations, Section 16302

Section 16302 of the regulations provides that an interested party, including an awarding body, "*may* file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director ..." (Emphasis added.) Thus, the awarding body is not required to file such a petition, and no activities are required.

4. Appeal of Public Work Coverage Determination – Labor Code Section 1773.4 and Title 8, California Code of Regulations, Section 16002.5

Section 16002.5 of the regulations, as it interprets Labor Code section 1773.4, provides that an interested party, including an awarding body, "*may* appeal to the Director of Industrial Relations ... a determination of coverage under the public works laws ... regarding either a specific project or type of work ..." (Emphasis added.) Thus, the awarding body is not required to make such appeal, and no activities are required.

B. Notices and Reports

1. Statement of Prevailing Wage Rates – Labor Code Section 1773.2

Labor Code section 1773.2 states:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.
>
> In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

Labor Code section 1773.2 does impose on the awarding body the activity of providing notice, in either of the fashions set forth.

2. Ineligible Contractors and Subcontractors – Labor Code Section 1777.1 and Title 8, California Code of Regulations, Sections 16800 through 16802.

Labor Code section 1777.1, subdivision (d), requires the Labor Commissioner, not less than semi-annually, to "publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project ..." Sections 16800 through 16802 set forth

procedures for the Division of Labor Standards Enforcement to investigate and conduct hearings for debarment of contractors and subcontractors.

The plain language of the test claim statute and regulations does not impose any activities on the awarding body.

3. Notice Regarding Apprenticeship Standards – Labor Code Sections 1773.3 and 1777.5, Subdivision (n)

Labor Code section 1773.3 states:

> An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. ... Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

Section 1777.5 sets apprenticeship standards. Subdivision (n) states:

> The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

The plain language of the test claim statute requires the awarding body, when apprentices will be used in the contract, to include language in the contract regarding apprenticeship requirements and provide a copy of the contract award to the Division of Apprenticeship Standards.

4. Take Cognizance of and Report Suspected Violations — Labor Code Section 1726

Labor Code section 1726 states in relevant part:

> The body awarding the contract for public work shall take cognizance of violations of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

Thus, the plain language of this test claim statute requires the awarding body to take cognizance of and report any suspected violations to the Labor Commissioner.

D. Payroll Records – Labor Code Section 1776 and Title 8, California Code of Regulations, Sections 16400 - 16403

Labor Code section 1776 states in relevant part:

> (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public

work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury ...

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) *shall* be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

...

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement *shall* be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal labor Management Cooperation Act of 1978 ... *shall* be marked or obliterated only to prevent disclosure of an individual's social security number. ...

...

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof,

for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties *shall* be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract *shall* cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act ... and the Information Practices Act of 1977 ... governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section. (Emphasis added.)

Section 16400 of the regulations states in relevant part:

(c) Acknowledgment of Request. The public entity receiving a request for payroll records *shall* acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty-five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and

(4) Provide for inspection.

(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of

> Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice. (Emphasis added.)

Section 16401 provides that the format for reporting payroll records by the contractor shall be on a form provided by the public entity and that copies of such forms are available at any office of the Division of Labor Standards Enforcement throughout the state. The section also provides specified words for the required certification, but allows the public entity to require a more strict or extensive form of certification.

Section 16402 of the regulations states:

> The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

Section 16403 of the regulations states:

> (a) Records received from the employing contractor *shall* be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;
>
> (b) copies provided to the public upon written request *shall* be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;
>
> (c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information. (Emphasis added.)

In summary, requests by the public for certified payroll records can only be made through the awarding body, Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards, and any copies provided to the public shall be redacted to prevent disclosure of an individual's name, address, social security number and other private information. Once the awarding body receives a request for the records from the public, the awarding body is required to send an acknowledgment to the requesting party and indicate to the requestor the costs for preparing the records. The awarding body's request to the contractor for the records must include specified information. The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the awarding body or other entity through which the request was made; the regulation establishes those costs, and requires that

payment be made by the person seeking the record prior to release of the documents to cover the actual costs of preparation. The regulations further require that the awarding body keep unredacted copies of any such payroll records on file for at least 6 months following completion and acceptance of the project, or longer if the project is disputed. Upon request of the Division of Apprenticeship Standards or the Division of Labor Standards, the awarding body is required to withhold from contractor progress payments any penalties for the contractor's noncompliance. The body awarding the contract is also required to include in the contract stipulations regarding the contractor's requirements regarding payroll records.

With regard to providing certified payroll records to a joint labor-management committee under Labor Code section 1776, subdivision (e), it is unclear from the plain language of the statute whether such records must be provided by the awarding body or if such records may be provided by the contractor, since subdivision (b)(3) states: "The public shall not be given access to the records at the principal office of the contractor."

In interpreting statutes, the primary rule is to ascertain the intent of the Legislature so as to effectuate the purpose of the statute.[137] The first step is to examine the statutory language, giving the words their usual and ordinary meaning.[138] If there is ambiguity, extrinsic sources including legislative history may be used so that the general purpose of the statute is promoted rather than defeated.[139]

In this case, the Legislature enacted statutes to allow a joint labor-management committee the ability to independently enforce prevailing wage requirements under Labor Code section 1771.2.[140] As part of that enactment, section 1776 was modified to address certified payroll records released to a joint labor-management committee. The Senate Rules Committee bill analysis stated:

> This bill provides that a federally recognized joint labor-management committee may obtain a copy of a certified payroll from a *contractor* on a public works project, but with names and social security numbers deleted. If the committee discovers unpaid prevailing wages or fringe benefits due, and related penalties, it may file a civil action to collect them. ...[141] (Emphasis added.)

Thus it is clear from the legislative history that the provisions were intended to allow the joint labor-management committee to obtain certified payroll records directly from the contractor rather than the awarding body.

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[137] *Estate of Griswold* (2001) 25 Cal 4th 904, 910.

[138] *Id.* at 911.

[139] *Ibid.*

[140] Statutes 2001, chapter 804.

[141] Senate Rules Committee, Office of Senate Floor Analyses, SB 588 Bill Analysis, September 12, 2001, page 2.

Therefore, the test claim statutes and regulations require awarding bodies to perform the following activities:

- Upon a request made to the awarding body by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
  - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
  - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b));
  - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
  - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
- Withhold penalties from contractor progress payments for noncompliance with section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).)

E. Withholdings

1. Withhold Contract Payments Based on District Determination – Labor Code Section 1726

Labor Code section 1726 states in relevant part that "if the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed." The plain language of this statute does not require the awarding body to engage in the activity of investigating a potential violation of the chapter.

2. Withhold and Retain Contract Payments to Satisfy Civil Wage and Penalty Assessments – Labor Code Section 1727

Labor Code section 1727 states:

> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.
>
> (b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor

> under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed until receipt of a final order that is no longer subject to judicial review.

Thus, the plain language of the statute requires the awarding body to withhold from contractor payments the amount necessary to satisfy a civil wage and penalty assessment issued by the Labor Commissioner, or receive from the contractor any money withheld for such purpose by the contractor from the subcontractor. However, where the plain language of the test claim statute *prohibits* the awarding body from disbursing the withheld money until a final order that is no longer subject to judicial review, no activities are required of the awarding body.

3. Release Withheld Funds – Labor Code Section 1742, Subdivision (f)

Labor Code section 1742, subdivision (f), states in relevant part that "[a]n awarding body that has withheld funds in response to a civil wage and penalty assessment … shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds … to the Labor Commissioner."

The plain language of this statute requires the activity of releasing funds to the Labor Commissioner upon receipt of the final order.

F. Labor Compliance Program

Claimant pled several activities required of districts when they implement a Labor Compliance Program pursuant to Labor Code section 1771.5.[142] Ordinarily, the prevailing wage requirements are applicable for every public works project that exceeds $1,000.[143] Section 1771.5 states in pertinent part that if an awarding body *elects* to initiate and enforce a Labor Compliance Program, the awarding body can avoid prevailing wage requirements for public works projects of up to $25,000 for construction work or up to $15,000 for alteration, demolition, repair or maintenance work. Section 1771.7 further provides that an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004 *shall* initiate and enforce a Labor Compliance Program. Nothing in the plain language of section 1771.5 *requires* the awarding body to elect to initiate or enforce, and therefore undertake any activities related to, a Labor Compliance Program, nor does the plain language of sections 1771.5 or 1771.7 *require* the awarding body to use funds derived from the referenced bond measures. Staff therefore finds there is no "legal" compulsion for K-12 school districts or community colleges to initiate and enforce a Labor Compliance Program.

Absent such legal compulsion, the courts have ruled at times that "practical" compulsion might be found. As noted above, the Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court

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[142] With regard to initiating and enforcing a Labor Compliance Program, claimant pled Labor Code sections 1771.5, 1771.6 and 1771.7, Title 8, California Code of Regulations sections 16425 – 16439 and 17220 – 17221, "AB 1506 Labor Compliance Program Guidebook," "School Facility Program Substantial Progress and Expenditure Audit Guide," and "Antioch Unified School District Labor Compliance Program."

[143] Labor Code section 1771.

determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[144]

The Department of General Services, Office of Public School Construction, asserts that the law does not compel a district to obtain funding from the state as a condition of building schools, and school districts may choose to build facilities through the use of district raised funds. Claimant argues that the use of *district* raised funds is not realistic, citing several Education Code provisions which "strictly limit" the district's ability to issue local school bonds and manifest the Legislature's intent that the state should provide financing for school construction. Claimant summarized the argument as follows:

> In summary, the last 60 years of legislative history shows repeated and consistent recognition that school districts are unable to meet the school construction needs of their pupils. The history repeatedly reveals an admission that the education of school children is the primary responsibility of the state. The history of the inability of school districts and the obligation of the state to educate children results in the above recited litany of state money for school construction at low or no interest rates, repayment requirements of less than the amounts apportioned, and repayment terms unavailable anywhere else. Education of children is an obligation and function of the state. Classrooms are required to provide that education. Therefore, building classrooms is a state obligation.[145]

In the foregoing analysis regarding public works projects, however, staff found that the only public works projects mandated by the state are projects the districts undertake for repair and maintenance. Since no compulsion to undertake other types of public works projects was found, the only issue here is whether K-12 school districts and community college districts are compelled to use Kindergarten-University Public Education Facilities Bond Act of 2002 and 2004 funds for repair and maintenance projects, thereby triggering the requirement for the district to implement an LCP. For the reasons stated below, staff finds no such compulsion exists under the test claim statutes, regulations, or alleged executive orders, or under other law or in the record.

Claimant argues that requiring the district to use district-raised funds rather than state funds "results in non-legal compulsion in the form of double taxation which is prohibited by *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70-76."[146] That California Supreme Court case dealt with a claim seeking subvention of costs imposed as a result of a state statute which extended federally-mandated coverage of the state's unemployment insurance law to include state and local agencies.[147] The court noted that federal law provides powerful incentives to enactment of unemployment insurance protection by the individual states, i.e., "certified" state programs, and described the current situation as follows:

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[144] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

[145] Claimant comments, submitted October 20, 2003, page 10.

[146] *Ibid.*

[147] *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 51.

> In current form, the Federal Unemployment Tax Act (hereafter FUTA) ... assesses an annual tax upon the gross wages paid by covered private employers nationwide. The tax rate, which has varied over the years, stands at 6.2 percent for calendar year 1990. (Citations omitted.) However, employers in a state with a federally "certified" unemployment insurance program may credit their contributions to the state system against up to 90 percent of the federal tax. ... A "certified" state program also qualifies for federal administrative funds. (Citations omitted.)[148]

One of the questions before the court was whether the new state law, because of the federal incentives for enacting it, was in fact a "federal" mandate.[149] The court ruled that the state statute in question was actually a federal mandate; since the statute was not subject to the tax and spend limitations of articles XIII A and B, the local agency could tax and spend as necessary to meet expenses of the new legislation.[150] The court reasoned that "certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense,"[151] and provided the following explanation:

> If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty – full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.
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> ...
>
> Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[152]

Claimant points out that in November of 2002 the voters approved Proposition 47, the Kindergarten-University Public Education Facilities Bond Act of 2002, which allocated more than $8 billion for new construction and more than $3 billion for the modernization of school facilities, which is a state general obligation bond measure to be repaid by taxation levied on all residents of the state, including school district constituents.[153] In response to Department of

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[148] *Id.* at 58.

[149] *Id.* at 70.

[150] *Id.* at 76.

[151] *Id.* at 73-74.

[152] *Id.* at 74.

[153] Claimant comments, submitted October 20, 2003, page 14.

General Services' suggestion that a school district has the discretion to build new facilities through the use of district raised funds, claimant argues that any district raised funds "would need to be repaid from taxes raised only from the constituents of that school district."[154] Claimant further argues that since any election to use district funds does not relieve the residents of that district from still paying taxes to reduce the state bonds, the citizens of the district would then be subject to "double taxation."[155] Claimant concludes that the "only reasonable alternative to school districts is to use available Proposition 47 state funds and to enforce a labor compliance program."[156]

Staff disagrees that using local general obligation bonds constitutes the "intolerable expense" of "double taxation" as described by the Supreme Court in *City of Sacramento*, or that school districts have no reasonable alternative to using funds available from Proposition 47 (2002 Kindergarten-University measure) or Proposition 55 (2004 Kindergarten-University measure). In fact, the ballot measure that enacted Proposition 47 states that, in addition to funding from state and local general obligation bonds, school districts also receive significant funds from developer fees and special local bonds known as "Mello-Roos" bonds.[157] The School Facility Program Handbook, which provides assistance to districts in applying for and obtaining these bond funds, notes that additional sources of funds for districts include, in addition to general obligation bonds, proceeds from the sale of surplus property and federal grants.[158] Under the Deferred Maintenance Program, K-12 school districts and community college districts can receive state matching funds, on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of existing school building components so that the educational process may safely continue.[159] None of these additional sources of funds triggers the requirement to initiate and establish an LCP.

Moreover, the purposes for the 2002 and 2004 bond measures, as stated in the ballot materials, were to provide funds for K-12 school districts to buy land, construct new buildings, reconstruct or modernize existing buildings, provide relief for critically overcrowded schools, and construct buildings for joint use; and for community college districts, the funds were intended to construct new buildings and related infrastructure, alter existing buildings, and purchase equipment for use in these buildings.[160]

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[154] *Ibid.*

[155] *Ibid.*

[156] *Ibid.*

[157] Official Voter Information Guide, General Election Tuesday, November 5, 2002, Proposition 47, Analysis by the Legislative Analyst, page 1.

[158] School Facility Program Handbook, A guide to assist with applying for and obtaining grant funds, prepared by the Office of Public School Construction, July 2007, page 12.

[159] Education Code sections 17582 – 17588 and 84660 et seq.; Deferred Maintenance Program Handbook, A guide to assist school districts in applying for and obtaining "grant" funds for the purposes of performing deferred maintenance work on school facilities, prepared by the Office of Public School Construction, June 2007, page 1.

[160] Official Voter Information Guide, General Election, Tuesday, November 5, 2002, Proposition 47, Analysis by the Legislative Analyst, page 2; Official Voter Information Guide,

Thus, although some of the 2002 and 2004 bond funds will likely be used for repairs, that was not their primary purpose. Furthermore, as noted above, K-12 school districts and community college districts have several funding alternatives to accomplish repair and maintenance. The Supreme Court in *Kern* stated that school districts, in the exercise of their discretion, will make the choices that are ultimately the most beneficial for the district:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[161]

Therefore, staff finds there is no evidence in the record or in law to demonstrate that districts are legally or practically compelled to use Kindergarten-University Public Education Facilities Bond Act of 2002 or 2004 funds to undertake repair or maintenance public works projects. Since none of the activities that flow from implementation of an LCP pursuant to the test claim statutes, regulations or alleged executive orders[162] have been triggered by a state-mandated requirement, none of those statutes, regulations or alleged executive orders are subject to article XIII B, section 6.

G. Hearings and Court Proceedings

Claimant pled several activities related to a new administrative hearing process pursuant to Labor Code sections 1742 and 1742.1 and Title 8, California Code of Regulations, sections 16413 and 17220, et seq. This new process was established for contractors and subcontractors to obtain review of civil wage and penalty assessments issued by the Labor Commissioner, or decisions of the awarding body to withhold contract payments when enforcing under a Labor Compliance Program pursuant to Labor Code section 1771.5, or under Labor Code section 1726.

Labor Code section 1742 states in relevant part:

> (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the

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California Primary Election, Tuesday, March 2, 2004, Proposition 55, Analysis by the Legislative Analyst, page 6.

[161] *Kern High School Dist., supra,* 30 Cal. 4th 727, 753.

[162] Labor Code sections 1771.5, 1771.6 and 1771.7, Title 8, California Code of Regulations sections 16425 – 16439 and 17220 – 17221, "AB 1506 Labor Compliance Program Guidebook," "School Facility Program Substantial Progress and Expenditure Audit Guide," and "Antioch Unified School District Labor Compliance Program."

assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b)(1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge ... The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be

given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

...

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

...

Section 16413 of the regulations further establishes procedures for a contractor or subcontractor to follow when requesting a hearing under Labor Code section 1742.

Labor Code section 1742.1 requires the Labor Commissioner to afford the affected contractor or subcontractor, upon his or her request, to meet with the Labor Commissioner to attempt to settle the dispute without the need for formal proceedings. The section further states in relevant part:

> The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6 [i.e., under a Labor Compliance Program], afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. ...

Sections 17220 et seq. of the regulations set forth procedures for an awarding body to follow when enforcing under a Labor Compliance Program pursuant to Labor Code section 1771.6.

The plain language of Labor Code sections 1742 and 1742.1, and the regulations cited, does not require awarding bodies to engage in any hearing activities, respond to writs of mandate, or participate in settlement meetings, unless the awarding body is voluntarily exercising enforcement authority under Labor Code section 1726 or 1771.5.[163] As noted above, Labor Code section 1726 *does not* require an awarding body to investigate potential violations of the chapter, nor does Labor Code section 1771.5 require an awarding body to initiate and enforce a Labor Compliance Program. Since both of these underlying activities are discretionary, Labor Code sections 1742 and 1742.1, and sections 16413 and 17220 et seq. of the regulations, do not mandate any activities on the awarding body.

Labor Code section 1771.2 allows a joint labor-management committee, established pursuant to federal law, to bring an action in court against an employer, i.e., a contractor or subcontractor, that fails to pay the prevailing wage to its employees as required. Nothing in that statute requires the awarding body to appear or participate in legal proceedings from such action by the joint labor-management committee. Thus, Labor Code section 1771.2 does not mandate any activities on the awarding body.

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[163] Labor Code section 1771.6, Title 8, California Code of Regulations, section 17202, subdivision (c).

Summary of Required Activities

Therefore, staff finds only the following activities are required by the plain language of the test claim statutes and regulations:

- Obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract. (Lab. Code, § 1773, tit. 8, Cal. Code Regs., §§ 16202 & 16204.)
- Include a statement of prevailing rates of per diem wages in the call and advertisement for bids, the bid specifications, and in the public works contract itself, or, in lieu of those requirements, the district may include in the call for bids, bid specifications, and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in the awarding body's principal office, and in that case the district must post the statement at all job sites. (Lab. Code, § 1773.2.)
- Provide a copy of the contract award to the Division of Apprenticeship Standards, when apprentices will be used in the contract, and include language in the contract regarding apprenticeship requirements. (Lab. Code, §§ 1773.3 & 1777.5, subd. (n).)
- Take cognizance of violations of the prevailing wage laws in the course of the execution of the contract, and report any suspected violations to the Labor Commissioner. (Lab. Code, § 1726.)
- Regarding certified payroll records, perform the following activities:
    - Upon a request made to the awarding body by the public for payroll records:
        - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
        - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
        - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b))
        - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
        - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
    - Withhold penalties from contractor progress payments for noncompliance with Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
    - Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).).

- Withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner and receive from the contractor any money withheld for such purpose by the contractor from the subcontractor. (Lab. Code, § 1727.)
- Transmit funds withheld in response to a civil wage and penalty assessment to the Labor Commissioner upon receipt of a certified copy of a final order that is no longer subject to judicial review. (Lab. Code, § 1742, subd. (f))

Staff further finds that these activities are only mandated by the state for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.
3. For any K-12 school district or community college district that is subject to the UPCCAA, when a public project, as defined, is not an emergency as set forth in Public Contract Code section 20113 or 20654, and the project cost will exceed $30,000.

Issue 2: Do the test claim statutes or regulations impose a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

A "new program or higher level of service" is imposed when the mandated activities: a) are new in comparison with the pre-existing scheme; *and* b) result in an increase in the actual level or quality of governmental services provided by the district.[164] To make this determination, the mandated activities must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes or regulations.

[164] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

Obtain Prevailing Wage Rate (Lab. Code, § 1773, Cal. Code Regs, tit. 8, §§ 16202 & 16204)

The statute and regulations require the awarding body to obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract.

Prior to 1975, Labor Code section 1773 stated in relevant part:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall *ascertain* the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract. ...
>
> In determining such rates, the *awarding body* shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the *awarding body* shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.
>
> If the *awarding body* determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the *awarding body* may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the *awarding body* determines that another rate should be adopted. (Emphasis added.)[165]

The Department of Industrial Relations explains how this pre-existing process worked:

> Labor Code section 1773 required the local agency to consider the "rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works." [Citations.] If these two mandatory sources of information were insufficient to determine the rate actually prevailing, local agencies had to "obtain and consider further data from the labor organizations and employers or employer associations concerned." *Id.* Local agencies had to obtain further information on what rates to pay each craft for overtime and holiday work, depending on which collective bargaining agreement, if any, applied.[166]

In this pre-existing law, the burden was on the awarding body to ascertain and determine the prevailing wage rates for public works projects.

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[165] Statutes 1971, chapter 785

[166] Department of Industrial Relations comments, submitted January 15, 2003, page 9.

Labor Code section 1773 now requires the awarding body to "obtain" the general prevailing rate of per diem wages from the Director of Industrial Relations.[167] Section 16202 of the regulations requires the awarding body to request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination.

Thus, the test claim statute and regulation shifted this responsibility for ascertaining and determining prevailing wage rates *from* the awarding body *to* the Director of Industrial Relations. The Department of Industrial Relations explains the current process as follows:

> Currently, the Director performs this arduous task of determining what are prevailing wages. [Citations.] The definition of prevailing wages has not changed substantially since prior to 1975, including the requirement that the wages be set for each local geographic area. The Director, through the Division of Labor Statistics and Research ("DLSR") publishes general prevailing wage determinations twice each year for each craft or trade, by county. [Citations.] In addition, DLSR provides special determinations when requested. [Citations.] This work costs the Department approximately $2,071,082.39 per year, based on the prior two and a half fiscal years. [Citations.] This is work local agencies no longer do. Instead, local agencies are required simply to check the most recent determination before advertising a request for bids.

With regard to the obligation to "ensure" that the correct rate is used, the Department states:

> Prior to 1975, when local agencies determined local prevailing wages, the duty to obtain the correct prevailing wage was subsumed in the requirement that agencies ensure they were using the correct rate. However, any interested party could request review of the local agency's determination, and the local agency then had to justify its determination. [Citations.]
>
> In exchange for the Director's making rate determinations, local agencies now obtain the correct prevailing wages from the Director. [Citations.] This task no longer requires local agencies to do the actual investigations, surveys, and calculation ("determination") of the prevailing wage. That is, while the local agencies assume the burden of sending a letter, making a phone call, or checking the Department's website, this writing, sending or calling is substantially less expensive than was their prior obligation to investigate and calculate prevailing wages for each craft or trade on public works projects. ...[168]

The Supreme Court has stated that a reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided.[169] Here that has not occurred. Rather, the test claim statute accomplishes a shift of responsibility *from* school

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[167] Statutes 1976, chapter 281.

[168] *Id.* at page 10.

[169] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

districts *to* the state. And, although the district is left with the responsibility for obtaining the prevailing wage rates from the state and continuing to ensure that the proper rate is used in the contract, this result constitutes not a higher level of service but a lower level of service on the part of the district.

Based on the foregoing, staff finds Labor Code section 1773 and sections 16202 and 16204, mandating the activity of obtaining the prevailing wage rates from the Department of Industrial Relations and ensuring the proper rate is used in the contract, do not impose a new program or higher level of service on school districts.

Statement of Prevailing Wages (Lab. Code, § 1773.2)

The statute requires the awarding body to include a statement of prevailing rates of per diem wages in the call and advertisement for bids, the bid specifications, and in the public works contract itself, or, in lieu of those requirements, the awarding body may include in the call for bids, bid specifications, and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in the awarding body's principal office, and in that case must post the statement at all job sites.

Prior to 1975, Labor Code section 1773.2 stated:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract.
>
> In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy of the prevailing rate of per diem wages on file at its principal office, in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year, and in such event, the awarding body shall cause a copy thereof to be posted at each jobsite.[170]

In the 1977 test claim statute, section 1773.2 was amended *solely* to remove the requirement that the awarding body publish prevailing wage rate determinations in the newspaper each year when the awarding body chooses the option of referring to a copy of the prevailing wage rates on file at its principal office.[171]

A reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided. Here, that has not occurred. Instead, the burden on school districts has been lessened by removing the requirement to annually publish their prevailing

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[170] Statutes 1974, chapter 876.

[171] Statutes 1977, chapter 423.

wage rates in the newspaper under specified circumstances. This result constitutes not a higher level of service but a lower level of service. Therefore, staff finds Labor Code section 1773.2 does not impose a new program or higher level of service on school districts.

Certified Payroll Records (Lab. Code, § 1776, subdivisions (b), (e), (g) & (h), Cal. Code Regs., tit. 8, §§ 16400 & 16403)

The statute and regulations require the awarding body to perform the following activities:

- Upon a request made to the awarding body by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records;
  - obtain certified payroll records from the contractor, including specified information in the request;
  - mark or obliterate the records to prevent disclosure of an individual's private information
  - provide copies of the records to the requestor; and
  - retain copies of the records for at least 6 months.
- Withhold penalties from contractor progress payments for noncompliance with Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement.
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776.

Prior to 1975, Labor Code section 1776 stated:

> Every contractor and subcontractor shall keep an accurate record showing the name, occupation, and the actual per diem wages paid to each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the body awarding the contract and to the Division of Labor Law Enforcement.[172]

The test claim statutes modified section 1776 to require: 1) the contractor to *furnish* certified copies of payroll records to the awarding body upon request,[173] at which point the payroll records become subject to the California Public Records Act;[174] 2) the awarding body to *obtain and provide copies of the records to the public* upon request[175] but marked or obliterated to prevent disclosure of an individual's name, address, and social security number;[176] 3) the awarding body, upon the request of the Division of Apprenticeship

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[172] Statutes 1949, chapter 127.

[173] Labor Code section 1776, subdivision (b)(2).

[174] Government Code sections 6250 et seq.

[175] Labor Code section 1776, subdivision (b)(3).

[176] Labor Code section 1776, subdivision (e).

Standards or the Division of Labor Standards Enforcement, to withhold from progress payments any penalties assessed for noncompliance;[177] and 4) the awarding body to insert stipulations in the contract regarding the contractor's requirements.[178] Sections 16400 through 16403 of the regulations were added to: 1) require the awarding body to acknowledge a request for payroll records to the requestor, and provide the costs the requestor must pay for the awarding body and contractor to prepare the records; 2) specify the information required in a request to the contractor for the records; 3) establish fees to be charged for preparing and reproducing the records; and 4) require the awarding body to keep unredacted copies of requested payroll records for at least 6 months following completion and acceptance of the project. These requirements are new in comparison to the preexisting law.

The Department of Industrial Relations states that the test claim statutes modifying Labor Code section 1776 did not significantly change any awarding body requirement:

> Prior to 1975, there was no provision for local agencies to obtain or copy [Certified Payroll Records]. Since local agencies did their own enforcement, however, they routinely obtained them. ... Before 1975, the Public Records Act made such information disclosable on demand from the public. See Government Code §§ 6252 ["Local agency" includes school district], 6252 (d) [definition of public record]. The post 1975 amendments to § 1776 did not change local agencies' pre-existing requirements to provide copies of public records (including payroll records) to the public. ...
>
> Labor Code § 1776 did not change any local agency requirement in any meaningful way. Test Claimant claims that there is a new mandate because local agencies now have to make copies of the [Certified Payroll Records] on request by members of the public and obliterate certain personal information. First, the requirement to obliterate personal information is not necessarily with the local agency. Labor Code § 1776(e) merely requires that the copy provided to the public by DLSE or the local agency "be obliterated," which can be done by the private contractor. ...[179]

Staff disagrees with the Department. The previous statute did not provide for the awarding body to *obtain a copy* of the payroll records, merely the ability to inspect them. The California Public Records Act[180] provides public access only to writings that are in the *possession* of state or local agencies.[181] Consequently, there was no pre-existing duty on the district to provide public access to the records. The fact that such copies were routinely obtained by the

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[177] Labor Code section 1776, subdivision (g).

[178] Labor Code section 1776, subdivision (h).

[179] Department of Industrial Relations comments, submitted January 15, 2003, pages 14-15.

[180] Government Code section 6250 et seq.

[181] Government Code section 6252, subdivision (e); "public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

awarding body in the course of enforcing the CPWL does not change the duties imposed by the previous statute, which plainly did not require the awarding body to obtain the records on behalf of the public or make the specified redactions. Moreover, Government Code section 17565 provides that if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate. Additionally, although it is true that personal information could be "obliterated" by the contractor, the test claim statutes require the awarding body to provide the record to the public, in a form that prevents disclosure of individual information. Therefore, staff finds it is the awarding body's responsibility to mark or obliterate the record to prevent disclosure of individual information.

Thus, there are new requirements of school districts as awarding bodies that were not required under pre-existing law:

- Perform the following activities upon a request by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
  - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
  - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b))
  - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
  - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
- Withhold penalties from contractor progress payments for noncompliance, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g)).
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776 (Lab. Code, § 1776, subd. (h)).

These new requirements do provide a higher level of service to the public since the public now has access to certified payroll records through the awarding body, and the individual employee's rights to privacy are protected by the awarding body obliterating certain information. Withholding penalties from progress payments helps enforce the law to ultimately ensure contractors' cooperation. Moreover, placing stipulations in the contract provides notice to the contractor of his or her requirements before the contract is signed. Staff therefore finds that the new requirements imposed on school districts as awarding bodies constitute a new program or higher level of service within the meaning of article XIII B, section 6.

Apprenticeship Requirements (Lab. Code, §§ 1773.3 & 1777.5, subd. (n))

The statutes require the awarding body to provide a copy of the contract award to the Division of Apprenticeship Standards when apprentices will be used in the contract, and include language in the contract regarding apprenticeship requirements.

Prior to 1975, Labor Code section 3098 stated:

> An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. ... Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.[182]

Section 3098 was renumbered to section 1773.3 in Statutes 1978, chapter 1249, with substantially the same language. Therefore, the requirements existed prior to 1975 and no new program or higher level of service is imposed.

Prior to 1975, Labor Code section 1777.5 stated in relevant part:

> The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.[183]

This exact language was ultimately renumbered to subdivision (n) in Statutes 1999, chapter 903. Therefore, the requirements existed prior to 1975 and no new program or higher level of service is imposed.

Take Cognizance of and Report Suspected Violations (Lab. Code, § 1726), Withhold Funds for Civil Wage and Penalty Assessments (Lab. Code, § 1727), and Transmit Funds to Labor Commissioner (Lab. Code, § 1742, subd. (f))

These statutes require the awarding body to: 1) take cognizance of violations of the prevailing wage laws in the course of the execution of the contract, and report any suspected violations to the Labor Commissioner; 2) withhold any amounts necessary to satisfy a Civil Wage and Penalty Assessment issued by the Labor Commissioner and receive from the contractor any money withheld for such purpose by the contractor from the subcontractor; and 3) transmit funds withheld in response to a civil wage and penalty assessment to the Labor Commissioner upon receipt of a certified copy of a final order that is no longer subject to judicial review.

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[182] Statutes 1974, chapter 1095.

[183] Statutes 1974, chapter 965.

With regard to the awarding body's role in reporting CPWL violations, prior to 1975, Labor Code section 1726 stated:

> The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract.[184]

The test claim statute, Statutes 2000, chapter 954, modified section 1726 to state in relevant part:

> The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of execution of the contract, and *shall promptly report* any suspected violations to the Labor Commissioner. (Emphasis added.)

Thus, there was a pre-existing requirement for awarding bodies to "take cognizance" of violations, and this requirement does not impose a new program or higher level of service. There is, however, a new requirement to "report" suspected violations to the Labor Commissioner.

With regard to withholding funds from contractor payments for CPWL violations, prior to 1975, Labor Code section 1727 stated:

> Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body.[185]

The test claim statute, Statutes 2000, chapter 954, modified section 1727, which states:

> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom any amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.
>
> (b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding

---

[184] Statutes 1937, chapter 90.

[185] Statutes 1945, chapter 1431.

body until receipt of a final order that is no longer subject to judicial review.

Thus, the only change in the awarding body's responsibility is to now withhold amounts required to satisfy a civil wage and penalty assessment made by the Labor Commissioner, rather than the previous requirement to withhold amounts forfeited pursuant to a stipulation in the contract or for other violations of the CPWL, once a full investigation was conducted by the Division of Labor Law Enforcement or by the awarding body.

In the same test claim statute, Statutes 2000, chapter 954, Labor Code section 1742 was added to provide a hearing procedure for contractors or subcontractors to appeal a civil wage and penalty assessment. Subdivision (f) of that section requires an awarding body that has withheld funds in response to a civil wage and penalty assessment to transmit the withheld funds to the Labor Commissioner, upon receipt of a certified copy of a final order that is no longer subject to judicial review.

The Department of Industrial Relations argues that these are not new requirements, explaining the historical and current processes as follows:

> Prior to 1975, local agencies were required both to "take cognizance" of violations and to withhold funds owed to contractors for prevailing wage violations. Labor Code §§ 1726, 1727. If there were insufficient funds available for withholding, then local agencies notified the Labor Commissioner of the violation. The local agency, with the Labor Commissioner's assistance filed civil lawsuits against the offending contractors. *Id.*
>
> This obligation to report violations to the Labor Commissioner has not changed. Enforcement of prevailing wage violations was removed from local agencies as of 2001, Stats. 2000, ch. 954. In exchange for this reduction in work for local agencies, the [L]egislature added a reporting responsibility. ...
>
> Prior to 1975, local agencies withheld funds owed contractors for prevailing wage violations. Labor Code § 1727. This obligation did not change after 1975. In 2000, as part of the overall change in enforcement, private contractors had to withhold funds from offending subcontractors if the local agency had not withheld sufficient funds. The local agency had no role in this process. [Citations.]
>
> ... [T]he Labor Commissioner did not issue citations against contractors prior to 1975. Local agencies did the bulk of the enforcement.
>
> Currently, the Labor Commissioner does all the enforcement work, and local agencies do no more than withhold funds when the Labor Commissioner informs them of violations. This is identical to local agencies' historic responsibility to "take cognizance" of violations and withhold payments. [186]

[186] Department of Industrial Relations comments, submitted January 15, 2003, pages 16-17.

Under the previous process, the awarding body would take cognizance of CPWL violations pursuant to Labor Code section 1726, do its own investigations and enforcement, and withhold any penalties from contractor payments pursuant to Labor Code section 1727, seeking assistance from the Labor Commissioner as needed. Currently, according to the Department of Industrial Relations, the Labor Commissioner does all the enforcement work, unless the awarding body enforces the CPWL violations by voluntarily establishing a Labor Compliance Program. Thus, the test claim statutes have shifted primary enforcement of the CPWL from local agencies to the state, leaving awarding bodies the option to implement a Labor Compliance Program. In addition, there is no substantive change in the requirement that awarding bodies withhold funds from contractors for CPWL violations; the triggering mechanism is now a civil wage and penalty assessment issued by the Labor Commissioner rather than the completion of an investigation by the Division of Labor Law Enforcement or by the awarding body.

The Supreme Court has stated that a reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided.[187] Here that has not occurred. Rather, the test claim statute accomplishes a shift of responsibility *from* school districts *to* the state with regard to enforcement of the CPWL. And, although the district is left with some minor responsibility for reporting suspected violations of the CPWL to the Labor Commissioner and transmitting withheld funds at the appropriate time, this result constitutes not a higher level of service but a lower level of service. With regard to withholding funds from contractors for CPWL violations, there is no change in that level of service.

Based on the foregoing, staff finds that Labor Code sections 1726, 1727 and 1742, subdivision (f), do not impose a new program or higher level of service on school districts.

Summary

Therefore, staff finds the activities listed below that are required of K-12 school districts or community college districts when acting as an awarding body, constitute a new program or higher level of service within the meaning of article XIII B, section 6, but only when triggered by repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.

[187] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and

    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.

3. For any K-12 school district or community college district that is subject to the UPCCAA, when a public project, as defined, is not an emergency as set forth in Public Contract Code section 20113 or 20654, and the project cost will exceed $30,000.

Activities constituting a new program or higher level of service under the foregoing circumstances:

- Perform the following tasks upon a request made to the awarding body by the public for certified payroll records:
    - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
    - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
    - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b))
    - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
    - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
- Withhold penalties from contractor progress payments for noncompliance with Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).)

Issue 3: Do the test claim statutes or regulations impose costs mandated by the state within the meaning of Government Code section 17514 and article XIII B, section 6 of the California Constitution?

For these statutes to impose a reimbursable, state-mandated program, two additional elements must be satisfied. First, the statutes must impose "costs mandated by the state" pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher

level of service. The claimant alleged in the original test claim "it is estimated that the district has incurred, or will incur, in excess of $200 in staffing and other costs in excess of revenues annually, for the period from July 1, 2000 through June 2002, to implement the new duties mandated by the state, for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement."[188]

Thus, there is evidence in the record, signed under penalty of perjury that the claimant will or has incurred "costs mandated by the state."

Government Code section 17556 states in relevant part that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds:

> (d) the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The increased level of service at issue is the preparation and copying of certified payroll records under Labor Code section 1776, subdivisions (b) and (e). Subdivision (e) states "the requesting party shall, prior to being provided the records, reimburse the costs of *preparation* by ... the entity through which the request was made." Subdivision (i) of that section provides that the Director of the Department of Industrial Relations "shall adopt rules consistent with the California Public Records Act ... and the Information Practices Act of 1977, ... governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section." Section 16402 of those regulations states:

> The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

Thus, the Department has established "reasonable fees to be charged" of the requesting party to cover the costs of preparation of the records. Construction of a statute by the administrative officials charged with its enforcement or interpretation may not be controlling but is entitled to

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[188] On page 7 of Exhibit 6, "Second Declaration of William McGuire," of the test claim amendment filed July 31, 2003, claimant states:

> To the extent that Clovis Unified School District commences a public works project subject to Labor Code Section 1771.7, it is estimated that Clovis Unified School District will incur in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

great weight and will be followed unless it is clearly erroneous or unauthorized.[189] There is no evidence in the record to show that the costs allowed by the Department's regulation are not sufficient to cover the actual costs of preparation of these payroll records.

In the ordinary sense, "preparation" is defined as "the act or process of preparing."[190] "Prepare" is defined as "to make ready in advance for a particular purpose, event or occasion."[191] Based on these definitions, and absent any other information in the record, staff finds that all activities leading up to getting the records ready to be released, including reproduction and actually providing the records, are included in the fees that can be recovered from the requesting party. Thus includes the following activities:

- obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (c));
- send an acknowledgment to the requestor including notification of the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (d));
- make the specified redactions (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b)) ; and
- provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)).

Therefore, staff finds that a school district has authority to charge fees sufficient to pay for this portion of the increased level of service, and Government Code section 17556, subdivision (d), is applicable to deny reimbursement for those activities.

Staff finds the following remaining activities do impose costs mandated by the state, but only when such activities result from a public works project for repair or maintenance that must be contracted for pursuant to the Public Contract Code:

- Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).)

Conclusion

Staff concludes that Labor Code section 1776, subdivisions (g) and (h), and section 16403, subdivision (a), of the Department of Industrial Relations' regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, but only when those activities are triggered by projects for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002,

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[189] *State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (1995) 37 Cal.App.4th 675, 683.

[190] Webster's II, New Collegiate Dictionary, 1999, page 873, column 1.

[191] *Ibid.*

17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000. (Pub. Contract Code, § 20114.)
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000. (Pub. Contract Code, § 20655.)
3. For any K-12 school district or community college district that is subject to the Uniform Public Contract Cost Accounting Act (UPCCAA), when a public project, as defined, is not an emergency as set forth in Public Contract Code section 20113 or 20654, and the project cost will exceed $30,000.[192] (Pub. Contract Code, § 22032.)

Only the following activities for the foregoing projects are reimbursable:

- Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with Labor Code section 1776, upon request of the Department of Industrial Relations' Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).)

None of the other test claim statutes, regulations or alleged executive orders that were pled mandate a new program or higher level of service subject to article XIII B, section 6.

Recommendation

Staff recommends the Commission adopt this analysis to partially approve the test claim.

[192] Prior to January 1, 2007, the dollar limit for public projects that could be performed by the district with its own forces was $25,000.

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STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director-Legal Unit
320 W. Fourth St, Suite 600
Los Angeles, CA 90013

Tel. No (213) 576-7725
Fax (213) 576-7735

EXHIBIT U

March 28, 2008

RECEIVED
MAR 2 8 2008
COMMISSION ON STATE MANDATES

Paula Higashi, Executive Director
Commission on State Mandates
980-Ninth Street, Suite 300
Sacramento, CA 95814

RE: Clovis Unified School District
Test Claim No.: 01-TC-28
Prevailing Wage Rates

Dear Ms. Higashi:

The Department of Industrial Relations generally agrees with the Draft Analysis. However, we believe there is historical evidence that would show that certain activities identified as mandate are in fact not new or substantial. We are unable to provide declarations or other evidence to show how prevailing wages were enforced prior to 1976 by April 1, 2008, however. We therefore request an extension of the time provided for filing comments on the Commission's Draft Staff Analysis.

Thank you for you consideration in this matter.

Yours truly,

Andrew Holmes-Swanson

AHS/cp

cc:
See Attached Mailing List

PROOF OF SERVICE

(Code Civ. Proc. §§ 1013a, 2015.5)

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.
And Affected Parties and State Agencies

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 320 W. Fourth Street, Suite 600, Los Angeles, CA 90013.

On March 28, 2008, I served the enclosed **Letter to Paula Higashi, Executive Director, dated March 28, 2008,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Loa Angeles, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)
A	Mr. Keith Peterson SixTen & Associates 3841 North Freeway Blvd., Suite 170 Sacramento, CA 95834
A	Ms. Sandy Reynolds Reynolds Consulting Group, Inc P.O. Box 894059 Temecula, CA 92589
A	Ms. Chris Krueger Department of Justice 1300 I. Street, Suite 125 Sacramento, CA 95814
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842
A	Mr. Robert Miyashiro Education Mandated Cost Network 1121 L. Street, Suite 1060 Sacramento, CA 95814
A	Mr. Jim Spano State Controller's Office (B-08) Division of Audits 300 Capitol Mall, Suite 518 Sacramento, CA 95814
A	Ms. Ginny Brummels State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816
A	Ms. Beth Hunter, Director Centration, Inc. 8316 Red Oak Street, Suite 101 Rancho Cucamonga, CA 91730

A Ms. Donna Ferebee (A-15)
Department of Finance
915 L. Street, 6th Floor
Sacramento, CA 95814

A Mr. Bill McGuire
Assistant Superintendent
Clovis Unified School District
1450 Herndon
Clovis, CA 93611-0599

A Mr. David E. Scribner
Scribner & Smith, Inc
2200 Sunrise Boulevard, Suite 220
Gold River, CA 95670

A Mr. Keith B. Petersen
President
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

A Ms. Carol Bingham (E-8)
California Department of Education
Fiscal & Administrative Services Division
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Sacramento, CA 95814

A Mr. Steve Shields
Shields Consulting Group, Inc.
1536 - 36th Street
Sacramento, CA 95816

A Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

A Mr. Scott Kronland
Altshuler, Berzon, Nassbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

A Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

A Mr. Rob Cook
Office of Public School Construction
Department of General Services
1130 K Street, Suite 400
Sacramento, CA 95814

A Mr. Erik Skinner
California Community Colleges
Chancellor's Office (G-01)
1102 Q. Street, suite 300
Sacramento, CA 95814-6549

A Mr. Joe Rombold
School Innovations & Advocacy
11130 Sun Center Drive, suite 100
Rancho Cordova, CA 95670

A Mr. David Cichella
California School Management Group
1111 E Street
Tracy, CA 95376

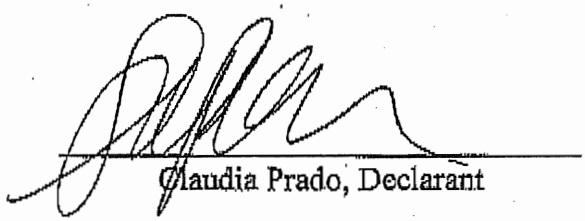
A Mr. Arthur Palkowitz
San Diego Unified School District
Office of Resource Development
4100 Normal Street, room 3209
San Diego, CA 92103-8363

A Ms. Jeannie Oropeza
Department of Finance (A-15)
Educations Systems Unit
915 L. Street, 7th Floor
Sacramento, CA 95814

A Ms. Susan Geanacou
Department of Finance (A-15)
915 L. Street, 7th Floor
Sacramento, CA 95814

A Mr. J. Bradley Burgess
Public Resources Management Group
895 La Sierra Drive
Sacramento, CA 95864

Executed on March 28, 2008, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Claudia Prado, Declarant

FACSIMILE COVER SHEET

Office of the Director, Legal Unit
Department of Industrial Relations
320 W. Fourth Street, Suite 600
Los Angeles, California 90013
Telephone Number: (213) 576-7725
Fax: (213) 576-7735

Date: March 28, 2008

To: Paula Higashi

Fax No.: (916) 445-0278

From: Andrew Holmes-Swanson

Re: Clovis

MESSAGE:

I am transmitting 7 pages including this cover sheet. If transmission is incomplete, please call (213) 620-6069.

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
VE: (916) 323-3562
.: (916) 445-0278
E-mail: csminfo@csm.ca.gov

EXHIBIT V

March 28, 2008

Mr. Andrew Holmes-Swanson
Department of Industrial Relations
Division of Administration
320 W. Fourth Street, Suite 600
Los Angeles, CA 90013

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: **Request for Extension of Time**
Prevailing Wage Rate, 01-TC-28
Clovis Unified School District
Labor Code Sections 1720,1720.2,1720.3,1726,1727,1733,1735,1741,1742, 1742.1,1743,1750,1770,1771,1771.5,1771.6,1772,1773,1773.1,1773.2,1773.3, 1773.5,1773.6,1775,1776,1777.1,1777.5,1777.6,1777.7,1812,1813,1861;
Public Contract Code, Section 22002;
Statutes 1976, Ch. 281; Statutes 1976, Ch. 538; Statutes 1976, Ch. 599; Statutes 1976, Ch. 861; Statutes 1976, Ch. 1174; Statutes 1976, Ch. 1179; Statutes 1977, Ch. 423; Statutes 1978, Ch. 1249; Statutes 1979, Ch. 373; Statutes 1980, Ch 962; Statutes 1980, Ch. 992; Statutes 1981, Ch 449; Statutes 1983, Ch. 681; Statutes 1983, Ch. 1054; Statutes 1988, Ch. 160; Statutes 1989, Ch. 278; Statutes 1989, Ch. 1224; Statutes 1992, Ch. 913; Statutes 1992, Ch. 1342; Statutes 1993, Ch.589; Statutes 1997, Ch. 17; Statutes 1997, Ch. 757; Statutes 1998, Ch. 443; Statutes 1998, Ch. 485; Statutes 1999, Ch. 30; Statutes 1999, Ch. 83; Statutes 1999, Ch. 220; Statutes 1999, Ch. 903; Statutes 2000, Ch. 135; Statutes 2000, Ch. 875; Statutes 2000, Ch. 881; Statutes 2000, Ch. 920; Statutes 2000, Ch. 954; Statutes 2001, Ch. 804; Statutes 2001, Ch. 938;
Title 8, CCR, Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802,17201-17212, 17220-17229, 17230-17237,17240-17253, 17260-17264

Dear Mr. Holmes-Swanson:

Your request for extension of time to file comments on the draft staff analysis for this test claim is approved for good cause. Comments from state agencies are now due on Monday, April 14, 2008.

Please contact Deborah Borzelleri at (916) 322-4230 if you have any questions.

Sincerely,

NANCY PATTON
Assistant Executive Director

Commission on State Mandates

Original List Date: 7/8/2002
Last Updated: 4/26/2007
List Print Date: 03/28/2008
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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State and Consumer Services Agency
DEPARTMENT OF GENERAL SERVI
Interagency Support Division • Office of Public School Co...
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EXHIBIT W

April 1, 2008

RECEIVED
APR 01 2008
COMMISSION ON STATE MANDATES

Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Paula Higashi:

The Office of Public School Construction (OPSC) would like to submit minor revisions to our previous comments regarding test claim *Prevailing Wage Rate, 01-TC-28.* In September 15, 2003, when the comments were submitted, Proposition 47 was the only bond in effect. However, in 2004 and 2006, Propositions 55 and 1D were passed. Therefore, we would like to update our previous comments to include the following revisions listed below in bold:

> The Education Code does not compel a district to obtain funding from the State through SFP as a condition of building schools. School districts may choose to build facilities through the use of district raised funds. Program elements are only required if a district chooses to participate in the program. Additionally, Labor Code ... Section 1771.7 states "an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of **either** 2002 **or 2004**... for a public works project, shall initiate and enforce ... a labor compliance program".
>
> The OPSC further states that the State Allocation Board (SAB) has authority to increase the per pupil grant amount to accommodate the State's share for the additional costs due to the initiation and enforcement of a LCP **for school projects funded from Proposition 47 or Proposition 55. Proposition 1D does not require school districts to enforce a LCP; therefore, projects that include LCPs are not eligible for funding increases under this bond.**

Thank you for the opportunity to comment on this claim to update our previous comments on this test claim.

Please do not hesitate to call me at (916) 323-7252 with any questions you may have regarding this request.

Regards,

Rob Cook
Executive Officer

cc: Commission's Parties and Interested Parties List as of 4/26/07 (Enclosure)

Commission on State Mandates

Original List Date: 7/8/2002
Last Updated: 4/26/2007
List Print Date: 02/21/2008
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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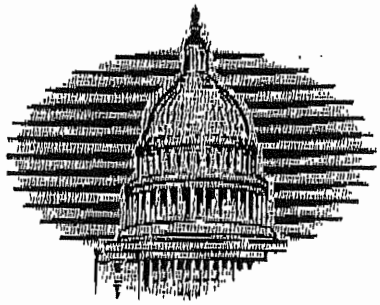

STATE OF CALIFORNIA
DEPARTMENT OF GENERAL SERVICES

OFFICE OF PUBLIC SCHOOL CONSTRUCTION

FACSIMILE TRANSMITTAL SHEET

TO: MS NANCY PATTON	DATE: 4/1/08
FAX NUMBER: (916) 445-0278	FROM: BRYAN O'DELL
PHONE NUMBER: (916) 323-3562	PHONE NUMBER: (916) 323-7109
CC:	TOTAL NO. OF PAGES INCLUDING COVER: 6

☐ URGENT ☒ FOR YOUR REVIEW ☐ REPLY ASAP ☐ PLEASE COMMENT

This fax includes the Office of Public School Construction's additional comments for *Prevailing Wage Rate, 01-TC-28.*

Hardcopies of the letters will follow by mail. If you have any questions, or if any part of this transmission is not legible, please do not hesitate to contact me.

Sincerely,

Bryan O'Dell

1130 K STREET, SUITE 400 • SACRAMENTO, CA 95814
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STATE OF CALIFORNIA
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EXHIBIT X

14 April 2008

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth St., Suite 300
Sacramento, CA 95814

Re: Clovis Unified School District
Test Claim No.: 01-TC-28
Prevailing Wage Rates

Dear Ms. Higashi:

The Department of Industrial Relations ("DIR") is in general agreement with the Draft Analysis ("Draft") but wishes to comment on two aspects of the Draft: The specific elements of the Test Claim that the Draft recommends the Commission find to be reimbursable and the breadth of the alleged mandate under the Public Contracts Code. The three elements of the California Public Works Law ("CPWL") the Draft describes as mandates are in fact not mandates subject to reimbursement. Additionally, the requirement to hire private contractors under the Public Contracts Code is smaller than the Draft describes. DIR therefore asks that the Draft be modified to recommend the Commission find no mandate to changes in the CPWL.

Any Mandate That Exists Is So Negligible As To Not Require Subvention: The Draft concludes that only three obligations in the CPWL constitute reimbursable mandates. Assuming this is correct (but see, *infra* p. 2-4), these remaining obligations do not qualify as reimbursable mandates because the state already is providing funding that would include these activities or that reduces any increased mandate to negligible levels.

Partial state funding already exists for maintenance and repair projects in school districts and community colleges. (Ed. Code, §§ 17582 -17588, 84660).[1] Any additional

[1] Education Code section 17582 is "for the purpose of major repair or replacement of plumbing, heating, air conditioning, electrical, roofing, and floor systems, the exterior and interior painting of school buildings, the inspection, sampling, and analysis of building materials to determine the presence of asbestos-containing materials, the encapsulation or removal of asbestos-containing materials, the inspection, identification, sampling, and analysis of building materials to determine the presence of lead-containing materials, the control, management, and removal of lead-containing materials, and any other items of maintenance approved by the State Allocation Board." While Education Code section 84660 funds "unusual, nonrecurring work to restore a facility to a safe and continually

increase in cost to maintenance and repair projects is not reimbursable because it is negligible next to the entirety of a project's cost. In *Dept. of Finance v. Com. on State Mandates* (2003), 30 Cal.4th 727 ("*Kern*"), the California Supreme Court determined that the notice and agenda costs at issue were not unfunded because the state funded the program associated with these new services, and there was no barrier to shifting that money to cover them. Diverting funds for these inexpensive tasks did not make the mandate reimbursable. When discussing the costs imposed by notice and agenda compliance the court stated:

> At most, claimants, by being compelled to incur notice and agenda compliance costs - and pay those costs from program funds - have suffered a relatively minor diminution of program funds available to them for substantive program purposes. The circumstance that the program funds claimants may have wished to use exclusively for substantive program activities are thereby reduced, does not in itself transform the related costs into a reimbursable state mandate. (citations excluded.)
>
> *Kern, supra*, 30 Cal.4th at 748.

Kern's analysis equally applies here. State funds are available for maintenance and repair projects, and the asserted mandates (primarily record-keeping) are negligible. Shifting small amounts of money for compliance with allegedly new CPWL provisions does not create a reimbursable state mandate.

The Draft proposes that out of all of the amendments to the CPWL only three specific provisions of the Labor Code create mandates that are subject to subvention: two are primarily record-keeping and one is a simple extension of long standing obligations. While DIR agrees with the Draft where it finds no mandate in changes to the CPWL, DIR disagrees with the Draft's conclusion that three sections of the CPWL are subject to subvention.

Retaining Certified Payroll Records ("CPRs") For Six Months At Most Results In A Negligible Increase In Levels of Service: *Kern*'s analysis also applies to the record retention provisions in California Code of Regulations, title 8, section 16403, the Draft proposes to find a mandate.[2] In addition to the funding discussed above, school districts and community colleges can charge private parties for all but one provision of California Code of Regulations, title 8, section 16403.[3] (Cal. Code Regs, tit. 8, § 16402.) These CPRs are either in a paper form (which are usually not more than 150 pages long) or in an electronic form. The cost of storing such a small quantity of documents is insignificant, especially for the electronic versions. The reimbursement already provided is more than

---

useable condition," there is no indication that these monies from either source cannot be applied to the administrative costs directly associated with such projects.

[2] School districts and community colleges are to retain copies of CPRs that are requested and paid for by private parties for six months.

[3] See attached 1985 Regulatory Review discussing these regulatory sections.

enough to cover the requirements cited in the Draft and therefore there is no need for subvention. Thus school districts and community colleges are receiving money in *two* ways that reduces any mandate under California Code of Regulations, title 8, section 16402, to a *de minimis* level: through state funding for the project itself and from the CPR fees charges to private parties.

Segregating the minimal costs to retain records for the purpose of subvention creates a further dilemma. How might an Awarding Body separate the costs of retaining CPRs that meet the Draft's parameters from the countless other documents it retains? If *de minimis* has any meaning, it has to include some balance of the relative cost of subvention versus the administrative cost to the local agencies to track the alleged mandate's costs.

Inserting A Clause In Public Works Contracts (Labor Code section 1776(h)) At Most Results In A Negligible Increase In Levels of Service: Labor Code section 1776(h) requires that an Awarding Body insert in its contracts a restatement of the requirements of Labor Code section 1776; this is obviously a stock paragraph that only is drafted one time and repeatedly inserted. The obligation to include a clause in a contract is not unique to Labor Code section 1776(h). Awarding Bodies' contracts for public works already must specify in the contract "what the general rate of per diem wages is for each craft, classification, or type of worker" (Lab. Code, § 1773.2) and the limitation that work not exceed eight hours in a workday (Lab. Code, § 1810). These requirements existed in the 1975 Labor Code. Therefore, inserting an additional requirement into a public works contract is at best a *de minimis* increase; given the reimbursement already provided as well as the difficultly determining the cost, it does not merit subvention.

Retaining Contract Payments For CPR Violations (Labor Code Section 1776(g)) Is Not A Mandate: The Draft recommends that Labor Code section 1727 [retention of contract payments for the failure to pay prevailing wages] is not a mandate because it does not require any action by an Awarding Body. The Draft recommends that nearly identical action, retention of contract amounts for CPR violations, by an Awarding Body, however, is a mandate.

The same analysis of Labor Code section 1727 applies to Labor Code section 1776(g). The Draft recommends that Labor Code section 1727 is not a mandate because it does not require the Awarding Body to take any action. ("[W]here the plain language of the test claim statute *prohibits* the awarding body from disbursing the withheld money until a final order that is no longer subject to judicial review, no activities are required of the awarding body." Draft, p. 49.) Although the language of each of these statutes may differ slightly, in reality, they do the same thing: prohibit payments by the Awarding Body at the Labor Commissioner's instruction.

While Labor Code section 1776(g) deals with a specific situation, it does not actually result in an increase in service because the obligation already was subsumed in Labor Code section 1727. Under the pre-1975 statutory scheme, Labor Code section

1727 required "*the awarding body shall withhold and retain thereform all amounts which have been forfeited pursuant to ... the terms of this chapter.*" Labor Code section 1776(g) is part of the same chapter as section 1727. Retention of contract payments therefore is not a new or increased level of service because the obligation to withhold for violations of the prevailing wage statute does not impose a new program or higher level of service. (*City of Merced v. State of California* (1984) 153 Cal.App.3d 777.)

Public Contracts Code: The Public Contracts Code requirement that a school district or community college put certain projects out for bid is narrower than the Draft describes. The Draft states there is no requirement to contract (and thus fall under the CPWL) unless a project is for maintenance or repair (as required by Education Code sections 17002, 17565, 17593, and 18601), is not an "emergency" (as set forth in either Education Code section 20113 or 20654) and meets one of three thresholds. The K-12 threshold (Pub. Contracts Code, § 20114) and Community College threshold (Pub. Contracts Code, § 20655) contain both enrollment and material cost minimums before contracting with private parties is required. The Uniform Public Construction Cost Accounting Act ("UPCCAA") threshold (Pub. Contracts Code, § 20032) has only minimum project costs requirements. (See, Draft, pgs. 37-40.)

A project can meet the K-12 or Community College thresholds without meeting the project cost threshold under the UPCCAA; in such a situation, a mandate only occurs under one set of thresholds. It is also possible for a project's cost to trigger the UPCCAA threshold without meeting enrollment and material cost requirements of the K-12 and Community College thresholds.

Public Contracts Code section 22030 allows a public agency to decide whether to subject itself to the UPCCAA thresholds or the K-12 and Community College thresholds. The Draft recognized this section as being applicable to "[a] public agency whose governing board has by resolution *elected* to become subject to this Act." (Draft, p. 15 (emphasis added).) Thus, the decision to be subject to one or the other set of thresholds is a choice. Therefore, any project that does not create a mandate to contract with private parties under both sets of thresholds should not be considered a mandate for subvention purposes. To the extent that the Draft does not make this clear, DIR recommends it be modified to clearly state that a project must meet both sets of thresholds before it is considered a mandate.

Parsing the cost to include one clause in a contract from the cost to include another clause, retaining contract payments for CPR violations as opposed to wage payment violations, and retaining some CPRs, presents the problem of whether the cost to administer any subvention heavily outweighs the benefit to local agencies. While the original Test Claim included a general, non-specific declaration of the increased cost, a new declaration, limited to whatever mandates the Commission believes might exist,

should be required to justify the Test Claim.[4] DIR believes that such a declaration would show that, in the limited circumstances in which a mandate might exist to contract with private parties, the three alleged CPWL mandates cause virtually no increased costs.

Yours Truly,

Anthony Mischel
Attorney At Law

encl.

cc: See attached list

[4] This would also be of assistance in evaluating the application of *Kern*'s comparison to the cost of the project as a whole.

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11130 Sun Center Drive, Suite 100
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//

Mr. Allan Burdick
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1130 K Street, Suite 400
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Mr. Erik Skinner
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1102 Q. Street, suite 300
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Mr. David Cichella
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1111 E Street
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Mr. Arthur Palkowitz
San Diego Unified School District
Office of Resource Development
4100 Normal Street, room 3209
San Diego, CA 92103-8363

Ms. Jeannie Oropeza
Department of Finance (A-15)
Educations Systems Unit
915 L. Street, 7th Floor
Sacramento, CA 95814

//

Ms. Susan Geanacou
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915 L. Street, 7th Floor
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Mr. J. Bradley Burgess
Public Resources Management Group
895 La Sierra Drive
Sacramento, CA 95864

INITIAL STATEMENT OF REASONS

TITLE 8: Chapter 8, Group 3, Articles 1-7
Sections 16000-16500 of the Regulations
of the Office of the Director Regarding Payment
of Prevailing Wages Upon Public Works

Problems Addressed by Proposed Action

Recently enacted legislation (Chapter 681 S.1983) requires regulations to set forth cost (fees) for the reproduction and preparation of certified payroll records for determining compliance with prevailing wage requirements on public works jobs.

Existing regulations allow for the Director to adopt collective bargaining agreements to determine the prevailing wage rates, however, no criteria is set forth to determine how the Director will adopt such agreements or to what extent (geographical or otherwise) such agreements will constitute the prevailing wage determination.

Some collective bargaining agreements: (1) allow weekend or night work at regular wage rates on public works projects; or (2) permit the use of "helper" labor classifications; or (3) include future changes in the wage rate structure (upwards or downwards) during the length of the collective bargaining agreement. Existing regulations are not clear or do not address these provisions.

In addition, existing regulations in Articles 1-6 are poorly organized, repeat statutory requirements and are in need of revision for greater clarity and understanding. Existing sections also lack statutory authority and reference citations after each numbered section, now required by the Government Code.

Specific Purpose of Proposed Action

The purpose of the proposed action is to remedy the problems enumerated above in the "Problems Addressed" statement. Specifically, the proposed regulations include new provisions setting forth charges (costs) to be paid for the preparation and reproduction of certified payroll records to implement legislative mandate in Chapter 681 S.1983.

The proposed regulations set forth criteria for the Director to follow when adopting collective bargaining agreements as the prevailing wage rates for public works projects.

The proposed regulations also clarify provisions to permit weekend work at regular (day) wage rates on public works projects. The regulations would also permit the use of "helper" labor classifications that are included in some collective bargaining agreements, but have not previously been addressed in prevailing wage regulations. The proposed regulations also would identify future changes in prevailing wage rates that are included in collective bargaining agreements, when such agreements are adopted by the Director.

clearly defined. If the responsibilities are clearly defined, the blanket request would not be accepted. The reason for the change is to discourage blanket requests for all contractors' payroll records when only one employer's records are needed. Blanket requests are very time consuming and costly to process. The Department believes that the interests of all affected parties would be better served if these "fishing expeditions" were curtailed.

Substantive new language is proposed to be added to existing Section 16207.12, which would require the public entity to include in an acknowledgment letter to the party requesting payroll records, the contractor's cost estimate for reproducing and furnishing such documents. The purpose for the inclusion of the new language is to inform the affected public that there are reimbursement costs associated in the request process.

Substantive new language is proposed to be added to newly renumbered subsection 16400(d) [existing Section 16207.13] to require the public entity to include in its request to contractors for certified copies of payroll records, the cost of providing the copies, and that the contractor is to make available for inspection copies of the records.

The reason for the proposed additional language is to place the burden of responsibility on the public entity for informing the contractor of his/her duty to estimate the copying cost, and the requirement to make the records available for inspection.

Section 16401. Reporting of Payroll Requests.

Existing Section 16207.15 is proposed to be amended with both substantive and nonsubstantive changes. The nonsubstantive changes are proposed for organizational consistency and style.

A substantive change is proposed to be made to allow the Labor Commissioner, instead of the public entity, to specify an acceptable payroll record format when the contractor does not comply with statutory informational requirements for providing certified payroll records. The intent is to centralize the decision-making process so that a myriad of different formats is not used.

By applying the same standards for the reporting format, more efficient investigation by enforcement agencies will be achieved, which will reduce costs to those enforcement bodies.

Section 16402. Cost.

Existing Section 16207.17 is proposed to be amended and renumbered to new Section 16402, and substantial revisions are proposed to be made to the text. The processing fee of $1.00 is proposed to be changed to $10.00 to more realistically reflect the handling costs to the contractor for furnishing payroll record copies. An additional provision for advance payment for contractor's reproduction costs by the requesting party is proposed to be included to discourage frivolous, time-consuming requests.

Section 16403. Privacy Considerations.

Existing Section 16207.18 is proposed to be renumbered to new Section 16403 to be consistent with the new organizational structures of the proposed regulations. No other changes are proposed to be made, except to require that other employee private information should be obliterated from any payroll record furnished to the public. The purpose of obliterating other private information is to protect individual employees from being identified.

Article 7. Severability

Section 16500. Severability.

It is proposed to adopt new Article 7 to include existing Section 16207.19, which is proposed to be amended and renumbered to new Section 16500.

The text referring to costs to a local agency and school districts is proposed to be repealed as unnecessary, as it is a cost disclaimer which should not have been included in the existing text.

~~16207.16~~ (b) Words of Certification. The form of certification shall be as foll
I, _____ (Name-print), the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named.

Date: _____ Signature: _____

A public entity may require a more strict and/or more extensive form of certification.

AUTHORITY CITED: Labor Code Sections 54 and 1773.5.
Reference: Labor Code Section 1776.

Renumber and amend existing Section 16207.17 to new Section 16402 to read:

~~16207.17. Fees. The public entity furnishing copies of payroll records to the person requesting them may charge no more than one ($1.00) dollar initial processing fee (per contractor) and twenty five (25¢) cents per page side copied.~~

16402. Cost. The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. An additional cost of $10 for handling may be required where the volume of information is large. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

AUTHORITY CITED: Labor Code Section 1776.
Reference: Labor Code Section 1776 (h).

Renumber and amend existing Section 16207.18 to new Section 16403 to read:

~~16207.18.~~ 16403. Privacy Considerations. (a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to of each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

AUTHORITY CITED: Labor Code Sections 54, 1773.5, and 1776.
Reference: Labor Code Section 1776.

Adopt new Article 7:

Article 7. SEVERABILITY

Renumber and amend existing Section 16207.19 to new Section 16500 to read:

~~16207.19.~~ 16500. Severability. If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application, and to this end the provisions of these regulations are severable.
~~Pursuant to Section 9 of Chapter 281, Statutes 1976, and Chapter 1249, statutes 1978, the Director has determined that the proposed action will create no additional costs to any local agency or school district as provided by Section 2231 of the Revenue and Taxation Code.~~

AUTHORITY CITED: Labor Code Sections 54, 1773.5, and 1776.
Reference: Labor Code Sections 1773.5 and 1776.

FINAL STATEMENT OF REASONS

TITLE 8: Chapter 8, Group 3, Articles 1-7
Sections 16000-16500 of the Regulations
of the Office of the Director Regarding Payment
of Prevailing Wages Upon Public Works

Problems Addressed by Proposed Action

Recently enacted legislation (Chapter 681 S.1983) requires regulations to set forth cost (fees) for the reproduction and preparation of certified payroll records for determining compliance with prevailing wage requirements on public works jobs.

Existing regulations allow for the Director to adopt collective bargaining agreements to determine the prevailing wage rates, however, no criteria is set forth to determine how the Director will adopt such agreements or to what extent (geographical or otherwise) such agreements will constitute the prevailing wage determination.

Some collective bargaining agreements: (1) allow weekend or night work at regular wage rates on public works projects; or (2) permit the use of "helper" labor classifications; or (3) include future changes in the wage rate structure (upwards or downwards) during the length of the collective bargaining agreement. Existing regulations are not clear or do not address these provisions.

In addition, existing regulations in Articles 1-6 are poorly organized, repeat statutory requirements, and are in need of revision for greater clarity and understanding. Existing sections also lack statutory authority and reference citations after each numbered section, now required by the Government Code.

Specific Purpose of Proposed Action

The purpose of the proposed action is to remedy the problems enumerated above in the "Problems Addressed" statement. Specifically, the proposed regulations include new provisions setting forth charges (costs) to be paid for the preparation and reproduction of certified payroll records to implement legislative mandate in Chapter 681 S.1983.

The proposed regulations set forth criteria for the Director to follow when adopting collective bargaining agreements as the prevailing wage rates for public works projects.

The proposed regulations also clarify provisions to permit weekend work at regular (day) wage rates on public works projects. The regulations would also permit the use of "helper" labor classifications that are included in some collective bargaining agreements, but have not previously been addressed in prevailing wage regulations. The proposed regulations also would identify future changes in prevailing wage rates that are included in collective bargaining agreements, when such agreements are adopted by the Director.

Mr. Bolli, HBMWD

Mr. Bolli comments that a uniform, acceptable accounting procedure or format should be developed for use in public reporting requirements.

Response: Such a procedure is set forth in newly renumbered Section 16401, Reporting of Payroll Requests. New language is added to existing regulation to specify that if a contractor does not comply with reporting requirements as set forth in Labor Code Section 1776, the Labor Commissioner may require use of the Department's suggested format "Public Works Payroll Reporting Form" (Form A-1-131).

Section 16402. Cost.

Existing Section 16207.17 is amended and renumbered to new Section 16402, and substantial revisions are made to the text. The processing fee of $1.00 is changed to $10.00 to more realistically reflect the handling costs to the contractor for furnishing payroll record copies. An additional provision for advance payment for contractor's reproduction costs by the requesting party is included to discourage frivolous, time-consuming requests.

Response to Public Comment

WRITTEN COMMENTS

Mr. Smith, ACWA

Mr. Smith comments that his association members advise him that the rates proposed by the Department are insufficent to recover costs involved since costs tend to change, and may vary in different situations.

1/

Mr. Smith, instead, suggests that Section 16402 be revised to provide for the charging of the actual cost of providing the service.

Response: Mr. Smith's proposal cannot be adopted. The Department is instructed by Labor Code Section 1776(h) to establish reasonable fees to be charged for reproducing copies of certified payroll records.

It is therefore, necessary, for the Director to specify in regulation, a standard cost to contractors for providing these copies to avoid overstatement on the contractor's part of such costs. This regulation is also necessary because labor costs for providing the service may vary among different contractors.

The addition of a $10.00 handing fee is consistent with the California Public Records Act, which governs release of records, and establishes reasonable fees to be assessed for reproduction of records.

It will be the responsibility of each awarding body to establish flexible guidelines for imposing an additional $10.00 fee if the volume of information required is large.

[ROBBINS-Ca. Records Act]

Mr. O'Shea, Building & Construction Trades Department

Mr. O'Shea recommends that Section 16402 be changed to limit the cost of securing certified payroll records to $1.00 for the first page and 25¢ per each additional page.

Response: Mr. O'Shea's proposal cannot be adopted. In establishing reasonable fees for the reproduction of certified payroll records, the Director must take cognizance of costs incurred by contractors, in addition to their actual reproduction costs. The proposed $10.00 fee is believed to cover the contractor's cost for supplying these records, and is consistent with the California Public Records Act governing the release of records.

[ROBBINS-does this regulation conflict with Government Code 6257?]

Mr. Center, FFC

Mr. Center proposes deletion of the term "in advance by the person" (sic), on the basis that this term creates confusion since payment is covered under the last sentence of this section [Payment.... shall be made prior to release of the document to cover the actual costs of preparation."].

Response: The first sentence in Section 16402 is necessary as it specifies to whom the cost of preparation applies, and states, in general, that the person seeking the records must pay in advance.

It does not duplicate the final sentence in this section since the final sentence does not specify who are the payers/payees.

Legal authority for requiring advance payment is set forth in Labor Code Section 1776(b)(3):

> ...The requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractor, and the entity through which the request was made.

Advance payment in person is a necessary element in this regulation to preclude collection problems on the part of the contractor. It would not be fair for a requestor to put a contractor through the trouble of reproducing certified payroll records, and if the requestor changed his/her mind about wanting the records, the contractor would be left to bear the financial burden for reproduction, as well as labor costs.

The purpose of requiring advance payment is to discourage frivolous, time-consuming requests made to "harass" public entities, as well as contractors. The Department's records show that certain interested parties were submitting an inordinate number of requests for payroll records without legitimate substantiation. The advance payment requirement is proposed to resolve this problem administratively.

Mr. Richardson, Labor Research Group (IBEW 595)

Mr. Richardson recommends deletion of all language beyond the term "thereafter" in this subsection on the basis that imposition of this amendment, referring to the $10.00 handling fee, and an additional $10.00 fee if the volume of information is large, is contrary to the intent of Labor Code Section 1776 and Government Code Section 6750 (California Public Records Act), which are designed to allow public access to government records.

Mr. Richardson asserts that proposed Section 16402 is designed to inhibit access.

Response:

ROBBINS: does our regulation conflict with Gvt. Code 6257? 1776(b)(3) vs. Gvt. Code 6257 which prevails? Please address issue of public access. Unable to locate Gvt. Code 6750 is it an incorrect reference?

Ms. Gates, PDWPF

Ms. Gates recommends deletion of both $10.00 handling charges on the basis that the fees will be as a source of disagreement and delay, and enforcement will be difficult. Ms. Gates questions who would decide when the volume of information is large enough to require a $20.00 handling fee.

Response: As presently proposed, a $10.00 fee to the contractor would be required in addition to reproduction costs as specified. An additional $10.00 fee would be required if the volume of information requested is large.

It will be the awarding body's responsibility to establish flexible guidelines for imposing the additional $10.00 fee.

[Robbins-is Gates' argument valid re definition of "large". Is this Section, as written, open to too broad of an interpretation?]

Mr. Ouye, SMUD

Mr. Ouye believes that the reimbursement schedule is unreasonably low as it would not cover operating expenses, and, instead, proposes a survey of agencies to set a more reasonable payment schedule for providing payroll records.

Response: The Director is instructed by Labor Code Section 1776(h) to establish reasonable fees to be charged for reproducing copies of certified payroll records. This statute does not require that a specific method be used to establish such a fee.

This Section sets forth standard costs which were established consistent with the statutory mandate, and determined by the Director to be reasonable. Since operating expenses vary among contractors and awarding bodies, it is necessary that a cost be specified in regulation so that such costs are not inflated.

[ROBBINS-how did CC arrive at $10.00 fee? Should we define "if volume is large"?. How can we argue inclusion of "large"? Should we respond to conducting a survey?]

ORAL COMMENTS

Mr. Bassett, Caltrans

Mr. Bassett requests that the word "public entity" be included as the beneficiary of the $10.00 handling fee proposed to reimburse contractors or subcontractors on the basis that his agency would want to at least recover a minimal portion of some of the time demands generated by this request process.

Response: [Carmody, ROBBINS-See memo on issues]
Do we want to do this?

Section 16403. Privacy Considerations.

Existing Section 16207.18 is renumbered to new Section 16403 to be consistent with the new organizational structure of the proposed regulations. No other changes are made, except to require that other employee private information should be obliterated from any paytoll record furnished to the public. The purpose of obliterating other private information is to protect individual employees from being identified.

Response to Public Comment

WRITTEN COMMENTS

Mr. Spruance; Minasian, et al

Mr. Spruance comments:

Privacy is subjective. It should not be the public agency's responsibility to ascertain what is private with respect to individual employees of various contractors. Therefore, the proposed regulation should be redrafted to define specific categories of private information, or else require the contractor to indicate what information is considered to be private.

The "Statement of Reasons" indicates that the purpose of the change is to protect individual employees from being identified. If so, the regulation could be amended by requiring deletion or obliteration of "other private information which tends to identify individual employees."

Response: Private information is as defined in the Public Records Act.

Privacy is not subjective.

ROBBINS-Help!

please respond to this comment.

ORAL COMMENTS

Subsection 16403(b)

Mr. O'Shea, Building & Construction Trades Dept.

Mr. O'Shea asks whether "other private information" obliterated would include an employee's work classification.

Response: "Other private information" obliterated would not include an employee's work classification. A work classification is a necessary element in a certified payroll record.

[ROBBINS-Public Records act]

This is a critical element in establishing PW's are paid. It is unless coupled w/ identifying employee factors not confidential [illegible] information

Subsection 16403(c)

Mr. Bassett, Caltrans

Mr. Bassett proposes inclusion of the following double-underlined text:

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractors) when asked, so long as the entity requires such information of an identifying nature from the inquiring party which will reasonably preclude release of private or confidential information.

Mr. Bassett comments that the public entity should find out who is requesting the information.

State of California

Department of Industrial Relations

PAYMENT OF PREVAILING WAGES

Excerpts from California Labor Code,
California Administrative Code, California
Public Utilities Code, and
California Government Code

Issued by

Division of Labor Standards Enforcement
Division of Labor Statistics and Research
455 Golden Gate Avenue
P.O. Box 603
San Francisco, California 94101
July 1980

1983

FOREWORD

California law requires that not less than the general prevailing rate of per diem wages be paid to all workers employed on public works. Awarding bodies must obtain determinations for each craft, classification and type of worker needed to execute any contract for public work from the Director of the State Department of Industrial Relations.

Excerpts from the *Labor Code* and the *California Administrative Code* contained in this booklet have been published primarily to acquaint the more than 6,000 public awarding bodies with their responsibilities under the State's prevailing wage law. The booklet can also serve as a useful reference for contractors who undertake public works and craft representatives. These excerpts incorporate all amendments effective up to and including January 1, 1980, including amendments to Sections 1775 and 1777.7, the addition of Section 1722.1, and the renumbering of Section 3098 to Section 1773.3 in the *Labor Code*, and the adoption of Sections 16016–16019, 16207.10–16207.19 and the repeal of Section 16207.9 of the *California Administrative Code*.

Excerpts from the *Public Utilities Code* and the *Government Code* contained in this booklet have been published to acquaint public utilities, janitorial contractors, and other interested parties of prevailing wage requirements.

Awarding bodies may obtain prevailing wage determinations of the Director by writing to Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. Each request must specify the location where the work is to be performed, including the county, and the particular crafts, classifications, or types of workers for which a determination is needed.

Enforcement problems should be referred to the nearest district office of the Division of Labor Standards Enforcement. Addresses of these offices are listed at the end of this booklet.

District offices of the Division of Apprenticeship Standards are also listed at the end of this booklet.

Donald Vial

July 1980

Donald Vial
Director of Industrial Relations

16207.15. Reporting Format.

The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research
Post Office Box 603
San Francisco, California 94101
ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be at the discretion of the public entity provided the form can be readily understood by the person requesting the copies of the payroll records and the privacy considerations pursuant to Section 16207.18 below are complied with.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.16. Words of Certification.

The form of certification shall be as follows:

I, _____ (Name—print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____ (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named.

Date: _____ Signature: _____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.17. Fees.

The public entity furnishing copies of payroll records to the person requesting them may charge no more than one ($1.00) dollar initial processing fee (per contractor) and twenty-five (25¢) cents per page side copied.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code.

16207.18. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation including arbitration, mediation or other methods of dispute resolution are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number of each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person (s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54 and 1776, Labor Code. Reference: Section 1776, Labor Code; Section 6250 et seq., Government Code; and Section 1798 et seq., Civil Code.

16207.19. Severability.

If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application, and to this end the provisions of these regulations are severable.

Pursuant to Section 9 of Chapter 281, Statutes 1976, and Chapter 1249, Statutes 1978, the Director has determined that the proposed action will create no additional costs to any local agency or school district as provided by Section 2231 of the Revenue and Taxation Code.

NOTE: Authority cited: Sections 54 and 1776, Labor Code; Section 9, Chapter 281, Statutes 1976; and Chapter 1249, Statutes 1978. Reference: Section 1776, Labor Code; Section 9, Chapter 281, Statutes 1976; and Chapter 1249, Statutes 1978 (8 Cal Admin. §16207.9. prior).

State of California

Memorandum

To : Bill Becker
Peter Weiner
Al Reyff - DLSE
Jim Roeckel - DLSR
Chuck Gorrill - DAS

Date : January 21, 1980

Subject : AB 3174 - RULES AND REGULATIONS

From : Department of Industrial Relations
Ernie E. Vivas, Staff Counsel

Attached is a copy of the final draft. The changes made on the original proposal were brought about by the testimony at the hearings. Only one written comment was received. It, however, was addressed at the law rather than rules.

Please EXPEDITE any comments. I would like to file no later than the 31st of January.

I have not included the form, but the changes are not problematic in any way. As for the final draft, I feel that the rules are a better expression as a result of the few changes made and should present no real problems.

Ernie

Ernie E. Vivas, Staff Counsel

EEV:wll

att.

cc: D. Vial
Ed. Wallace - DAS
Patty Gates

SURNAME

FORM A 5-1001 (3-88)

PROPOSED RULES AND REGULATIONS

AB 3174

Definitions

Add to Article 1:

16015. Payroll Records. Payroll records shall mean all time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project (Labor Code §1720 et seq.).

16016. Certified. Certified shall mean the affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

16017. Public Entity. Public entity for the purpose of processing requests for inspection of payroll records or

furnishing certified copies thereof, shall mean any of the following: the body awarding the contract; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE) within the Department of Industrial Relations.

16018. Contractor - Subcontractor. The terms "contractor" and "subcontractor" shall include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in such capacity, when working on public works pursuant to Article 1 (commencing with Section 1720) and Article 2 (commencing with Section 1770) of Chapter 1 of Part 7 of Division 2 of the Labor Code.

ARTICLE 5.

Section 16207.5 is Repealed

ARTICLE 6.

Payroll Records - Forms - Reporting

§16207.10. Request for Payroll Records. Requests from the public for certified copies of payroll records shall be made to any of the following: (a) the body awarding the contract, (b) any office of the Division of Labor Standards Enforcement, or (c) any office of the Division of Apprenticeship Standards of the Department of Industrial Relations.

§16207.11. Request in Writing. Any request for payroll records pursuant to §1776 of the Labor Code shall be in writing and contain at least the following information: (a) the body awarding the contract; (b) the contract number and/or description; (c) the particular job location if more than one; (d) the name of the contractor; (e) the regular business address, if known. Requests for records of more than one contractor or subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be

entertained unless the records are requested by each separate contractor employer with the information as outlined above provided for each.

§16207.12. Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16207.13 below, to the person who requested said records.

§16207.13. Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following: (a) specify the records to be provided and the form upon which the information is to be provided; (b) conspicuous notice of the following: (1) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and (2) that failure to provide certified copies of the records to the requesting public entity within 10 working days of receipt of the request will subject the contractor

to a penalty of twenty-five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated.

§16207.14. Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of §1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

§16207.15. Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code §1776 shall be on a form provided by the public entity, which shall be substantially as follows:

(Insert Copy of Form Here)

Acceptance of any other format shall be at the discretion of the public entity provided the form can be readily understood by the person requesting the copies of the payroll records and the privacy considerations pursuant to Section 16207.18 below are complied with.

§16207.16. Words of Certification. The form of certification shall be as follows:

1992

I, _____ the undersigned, am
(Name - print)

_____ with the authority to act
(position in business)

for and on behalf of _____,
(name of business and/or contractor)

certify under penalty of perjury that the records or copies thereof submitted and consisting of _____
(description, no of pages)

are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named.

Date:_____ Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

§16207.17. Fees. The public entity furnishing copies of payroll records to the person requesting them may charge no more than one ($1.00) dollar initial processing fee (per contractor) and twenty-five (25¢) cents per page side copied.

§16207.18. Privacy Considerations. (a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation including

arbitration, mediation or other methods of dispute resolution are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below; (b) Copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number of each employee cannot be identified. All other information including identification of the contractor shall not be obliterated; (c) The public entity may verify by affirmation or negation (yes or no) that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

§16207.19. Severability. If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application, and to this end the provisions of these regulations are severable.

Pursuant to Section 9 of Chapter 281, Statutes 1976, and Chapter 1249, Statutes 1978, the Director has determined that the proposed action will create no additional costs to any local agency or school district as provided by Section 2231 of the Revenue and Taxation Code.

The Office of Administrative Hearings
717 K Street, Suite 409
Sacramento, California 95814
ATTENTION: Codification Manager

February 4, 1980

SUBMISSION OF PROPOSED RULES AND REGULATIONS FOR FILING WITH THE SECRETARY OF STATE - ERNEST E. VIVAS (ATSS) 597-2746

Office of the Director
Ernest E. Vivas, Staff Counsel

Submitted, for your information and filing with the Secretary of State, are ten copies of the proposed rules and regulations promulgated by the Director of the Department of Industrial Relations.

Ernest E. Vivas, Staff Counsel

EEV:wll

Enc. (10)

cc: Don Vial (1)
Bill Becker (5)
Al Reyff (3)
Ed Wallace (1)
Sandra Brooks (1)
Chuck Gorrill (1)
Jim Roeckel (1)
Peter Weiner (1)

(1) Article 1 Definitions

(2) Adopt Sections 16016, 16017, 16018 and 16019 to read:

(3) §16016. Payroll Records. Payroll records shall mean all time cards, cancelled checks, cash receipt, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project (Labor Code §1720 et seq.).

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Sections 1776 and 1812.

(4) §16017. Certified. Certified shall mean the affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Section 1776.

(5) §16018. Public Entity. Public entity for the purpose of processing requests for inspection of payroll records or furnishing certified copies thereof, shall mean any of the following: the body awarding the contract; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE) within the Department of Industrial Relations.

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Section 1776.

(6) §16019. Contractor - Subcontractor. The terms "contractor" and "subcontractor" shall include a contractor, subcontractor, licensee, officer, agent, or representive thereof, acting in such capacity, when working on public works pursuant to Article 1 (commencing with Section 1720) and Article 2 (commencing with Section 1770) of Chapter 1 of Part 7 of Division 2 of the Labor Code.

NOTE: Authority cited: Labor Code Sections 54, 1722.1 and 1776
Reference: Labor Code Sections 1722.1 and 1776

(7) Article 5 Department and Division Authority

(8) Repeal Section 16207.9

NOTE: Authority cited: Labor Code Sections 54 and 1776; Government Code Section 11421; Revenue and Taxation Code Section 2231

Reference: Government Code Section 11421; Revenue and Taxation Code Section 2237; Section 9, Chapter 281, 1976 Statutes.

(9) Adopt Article 6 to read:

Article 6. Payroll Records - Forms - Reporting

(10) Adopt Sections 16207.10, 16207.11, 16207.12, 16207.13, 16207.14, 16207.15, 16207.16, 16207.17, 16207.18, and 16207.19 to read:

DO NOT WRITE IN THIS SPACE

(11) §16207.10. Request for Payroll Records. Requests from the public for certified copies of payroll records shall be made to any of the following: (a) the body awarding the contract, (b) any office of the Division of Labor Standards Enforcement, or (c) any office of the Division of Apprenticeship Standards of the Department of Industrial Relations.

NOTE: Authority cited: Labor Code Sections 54 and 1776

Reference: Labor Code Section 1776.

(12) §16207.11. Request in Writing. Any request for payroll records pursuant to §1776 of the Labor Code shall be in writing and contain at least the following information: (a) the body awarding the contract; (b) the contract number

and/or description; (c) the particular job location if more than one; (d) the name of the contractor; (e) the regular business address, if known." Requests for records of more than one contractor or subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be entertained unless the records are requested by each separate contractor employer with the information as outlined above provided for each.

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Section 1776.

(13) §16207.12. Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16207.13 below, to the person who requested said records.

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Section 1776.

(14) §16207.13. Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following: (a) specify the records to be provided and the form upon which the information is to be provided; (b) conspicuous notice of the following: (1) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and (2) that failure to provide certified copies of the records to the requesting public entity within 10 working days of receipt of the request will subject the contractor to a penalty of twenty-five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated.

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Section 1776.

(15) §16207.14. Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of §1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

NOTE: Authority cited: Labor Code Sections 54, 1776, and 1812
Reference: Labor Code Sections 1776 and 1812.

DO NOT WRITE IN THIS SPACE

(16) §16207.15. Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code §1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research
Post Office Box 603
San Francisco, California 94101
ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be at the discretion of the public entity provided the form can be readily understood by the person requesting the copies of the payroll records and the privacy considerations pursuant to Section 16207.18 below are complied with.

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Section 1776.

(17) §16207.16. Words of Certification. The form of certification shall be as follows:

I, _____ the undersigned, am
(Name - print)
_____ with the authority to act
(position in business)
for and on behalf of _____,
(name of business and/or contractor)
certify under penalty of perjury that the records or copies thereof submitted and consisting of
(description, no. of pages)

are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named.

Date: _____ Signature: _____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Section 1776.

(18) §16207.17. Fees. The public entity furnishing copies of payroll records to the person requesting them may charge no more than one ($1.00) dollar initial processing fee (per contractor) and twenty-five (25¢) cents per page side copied.

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Section 1776.

(19) §16207.18. Privacy Considerations. (a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation including arbitration, mediation or other methods of dispute resolution

DO NOT WRITE IN THIS SPACE

are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below; (b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number of each employee cannot be identified. All other information including identification of the contractor shall not be obliterated; (c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Labor Code Sections 54 and 1776
Reference: Labor Code Section 1776, Government Code Section 6250 et seq; and Civil Code Section 1798 et seq.

(20) §16207.19. Severability. If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or application, and to this end the provisions of these regulations are severable.

Pursuant to Section 9 of Chapter 281, Statutes 1976, and Chapter 1249, Statutes 1978, the Director has determined

that the proposed action will create no additional costs to any local agency or school district as provided by Section 2231 of the Revenue and Taxation Code.

NOTE: Authority cited: Labor Code Sections 54 and 1776; Section 9, Chapter 281, Statutes 1976 and Chapter 1249, Statutes 1978.

Reference: Labor Code Section 1776; Section 9, Chapter 281, Statutes 1976 and Chapter 1249, Statutes 1978; (8 Cal Admin. §16207.9. prior).

State of California

Memorandum

To : Bill Becker, Chief Deputy Director
DIR Headquarters

Date : November 21, 1979

Subject: AB 3174 Rules

From : Department of Industrial Relations
Division of Apprenticeship Standards

Edward W. Wallace, Chief EW

1. Definition of "public entity" should be included to forestall misunderstanding.

2. 16207.13 Request to Contractor

   Who would enforce and collect the penalty of $25 per day, per worker portion of this section if the contractor does not respond to the request in ten (10) days?

   The Division responsible for collection of the penalties needs to be specified.

3. Section 16207.16 Fees

   At this time, DAS has no procedure for district offices to receive or keep monies. Unless the regulations required the fees be paid by cashiers check or money order, procedures will have to be developed.

4. The regulations would formalize some parts of the method DAS used in responding to the request for payroll records in the agreement between DAS and DLSE. (See attached)

EWW:SSB:yp

Attach.

cc: Al Reyff, DLSE
~~Jim Roecket, DLSR~~
C. Gorrill, DAS

SURNAME

ORM A 5-1001 (8-69)

State of California

Memorandum

To : Assistant Chiefs
Area Administrators
Senior Consultants
Consultants
District Offices

Date : April 19, 1979

Subject: Request for Certified Payroll Records

Telephone: ATSS (415) 557-1700

From : Department of Industrial Relations
Division of Apprenticeship Standards

Edward W. Wallace, Chief EWW

An agreement has been reached between the Division of Apprenticeship Standards and the Division of Labor Standards Enforcement on responsibility for "Request for Certified Payroll Records" as provided for in Section 1776 of the Labor Code:

Division of Labor Standards Enforcement will be the responsible Division for processing the request. DLSE has the mechanism to assess penalties, collect fines or recover wages.

Division of Apprenticeship Standards district offices should refer all request to the local DLSE offices.

If the Division of Apprenticeship Standards district offices should receive a request through the mail, reply to the requestor acknowledging receipt of the request, and advising that the request has been forwarded to DLSE for processing and any questions regarding the request should be directed to them.

EWW:SSB:yp

Attach.

2006 SURNAME

FORM A 5-1001 (5-69)

EXHIBIT Y

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR
ARNOLD SCHWARZENEGGER
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

April 15, 2008

RECEIVED

APR 15 2008

COMMISSION ON STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter dated March 28, 2008, the Department of Finance has reviewed the draft staff analysis for Claim No. 01-TC-28, "Prevailing Wage Rate", and respectfully submits the following comments. As a result of our review, Finance concurs with the Commission staff's recommendation to deny the relevant test claim statutes and regulations that were pled as mandating a new program or higher level of service within the meaning of Article XIIIB, Section 6 of the California Constitution.

Additionally, we note that the State School Deferred Maintenance Program (Education Code section 17582, et seq.) and the Community Colleges Facility Deferred Maintenance and Special Repair Program (Education Code section 84660, et seq.) provide State-matching funds, on a dollar-for-dollar basis, to assist school and community college districts with expenditures for major repair or replacement of existing school building components. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have received funding to cover the State's share of any related costs resulting from the activities as recommended by the Commission to be a reimbursable state-mandated program on pages 70-71 of the draft staff analysis. We suggest the Commission consider the availability of funding provided from the State School Deferred Maintenance Program and the Community Colleges Facility Deferred Maintenance and Special Repair Program to school districts and community colleges as offsetting revenues, should the Commission adopt a decision finding a reimbursable mandate.

As required by the Commission's regulations, a "Proof of Service" has been enclosed indicating that the parties included on the mailing list which accompanied your March 28, 2008 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Lenin Del Castillo, Principal Program Budget Analyst at (916) 445-0328.

Sincerely,

Jeannie Oropeza
Program Budget Manager

Attachments

ICC: OROPEZA, SCHWEIZER, DELCASTILLO, FEREBEE, GEANACOU, FILE

I:\WP\MANDATE.08\01-TC-28 PREVAILING WAGE RATE.DOC

DEPARTMENT OF
FINANCE
915 L STREET
SACRAMENTO, CA 95814-3706

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

Attachment A

DECLARATION OF LENIN DEL CASTILLO
DEPARTMENT OF FINANCE
CLAIM NO. CSM—01-TC-28

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter , Statutes of , (,) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

4/15/08
at Sacramento, CA

Lenin Del Castillo

PROOF OF SERVICE

Test Claim Name: Prevailing Wage Rate
Test Claim Number: CSM—01-TC-28

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7th Floor, Sacramento, CA 95814.

On April 15, 2008 I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

E-8
Department of Education
School Business Services
Attention: Marie Johnson
560 J Street, Suite 170
Sacramento, CA 95814

Mandated Cost Systems, Inc.
Attention: Steve Smith
2275 Watt Avenue, Suite C
Sacramento, CA 95825

San Diego Unified School District
Attention: Arthur Palkowitz
4100 Normal Street, Room 3159
San Diego, CA 92103-2682

E-8
State Board of Education
Attention: Bill Lucia, Executive Director
721 Capitol Mall, Room 532
Sacramento, CA 95814

California Teachers Association
Attention: Steve DePue
2921 Greenwood Road
Greenwood, CA 95635

Girard & Vinson
Attention: Paul Minney
1676 N. California Blvd., Suite 450
Walnut Creek, CA 95496

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 15, 2008 at Sacramento, California.

Annette Waite

Annette Waite

ICC: OROPEZA, SCHWEIZER, DELCASTILLO, FEREBEE, GEANACOU, FILE

I:\WP\MANDATE.08\01-TC-28 PREVAILING WAGE RATE.DOC

2014

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director-Legal Unit
320 W. Fourth Street, Suite 600
Los Angeles, CA 90013

Arnold Schwarzenegger, *Governor*

Telephone No.: (213) 576-7725
Facsimile No.: (213) 576-7735

EXHIBIT Z

May 22, 2008

Paula Higashi, Executive Director
Commission on State Mandates
980-Ninth Street, Suite 300
Sacramento, CA 95814

RE: Clovis Unified School District
Test Claim No.: 01-TC-28
Prevailing Wage Rates

Dear Ms. Higashi:

I received the Commission's agenda last night showing the above Test Claim on the Commission's agenda for its June 26, 2008, meeting. Unfortunately, I will be out of state that week on a preplanned vacation (for which I have already purchased airline tickets) and cannot attend. As I am the primary attorney on this matter, and the one designated by the Department to represent it at the hearing, I am requesting that the matter be continued to the August or October agenda (I am out of the country at the time of the September meeting).

Thank you in advance for your anticipated cooperation.

Yours truly,

Anthony Mischel

ASM/sp

cc: See Attached Mailing List

PROOF OF SERVICE
(Code Civ. Proc. §§ 1013a, 2015.5)

Re: Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.

And Affected Parties and State Agencies

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 320 W. Fourth Street, Suite 600, Los Angeles, CA 90013.

On May 22, 2008, I served the enclosed **Letter to Paula Higashi, Executive Director, dated May 22, 2008,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Loa Angeles, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

2016

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)
A	Mr. Keith Peterson SixTen & Associates 3841 North Freeway Blvd., Suite 170 Sacramento, CA 95834
A	Ms. Sandy Reynolds Reynolds Consulting Group, Inc P.O. Box 894059 Temecula, CA 92589
A	Ms. Chris Krueger Department of Justice 1300 I. Street, Suite 125 Sacramento, CA 95814
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842
A	Mr. Robert Miyashiro Education Mandated Cost Network 1121 L. Street, Suite 1060 Sacramento, CA 95814
A	Mr. Jim Spano State Controller's Office (B-08) Division of Audits 300 Capitol Mall, Suite 518 Sacramento, CA 95814
A	Ms. Ginny Brummels State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816
A	Ms. Beth Hunter, Director Centration, Inc. 8316 Red Oak Street, Suite 101 Rancho Cucamonga, CA 91730

A Ms. Donna Ferebee (A-15)
Department of Finance
915 L. Street, 6th Floor
Sacramento, CA 95814

A Mr. Bill McGuire
Assistant Superintendent
Clovis Unified School District
1450 Herndon
Clovis, CA 93611-0599

A Mr. David E. Scribner
Scribner & Smith, Inc
2200 Sunrise Boulevard, Suite 220
Gold River, CA 95670

A Mr. Keith B. Petersen
President
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

A Ms. Carol Bingham (E-8)
California Department of Education
Fiscal & Administrative Services Division
1430 N. Street, Suite 2213
Sacramento, CA 95814

A Mr. Steve Shields
Shields Consulting Group, Inc.
1536 - 36th Street
Sacramento, CA 95816

A Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

A Mr. Scott Kronland
Altshuler, Berzon, Nassbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

A Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

A Mr. Rob Cook
Office of Public School Construction
Department of General Services
1130 K Street, Suite 400
Sacramento, CA 95814

A Mr. Erik Skinner
California Community Colleges
Chancellor's Office (G-01)
1102 Q. Street, suite 300
Sacramento, CA 95814-6549

A Mr. Joe Rombold
School Innovations & Advocacy
11130 Sun Center Drive, suite 100
Rancho Cordova, CA 95670

A Mr. David Cichella
California School Management Group
1111 E Street
Tracy, CA 95376

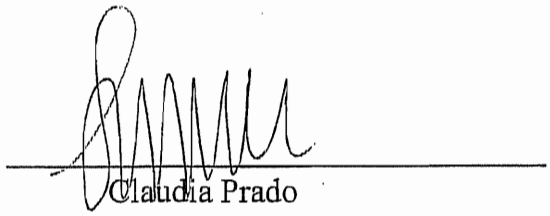
A Mr. Arthur Palkowitz
San Diego Unified School District
Office of Resource Development
4100 Normal Street, room 3209
San Diego, CA 92103-8363

A Ms. Jeannie Oropeza
Department of Finance (A-15)
Educations Systems Unit
915 L. Street, 7th Floor
Sacramento, CA 95814

A Ms. Susan Geanacou
Department of Finance (A-15)
915 L. Street, 7th Floor
Sacramento, CA 95814

A Mr. J. Bradley Burgess
Public Resources Management Group
895 La Sierra Drive
Sacramento, CA 95864

Executed on May 22, 2008, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Claudia Prado

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
E: (916) 323-3562
(916) 445-0278
E-mail: csminfo@csm.ca.gov

EXHIBIT AA

May 28, 2008

Mr. Anthony Mischel
Department of Industrial Relations
Division of Administration
320 W. Fourth St., Suite 600
Los Angeles, CA 90013

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

Re: **Request for Postponement of Hearing**
Prevailing Wage Rate, 01-TC-28
Clovis Unified School District, Claimant
Labor Code Section 1720 et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.

Dear Mr. Mischel:

Your request for postponement of the June 26, 2008 hearing on the above-named test claim is approved for good cause.

Hearing

This matter will be heard on Friday, **August 1, 2008, at 9:30 a.m.** in Room 447 of the State Capitol, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, or if other witnesses will appear.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Deborah Borzelleri at (916) 322-4230 if you have questions.

Sincerely,

PAULA HIGASHI
Executive Director

J:/mandates/2001/tc/01tc28/dirpostponementok

MAILED: V FAXED: _____
DATE: 5/29/08 INITIAL: AE
CHRON: V FILE: _____
WORKING BINDER: _____

Original List Date: 7/8/2002
Last Updated: 4/26/2007
List Print Date: 05/28/2008
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Agenda Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Ms. Sandy Reynolds Reynolds Consulting Group, Inc. P.O. Box 894059 Temecula, CA 92589	Tel: Fax:	(951) 303-3034 (951) 303-6607
Mr. Steve Shields Shields Consulting Group, Inc. 1536 36th Street Sacramento, CA 95816	Tel: Fax:	(916) 454-7310 (916) 454-7312
Ms. Beth Hunter Centration, Inc. 8570 Utica Avenue, Suite 100 Rancho Cucamonga, CA 91730	Tel: Fax:	(866) 481-2621 (866) 481-2682
Mr. Robert Miyashiro Education Mandated Cost Network 1121 L Street, Suite 1060 Sacramento, CA 95814	Tel: Fax:	(916) 446-7517 (916) 446-2011
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2026

Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent, v. FRANCIS V. SEE, Objector and Appellant.
Cal. 2001.

Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent,
v.
FRANCIS V. SEE, Objector and Appellant.
No. S087881.

Supreme Court of California
June 21, 2001.

SUMMARY

After an individual died intestate, his wife, as administrator of the estate, filed a petition for final distribution. Based on a 1941 judgment in a bastardy proceeding in Ohio, in which the decedent's biological father had confessed paternity, an heir finder who had obtained an assignment of partial interest in the estate from the decedent's half siblings filed objections. The biological father had died before the decedent, leaving two children from his subsequent marriage. The father had never told his subsequent children about the decedent, but he had paid court-ordered child support for the decedent until he was 18 years old. The probate court denied the heir finder's petition to determine entitlement, finding that he had not demonstrated that the father was the decedent's natural parent pursuant to Prob. Code, § 6453, or that the father had acknowledged the decedent as his child pursuant to Prob. Code, § 6452, which bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent/child relationship unless the parent or relative acknowledged the child and contributed to the support or care of the child. (Superior Court of Santa Barbara County, No. B216236, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B128933, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, since the father had acknowledged the decedent as his child and contributed to his support, the decedent's half siblings were not subject to the restrictions of Prob. Code, § 6452. Although no statutory definition of "acknowledge" appears in Prob. Code, § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had confessed paternity in the 1941 bastardy proceeding, he had acknowledged the decedent under the plain terms of the statute. The court also held that the 1941 Ohio judgment established the decedent's biological father as his natural parent for purposes of intestate succession under Prob. Code, § 6453, subd. (b). Since the identical issue was presented both in the Ohio proceeding and in this California proceeding, the Ohio proceeding bound the parties in this proceeding. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Concurring opinion by Brown, J. (see p. 925).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Parent and Child § 18--Parentage of Children-- Inheritance Rights--Parent's Acknowledgement of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent were precluded by Prob. Code, § 6452, from sharing in the intestate estate. Section 6452 bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative acknowledged the child and contributed to that child's support or care. The decedent's biological father had paid court-ordered child support for the decedent until he was 18 years old. Although no statutory definition of "acknowledge" appears in § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had appeared in a 1941 bastardy proceeding in another state, where he confessed paternity, he had acknowledged the decedent under the plain terms of § 6452. Further, even though the father had not had contact with the decedent and had not told his other children about him, the record disclosed no evidence that he

disavowed paternity to anyone with knowledge of the circumstances. Neither the language nor the history of § 6452 evinces a clear intent to make inheritance contingent upon the decedent's awareness of the relatives who claim an inheritance right.
[See 12 Witkin, Summary of Cal. Law (9th ed. 1990) Wills and Probate, §§ 153, 153A, 153B.]
(2) Statutes § 29--Construction--Language--Legislative Intent.
In statutory construction cases, a court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. A court begins by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, the court may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. In such cases, the court selects the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoids an interpretation that would lead to absurd consequences.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Judicial Construction of Certain Language.
When legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, a court may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

(4) Statutes § 20--Construction--Judicial Function.
A court may not, under the guise of interpretation, insert qualifying provisions not included in a statute.

(5a, 5b) Parent and Child § 18--Parentage of Children--Inheritance Rights--Determination of Natural Parent of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent, who had been born out of wedlock, were precluded by Prob. Code, § 6453 (only "natural parent" or relative can inherit through intestate child), from sharing in the intestate estate. Prob. Code, § 6453, subd. (b), provides that a natural parent and child relationship may be established through Fam. Code, § 7630, subd. (c), if a court order declaring paternity was entered during the father's lifetime. The decedent's father had appeared in a 1941 bastardy proceeding in Ohio, where he confessed paternity. If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. Since the Ohio bastardy proceeding decided the identical issue presented in this California proceeding, the Ohio proceeding bound the parties in this proceeding. Further, even though the decedent's mother initiated the bastardy proceeding prior to adoption of the Uniform Parentage Act, and all procedural requirements of Fam. Code, § 7630, may not have been followed, that judgment was still binding in this proceeding, since the issue adjudicated was identical to the issue that would have been presented in an action brought pursuant to the Uniform Parentage Act.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Prior Proceeding--Criminal Conviction on Guilty Plea.
A trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. The issue of the defendant's guilt was not fully litigated in the prior criminal proceeding; rather, the plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his or her guilt. The defendant's due process right to a civil hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources.

(7) Descent and Distribution § 1--Judicial Function.
Succession of estates is purely a matter of statutory regulation, which cannot be changed by the courts.

COUNSEL
Kitchen & Turpin, David C. Turpin; Law Office of Herb Fox and Herb Fox for Objector and Appellant.
Mullen & Henzell and Lawrence T. Sorensen for Petitioner and Respondent.
BAXTER, J.
Section 6452 of the Probate Code (all statutory

references are to this code unless otherwise indicated) bars a "natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative "acknowledged the child" and "contributed to the support or the care of the child." In this case, we must determine whether section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of-wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory ***908** construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife, Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self-described "forensic genealogist" (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from Margaret Loera and Daniel Draves, [FN1] objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

FN1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a "bastardy complaint" [FN2] in the juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and "confessed in Court that the charge of the plaintiff herein is true." The court adjudged Draves to be the "reputed father" of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $5 per week for child support and maintenance. Draves complied, and for 18 years paid the court-ordered support to the clerk of the Huron County court.

FN2 A "bastardy proceeding" is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as "Denis Howard Griswold," a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold ***909** divorced in 1978 or after his mother died in 1983, Griswold learned that Draves was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children, Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two

children-Margaret and Daniel-as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's "natural parent" or that Draves "acknowledged" Griswold as his child as required by section 6452.

The Court of Appeal disagreed on both points and reversed the order of the probate court. We granted Doner-Griswold's petition for review.

Discussion

(1a) Denis H. Griswold died without a will, and his estate consists solely of separate property. Consequently, the intestacy rules codified at sections 6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half "[w]here the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them." (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: "If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ...."

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions-section 6450, section 6452, and section 6453-must be considered. ***910**

As relevant here, section 6450 provides that "a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person" where "[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: "If a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [¶] (a) The parent or a relative of the parent *acknowledged the child.*[¶] (b) The parent or a relative of the parent contributed to the support or the care of the child." (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a "natural parent" within the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452. At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. *Acknowledgement*

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative "acknowledged the child." (*Id.*, subd. (a).) On review, we must determine whether Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record reflects no other acts of acknowledgement, but no disavowals either.

(2) In statutory construction cases, our

fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [*911105 Cal.Rptr.2d 457, 19 P.3d 1196].) "We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Ibid.*;*People v. Lawrence* (2000) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d 570, 6 P.3d 228].) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana*, *supra*,25 Cal.4th at p. 272; *People v. Lawrence*, *supra*,24 Cal.4th at pp. 230-231.)If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana*, *supra*,25 Cal.4th at p. 272.)In such cases, we " ' "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Ibid.*)

(1b) Section 6452 does not define the word "acknowledged." Nor does any other provision of the Probate Code. At the outset, however, we may logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of "acknowledge " is "to admit to be true or as stated; confess." (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 ["to show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admit"].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly " confessed" that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. [FN3] Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

FN3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, ***912** test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*,25 Cal.4th at p. 274; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would "provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)The Commission also advised that the purpose of the legislation was to "make probate more efficient and expeditious." (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental

acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to "make probate more efficient and expeditious." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these is neither illogical nor absurd with respect to the intent of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the participation ***913** of that parent or his relative in the estate of the deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) "so absurd as to make it manifest that it could not have been intended" by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688 [89 P. 833] [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal.App.4th 843 [59 Cal.Rptr.2d 346](*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons "who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both "acknowledged the child " and "contributed to the support or the care of the child" as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of evidence in the record that the plaintiff had signed as "Father" on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. (*Lozano*, *supra*,51 Cal.App.4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute.(*Lozano*, *supra*,51 Cal.App.4th at p. 848.)*Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id.* at p. 849, citing ***914**Code Civ. Proc., § 376, subd. (c), Health & Saf. Code, § 102750, & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano* reasoned, it certainly had precedent for doing so. (*Lozano*, *supra*,51 Cal.App.4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes "by publicly

acknowledging it as his own." (See Civ. Code, former § 230.) [FN4]Since that statute dealt with an analogous subject and employed a substantially similar phrase, we address the case law construing that legislation below.

> FN4 Former section 230 of the Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)
> In 1975, the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 828-829 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

In *Blythe v. Ayres* (1892) 96 Cal. 532 [31 P. 915], decided over a century ago, this court determined that the word "acknowledge," as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayers*, *supra*,96 Cal. at p. 577.)We therefore employed the word's common meaning, which was " 'to own or admit the knowledge of.' " (*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542 [108 P. 499].) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal.App.2d 385, 388-389 [330 P.2d 452]; see *Estate of Gird*, *supra*,157 Cal. at pp. 542-543), but, as discussed, the word retains virtually the same meaning in general usage today-"to admit to be true or as stated; confess." (Webster's New World Dict., *supra*, at p. 12; see Webster's 3d New Internat. Dict., *supra*, at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82 [183 P. 552, 7 A.L.R. 313], for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his ***915** one act of signing the birth certificate and proclaimed: "A more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine." (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird*, *supra*,157 Cal. 534, we indicated in dictum that "a public avowal, made in the courts" would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird*, *supra*,157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal.App.2d 391 [181 P.2d 741], a man's admission of paternity in a verified pleading, made in an action seeking to have the man declared the father of the child and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.)Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. [FN5](*Wong v. Young*, *supra*,80 Cal.App.2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168 [75 P. 790] [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), had not been established. (*Wong v. Young*, *supra*,80 Cal.App.2d at p. 394.)

> FN5 Section 255 of the former Probate Code provided in pertinent part: " 'Every

> illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' " (*Estate of Ginochio* (1974) 43 Cal.App.3d 412, 416 [117 Cal.Rptr. 565], italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. 892, § 42, p. 3001.) (3) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the ***916** same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) (1c) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former § 255, as well) suffice for purposes of intestate succession under section 6452. [FN6]

> FN6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to "publicly" acknowledge a child born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayers*, *supra*,96 Cal. 532,*Estate of Wilson*, *supra*,164 Cal.App.2d 385, and *Estate of Maxey* (1967) 257 Cal.App.2d 391 [64 Cal.Rptr. 837].

In *Blythe v. Ayres*, *supra*,96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he "was garrulous upon the subject" of his paternity and "it was his common topic of conversation." (*Id.* at p. 577.)Not only did the father declare the child to be his child, "to all persons, upon all occasions," but at his request the child was named and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that "it could almost be held that he shouted it from the house-tops." (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former section 230 of the Civil Code could "hardly be considered debatable." (*Blythe v. Ayres*, *supra*,96 Cal. at p. 577.)

In *Estate of Wilson*, *supra*,164 Cal.App.2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.)Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute. ***917**

In *Estate of Maxey*, *supra*,257 Cal.App.2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare.(*Id.* at p. 397.)The father also, in the presence of others, had asked for permission to

take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277 [223 P. 974].) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano*, *supra*,51 Cal.App.4th 843 [examining father's acts both before and after child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the validity of different forms of acknowledgement should not detract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird*, *supra*,157 Cal. at pp. 542-543; *Wong v. Young*, *supra*,80 Cal.App.2d at pp. 393-394.)As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*,257 Cal.App.2d at p. 397) or "shouted ... from the house-tops " (*Blythe v. Ayres*, *supra*,96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 does not support such requirements. (See *Lozano*, *supra*,51 Cal.App.4th at p. 848.)(4) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].)

(1d) Second, even though *Blythe v. Ayres*, *supra*,96 Cal. 532,*Estate of Wilson*, *supra*,164 Cal.App.2d 385, and *Estate of Maxey*, *supra*,*918257 Cal.App.2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child "publicly acknowledg[e] it as his own"; (2) that he "receiv[e] it as such, with the consent of his wife, if he is married, into his family"; and (3) that he "otherwise treat[] it as if it were a legitimate child." (*Ante*, fn. 4; see *Estate of De Laveaga*, *supra*,142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*,51 Cal.App.4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is "presumed" to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child"].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold emphasizes the circumstance that Draves did not tell his two other children of Griswold's existence. The record here, however, stands in sharp contrast to the primary authority she offers on this point.*Estate of Baird*, *supra*,193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives,

family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.)In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: "A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity. " (*Id.* at p. 276.)***919**

Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*,43 Cal.App.3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of Ginochio*, *supra*,43 Cal.App.3d at pp. 416-417.)Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided that their terms did not apply to "a natural brother or a sister of the child" born out of wedlock. [FN7] In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal.App.4th 1099 [9 Cal.Rptr.2d 475] held that a half sibling was a "natural brother or sister" within the meaning of such ***920** exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it "creates an undesirable risk that the estate of the deceased out-of-wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the decedent was unaware." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

> FN7 Former section 6408, subdivision (d) provided: "If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that

> parent and child unless both of the following requirements are satisfied: [¶] (1) The parent or a relative of the parent acknowledged the child. [¶] (2) The parent or a relative of the parent contributed to the support or the care of the child. " (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the "undesirable risk" that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby subjecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of circumstances presented in *Estate of Corcoran*, *supra*,7 Cal.App.4th 1099, and to substantially reduce the risk noted by the Commission. [FN8]*921

> FN8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court "acknowledgement" that would have allowed an illegitimate child to inherit from the father in that state. (See *Estate of Vaughan* (2001) 90 Ohio St.3d 544 [740 N.E.2d 259, 262-263].) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the place where Draves's acknowledgement occurred. (Civ. Code, §§ 755, 946; see *Estate of Lund* (1945) 26 Cal.2d 472, 493-496 [159 P.2d 643, 162 A.L.R. 606] [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former § 230 of the Civ. Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states wherein such acts were not legally sufficient].)

B. *Requirement of a Natural Parent and Child Relationship*

(5a) Section 6452 limits the ability of a "natural parent" or "a relative of that parent" to inherit from or through the child "on the basis of the parent and child relationship between that parent and the child."

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. [FN9] (See *Estate of Sanders* (1992) 2 Cal.App.4th 462, 474-475 [3 Cal.Rptr.2d 536].) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

> FN9 Section 6453 provides in full: "For the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out

> the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, [FN10] if a court order was entered during the father's lifetime declaring paternity. [FN11] (§ 6453, subd. (b)(1).)

> FN10 Family Code section 7630, subdivision (c) provides in pertinent part: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664."

> FN11 See makes no attempt to establish Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he *922 argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 276 [154 Cal.Rptr. 87].) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1520 [70 Cal.Rptr.2d 33](*Weir*);*Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85 [195 Cal.Rptr. 646]; cf. *Estate of Camp* (1901) 131 Cal. 469, 471 [63 P. 736] [same for adoption determinations].)

Doner-Griswold does not dispute that the parties here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir*, *supra*,59 Cal.App.4th at pp. 1516-1517, 1521.)Instead, she contends See has not shown that the issue adjudicated in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (1988) 47 Ohio App.3d 65 [546 N.E.2d 1354, 1357] [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the "reputed father" of a child, [FN12] satisfied an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (1984) 22 Ohio App.3d 84 [489 N.E.2d 825, 829]; see also *Estate of Hicks* (1993) 90 Ohio App.3d 483 [629 N.E.2d 1086, 1088-1089] [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

> FN12 The term "reputed father" appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941

bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (1937) 56 Ohio App. 82 [8 Ohio Op. 393, 10 N.E.2d 14, 16].)

Next, Doner-Griswold argues the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. ***923** It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal.App.3d 29 [246 Cal.Rptr. 762](*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross-complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. (6) The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. "The issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources." (*Id.* at p. 34, fn. omitted.)

(5b) Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (1936) 53 Ohio App. 19 [6 Ohio Op. 501, 4 N.E.2d 151, 152] [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need to limit litigation or conserve judicial resources. (See *Pease*, *supra*,201 Cal.App.3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the record. ***924**

Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*,59 Cal.App.4th at p. 1521.)Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14 [97 S.Ct. 1459, 1466, 52 L.Ed.2d 31] [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child

relationship had been established in state court paternity actions prior to the fathers' deaths].)

In sum, we find that the 1941 Ohio judgment was a court order "entered during the father's lifetime declaring paternity" (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

Disposition

(7) " 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts.' " (*Estate of De Cigaran*, *supra*,150 Cal. at p. 688.)We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred. ***925BROWN, J.**

I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers "acknowledge[s] the child" within the meaning of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must affirm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contravenes the overarching purpose behind our laws of intestate succession-to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a "forensic genealogist."

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to that child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So.2d 574, 577 [a father must "openly treat" a child born out of wedlock "as his own " in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here. ***926**

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Hall v. City of Taft
Cal.

GUY HALL, Respondent,
v.
THE CITY OF TAFT et al., Appellants.
L. A. No. 24244.

Supreme Court of California
Oct. 19, 1956.

HEADNOTES

(1) Schools § 2--Legislative Control.
The public schools are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution, and the Legislature is given plenary powers in relation thereto, subject only to constitutional restrictions.
See **Cal.Jur.,** Schools, § 4 et seq.; **Am.Jur.,** Schools, § 7 et seq.
(2) Schools § 2--Legislative Control.
The public school system is of statewide supervision and concern, and legislative enactments thereon control over attempted regulation by local government units.

(3) Schools § 10--School Districts.
School districts are agencies of the state for local operation of the state school system.

(4) Schools § 52--School Property.
The beneficial ownership of property of public schools is in the state.

(5) Schools § 60--School Property--Buildings and Construction.
While a large degree of autonomy is granted school districts by the Legislature, no statute or constitutional provision expressly makes school buildings or their construction any more amenable to regulation by a municipal corporation than structures built and maintained by the state generally for its use.
See **Cal.Jur.,** Schools, § 70 et seq.; **Am.Jur.,** Schools, § 71 et seq.
(6) Municipal Corporations § 237--Local Regulations--Conflicts With Statute.
When the state engages in such sovereign activities as construction and maintenance of its buildings as differentiated from enacting laws for conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation; neither Const., art. XI, § 11, relating to police power of cities and other local subdivisions, nor Gov. Code, §§ 38601, 38660, empowering a city to regulate the construction of buildings within its limits, should be considered as conferring such powers on local government agencies.
See **Cal.Jur.2d,** Buildings, § 6; **Am.Jur.,** Municipal Corporations, § 287.
(7) Schools § 60--School Property--Buildings and Construction.
Construction of school buildings by school districts is not subject to building regulations of a municipal corporation in which the building is constructed, because the state has completely occupied the field by general laws and such regulations conflict with such laws.

(8) Municipal Corporations § 237--Local Regulations--Conflicts With Statute.
A city may not enact ordinances which conflict with general laws on statewide matters.

(9) Schools § 60--School Property--Buildings and Construction.
The Health and Safety Code provisions relating to structural design aimed at procuring buildings less dangerous from the standpoint of earthquakes (§§ 19150, 19151) and requiring that building permits be obtained from the proper city or county officers (§ 19120) do not limit or modify the provisions of the Education Code (§§ 5021, 5041, 18001 et seq.) which set forth a complete system for the construction of school buildings.

(10) Schools § 60--School Property--Buildings and Construction.
Rules and regulations adopted for the construction of school buildings under the Education and Health and Safety Codes (Cal. Administrative Code, tit. 21, ch. 1) may not be interpreted to mean that a city's building regulations must be met in the construction of a school building; they tend more to indicate that school districts could follow such regulations as well as those of the state but are not bound to do so.

(11) Statutes § 112(1)--Construction.
The final construction of a statute is the function of courts.

SUMMARY

APPEAL from a judgment of the Superior Court of Kern County. William L. Bradshaw, Judge. Affirmed.

Action to enjoin a city from enforcing its building ordinance. Judgment for plaintiff affirmed.

COUNSEL
Henry G. Baron, City Attorney, and Allen Grimes for Appellants.
Mack, Bianco, King & Eyherabide and Dominic Bianco for Respondent.
Edmund G. Brown, Attorney General, Richard H. Perry, Deputy Attorney General, Johnson & Stanton, Gardiner Johnson and Thomas E. Stanton, Jr., as Amici Curiae on behalf of Respondent. *179
CARTER, J.
Defendants, Taft, a nonchartered city of the sixth class, its council and chief of police, appeal from a judgment enjoining it from enforcing against plaintiff, a building contractor, its building ordinance.

There is no dispute as to the facts. On April 22, 1955, plaintiff as contractor entered into a contract with Taft Union High School and Junior College District, hereafter called district, a school district duly organized under the state laws, to construct in Taft for the district, a school building for $614,113. The plans and specifications for the building were approved by the State Department of Education and State Division of Architecture. Plaintiff commenced construction which was to be completed in 320 days, but work was "stopped" by Taft, the city, demanding that plaintiff obtain a building permit from it involving a $300 fee and submission to the building ordinance [FN*] of Taft. The district has employed an inspector to assure that the building is constructed according to the plans and specifications. Defendants assert that plaintiff has refused to obtain a permit from the city for the construction of the building and they intend to enforce the penal and civil provisions of the building ordinance of the city.

> FN* Taft by ordinance had adopted the "Uniform Building Code 1952 edition adopted and published by the Pacific Coast Officials Conference in 1952."

The issue is whether a municipal corporation's building regulations are applicable to the construction of a public school building by a school district in the municipality. Taft argues that it had power to adopt police regulations-building construction regulations under the Constitution. [FN†]

> FN† "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Cal. Const., art. XI, § 11.)

(1) The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the state Legislature is given comprehensive powers in relation thereto. The Legislature shall not pass local or special laws "Providing for the management of common schools." (Cal. Const., art. IV, § 25, subd. 27.) "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, *the Legislature* shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (Emphasis added; *id.*, art. IX, § 1.) There *180 is a State Board of Education, an elected superintendent of public instruction and there are county superintendents whose salary and qualifications are prescribed by the Legislature (*id.*, art. IX, §§ 3, 3.1, 7). The proceeds of all public lands that have been or may be granted by the United States to the state and other property is "inviolably" appropriated to the support of the common schools (*id.*, art. IX, § 4) and "Out of the revenue from state taxes for which provision is made in this article, together with all other state revenues, there shall first be set apart the moneys to be applied by the State to the support of the Public School System and the State University." (*Id.*, art. XIII, § 15.) "The *Legislature* shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." (Emphasis added; *id.*, art. IX, § 5.) "The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and state colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them. No school or

college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System *or placed under the jurisdiction of any authority* other than one included within the Public School System. ...

"The Legislature shall provide for the levying annually by the governing body of each county, and city and county, of such school district taxes, at rates not in excess of the maximum rates of school district tax fixed or authorized by the Legislature, as will produce in each fiscal year such revenue for each school district as the governing board thereof shall determine is required in such fiscal year for the support of all schools and functions of said district authorized or required by law." (Emphasis added; *id.*, art. IX, § 6.) A school district may lie in more than one county and may issue bonds. (*Id.*, art. IX, § 6 1/2.) No money shall ever be appropriated for "any school not under the exclusive control of the officers of the public schools. ..." (*Id.*, art. IX, § 8.) "The *Legislature* shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts, and junior college districts, of every kind and class, and may classify such districts." (Emphasis added; *id.*, art. IX, § 14.) In harmony with those provisions it has been held that the power of the state Legislature over ***181** the public schools is plenary, subject only to any constitutional restrictions. (*Pass School Dist. v. Hollywood City School Dist.*, 156 Cal. 416, 418 [105 P. 122, 20 Ann.Cas. 87, 26 L.R.A.N.S. 485]; *Kennedy v. Miller*, 97 Cal. 429 [32 P. 558]; *Worthington School Dist. v. Eureka School Dist.*, 173 Cal. 154 [159 P. 437]; *Merrill etc. School Dist. v. Rapose*, 125 Cal.App.2d 819 [271 P.2d 522]; see *Woodcock v. Dick*, 36 Cal.2d 146 [222 P.2d 667]; *Seidel v. Waring*, 36 Cal.2d 149 [222 P.2d 669].) (2) The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units. (*Esberg v. Badaracco*, 202 Cal. 110 [259 P. 730]; *Cloverdale Union H. S. Dist. v. Peters*, 88 Cal.App. 731 [264 P. 273]; *Piper v. Big Pine School Dist.*, 193 Cal. 664 [226 P. 926]; *Kelso v. Board of Education*, 42 Cal.App.2d 415 [109 P.2d 29]; *Kennedy v. Miller*, *supra*, 97 Cal. 429; *Worthington School Dist. v. Eureka School Dist.*, *supra*, 173 Cal. 154; *Board of Education v. Davidson*, 190 Cal. 162 [210 P. 961]; *Phelps v. Prussia*, 60 Cal.App.2d 732 [141 P.2d 440]; *Lansing v. Board of Education*, 7 Cal.App.2d 211 [45 P.2d 1021]; *People v. Mertz*, 2 Cal.2d 136 [39 P.2d 422]; *Gerth v. Dominguez*, 1 Cal.2d 239 [34 P.2d 135].) It is said in *Piper v. Big Pine School Dist.*, *supra*, 193 Cal. 664, 669: "It [the education of the children of the state] is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state." (3) School districts are agencies of the state for the local operation of the state school system. (*Cloverdale Union H. S. Dist. v. Peters*, *supra*, 88 Cal.App. 731, 738; *Board of Education v. Davidson*, *supra*, 190 Cal. 162, 168; *Butler v. Compton Junior College Dist.*, 77 Cal.App.2d 719 [176 P.2d 417]; *Lansing v. Board of Education*, *supra*, 7 Cal.App.2d 211; *Merrill etc. School Dist. v. Rapose*, *supra*, 125 Cal.App.2d 819.) (4) The beneficial ownership of property of the public schools is in the state. It is said in *Pass School Dist. v. Hollywood City School Dist.*, *supra*, 156 Cal. 416, 419: "To the contention that a transfer of ownership thus accomplished works the taking of property without due process of law, it should be sufficient ***182** to point out that in all such cases the beneficial owner of the fee [of public school property] is the state itself, and that its agencies and mandatories-the various public and municipal corporations in whom the title rests - are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs. The transfer of title without due process of law, of which appellant so bitterly complains, is nothing more, in effect, than the naming by the state of other trustees to manage property which it owns and to manage the property for the same identical uses and purposes to which it was formerly devoted. In point of law, then, the beneficial title to the estate is not affected at all. All that is done is to transfer the legal title under the same trust from one trustee to another. In this sense the trustees of the Hollywood City School District became, by operation of law, successors to the trustees of the Pass School District, as is directly held in *Allen v. School Town of Macey*, 109 Ind. 559 [10 N.E. 578], where it is said: 'It is now a well-recognized legal inference deducible as well from general principles as from the decided cases, that under the constitution and laws of this state, public school property is held in trust for school purposes by the persons or corporations authorized for the time being to control such property, and that it is in the

power of the legislature to provide for a change in the trusteeship of such property in certain contingencies presumably requiring such a change, or, indeed, to change the trustees of that class of property whenever it may choose to do so.'

"Even if such well-established principles could be set aside under the plea that they work injustice in the individual case, this plea here presented is without merit. The state is profoundly interested in the education of its young, but has no deep concern over the personality of the trustees who shall administer this trust, so long as the administration is in the orderly form of law." (See *Fawcett v. Ball*, 80 Cal.App. 131, 136 [251 P. 679]; *Butler v. Compton Junior College Dist.*, 77 Cal.App.2d 719 [176 P.2d 417]; *Kennedy v. Miller*, 97 Cal. 429 [32 P. 558]; *Gridley School Dist. v. Stout*, 134 Cal. 592 [66 P. 785].) (5) While a large degree of autonomy is granted to school districts by the Legislature, we are referred to no statute or constitutional provision which, as far as the question here involved is concerned, expressly makes school buildings or their construction any more amenable to regulation by a municipal corporation than structures which are ***183** built and maintained by the state generally for its use. (6) When it engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation. Section 11 of article XI of the state Constitution, *supra*, should not be considered as conferring such powers on local government agencies. Nor should the Government Code sections which confer on a city the power to regulate the construction of buildings within its limits (see Gov. Code, §§ 38601, 38660) be so considered. It is said in *In re Means*, 14 Cal.2d 254, 258 [93 P.2d 105], holding that a state employee working on a state structure in a city need not meet the requirements of a city charter provision: "If one who has been employed by the state may not work on state property within a municipality without the consent of the municipality obtained after examination, the city has, in effect, added to the requirements for employment by the state, and restricted the rights of sovereignty. ...

"Turning to the contentions of the respondent that the regulation of plumbing is a municipal affair, the rule to be applied is not entirely a geographical one. Under certain circumstances, an act relating to property within a city may be of such general concern that local regulation concerning municipal affairs is inapplicable. ... For example, where one of the city's streets has been declared by an act of the legislature to be a secondary highway, the improvement of that street is not a municipal affair within the meaning of the Constitution. ... Also, regulations prescribed by charter or ordinance of a city requiring that the work of altering and improving buildings be subject to local supervision have been held inapplicable to state building. (*City of Milwaukee v. McGregor*, 140 Wis. 35 [121 N.W. 642, 17 Ann.Cas. 1002].)

"In the case of *Kentucky Institution for Education of Blind v. City of Louisville*, 123 Ky. 767 [97 S.W. 402, 8 L.R.A.N.S. 553], the city attempted to enforce an ordinance relating to fire escapes with respect to a state institution for the blind. The court held the ordinance inapplicable, stating: 'The principle is that the state, when creating municipal governments does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control.***184** The municipal government is but an agent of the state, not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the state. It is competent for the state to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities. How can the city ever have a superior authority to the state over the latter's own property, or in its control and management? From the nature of things it cannot have.' " (See also *Board of Education v. City of St. Louis*, 267 Mo. 356 [184 S.W. 975]; *Salt Lake City v. Board of Education*, 52 Utah 540 [175 P. 654]; 31 A.L.R. 450.)

Pasadena School Dist. v. Pasadena, 166 Cal. 7 [134 P. 985, Ann.Cas. 1915B 1039, 47 L.R.A.N.S. 892], fails to consider the factors above mentioned and insofar as it is inconsistent with this opinion it is overruled. The question here considered was not involved in *Roman Catholic etc. Corp. v. City of Piedmont*, 45 Cal.2d 325, 332-333 [289 P.2d 438].

(7) Moreover, in connection with the foregoing and as an additional ground why the construction of school buildings by school districts are not subject to the building regulations of a municipal corporation in which the building is constructed, is that the state has completely occupied the field by general laws, and

such local regulations conflict with such general laws, when we consider the activity involved. (8) A city may not enact ordinances which conflict with general laws on statewide matters. (*Simpson v. City of Los Angeles*, 40 Cal.2d 271 [253 P.2d 464]; *Pulcifer v. County of Alameda*, 29 Cal.2d 258 [175 P.2d 1]; ***Ex parte*** *Daniels*, 183 Cal. 636 [192 P. 442, 21 A.L.R. 1172]; *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660 [262 P. 334]; *Ganley v. Claevs*, 2 Cal.2d 266 [40 P.2d 817]; *In re Murphy*, 190 Cal. 286 [212 P. 30]; *In re Mingo*, 190 Cal. 769 [214 P. 850]; *Natural Milk etc. Assn. v. City etc. of San Francisco*, 20 Cal.2d 101 [124 P.2d 25]; *Pipoly v. Benson*, 20 Cal.2d 366 [125 P.2d 482, 147 A.L.R. 515]; *Tolman v. Underhill*, 39 Cal.2d 708 [249 P.2d 280].) The particular situation presented and discussed in those cases is not helpful. *In re Means, supra*, 14 Cal.2d 254, herein discussed is most pertinent as it involves the attempted regulation of a state activity by a city, as distinguished from regulations of the members of the public.

The Education Code sets out a complete system for the construction of school buildings. The Legislature there declares ***185** that it is in the interest of the state to aid school districts in the construction of school buildings for the maintenance of the public school system inasmuch as the system is of general concern and the education of the children is an obligation and function of the state. (Ed. Code, §§ 5021, 5041.)The governing board of any school district shall manage and control the school property within its district (*id.*, § 18001). It (the board) shall furnish and repair the school property. (*Id.*, § 18002.) It shall provide as a part of school buildings patent flush water closets for the use of the pupils (*id.*, § 18009). It may repair old buildings by day's labor or by force account (*id.*, §§ 18055, 18057). The State Department of Education shall: "Establish standards for school buildings," review and approve all plans and specifications for buildings and disapprove those not meeting the standards, furnish plans, specifications and "building codes," and make rules and regulations to carry out those activities (*id.*, §§ 18102, 18101). "The governing board of any school district may, and when directed by a vote of the district shall, build and maintain a schoolhouse (*id.*, § 18151). Except in cities having a board of education the county superintendent shall pass upon all plans for school buildings and plans shall be submitted to him. "The Division of Architecture of the Department of Public Works under the police power of the State shall supervise the construction of any school building or, if the estimated cost exceed four thousand dollars ($4,000), the reconstruction or alteration of or addition to any school building, for the protection of life and property." (*Id.*, § 18191.) " 'Construction or alteration' as used in this article includes any construction, reconstruction, or alteration of, or addition to, any school building." (*Id.*, § 18193.) "The Division of Architecture shall pass upon and approve or reject all plans for the construction or alteration of any school building. To enable it to do so, the governing board of each school district and any other school authority before adopting any plans for a school building shall submit the plans to the Division of Architecture for approval, and shall pay the fees prescribed in this article." (*Id.*, § 18194.) "Before letting any contract for any construction or alteration of any school building, the written approval of the plans, as to safety of design and construction, by the Division of Architecture, shall be first had and obtained." (*Id.*, § 18195.) "In each case the application for approval of the plans shall be ***186** accompanied by the plans and full, complete, and accurate specifications, and structural design computations, and estimates of cost, which shall comply in every respect with any and all requirements prescribed by the Division of Architecture. " (*Id.*, § 18196.) All plans and specifications shall be prepared by a duly state licensed architect or engineer and the supervision of the work shall be by a duly licensed person. (*Id.*, § 18199.) No contract for construction is valid and no public money shall be paid for any work or materials furnished thereunder " unless the plans, specifications, and estimates comply in every particular with the provisions of this article and the requirements prescribed by the Division of Architecture and unless the approval thereof in writing has first been had and obtained from the division." (*Id.*, § 18200.) Progress reports must be made to the division (*id.*, § 18201). "The State Division of Architecture shall make such inspection of the school buildings and of the work of construction or alteration as in its judgment is necessary or proper for the enforcement of this article and the protection of the safety of the pupils, the teachers, *and the public.*The school district, city, city and county, or the political subdivision within the jurisdiction of which any school building is constructed or altered shall provide for and require competent, adequate, and continuous inspection during construction or alteration by an inspector satisfactory to the architect or structural engineer and the Division of Architecture. The inspector shall act

under the direction of and be responsible to the architect or structural engineer." (Emphasis added; *id.*, § 18203.) The division may adopt rules and regulations to carry out its duties and a violation of the provisions is a felony (*id.*, §§ 18202, 18204). If the supervisor of health of any school district notes any defect in "plumbing, lighting, or heating," he shall report to the district and if it does not act, to the county superintendent. (*Id.*, § 18221.) Each building, if two or more stories, shall have fire escapes (*id.*, § 18222).

(9) It is urged, however, that the foregoing provisions must be read in the background in which they were adopted, that is, that some of them were placed in the Education Code from the Field Act adopted in 1933 (Stats. 1933, ch. 59) and must be construed with the Riley Act of 1933 (Stats. 1933, ch. 601) now in the Health and Safety Code, sections 19100- 19170. The Riley Act provides that all buildings (with certain exceptions Health & Saf. Code, § 19100) must meet certain standards which are set forth (*id.*, §§ 19150, 19151).***187** Building permits must be obtained from the proper city or county officers charged with the enforcement of laws regulating construction (*id.*, § 19120). Any city or county may establish construction standards higher than those established by sections 19150 and 19151 of the Health and Safety Code. Plans and specifications for buildings shall be filed with the application for a building permit (*id.*, § 19132). Both the Field and Riley acts were enacted as urgency measures, the urgency being stated to be the series of earthquakes occurring shortly prior thereto (Stats. 1933, ch. 59, § 9; 1933, ch. 601, § 8.) We do not believe, however, that the Health and Safety Code provisions (Riley Act) limit or modify the provisions of the Education Code (Field Act) above discussed. The former deal with structural design aimed at procuring buildings less dangerous from the standpoint of earthquakes (Health & Saf. Code, §§ 19150, 19151) while the latter, as above pointed out, are broad and comprehensive including the whole field of construction regulations. The urgency that impelled the Legislature to enact both as urgency measures may have been the same but the scope is clearly different. Hence the provisions in the former providing for more stringent local regulations are not applicable to the latter.

Reference is made to rules and regulations, past and present, adopted for the construction of school buildings under the Education and Health and Safety Codes. (Cal. Administrative Code, tit. 21, Public Works, Division of Architecture, chap. 1, subchap. 1.) The purpose of the rules (we refer to the rules now in existence) is to protect lives and property of the people by regulating the design and construction of public school buildings so that, in addition to the normal loads to which such buildings are subjected, they shall resist future earthquakes. (Tit. 21, subchap. 1, group 1, art. I, § 1.) The rules are intended to establish "reasonable standards and minimum requirements " for the construction of such buildings in order to attain the requisite stability to withstand loads and forces "and to insure safety of construction " (*id.*, § 2). The detailed regulations set forth in sections 101 to 1206 have been adopted as a basis for the approval of plans and specifications. "It is not the intention to limit the ingenuity of the designer nor to interfere with existing building rules and regulations where such rules and regulations are more stringent. Where the designer desires to depart from the methods of analysis set up by these rules and regulations, it will be necessary that he submit his method in detail ***188** together with complete information including computations and test data covering the design in question. Permission to deviate from these rules and regulations is optional with the Division of Architecture and is dependent upon the division being satisfied that the structural members or portions of the building involved would provide at least such safety as would have been obtained had these rules and regulations been adhered to strictly." (*Id.*, § 70.) "Regulations and design values established in these rules and regulations are minimum requirements. Nothing herein contained shall be interpreted to interfere with or to waive the requirements of applicable local or state building laws or ordinances where the requirements of those laws are more stringent than the requirements of these rules and regulations." (*Id.*, § 115.) However, it is also provided that: "No rule or regulation shall be construed to deprive the Division of Architecture of its right to exercise the powers conferred upon it by law, or to limit the division in such enforcement of the act as is necessary to secure safety of construction and the proper administration of the law." (*Id.*, § 5.)

(10) It is very doubtful that those rules indicate an intention to interpret the Education Code sections to mean that a city's building regulations must be met in the construction of a school building. They tend more to indicate that the school districts could follow such regulations as well as those of the state but are not bound to do so. (11) In any event, since the final construction of a statute is the function of the courts

(2 Cal.Jur.2d, Administrative Law, § 17), we hold the statutes here involved should not be construed as requiring a school district to comply with the building regulations of a city.

There is no necessity for comparing in detail Taft's building code and the numerous comprehensive building regulations contained in the Education Code and the rules and regulations of the Division of Architecture, for as we have seen the state has occupied the field. As said in *In re Means, supra,* 14 Cal.2d 254, 258, 260, in speaking of the effect of a city ordinance, establishing standards for plumbers, on a state employee in a city, the state civil service system provides a comprehensive plan for the selection of state employees and although the city ordinance does not purport to prescribe the conditions for state employment, "If one who has been employed by the state may not work on state property within a ***189** municipality without the consent of the municipality obtained after examination, the city has, in effect, *added to the requirements for employment by the state, and restricted the rights of sovereignty.* ...

"Although the legislature has enacted no statute regulating plumbing, if the city's ordinance is a valid exercise of power, then one whom the state has examined and found eligible for employment as a plumber and who has later entered the state civil service may be unable to work on state property because he cannot pass the examination of a city health officer or licensing board. The result is a direct conflict of authority. Either the local regulation is ineffective or the state must bow to the requirement of its governmental subsidiary. Upon fundamental principles, that conflict must be resolved in favor of the state." (Emphasis added.) The same comments apply to the references in the instant construction contract and specifications that the building is to be constructed in compliance with local regulations.

The judgment is affirmed.

Gibson, C. J., Shenk, J., Traynor, J., Schauer, J., Spence, J., and McComb, J., concurred.
Cal.
Hall v. City of Taft
47 Cal.2d 177, 302 P.2d 574

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C In re Rudy L.
Cal.App.2.Dist.
In re RUDY L., a Person Coming under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent,
v.
RUDY L., Defendant and Appellant.
No. B079446.

Court of Appeal, Second District, Division 1, California.
Oct 27, 1994.

SUMMARY

The trial court entered an order declaring a minor to be a ward of the court (Welf. & Inst. Code, § 602), based on his commission of vandalism in violation of Pen. Code, § 594. (Superior Court of Los Angeles County, No. FJ08122, Gary Bounds, Temporary Judge. [FN*])

FN* Pursuant to California Constitution, article VI, section 21.

The Court of Appeal affirmed. It held that the trial court did not err in finding the minor had committed vandalism and in declaring him a ward of the court, despite his assertion that lack of permission is an element of vandalism, and that the People failed to prove he had no permission to spray paint on a building. While defendant's appeal was pending, Pen. Code, § 594, subd. (a), was amended to provide that, with respect to public real property, "it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property." However, nothing in the statute's language, either before or after it was amended, specifically makes lack of permission an element of vandalism. Moreover, the legislative history fails to show a legislative understanding that lack of permission is an element of the offense, nor does it show an intent to change the law and make it an element. Although construing the statute in a manner that does not make lack of permission an element renders the phrase "nor had the permission of the owner" surplusage, an undesirable result, it is consistent with legislative intent as expressed in the statute's language (Code Civ. Proc., § 1859). (Opinion by Spencer, P. J., with Ortega and Vogel (Miriam A.), JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Malicious Mischief § 3--Malicious Injury to Property Vandalism--Lack of Permission as Element of Offense.
The trial court did not err in finding a minor had committed vandalism (Pen. Code, § 594), and in declaring him a ward of the court, despite his assertion that lack of permission is an element of vandalism, and that the People failed to prove he had no permission to spray paint on a building. While defendant's appeal was pending, Pen. Code, § 594, subd. (a), was amended to provide that with respect to public real property, "it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property." However, nothing in the statute's language, either before or after it was amended, specifically makes lack of permission an element of vandalism. Moreover, the legislative history fails to show a legislative understanding that lack of permission is an element of the offense, nor does it show an intent to change the law and make it an element. Although construing the statute in a manner that does not make lack of permission an element renders the phrase "nor had the permission of the owner" surplusage, an undesirable result, it is consistent with legislative intent as expressed in the statute's language (Code Civ. Proc., § 1859).
[See 2 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1988) §§ 678, 684.]
(2) Statutes § 20--Construction--Judicial Function--Construction of Statute as Written.
It is against all settled rules of statutory construction that courts should write into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute. The court must follow the language used in a statute and give it its plain meaning, even if it appears probable that a different object was in the mind of the Legislature.

COUNSEL
Tibor I. Toczauer, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, John R. Gorey and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.
***1009SPENCER, P. J.**

Introduction

Appellant Rudy L. appeals from an order declaring him to be a ward of the court pursuant to Welfare and Institutions Code section 602 based on his commission of vandalism in violation of Penal Code section 594.

Statement of Facts

On the afternoon of April 29, 1993, appellant spray-painted the letter "A" on the wall of an empty building located at 5327 East Beverly Boulevard. Neither appellant nor his mother owned the building.

Contention

(1a) Appellant contends the petition erroneously was sustained, in that the elements of the crime he was found to have committed were not proven--lack of permission is an element of vandalism, and the People failed to prove he had no permission to paint on the building wall. For the reasons set forth below, we disagree.

Discussion

At the time appellant spray-painted the building wall and the adjudication hearing was held, Penal Code section 594, subdivision (a) (hereinafter section 594(a)), provided: "Every person who maliciously (1) defaces with paint or any other liquid, (2) damages or (3) destroys any real or personal property not his or her own, ... is guilty of vandalism." Appellant's counsel argued appellant should not be found to have committed vandalism and the petition should not be sustained, in that lack of permission is an element of vandalism and the People failed to prove appellant lacked permission to spray-paint the building wall. The court concluded, based on the language of the statute, lack of permission was not an element of the offense but, rather, permission was a defense. It thereafter found appellant had committed the offense and sustained the petition.

While appellant's appeal was pending, section 594(a) was amended. (Stats. 1993, ch. 605, § 4.) It now provides: "Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, ... is guilty of vandalism: [¶] (1) Sprays, ***1010** scratches, writes on, or otherwise defaces. [¶] (2) Damages. [¶] (3) Destroys. [¶] Whenever a person violates paragraph (1) with respect to real property belonging to any public entity, ... it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property."

Appellant argues the provision as to the permissive inference makes it clear the Legislature considered lack of permission to be an element of vandalism. Since the prosecution failed to prove this element, appellant is entitled to reversal of the adjudication; double jeopardy protection bars retrial of the case.

In the People's view, the Legislature's failure to specify that lack of permission is an element of the offense means it is not and never has been an element, the permissive inference language notwithstanding. Therefore, the prosecution did not fail to prove its case. However, if the court concludes lack of permission is an element of the offense, then the element was added as a result of the 1993 amendment to section 594(a). If so, and the amendment is applied retroactively to appellant's case, double jeopardy protection does not apply and the People should be allowed to retry the case.

Where a statute is ambiguous, it requires construction by the court. Here, the amended statute is ambiguous. The permissive inference language allows an inference an actor had no permission to deface government property, but the language of the statute does not specify that lack of permission is an element of the offense, making it unclear whether or not it is an element. Thus, construction of the statute is necessary.

A statute is to be construed so as to give effect to the intention of the Legislature. (Code Civ. Proc., § 1859; *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 12 [177 Cal.Rptr. 325, 634 P.2d 352].) To do so, " '[t]he court turns first to the words [of the statute]

themselves for the answer.' [Citation.]" (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) The statutory language used is to be given its usual, ordinary meaning and, where possible, significance should be given to every word and phrase. (*Id.* at p. 230.)As stated in Code of Civil Procedure section 1858, "... where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Accordingly, a construction which renders some words surplusage should be avoided. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836].) Moreover, "[w]ords must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. [Citations.]" (*Ibid.*)***1011**

Additionally, in construing a statute, the duty of the court "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." (Code Civ. Proc., § 1858.)(2) "It is ... against all settled rules of statutory construction that courts should write into a statute by implication express requirements which the Legislature itself has not seen fit to place in the statute." (*People v. White* (1954) 122 Cal.App.2d 551, 554 [265 P.2d 115]; see *Estate of Tkachuk* (1977) 73 Cal.App.3d 14, 18 [139 Cal.Rptr. 55].) The court must follow the language used in a statute and give it its plain meaning, " ' "even if it appears probable that a different object was in the mind of the legislature." ' " (*People v. Weidert* (1985) 39 Cal.3d 836, 843 [218 Cal.Rptr. 57, 705 P.2d 380].)

(1b) It is clear that in neither version of section 594(a) did the Legislature specify that lack of permission was an element of the offense of vandalism. Moreover, had the Legislature intended to make lack of permission an element it easily could have done so. In other criminal statutes, it has specifically stated that lack of permission or consent is an element of the offense. (See, e.g., Pen. Code, § 211 ["Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and *against his will*, accomplished by means of force or fear." (Italics added.)]; *id.*, § 261, subd. (a)(2) ["Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator ... [w]here it is accomplished *against a person's will* by means of force, violence, duress, menace, or fear ...." (Italics added.)]; *id.*, § 596 ["Every person who, *without the consent of the owner*, wilfully administers poison to any animal, the property of another, ... is guilty of a misdemeanor." (Italics added.)].)

As stated above, a statute is to be interpreted according to the words used, and the court is not to insert provisions omitted by the Legislature. (Code Civ. Proc., § 1858; *People v. White, supra*, 122 Cal.App.2d at p. 554.) Additionally, a statute should be interpreted in the context of the whole system of law of which it is a part. (*People v. Comingore* (1977) 20 Cal.3d 142, 147 [141 Cal.Rptr. 542, 570 P.2d 723].) Thus, if a statute "referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent." (*Craven v. Crout* (1985) 163 Cal.App.3d 779, 783 [209 Cal.Rptr. 649]; accord, *Estate of Reeves* (1991) 233 Cal.App.3d 651, 657 [284 Cal.Rptr. 650].) The omission of language in either version of section 594(a) making lack of permission an element of the offense, when such language has been inserted in other criminal statutes to make lack of permission or consent an element of the offenses, is indicative of a legislative intent not to make lack of permission an element of vandalism. ***1012**

The permissive inference language suggests that the Legislature had in mind the notion that lack of permission was an element of the offense. But, as stated above, the court must follow the language used in a statute and give it its plain meaning, " ' "even if it appears probable that a different object was in the mind of the legislature." ' " (*People v. Weidert, supra*, 39 Cal.3d at p. 843.)

On the other hand, a construction of section 594(a) which does not include lack of permission as an element of the offense renders the phrase "nor had the permission of the owner" surplusage. If lack of permission is not an element of the offense, an inference that the actor lacked permission is unnecessary. Whether or not such an inference existed, the actor still could prove permission-and thus lack of malice-as a defense. Such a construction would violate the principles that a statute should be construed so as to give effect to all provisions, and words used therein should not be rendered mere

surplusage. (Code Civ. Proc., § 1858; *California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p. 844.)

In addition to the rules of statutory construction, a valuable aid in ascertaining legislative intent may be the legislative history of a statute. (*California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p. 844.) The amendment to section 594(a) was proposed as part of Assembly Bill No. 1179, 1993-1994 Regular Session (Assembly Bill No. 1179). According to a report prepared for hearing by the Assembly Committee on Public Safety on May 4, 1993, the purpose of the bill was "to elevate the sentences for vandalism for persons who have a prior conviction where a term of imprisonment was served. If an individual knows he or she can get away with vandalism, they are going to continue to do it. Graffiti and vandalism generate public outrage," and "[t]he cost of graffiti removal is tremendous." More than that, the blight caused by graffiti "affects all communities" and causes "[t]urf wars" and gang violence, which can lead to murder. "When it comes to vandalism with a prior conviction, we need to look beyond the dollar value the tag caused and wake-up and recognize its link to gang violence, drug trafficking and all the associated social ills that affect neglected communities." The report defines vandalism in the language of section 594(a), and it mentions nothing about the question of permission.

The proposed amendment of section 594(a) was part of the amendment of Assembly Bill No. 1179 on May 17. The report prepared for the Assembly Committee on Ways and Means hearing on June 2, following amendment of the bill on May 17, refers to Assembly Bill No. 1179 as the "1993 California Graffiti Omnibus Bill" and notes the purpose of the bill is to "enhance the punishment for graffiti." It mentions nothing about the proposed amendment to section 594(a) or the issue of permission. ***1013**

The Senate Committee on Judiciary report for its July 13 hearing notes: "This bill would expand the definition of vandalism by replacing 'defaces with paint or any other liquid' with 'sprays, scratches, writes on, or otherwise defaces.' [¶] This bill would also provide a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy any real property owned by a governmental entity." However, the report does not further discuss the inference or the issue of permission. The same is true of the Senate Rules Committee report for its August 25 hearing, which followed the Senate's August 17 amendments to Assembly Bill No. 1179.

The Senate amended the bill again on September 7, then the bill was returned to the Assembly, which concurred in the amendments. The digest prepared for the Assembly vote again mentions the permissive inference but does not explain or discuss it. Neither does the Legislative Counsel's Digest prepared on Assembly Bill No. 1179.

As the foregoing shows, there is nothing in the legislative history of the amendment to section 594(a) to demonstrate a clear legislative understanding that lack of permission was an element of vandalism or an intent to change the law to make lack of permission an element of vandalism; the issue simply appears not to have been raised or discussed. This omission supports an inference, though not necessarily a strong one, the Legislature did not consider lack of permission to be an element of the offense or intend to change the law to make it an element. (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 508 [247 Cal.Rptr. 362,754 P.2d 70].)

To summarize, there is nothing in the language of section 594(a), either before or after amendment, which specifically makes lack of permission an element of vandalism. There is nothing in the legislative history of the amendment which clearly demonstrates a legislative understanding that lack of permission was an element of the offense, although such an understanding could be inferred from the reference to permission in the permissive inference provision. Neither does the legislative history show an intent to change the law and make it an element. However, construing the statute in a manner which does not make lack of permission an element would render the phrase "nor had the permission of the owner" surplusage.

On balance, we hold the better construction of section 594(a) is that it does not now and did not before amendment make lack of permission an element of vandalism. While this construction does render some of the language in the amended statute surplusage, an undesirable result (*California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p. 844), it is ***1014**

consistent with legislative intent as expressed in the language of the statute. (Code Civ. Proc., § 1859; *Landrum v. Superior Court, supra*, 30 Cal.3d at p. 12; *Moyer v. Workmen's Comp. Appeals Bd., supra*, 10 Cal.3d at p. 230.)

Thus, the trial court did not err in finding appellant had committed vandalism and in sustaining the petition; lack of permission was not an element of the offense. The amendment of section 594(a) did not make it an element, so retroactive application of the amended statute would not benefit appellant. Therefore, we need not consider the issues of retroactivity and retrial.

The order is affirmed.

Ortega, J., and Vogel (Miriam A.), J., concurred.
***1015**
Cal.App.2.Dist.
In re Rudy L.
29 Cal.App.4th 1007, 34 Cal.Rptr.2d 864

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C People v. Oken
Cal.App.2.Dist.

THE PEOPLE, Plaintiff,
v.
HARRY OKEN et al., Defendants; TONY ALARCON, Appellant; EL MONTE SCHOOL DISTRICT et al., Respondents.
Civ. No. 22496.

District Court of Appeal, Second District, Division 3, California.
Apr. 17, 1958.

HEADNOTES

(1) Appeal and Error § 41--Decisions Appealable--Orders on Motion to Strike.
While an order striking a pleading is not ordinarily appealable, the rule is otherwise where a cross-complaint is directed against cross-defendants not otherwise parties to the action.

(2) Pleading § 171--Amendment--On Leave of Court.
An attempted incorporation of counts or causes of action in an amended cross-complaint without leave of court is ineffective and may not be treated as a part of the pleading in the case.
See **Cal.Jur.2d,** Pleading, § 232; **Am.Jur.,** Pleading, § 291.
(3) Schools § 56, 57--Buildings and Construction.
A private citizen may not maintain an action for a judgment declaring that the public interest and necessity require the construction by a school district of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" described in the pleading; where, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine.

(4) Eminent Domain § 11, 150(1)--Who May Exercise Right-- IndividualsPleadings.
A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the property sought to be acquired to one of the public uses provided in Code Civ. Proc., § 1238, but must also make it appear that he is authorized to devote the property to the public use in question or that he is a person authorized to administer or have "charge of such use."
See **Cal.Jur.2d,** Eminent Domain, §§ 229, 282; **Am.Jur.,** Eminent Domain, § 28.
(5) Pleading § 13--Subject Matter--Facts Judicially Noticed.
An allegation by way of conclusion that the pleader "is a person, competent and qualified to acquire the real property" described in his pleading "as agent of the state and/or person in charge of the uses" therein set forth, should be disregarded, where the appellate court judicially knows it is untrue.

(6) Schools § 2--Legislative Power and Duty.
Const., art. IX, §§ 5, 6, declaring that the Legislature shall provide for "a system of common schools" and "a public school system," make the school system a matter of state care and supervision; the term "system" itself imports a unity of purpose as well as entirety of operation, and the direction to the Legislature to provide "a" system of common schools means one system applicable to all common schools; this duty, so far as the state has by the adoption of the Constitution undertaken it, cannot be delegated to any agency.
See **Cal.Jur.,** Schools, §§ 2, 4.
(7) Pleading § 254--Motion to Strike--Amended Pleading.
An amended cross-complaint was properly stricken by the trial court where it wholly failed to state a cause of action and was patently frivolous and sham.

(8) Pleading § 254--Motion to Strike--Amended Pleading.
Though there is no statutory provision for striking complaints from the files as there is with respect to sham or frivolous answers (Code Civ. Proc., § 453), a court may, by virtue of its inherent power to prevent frustration or abuse of its processes, strike a purported complaint that fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration.

SUMMARY

APPEAL from an order of the Superior Court of Los Angeles County striking a third amended cross-

complaint. Aubrey N. Irwin, Judge. Affirmed.

COUNSEL

Alexander Ruiz and Manuel Ruiz, Jr., for Appellant.

Harold W. Kennedy, County Counsel (Los Angeles), and Edwin P. Martin, Deputy County Counsel, for Respondents.

PATROSSO, J. pro tem. [FN*]

FN* Assigned by Chairman of Judicial Council.

This is an appeal by cross-complainant Tony Alarcon from an order striking his third amended cross-complaint as against the cross-defendants El Monte School District and county of Los Angeles. (1) While an order striking a pleading is not ordinarily appealable, the rule is otherwise where, as here, the cross-complaint is directed against cross-defendants not otherwise parties to the action. (*Trask v. Moore* (1944), 24 Cal.2d 365, 373 [149 P.2d 854].)

The action in which the cross-complaint was filed is one instituted on behalf of the People of the State of California by ***458** the district attorney of Los Angeles County against numerous defendants, including cross- defendant, alleged to be the owners or occupants of properties within an area comprising some 24 acres located in the county of Los Angeles and commonly known as "Hick's Camp," to abate a public nuisance alleged to exist upon the properties located therein by reason of the maintenance thereon of dilapidated buildings and unsanitary conditions therein more particularly described.

A demurrer having been sustained with leave to amend to the original cross-complaint, appellant filed a second amended cross-complaint containing four separate causes of action. Demurrers interposed by the respondents to the latter complaint were sustained without leave to amend as to the first, second and fourth cause of action thereof. Thereafter appellant filed a third amended cross-complaint which was stricken upon motion of the respondents as hereinbefore stated.

The third amended cross-complaint, as is likewise true of its predecessors, is in many respects a remarkable document. It purports to incorporate therein by reference, the first, second and fourth causes of action of the second amended cross-complaint to which, as previously stated, demurrers had been sustained without leave to amend. It then alleges that the action is brought by the appellant "on behalf of apprximately [sic] 35 persons similarly situated, named defendants, in the second amended complaint of nuisance on file herein, and also as agent for the State of California, and the person in charge of the public uses hereinafter set forth and requested." It then alleges that the El Monte School District and numerous individually named cross-defendants claim an interest in the property described in Exhibit "A," attached to the cross-complaint, which apparently comprises a portion of the property described in plaintiff's complaint, whereon are located the conditions which are sought to be abated as a public nuisance. It further alleges "that the public interest and necessity require that the said property be acquired by cross complainant as agent of the State of California, as provided in section 1001 of the California Civil Code. That cross complainant, Tony Alarcon, is a person, competent and qualified to acquire the real property and improvements thereon, described herein, as agent of the State and/or person in charge of the uses hereinafter set forth. That cross complainant seeks to take and condemn private property, to wit: Real Estate and improvements, for the public uses hereinafter ***459** set forth. That the plaintiff and cross defendants, El Monte School District, Ernest Roll, District Attorney for Los Angeles County and the County of Los Angeles, are public bodies within the purview of subsection 21 of the section 1238 of the California Code of Civil Procedure, ... to wit: To demolish, clear, abate or remove buildings from the area known as 'Hicks Camp' and herein described in exhibit 'A,' for the reason that the same are detrimental to the health, safety and morals of the people, and because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings predominating in said area. That the public interest and necessity require the construction by the El Monte School District of a school building and also the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land hereinabove described. In conjunction therewith, said public interest and necessity require, that buildings, dwellings and structures within said tract of land be demolished, cleared, abated and/or removed, in the interest of the health, safety and morals of the people, because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings therein, in a manner that will be most compatible with the greatest public good and the least private injury. ... That there

is grave danger of the creation of a public nuisance, unless the public uses herein referred to are provided for and the public interest and necessity stated above be adjuticated [sic]."

The cross-complaint closes with a prayer that the cross-defendants be required to set forth the nature, character, extent and value of their several estates or interest in the parcels of real property sought to be condemned and the severance damage, if any, accruing thereto; that the value of each separate interest or estate sought to be condemned and the severance damages, if any, be ascertained, and that upon payment to the defendants entitled to compensation of the several amounts so ascertained, the court make and enter a final order of condemnation, "conveying to cross complainant, as agent for the state, the properties for the public use above set forth."

We have ignored the allegations contained in the first, second and fourth causes of action, contained in the second amended cross-complaint, which were attempted to be incorporated ***460** by reference in the third amended cross-complaint in view of the fact that the demurrers interposed to these causes of action had, as noted, been sustained without leave to amend. (2) The attempted incorporation of these counts in the third amended cross-complaint without leave of the court is ineffective and they may not be treated as a part of the pleading in the case. (39 Cal.Jur.2d p. 339.) Moreover, without here undertaking to set forth in detail the voluminous allegations of said counts, we are completely satisfied that the trial court properly sustained the demurrers thereto without leave to amend. Each of these three causes of action seemingly undertakes to state a cause of action for monetary and injunctive relief against the respondents upon some undiscernible theory for damages which the cross-complainant and others similarly situated allegedly will sustain if the plaintiff prevails in its action to abate the nuisances alleged to exist upon the properties owned by them.

(3) From the allegations of appellant's pleadings which we have above summarized in some detail, it would appear that the relief which he seeks thereby as against the respondents is a judgment declaring that the public interest and necessity require the construction by the respondent El Monte School District of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" in the cross-complaint described. We know of no law, and none has been called to our attention, which authorizes a private citizen to maintain such an action. Where, when or how, if at all, a school district shall construct school buildings is a matter within the sole competency of its governing board to determine. (*Montebello Unified School Dist. v. Keay* (1942), 55 Cal.App.2d 839, 843-844 [131 P.2d 384].)

If, however, the third amended cross-complaint be construed as one whereby appellant as a private citizen seeks to acquire property for the purpose of constructing and operating a public school, it is likewise unauthorized by law. Section 1001 of the Civil Code, upon which appellant assertedly seeks to predicate his action, while authorizing any person, as "an agent of the State" or as "a person in charge of such use" to acquire private property under the power of eminent domain for any of the public uses provided in section 1238 of the Code of Civil Procedure is wholly without application. (4) A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the ***461** property sought to be acquired to one of the public uses provided in section 1238, but it must likewise be made to appear that he is authorized to devote the property to the public use in question, or otherwise stated, that he is a person authorized to administer or have "charge of such use." (*Beveridge v. Lewis* (1902), 137 Cal. 619, 621 [67 P. 1040, 70 P. 1083, 92 Am.St.Rep. 188, 58 L.R.A. 581].) (5) While appellant alleges by way of conclusion that he "is a person, competent and qualified to acquire the real property" described in his pleading "as agent of the State and/or person in charge of the uses" therein set forth, the allegation must be disregarded, because we judicially know it is untrue. (*Wilson v. Loew's Inc.* (1956), 142 Cal.App.2d 183, 187-188 [298 P.2d 152].) (6) "The constitution declares that the legislature shall provide 'for a system of common schools,' or, as expressed elsewhere in the organic law, 'a public school system.' " (23 Cal.Jur. p. 18; Cal. Const., art. IX, §§ 5-6.) "By these two sections, the constitution makes the school system a matter of state care and supervision. The term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools. And this duty to provide for the education of the children of the state, so far as the state has, by the adoption of the

constitution, undertaken it, cannot be delegated to any agency." (23 Cal.Jur. 21-22.) As said in *Piper v. Big Pine School Dist.*, 193 Cal. 664, 669 [226 P. 926]:

"It is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state."

From the allegations of the cross-complaint, it affirmatively appears that "(i)n this case it is the school district, acting through its governing board, that is the agent of the State in charge of the use for which the land was sought." (*Montebello Unified School Dist. v. Keay, supra.*)

(7) The third amended cross-complaint wholly fails to state a cause of action and is patently frivolous and sham. ***462** It was therefore properly stricken by the trial court. (8) As said by this court in *Neal v. Bank of America* (1949), 93 Cal.App.2d 678, 682-683 [209 P.2d 825]:

"It may be conceded that there is no statutory provision for striking complaints from the files, as there is in respect to sham or frivolous answers. (Code Civ. Proc., § 453.)However, the courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes. (41 Am.Jur. §§ 346, 347, p. 527; anno., 13 Am.St.Rep. 640.) ... In *Santa Barbara County v. Janssens*, 44 Cal.App. 318 [186 P. 372], it was held that an order striking an amended cross-complaint from the files was within the jurisdiction of the trial court, and presumably correct in the absence of error disclosed by the record. The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration. ... It cannot be doubted that the court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham and the order clearly was not an abuse of discretion."

The order appealed from is affirmed.

Shinn, P. J., and Wood (Parker), J., concurred.
A petition for a rehearing was denied May 7, 1958, and appellant's petition for a hearing by the Supreme Court was denied June 11, 1958. Carter, J., was of the opinion that the petition should be granted. ***463**

Cal.App.2.Dist.
People v. Oken
159 Cal.App.2d 456, 324 P.2d 58

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HSouthern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry Cal.App.1.Dist.

SOUTHERN CALIFORNIA LABOR MANAGEMENT OPERATING ENGINEERS CONTRACT COMPLIANCE COMMITTEE,
Plaintiff and Appellant,
v.
LLOYD W. AUBRY, JR., as Director, etc.,
Defendant and Respondent.
No. A074161.

Court of Appeal, First District, Division 4, California.
Mar. 31, 1997.

SUMMARY

The trial court denied plaintiff's petition for a peremptory writ of mandate seeking to direct the Director of the Department of Industrial Relations of the State of California to find that a dam project was subject to the state's prevailing wage law (Lab. Code, § 1720 et seq.), rather than the federal Davis-Bacon Act (40 U.S.C., § 276a(a)). (Superior Court of the City and County of San Francisco, No. 974794, William J. Cahill, Judge.)

The Court of Appeal affirmed the judgment, holding that the trial court properly denied the writ petition. Lab. Code, § 1773.5, provides that the Director of the Department of Industrial Relations "may establish rules and regulations for the purpose of carrying out this chapter, including ... the responsibilities and duties of awarding bodies under this chapter." Under Cal. Code Regs., tit. 8, §§ 16000, 16001, subd. (a), and 16001, subd. (b), federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to the prevailing wage law, even if it requires a higher wage than the Davis-Bacon Act. In this case, the awarding body was an agency of the federal government. Under the "Local Cooperation Agreement," the federal agency was given ultimate authority over construction, financial audits, paying construction companies, and determining that the project was complete. Since the project was controlled by a federal awarding body, the prevailing wage law did not apply under the regulations, which were valid inasmuch as they were consistent with case law and the prevailing wage law statutes. The court further held that the director did not violate the California Constitution (Cal. Const., art. III, § 3.5) by refusing to enforce a statute on constitutional or preemption grounds. (Opinion by Hanlon, J., with Anderson, P. J., and Reardon, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Public Works and Contracts § 6--Contracts-- Contractors' Rights and Liabilities--State Prevailing Wage Law--As Preempted by Federal Davis-Bacon Act.

The trial court properly denied a writ petition that would have directed the Director of the Department of Industrial Relations of the State of California to find that a dam project was subject to the state's prevailing wage law (Lab. Code, § 1720 et seq.), rather than the federal Davis-Bacon Act (40 U.S.C., § 276a(a)). Lab. Code, § 1773.5, provides that the director "may establish rules and regulations for the purpose of carrying out this chapter, including ... the responsibilities and duties of awarding bodies under this chapter." Under Cal. Code Regs., tit. 8, §§ 16000, 16001, subd. (a), and 16001, subd. (b), federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to the prevailing wage law, even if it requires a higher wage than the Davis-Bacon Act. In this case, the awarding body was an agency of the federal government. Under the "Local Cooperation Agreement," the federal agency was given ultimate authority over construction, financial audits, paying construction companies, and determining that the project was complete. Since the project was controlled by a federal awarding body, the prevailing wage law did not apply under the regulations, which were valid inasmuch as they were consistent with case law and the prevailing wage law statutes.

[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency, § 331.]

(2) Statutes § 29--Construction--Language--Legislative Intent.

A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so

as to effectuate the purpose of the law. In construing a statute, the court's first task is to look to the language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, the court looks no further and simply enforces the statute according to its terms. The court is required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. When used in a statute, words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. An overriding principle in this area is that the individual portions of a statute should be harmonized with the body of law of which it forms a part. The object that a statute seeks to achieve is of primary importance in statutory interpretation.

(3a, 3b) Public Works and Contracts § 6--Contracts--Contractors' Rights and Liabilities--State Prevailing Wage Law and Federal Davis-Bacon Act-- Purpose.
The overall purpose and object of California's prevailing wage law (Lab. Code, § 1720 et seq.) is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. The overall purpose and object of the federal Davis-Bacon Act (40 U.S.C. § 276a(a)) is to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area. The state's prevailing wage law and the Davis-Bacon Act each carry out a similar purpose. Read as a unit, they set out two separate, but parallel, systems regulating wages on public contracts. The prevailing wage law covers state contracts and the Davis-Bacon Act covers federal contracts.

(4) Administrative Law § 117--Judicial Review and Relief--Scope and Extent of Review--Arbitrary, Capricious, or Unreasonable Action.
An agency's regulation will not be set aside unless it is inconsistent with a statute, arbitrary, capricious, unlawful, or contrary to public policy. An agency's construction of statutes will generally be followed unless it is clearly erroneous.

(5) Constitutional Law § 34--Distribution of Governmental Powers--Conflicts Between Federal and State Powers--Preemption.
The supremacy clause (U.S. Const., art. VI) may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law. Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility. Further, there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the supremacy clause. However, despite the variety of opportunities for federal preeminence, courts have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law.

(6) Labor § 10--Regulation of Working Conditions--Minimum Wage and Prevailing Wage Law.
Minimum wage laws fall under the same classification as valid regulation of the employment relationship under state police powers. The prevailing wage law (Lab. Code, § 1720 et seq.) is not a minimum wage law.

(7) Administrative Law § 10--Administrative Construction and Interpretation of Laws--Department of Industrial Relations' Authority to Determine Project Not Subject to Prevailing Wage Law.
In a mandamus proceeding to determine whether the Director of the Department of Industrial Relations of the State of California properly determined that a dam project was not subject to the state's prevailing wage law (Lab. Code, § 1720 et seq.), the director did not violate the California Constitution by refusing to find a public works to exist based on a perceived fear of unconstitutionality or conflict with federal law. Under Cal. Const., art. III, § 3.5, an administrative

agency has no power to refuse to enforce a statute on the grounds it is unconstitutional or conflicts with federal law, until an appellate court has so held. However, the California Supreme Court has held that the purpose of Cal. Const., art. III, § 3.5, was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature, and cannot reasonably be construed to place a restriction on the authority of the Legislature to limit the scope of its own enactments. By limiting the implementation of a statute as directed by the Legislature, an agency neither declares it unenforceable, nor refuses to enforce it. Far from thwarting the Legislature's mandate, such action fulfills it. The director's administrative decisions in the present case were proper interpretations of the prevailing wage law within the scope of the Supreme Court's opinion.

COUNSEL

Carroll & Scully, Donald C. Carroll and Charles P. Scully II for Plaintiff and Appellant.

John M. Rea and Gary J. O'Mara for Defendant and Respondent. ***877**

HANLON, J.

Plaintiff and appellant Southern California Labor Management Operating Engineers Contract Compliance Committee (appellant) appeals from a judgment denying its petition for a peremptory writ of mandate directing defendant and respondent Lloyd W. Aubry, Jr. as Director of the Department of Industrial Relations of the State of California (respondent) to set aside his outstanding decision and issue a new determination that the Seven Oaks Dam project is a public works subject to the California prevailing wage law (Lab. Code, §§ 1771, 1720-1781) (hereinafter referred to as PWL) rather than Davis-Bacon Act, 40 United States Code section 276a(a), which is the federal prevailing wage law (hereinafter referred to as DBA).

Appellant contends: (1) the PWL applies even though the construction contract for the dam project was "awarded" by an agency of the federal government, and (2) respondent acted beyond its power by refusing to enforce a statute on constitutional or preemption grounds. We affirm.

I. *Statement of Facts*

Seven Oaks Dam project is a part of the Santa Ana River Mainstem, including Santiago Creek, California Flood Control Project. Construction of the complete flood control project is governed by a local cooperation agreement among the Department of the Army, Orange County Flood Control District, San Bernardino County Flood Control District and Riverside County Flood Control and Water Conservation District, which was executed in 1989. As a group the involved counties are denominated as "sponsors."

Relevant provisions of the local cooperation agreement are as follows:

The maximum allowable cost of the flood control project is set at $1,536,000,000. At the time of the execution of the agreement, total costs were estimated at $1,293,000,000 and the sponsors' cash contribution at $63,700,000. In addition, "sponsors shall provide all lands, easments [*sic*], rights-of-way, excavated material disposal areas, and perform relocations (excluding railroad bridges and approaches thereto) required for construction of the [flood control] project." The total contribution of the sponsors cannot exceed 50 percent or be less than 25 percent. During construction the sponsors shall provide a cash contribution of 5 percent of the total cost. No federal funds may be used to meet the sponsors' share, unless expressly authorized by statute. The federal government shall audit the sponsors' records and issue a final accounting which is binding on the sponsors. All funds contributed by the federal government and sponsors shall be placed in ***878** an escrow account. The federal government shall pay the costs of construction from funds in such account.

Basic contractual "obligations of the parties" include the following: A. "The [Federal] Government, subject to and using funds provided by the Sponsors and funds appropriated by the Congress, shall expeditiously construct the [Flood Control] Project (including alterations or relocations of railroad bridges and approaches thereto) applying those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies. The sponsors shall be afforded the opportunity to review and comment on all contracts, including relevant plans, specifications and special provisions prior to the issuance of invitations for bids. The Sponsors also shall be

afforded the opportunity to review and comment on all modifications and change orders prior to the issuance to the Contractor of a Notice to Proceed for such modification or change order unless an emergency exists or immediate action is required, in which case the [Federal] Government will direct the change without review by the Sponsors. The [Federal] Government will consider the views of the Sponsors, but award of the contracts including change orders and performance of the work thereunder shall be exclusively within the control of the [Federal] Government."

The term "contracting officer" is defined in the agreement as "the Commander of the U.S. Army Engineer District, Los Angeles, or his designee." Regarding "construction, phasing and management," "[t]he contracting officer shall consider the recommendations of the [sponsors] in all matters relating to the [Flood Control] Project, but the Contracting Officer, having ultimate responsibility for construction of the Project, has complete discretion to accept, reject, or modify the recommendations."

Sponsoring counties shall hold and save the federal government free from all damages "except for damages due to the fault or negligence of the [Federal] Government or its contractors." If hazardous substances are found in the area of the flood control project, the federal government "shall, after consultation with the Local Sponsors, but in its sole discretion, determine" what action to take. The sponsors agree to comply with all applicable federal and state laws and regulations. Some laws are specifically listed, but no mention is made of the California PWL or the federal DBA.

The final relevant provision of the local cooperation agreement is: "When the [Federal] Government determines that a feature or phase of the [Flood Control] Project is complete and appropriate for operation and maintenance by a Sponsor or Sponsors, the [Federal] Government shall turn the completed feature or phase over to the responsible Sponsor or Sponsors ...." *879

Pursuant to the local cooperation agreement, on March 29, 1994, the United States Army Engineer District-Los Angeles entered into a contract with CBPO of America, Inc., for construction of the Seven Oaks Dam and Appurtenances. Total estimated cost for the project was $167,777,000. The contract for the Seven Oaks Dam specifically provides that "laborers and mechanics employed or working upon the site of the work" will be paid in accordance with the DBA.

II. *Applicability of PWL*

(1a) Appellant contends that the PWL applies even though the construction contract for the Seven Oaks Dam project was "awarded" by an agency of the federal government. This contention lacks merit.

The core of the PWL is Labor Code section 1771[FN1], which provides in pertinent part: "Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers on public works." Under PWL respondent determines the general prevailing rate. (§§ 1770, 1773, 1773.6.)

FN1 Unless otherwise stated all citations to California statutes are to the Labor Code.

DBA provides in pertinent part: "The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction ... of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed ...." (40 U.S.C. § 276a(a).)

Other California code sections which define when PWL applies are the following.

Section 1720 provides in pertinent part: "As used in this chapter, 'public works' means: *880

"(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

"(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. 'Public work' shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

"(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not."

Section 1720.2 provides in pertinent part: "For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, 'public works' also means any construction work done under private contract when all of the following conditions exist: [¶] (a) The construction contract is between private persons. [¶] ... [¶] (c) Either of the following conditions exist: [¶] (1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract. [¶] (2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work."

Section 1720.3 provides: "For the limited purposes of Article 2 (commencing with Section 1770), 'public works' also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California." Section 1720.4 covers work on nonprofit installations performed by volunteer labor.

Section 1721 provides: " 'Political subdivision' includes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts."

Section 1722 provides: " 'Awarding body' or 'body awarding the contract' means department, board, authority, officer or agent awarding a contract for public work."

Section 1724 provides: " 'Locality in which public work is performed' means the county in which the public work is done in cases in which the *881 contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases."

Section 1740 provides: "Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements."

Section 1775 provides in pertinent part: "The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her."

Section 1777 provides: "Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of section

1776 is guilty of a misdemeanor."

Section 1777.7 provides in pertinent part: "(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state."

Sections 1779 and 1780 make it a misdemeanor to charge or collect fees with respect to the employment of persons on public works. The state, political subdivisions and contractors are mentioned in the sections; the federal government is not.

(2) "A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law .... In construing a statute, our first task is to look to the language of the statute itself.... When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute ***882** according to its terms.... [¶] ... 'We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." ...' ... ' "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." ... "When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." ... Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole ....' " (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388 [20 Cal.Rptr.2d 523, 853 P.2d 978], citations omitted.)

"[A]n overriding principle in this area is that the individual portions of a statute should be harmonized ... with the body of law of which it forms a part. [Citations.]" (*United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119, 1127 [262 Cal.Rptr. 158].) "The object that a statute seeks to achieve is of primary importance in statutory interpretation. [Citations.]" (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [4 Cal.Rptr.2d 837, 824 P.2d 643].)

(3a) The overall purpose and object of California's PWL "is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. [Citations.]" (*Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at p. 987; *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 356 [28 Cal.Rptr.2d 550].)

The overall purpose and object of DBA is " 'to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.' [Citation.] ... [T]he Act was intended to combat the practice of 'certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, [who] have been going around throughout the country " picking" off a contract here and a contract there.' The purpose of the bill was 'simply to give local labor and the local contractor a fair opportunity to participate in this building program.' [Citation.]" (*Universities Research Assn. v. Coutu* (1981) 450 U.S. 754, 773-774 [101 S.Ct. 1451, 1463, 67 L.Ed.2d 662].)

(1b),(3b) The PWL and DBA each carry out a similar purpose. DBA specifically provides that it only applies to contracts "to which the United ***883** States or the District of Columbia is a party." The PWL does not contain a specific clause limiting it to contracts to which the state of California or a political subdivision thereof is a party. However, the overall effect of the various code sections which constitute the PWL is to exclude contracts of the federal government. Thus, sections 1720, subdivision (c), 1720.2, 1720.3 and 1724 refer to construction jobs under the supervision of state entities while the sections assessing penalties for violating the PWL only mention state entities (§§ 1775, 1777, 1779). No sections, either individually or collectively, mandate that contracts awarded by, or construction jobs under the supervision of, federal authorities are subject to the PWL. In fact, the only mention of the federal government refers to a federal wage law (§ 1740).

Read as a unit PWA and DBA set out two separate, but parallel, systems regulating wages on public contracts. The PWL covers state contracts and DBA covers federal contracts.

Respondent has long agreed with this interpretation of the statutes.Section 1773.5 provides: "The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

One such regulation is California Code of Regulations, title 8, section 16001, entitled "Public Works Subject to Prevailing Wage Law," which provides: "Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort." (Cal. Code Regs., tit. 8, § 16001, subd. (b).)

Other pertinent regulations are as follows: "Awarding body" is defined as: "Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works." (Cal. Code Regs., tit. 8, § 16000.)"Public Funds. Includes state, local and/or federal monies." (Cal. Code Regs., tit. 8, § 16000.)"General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771." (Cal. Code Regs., tit. 8, § 16001, subd. (a).)

Thus under the regulations, federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to PWL, even if it requires a higher wage than DBA. Nothing in the two administrative cases of respondent, cited by appellant, contradicts the regulations because neither case involved the federal government. (Public Works ***884** Coverage Case No. 91-056, Southern Cal. Regional Rail Authority Lease of Union Pacific Right-of-Way, Decision on Appeal, Nov. 30, 1993 and Public Works Case No. 96-006, Department of Corrections, Community Correctional Facilities, June 11, 1996.)

(4) An agency's regulation "will not be set aside unless it is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy. [Citation.]" (*Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1466 [49 Cal.Rptr.2d 208].) An agency's "construction of statutes will generally be followed unless it is clearly erroneous. [Citation.]" (*United Public Employees v. Public Employment Relations Bd., supra*, 213 Cal.App.3d at p. 1125.)

(1c) To determine if respondent's regulations are valid interpretations of the statutes, we look to cases construing the PWL, DBA and related statutes, particularly those which involve the question of preemption by federallaw. (5) "[T]he Supremacy Clause, U.S. Const., Art. VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law. [Citations.] And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. [Citation.]" (*New York Blue Cross v. Travelers Ins.* (1995) 514 U.S. 645, ___ [115 S.Ct. 1671, 1676, 131 L.Ed.2d 695, 704]; see also *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93-94 [160 Cal.Rptr. 733, 603 P.2d 1329].)

"Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation] ...." (*Hillsborough County v. Automated Medical Labs.*(1985) 471 U.S. 707, 713 [105 S.Ct. 2371, 2375, 85 L.Ed.2d 714].) Further, "... there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause." (*De Canas v. Bica* (1976) 424 U.S. 351, 356 [96 S.Ct. 933, 937, 47 L.Ed.2d 43].)

In *Commissioner of Labor and Ind. v. Boston Housing Auth.* (1963) 345 Mass. 406 [188 N.E.2d 150, 157-158], the highest court in Massachusetts held that under the rules of preemption a federal agency operating a housing project in Boston

pursuant to federal regulations was not subject to a state prevailing wage law. Thus, in order to avoid a serious constitutional problem it interpreted the state law as not intended by the Legislature to require ***885** action by the federal agency in conflict with proper explicit budgetary requirements of a federal law. The court reasoned, "The intention to coerce such a head on conflict with Federal authority is not lightly to be attributed to the Legislature, which must be taken to have known the existing law relating to housing projects receiving [federal] contributions."

Gartrell Const. Inc. v. Aubry (9th Cir. 1991) 940 F.2d 437, 438-439 [131 A.L.R.Fed. 773] held that a private contractor performing work for the federal government on federal property was not required to obtain a California contractor's license, because he complied with the parallel federal "responsibility" regulations for contractors. The state law was preempted by the "similar" federal requirements. To same effect see *Airport Const. and Materials, Inc. v. Bivens* (1983) 279 Ark. 161 [649 S.W.2d 830, 832].

California Comm'n v. United States (1958) 355 U.S. 534, 540, 545-546 [78 S.Ct. 446, 450-451, 453-454, 2 L.Ed.2d 470], held that California statutes and regulations regarding rates for shipping freight could not be applied to federal procurement officials because "Congress has provided a comprehensive policy governing procurement." (*Id.* at p. 540.)In reaching its holding the nation's highest court quickly distinguished certain types of state laws. "We lay to one side these cases which sustain nondiscriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. [Citations.] We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States." (*Id.* at p. 543 [78 S.Ct. at p. 452].) (6) Minimum wage laws fall under the same classification as valid regulation of the employment relationship under state police powers.(*De Canas v. Bica, supra*, 424 U.S. at pp. 356-357 [96 S.Ct. at pp. 936-937].) The PWL is not a minimum wage law, however. (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 790 [163 Cal.Rptr. 460, 608 P.2d 277]).

(1d) *Hull v. Dutton* (11th Cir. 1991) 935 F.2d 1194, 1196-1198, held that a state agency which ran a switching railroad as a private carrier was subject to the Railway Labor Act and such federal law preempted a state law establishing bonus payments for certain state employees.

Chamber of Commerce of U.S. v. Bragdon (9th Cir. 1995) 64 F.3d 497, 504 held that the National Labor Relations Act preempted a Contra Costa County ordinance which established a prevailing wage law for "wholly private construction projects." In contrast, *People v. Hwang* (1994) 25 Cal.App.4th 1168, 1172, 1181-1182 [31 Cal.Rptr.2d 61], held that PWL was not preempted by the National Labor Relations Act as to a public works contract between a private contractor and county school district. ***886**

Drake v. Molvik & Olsen Elec., Inc. (1986) 107 Wn.2d 26 [726 P.2d 1238], held that the Washington prevailing wage law governed a "federally-funded construction project by the Seattle Housing Authority" and was not preempted by DBA. (To same effect see *Siuslaw Concrete Const. v. Wash., Dept. of Transp.* (9th Cir. 1986) 784 F.2d 952, 953-954, 959 [involving a state-run training program which might be exempt under the provision of DBA].)

Metropolitan Water Dist. v. Whitsett (1932) 215 Cal. 400, 408, 417 [10 P.2d 751] upheld the constitutionality of PWL, in part "on the theory that the state as the employer having full control of the terms and conditions under which it will contract may, through its legislatures, and within constitutional limits, provide the wage which shall be paid to its employees and that the payment of a less sum shall be unlawful." Overall, the state has greater power to legislate in areas covered by federal law as "proprietor" than as "regulator." (*Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.* (1993) 507 U.S. 218, 226-227, 232-233 [113 S.Ct. 1190, 1195-1196, 1198-1199, 122 L.Ed.2d 565].)

The basic distinction uniformly maintained in the cases is that stateenacted prevailing wage regulations are valid and not preempted by federal law when applied to contracts of the state or its political subdivisions. However, those laws cannot be applied to a project which is under the complete control of the federal government. This is also the distinction

made by respondent's regulations, which provide that the PWL rather than DBA is applied to federally funded or assisted construction projects in California when wages under PWL would be higher and the projects "are controlled or carried out by California awarding bodies of any sort." Accordingly, because the regulations are consistent with California cases, federal cases, cases from other states, and the PWL statutes, we will follow them.

In the present case, the awarding body is an agency of the federal government. The local cooperation agreement governs the overall project containing the Seven Oaks Dam project at issue herein. Under the local cooperation agreement, the federal agency is given the ultimate authority over the actual construction, financial audits, paying the construction companies, determination of what to do if hazardous substances are discovered and determination that a project is complete. Thus, the Seven Oaks Dam project is controlled and carried out by a federal awarding body and under respondent's regulations, the PWL does not apply.

Appellant expresses the fear that a decision for respondent "would positively invite California public bodies in the future to give California public ***887** monies to the Corps of Engineers (or to any private party if the trial court is correct) and to let it award all contracts, thereby allowing such public bodies and employers to evade the PWL." We wish to calm appellant's fears. This court shares the Legislature's interest in protecting working people in the state. Our decision is based on a careful scrutiny of the record to discover the actual relationship between federal, state and private parties. We do nothing more than uphold the regulations and apply the facts to the regulations and statute. As in other areas of the law, each case involving public contracts and PWL will be decided on its own facts and merits.

III. *Respondent's Administrative Decision*

(7) Appellant contends that respondent director violated the California Constitution by "refusing to find a public works to exist simply because of a perceived fear of unconstitutionality or conflict with federal law." This contention lacks merit.

California Constitution, article III, section 3.5 provides that an administrative agency has no power to refuse to enforce a statute on the grounds it is unconstitutional or conflicts with federal law, until an appellate court has so held. In *Reese v. Kizer* (1988) 46 Cal.3d 996, 1002 [251 Cal.Rptr. 299, 760 P.2d 495], the Supreme Court held: "The purpose of the amendment was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature. Its language, however, cannot reasonably be construed to place a restriction on the authority of the Legislature to limit the scope of its own enactments. By limiting the implementation of a statute as directed by the Legislature, an agency neither 'declares it unenforceable' nor 'refuses to enforce it.' Indeed, far from thwarting the Legislature's mandate, such action precisely fulfills it." (Fns. omitted.)

Respondent's administrative decisions in the instant case were proper interpretations of the PWL within the scope of *Reese*.

IV. *Disposition*

The judgment is affirmed. Costs are awarded to respondent.

Anderson, P. J., and Reardon, J., concurred.

A petition for a rehearing was denied April 29, 1997, and appellant's petition for review by the Supreme Court was denied July 9, 1997.

Cal.App.1.Dist.
Southern Cal. Lab. Management etc. Committee v. Aubry
54 Cal.App.4th 873, 63 Cal.Rptr.2d 106, 3 Wage & Hour Cas.2d (BNA) 1680, 97 Cal. Daily Op. Serv. 3259, 97 Daily Journal D.A.R. 5688

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HState Compensation Ins. Fund v. W.C.A.B.
Cal.App.2.Dist.
STATE COMPENSATION INSURANCE FUND, Petitioner,
v.
WORKERS' COMPENSATION APPEALS BOARD and SAM WELCHER, Respondents.
No. B086372.

Court of Appeal, Second District, Division 3, California.
Aug 8, 1995.

SUMMARY

A workers' compensation judge found that Lab. Code, § 5402 (failure to reject liability for workers' compensation injury claim within 90 days after filing of claim creates presumption that injury is compensable; presumption is rebuttable only by evidence discovered subsequent to 90-day period), barred evidence offered by a workers' compensation insurer concerning its admitted noncompliance with the statute and determined that an applicant was 100 percent permanently disabled due to industrial injury. The Workers' Compensation Appeals Board denied the insurer's petition for reconsideration.

The Court of Appeal affirmed the order denying reconsideration, holding that the Workers' Compensation Appeals Board correctly upheld the ruling of the workers' compensation judge. Once the statutory presumption attached due to the insurer's failure to respond to the applicant's timely claim within 90 days, the insurer had the burden of proof on the primary issue of causation. The insurer offered four medical reports to show that the applicant's diseases were not work related, but they had not been obtained during the 90-day statutory period. The presumption operates to bar the presentation of evidence which could have been obtained with the exercise of reasonable diligence and all of the records could have reasonably been obtained within the 90-day period. Thus, the insurer never established that it had exercised reasonable diligence in investigating the claim. Further, the workers' compensation judge properly excluded the testimony of the insurer's claims adjuster as to when the claim had been rejected, pursuant to Lab. Code, § 5502, subd. (d)(3), since she had not been identified as a witness at the mandatory settlement conference or in the settlement conference statement, and no explanation had been given at trial for the failure to so identify her. (Opinion by Klein, P. J., with Croskey and Aldrich, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 21--Construction--Legislative Intent--Purpose of Law.
A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. When the meaning of a statute is uncertain, resort may be had to the history of the legislation, including legislative and other reports, to resolve such ambiguities as exist.

(2a, 2b) Workers' Compensation § 67--Proceedings Before Workers' Compensation Appeals Board--Claims--Failure to Reject Claim of Injury Within Specified Time as Creating Presumption of Compensability--Statutory Purpose-- Presumption as Affecting Burden of Proof.
The purpose of the 1989 amendment to Lab. Code, § 5402, providing that failure to reject liability for a workers' compensation injury claim within 90 days after the filing of the claim creates a rebuttable presumption that the injury is compensable, was to expedite the entire claims process in workers' compensation cases by limiting the time during which the employer's investigation of an injured worker's claim could be undertaken-90 days-without being penalized for delay. The rebuttable presumption of § 5402 was intended to affect the burden of proof rather than the burden of producing evidence, because it was created by the Legislature to implement the public policy of expediting workers' compensation claims. As such, once the underlying facts have been established, the statute's effect in workers' compensation litigation is to place on the defendant employer/carrier the burden of proving that the employee/applicant does not have a compensable injury; in the absence of such proof, the consequences are adverse to the employer/carrier.
[See 2 **Witkin,** Summary of Cal. Law (9th ed. 1987)

Workers' Compensation, § 380.]

(3) Evidence § 20--Presumptions--Affecting Burden of Proof--As Implementing Public Policy.

While a presumption affecting the burden of producing evidence concerns only the particular litigation in which it applies, a presumption affecting the burden of proof is established to implement some public policy other than to facilitate the particular action in which it applies.

(4a, 4b) Workers' Compensation § 67--Proceedings Before Workers' Compensation Appeals Board--Claims--Failure to Reject Claim of Injury Within Specified Time as Creating Presumption of Compensability--Admissibility of Evidence to Rebut Presumption.

The Workers' Compensation Appeals Board correctly upheld the rulings of a workers' compensation judge that Lab. Code, § 5402 (failure to reject liability for workers' compensation injury claim within 90 days after filing of claim creates presumption that injury is compensable; presumption is rebuttable only by evidence discovered subsequent to 90-day period), barred evidence offered by a workers' compensation insurer concerning its admitted noncompliance with the statute and that the applicant was disabled due to industrial injury. Once the presumption attached due to the insurer's failure to respond to the applicant's timely claim within 90 days, the insurer had the burden of proof on the primary issue of causation. The insurer offered four medical reports to show that the applicant's diseases were not work related, but they had not been obtained during the 90-day statutory period. The presumption operates to bar the presentation of evidence which could have been obtained with the exercise of reasonable diligence and all of the records could have reasonably been obtained in the 90-day period. Thus, the insurer never established that it had exercised reasonable diligence in investigating the claim. Further, the workers' compensation judge properly excluded the testimony of the insurer's claims adjuster as to when the claim had been rejected, pursuant to Lab. Code, § 5502, subd. (d)(3), since she had not been identified as a witness at the mandatory settlement conference or in the settlement conference statement, and no explanation had been given at trial for the failure to so identify her.

(5) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction.

Contemporaneous administrative construction of a statute by the agency charged with its enforcement and interpretation, while not necessarily controlling, is of great weight, and courts will not depart from such construction unless it is clearly erroneous or unauthorized.

COUNSEL

Krimen, Klein, Da Silva, Daneri & Bloom and Don E. Clark for Petitioner.

Dennis J. O'Sullivan and David D. Robin for Respondents. *678

KLEIN, P. J.

A workers' compensation judge (WCJ), applying the rebuttable presumption of compensability provided in Labor Code section 5402, [FN1] barred evidence offered by defendant State Compensation Insurance Fund (SCIF) concerning its admitted noncompliance with the statute and determined that an applicant was 100 percent permanently disabled due to industrial injury. SCIF petitioned for reconsideration, and the Workers' Compensation Appeals Board (Board) denied reconsideration, upholding the WCJ. SCIF sought review in this court, contending that the WCJ had erred in finding applicant's injuries compensable in view of the extensive medical record demonstrating nonindustrial causation. Both the applicant and applicant's health care provider (Kaiser Permanente, The 4600 Group, referred to herein as Kaiser) answered the petition, contending that failure to apply Labor Code section 5402 in this instance would render the legislation, enacted as part of Legislature's effort in 1989 and 1990 to reform the workers' compensation system, meaningless. We agree, and affirm the determination of the Board.

FN1 The statute provides as follows: "Knowledge of an injury, obtained from any source, on the part of an employer, his or her managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under Section 5400. If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption is rebuttable only by evidence discovered subsequent to the 90-day period."

Facts and Procedural History

Applicant Sam Welcher, born June 25, 1930, worked from January 1965 to February 26, 1991, first as a truck driver and then a dispatcher, for defendant employer Cook & Cooley, insured by defendant SCIF. Applicant left the job because he was no longer able to work due to health problems, and in March 1991 underwent major aortic bypass surgery at Kaiser during which a kidney was removed and some toes were amputated. Applicant, suffering from renal failure, receives dialysis frequently, and the medical expenses in this case are large. [FN2] He filed his claim for workers' compensation benefits on August 30, 1991, alleging an industrial continuous trauma injury to his kidneys, right lower leg, to his internal system, to his heart and psyche, and that he had industrially caused hypertension as well.

FN2 At trial, Kaiser submitted a lien claim of $277,902.17, not a final lien.

SCIF did not deny liability in this case until January 2, 1992, almost four months after the date of knowledge of the injury, which constituted noncompliance with Labor Code section 5402. ***679**

At trial, applicant testified that during his daily employment as a radio dispatcher, he was often awakened in the night by calls concerning gasoline deliveries. He was in effect always "on call." Applicant missed very little time from work until he became sick in February 1991. Applicant felt stress on the job caused his illness, but would have continued to work if his illness had not intervened. Applicant further testified that the hypertension was diagnosed when he was 55 years old, and that his doctor had advised him to stop smoking, but said nothing about alcohol consumption.

The WCJ issued findings and award, determining that applicant had sustained industrial injury to his kidneys, his right lower extremity, his internal system, and his heart, and had work-related hypertension, "for the period 1/65 to 2/26/91 (pursuant to Labor Code Section 5402)." The WCJ found that applicant was permanently and totally disabled, and that there was need for further medical treatment for the applicant's renal and hypertensive conditions.

In her opinion on decision, the WCJ discussed applicant's medical history in detail, relying on the report dated March 25, 1991, by Kaiser physician Mark Saroyan, M.D., and on Kaiser's medical records. (The records, designated exhibit 20, which were extensive, were admitted at trial after being subpoenaed by defendant SCIF. Dr. Saroyan's reporting was included.) The WCJ's summary included the following: "In 1980, the applicant became a radio dispatcher. At that same time he was diagnosed as having hypertension and high cholesterol. This hypertension was not under control since the applicant stopped taking his medicine. During the period of 1984 to 1986, applicant had various polyps and possible cancerous growth[s] of his vocal cords with subsequent operations [o]n 6/8/84, 5/85, 4/86. During this time the applicant was [a] 2-pack a day smoker and possible alcohol user. The record is very vague about applicant's use of alcohol. Thus by 4/89, the applicant was diagnosed with uncontrollable hypertension, gallstones, hiatal hernia and chest pains. As for the chest pains, it was determined that the applicant had a normal EKG and no cardiac problems. Also at that time, applicant's care was transferred to Kaiser HMO. Eventually by 1991, the applicant had a renal failure which eventually resulted in dialysis with subsequent complication of amputation of his right first and second toes. Subsequent to 1991, the applicant had a history of unidentified G.I. bleeding with severe vascular disease. At the present time, the applicant is on dialysis for his total renal or kidney failure."

The WCJ elaborated further. "Applicant had a renal vascular hypertension which is the narrowing of the arteries to the kidneys. The kidneys, to ***680** compensate for the restricted flow of blood, produce[d] renin, a hormone which increase[d] blood pressure, hence renal vascular hypertension, as indicated by the Kaiser records. Thus, the applicant's hypertension was not a stress-related hypertension. This hypertension and the narrowing of arteries eventually [led] to ... applicant's renal failure. A stress-related hypertension is a hereditary condition which is exacerbated by a person's diet, weight, smoking habits, alcohol use and other contributory factors. In this case, the applicant's smoking contributed to his vascular narrowing disease of his arteries to his kidneys.... [¶] Applicant had renal vascular hypertension as opposed to stress caused hypertension. This is the reason why the applicant's hypertension was uncontrollable by the usual medications, which did not benefit him at all. The proper treatment for renal vascular hypertension is aorta-bi-iliac bypass and/or aorta-left-renal bypass....

Thus, it is found that the renal vascular hypertension with eventual renal failure and dialysis and amputation of the applicant's toes is non-industrial."

Finally, the WCJ declared: "Now, comes the interesting part of the case ..., the 90-day presumption applies. However, this presumption is rebutt[ed] by evidence discovered subsequent to the 90-day period. The Labor Code is not clear as to what type of evidence, i.e., medical or testimonial evidence for the delay. In this case, defense attorney wanted to present the testimony of the adjuster Amanda Corral-Cortez as to why the objection was not timely served on the applicant and his attorney within the 90 days. The WCJ had ruled that the testimony was inadmissible since her name as a witness was not listed either on his 7/23/93 MSC Statement [(Mandatory Settlement Conference Statement)] and [*sic*] the 8/4/93 Settlement Conference Summary. Because of the operation of Labor Code Section 5402, it is found the applicant's injury is industrial under the 90 day rule."

SCIF petitioned for reconsideration, pointing out what it deemed the "inconsistent" findings made by the WCJ. The WCJ recommended denial of reconsideration in her report and recommendation to the Board, because SCIF had not denied the injury in timely fashion. "The primary purpose of this Labor Code Section was that the defendants expeditiously investigate all claims in a timely manner so that the applicant will not be held in limbo as to the compensability of his injury. Defendants admitted that their denial was not timely ...." As to barring the testimony of SCIF's claims adjuster, the ***681** WCJ pointed out that by the time of the mandatory settlement conference "defendants had had approximately two years in which to investigate the applicant's claim," and discovery had closed on that date pursuant to Labor Code section 5502, subdivision (d)(3). [FN3]

> FN3 Labor Code section 5502 is a procedural statute, governing hearings and calendaring of workers' compensation matters, among other things. In pertinent part, subdivision (d)(3) provides "[d]iscovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

The Board denied SCIF's petition for reconsideration without further discussion. SCIF filed a verified, timely petition for writ of review in this court on September 2, 1994, observing there had been no published appellate opinion on what Labor Code section 5402 means, what kind of presumption has been created, and most particularly, what kind of evidence effectively rebuts the presumption created by the statute. SCIF argued that all its medical reports constituted evidence which rebutted the presumption, but did not submit the reports upon which it relied with the writ petition. (They are included in the Board record, however, and have been part of our review.) Kaiser filed opposition to the issuance of a writ, contending there have been several Board panel opinions in recent years taking the position the only rebuttal evidence admissible to combat the presumption of section 5402, once noncompliance by the employer/carrier has been established, is evidence that was *notreasonablyobtainable* within the 90-day period, and that these opinions had stated the dispositive rule in this case. This court issued a writ of review.

Discussion

I. *Statutory Intent*

(1) "A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [20 Cal.Rptr.2d 523, 853 P.2d 978].) When the meaning of a statute is uncertain, resort may be had to the history of the legislation, including legislative and other reports, to resolve such ambiguities as exist. (*Id.* at p. 393.)

(2a) In the case of Labor Code section 5402, the 1989 amendment to the section was one result of attempts "by representatives of organized labor, management and the insurance industry following several years of negotiation intended to streamline and improve the workers' compensation benefit ***682** delivery system...." (Enrolled Bill Rep., Assem. Bill No. 276 (Sept. 19, 1989) Dept. Industrial Relations, p. 4.) Its primary purpose, as the WCJ correctly stated, was to expedite the entire claims process in workers' compensation by limiting the time during which investigation by the employer of a claim by an

injured worker could be undertaken-90 days-without being penalized for delay. The "penalty" provided for delay was that a rebuttable presumption of compensability would attach to the claim.

II. *The Nature of the Presumption Created*

We consider what sort of "rebuttable presumption" the Legislature intended to create in Labor Code section 5402. "A presumption is an assumption of fact that the law *requires* to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence." (Evid. Code, § 600, subd. (a), italics added.) "A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." (Evid. Code, § 601.)

"A presumption affecting the burden of producing evidence requires the ultimate fact to be found from proof of the predicate facts in the absence of other evidence. If contrary evidence is introduced then the presumption has no further effect and the matter must be determined on the evidence presented. (Evid. Code, § 604.)" (*In re Heather B.* (1992) 9 Cal.App.4th 535, 561 [11 Cal.Rptr.2d 891].) A presumption affecting the burden of proof has a more substantial impact in determining the outcome of litigation. The effect of a presumption affecting the burden of proof is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, § 606.)(3) While a presumption affecting the burden of producing evidence concerns only the particular litigation in which it applies, a presumption affecting the burden of proof "is established to implement some public policy other than to facilitate the particular action in which it applies. [Citations.]" (*In re Heather B.*, *supra*, at p. 561; Evid. Code, § 605.)

(2b) We have concluded that the rebuttable presumption of Labor Code section 5402 was intended to affect the burden of proof rather than the burden of producing evidence, because it was created by the Legislature to implement the public policy of expediting workers' compensation claims. As such, once the underlying facts have been established, its effect in workers' compensation litigation is to place upon the defendant employer/carrier the burden of proving the employee/applicant does not have a compensable *683 injury; in the absence of such proof, the consequences are adverse to the employer/carrier.

(4a) In this case, "the underlying facts" were that applicant had made a timely claim to which SCIF had not responded for approximately four months, instead of the ninety days permitted by the statute. The WCJ's ruling barring the testimony of the SCIF claims adjuster was highly significant, in that SCIF was thus unable to avoid the application of the presumption. SCIF then had to assume the burden of proof on the primary issue in the case, which was industrial causation. Resolution of this issue required medical evidence, usually presented through medical reports from examining, treating or evaluating doctors. At trial, SCIF did offer, and the WCJ admitted, the reports of four defense doctors, obtained after January 2, 1992, including those prepared on August 2, 1993, and August 4, 1993, by internist and cardiologist Richard Hyman, M.D., in which he diagnosed hypertension and atherosclerotic peripheral vascular disease and concluded that neither were work related. All of these reports, however, were offered without explanation as to why they had not been obtained during the 90-day investigation period allowed by Labor Code section 5402.

III. *What Constitutes Evidence Which Will Rebut the Presumption of Compensability*

Once the presumption has attached to a claim, at issue is what evidence may be admitted on behalf of the employer/carrier to rebut the presumption. Labor Code section 5402 states that the evidence be only that "discovered subsequent to the 90-day period." While there is as yet no appellate discussion of this issue, the Board has spoken to it in a number of panel decisions. (5) We adhere to "the well-established principle that contemporaneous administrative construction of a statute by the agency charged with its enforcement and interpretation, while not necessarily controlling, is of great weight; and courts will not depart from such construction unless it is clearly erroneous or unauthorized." (*Industrial Indemnity Co. v. Workers' Comp. Appeals Board* (1985) 165 Cal.App.3d 633, 638 [211 Cal.Rptr. 683].)

(4b) In *Napier v. Royal Insurance Co.* (1992) SAC 174290, 20 Cal. Workers' Comp. Rptr. 124 (writ den.), [FN4] a Board panel rejected an extremely broad interpretation of Labor Code section 5402

which would have barred all further discovery once the presumption applied, but said: "While the ***684** presumption of compensability will preclude the defendant from disputing its liability for injury with evidence which could have been obtained with the exercise of reasonable diligence within the initial 90 day period, defendant is not thereafter permanently prevented from seeking evidence on corollary and related issues." The conclusion that the Labor Code section 5402 presumption operates to bar the presentation of evidence which "could have been obtained with the exercise of reasonable diligence" was also reached by the Board in *Finess v. American Motorists Ins. Co.* (1992) SAC 173856, 20 Cal. Workers' Comp. Rptr. 303 and *Casey v. CIGNA* (1993) GRO 7572, 5718, 6593, 21 Cal. Workers' Comp. Rptr. 248. What constitutes "reasonable diligence" is being decided on a case-by-case basis.

> FN4 A board panel decision reported in the California Workers' Compensation Reporter is regarded as a properly citable authority, particular on the issue of contemporaneous administrative construction of statutory language. (*Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [257 Cal.Rptr. 813].)

The Board has also identified at least one area where the presumption does not operate as a bar against the admission of evidence which may rebut compensability of a claim. An applicant's testimony at a hearing may rebut the presumption, if the WCJ does not find the applicant credible on the issue of compensability; the Board has reasoned that such testimony could not reasonably have been discovered in the 90-day period. (*Davis v. Workers' Comp. Appeals Bd.* (1994) 59 Cal.Comp.Cases 1066.)Following the same reasoning, the testimony of other witnesses at trial or by deposition on behalf of the applicant may rebut the presumption. (*Witherell v. Workers' Comp. Appeals Bd.* (1994) 59 Cal.Comp.Cases 1128, writ den.; and see *Pinson v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 141.)

None of these decisions assist SCIF in its contention that it should have been permitted to rebut the presumption with the evidence contained in its medical reports, or the evidence discussed by the WCJ which was contained in the records of lien claimant Kaiser, all of which could have reasonably been obtained in the 90-day period after August 30, 1991. In short, SCIF never established that it had exercised reasonable diligence in investigating this claim.

IV. *The WCJ's Labor Code Section 5502, Subdivision (d)(3), Ruling*

SCIF did offer the testimony of its claims adjuster Corral-Cortez at trial, although she had not been identified as a witness at the mandatory settlement conference or in the settlement conference statement. The WCJ ruled that this circumstance operated to exclude the evidence, pursuant to Labor Code section 5502, subdivision (d)(3). This statute, which was enacted in 1989 and has undergone amendment on several occasions since, was considered by the Board in *Zenith Insurance Co.* v. *Ramirez* (1992) 57 Cal.Comp.Cases 719.The Board (in bank) upheld and applied the mandatory settlement ***685** procedure including the provision closing discovery to a number of cases, noting that it was established "to guarantee a productive dialogue leading, if not to expeditious resolution of the whole dispute, to thorough and accurate framing of the stipulations and issues for hearing." (*Id.* at p. 727.)

In *Rodriguez v. Workers' Comp. Appeals Bd.* (1994) 30 Cal.App.4th 1425, 1433 [35 Cal.Rptr.2d 713], the Court of Appeal held that pursuant to Labor Code section 5402, "... it is the *rejection* [of liability] which must occur within the 90-day period, not the receipt of notice of that rejection." (Italics added.) In view of *Rodriguez*, the WCJ's ruling excluding the adjuster's testimony was particularly significant, because the testimony would very likely have been relevant concerning whether SCIF had in fact rejected the claim within the 90-day period but had simply not communicated its decision to the claimant. The WCJ, in the case before us, defended her ruling on this issue in her report to the Board, pointing out no explanation had been given at trial why the adjuster's identity had not been disclosed at the mandatory settlement conference, and emphasizing there had been inexcusable delay in this case. We conclude that the type of delay demonstrated herein was of the sort that Labor Code section 5402 was designed to discourage. The Board correctly upheld the WCJ's ruling.

Disposition

The Board's order dated July 21, 1994, denying

reconsideration, is affirmed.

Croskey, J., and Aldrich, J., concurred.

Petitioner's application for review by the Supereme Court was denied November 2, 1995. *686

Cal.App.2.Dist.
State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.
37 Cal.App.4th 675, 43 Cal.Rptr.2d 660, 60 Cal. Comp. Cases 717, 95 Cal. Daily Op. Serv. 6300, 95 Daily Journal D.A.R. 10,685

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Districts A and B are receiving a reduced tax allocation due to the detachment proceedings (§ 99). They are no longer serving the area in question for which they received state assistance payments in 1978–1979. This area should therefore not be included in their calculations for Fund contributions.

District C, on the other hand, is now receiving property tax revenues previously allocated to districts A and B. Its area benefitted from state assistance payments in 1978–1979, and contributions to the Fund have been made based upon tax assessments in its area. We believe that district C has the responsibility to continue the Fund contributions made by districts A and B for its area. The ratios, state assistance payments, and current allocations based upon assessments in the two separate territories should be calculated and applied to district C's total allocation.

We realize that section 98.6 is complex and that its terms are subject to varying interpretations. We have sought to construe the statutory language in a reasonable and common sense manner. The Legislature's program for flexibility and a measure of local control over the property tax allocations of special districts should not be unreasonably restricted or expanded due to district reorganizations. Our construction of section 98.6 is consistent with the limitations and purposes of the Fund as originally envisioned by the Legislature. Any possible hardships resulting from a district having to contribute to the Fund may be addressed by the board of supervisors at the time of redistribution.

In answer to the question presented, therefore, we conclude that special districts are required to contribute to the Fund to the extent that their territories received state assistance payments for the 1978–1979 fiscal year.

Opinion No. 86-603—April 15, 1987

SUBJECT: APPLICATION OF LABOR CODE § 1771 PREVAILING WAGE PROVISIONS—The prevailing wage provisions of Labor Code section 1771 apply to the employees of an engineering firm which contracts with a city to perform the duties of city engineer, except with respect to such duties which do not qualify as a public work.

Requested by: MEMBER OF THE CALIFORNIA ASSEMBLY

Opinion by: JOHN K. VAN DE KAMP, Attorney General
Anthony S. Da Vigo, Deputy

The Honorable Richard E. Floyd, Member of the California Assembly, has requested an opinion on the following question:

Do the prevailing wage provisions of Labor Code section 1771 apply to the employees of an engineering firm which contracts with a city to perform the duties of city engineer?

CONCLUSION

The prevailing wage provisions of Labor Code section 1771 apply to the employees of an engineering firm which contracts with a city to perform the duties of city engineer, except with respect to such duties which do not qualify as a public work.

ANALYSIS

We are advised that a city has entered into a contract with a private engineering firm to perform, on an extended basis, all or a portion of those duties which would ordinarily be performed by a city engineer. The firm is required upon written authorization of the city manager to provide all necessary consulting engineering services needed for the preparation of special reports, investigations and studies, plan checking, surveying and inspections, the preparation of plans, specifications and cost estimates and any other special municipal projects or programs requiring specialized consulting services.

We are asked whether the prevailing wage provisions of Labor Code section 1771 apply to such surveyors and related employees. The inquiry assumes that the work in question is a "public work" within the meaning of that section, as defined in section 1720 of said code:

> "As used in this chapter 'public works' means:
>
> "(a) Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.
>
> "(b) Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type. 'Public work' shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.
>
> "(c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether such political subdivision or district operates under a freeholder's charter or not.
>
> "(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.
>
> "(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds."

We have previously considered in another context the meaning of "public works" as it relates to such engineering services. (63 Ops. Cal. Atty. Gen. 501, 504–508 (1980).) It was there observed that each contract must be separately reviewed to determine whether the work in question qualifies as such. (*Id.*, 506–507.) That similar distinctions must be drawn with regard to the application of prevailing wage requirements to engineering services is indicated, for example, by the specifications of Title 8, California Administrative Code, section 16001, subdivision (c), providing that

certain field survey work is subject to such requirements "when it is integral to the specific public works project in the design, preconstruction, or construction phase." A letter dated March 30, 1978 from the Director of Industrial Relations to Public Agency Awarding Bodies contained the following administrative interpretation:

> "As the person authorized by the Legislature to determine prevailing wage rates, I have determined that surveyors are included in the prevailing wage law pertaining to public works, § 1720 *et seq.* and § 1770 *et seq.* of the Labor Code.
>
> "A general determination has been made that when a firm performs engineering, surveying, and photogrammetry work for preparation of any plans and specifications for an awarding body under contract, the work of the surveyors, or those assisting the surveyors to establish field control lines, is to be paid at prevailing wage rates according to Part 7 of the Labor Code which deals with 'Public Works and Public Agencies.'
>
> "Surveying, whether performed in the preparation or construction stage, is a necessary prerequisite and integral part of construction without which the work could not proceed and is performed by the type of classification of worker intended to be covered by the Act (§ 1723 and § 1772 of the Labor Code).
>
> "Covered work includes all field survey work related to the engineering phase of a public works project, as well as to the construction phase of a public works project. The engineering phase includes field survey work for feasibility and design. Covered work does not include field survey work, such as general land surveying and mapping, related to the planning function of agencies covered by the prevailing wage law; nor does it include office work."

It is not the purpose of this discussion to factor analyze all of the performance dimensions of a city engineer to determine which would or would not, if performed by a private concern pursuant to contract, qualify as a public work. By its own terms, Labor Code section 1771 does not apply to work which does not so qualify. With respect to work that does so qualify, that section provides:

> "Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.
>
> "*This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own* forces. This section is applicable to contracts let for maintenance work." (Emphasis added.)

Hence, the issue arises as to whether the work in question is "performed under

contract" or "carried out by a public agency with its own forces." The prevailing wage requirement applies in the former but not the latter circumstance.

In its contract with the city the firm is characterized as "the City Engineer." Reference is made to Government Code section 36505, providing that

> "The city council shall appoint the chief of police. It may appoint a city attorney, a superintendent of streets, *a civil engineer*, and such other subordinate officers or employees as it deems necessary." (Emphasis added.)

Hence, it is suggested that the prevailing wage law does not apply where the duties in general of a city engineer are performed on an ongoing basis by a private firm acting as city engineer, as distinguished from an independent contractor, and that its employees are therefore the city's "own forces." We shall first consider whether the contractual designation "City Engineer" is determinative of one's status as an appointee to public office under Government Code section 36505, *supra*, as distinguished from a contractor under section 37103 of said code.

A city may enter into a contract with an engineer for specialized services. (Gov. Code, § 37103.) Such a contract does not render the engineer a city officer. (28 Ops. Cal. Atty. Gen. 362, 364 (1956).) On the other hand, a contract for services is not inherently inconsistent with public office, where the contractor has been duly appointed and taken the required oath. (*Id.*) The status of such a contractor must be determined by the duties and powers conferred, and not solely by contractual references as "city engineer" or other appointive terms in the contract. (*Id.*, Staheli v. City of Redondo Beach (1933) 131 Cal. App. 71, 79.) In the latter case the court construed a contract providing in part that Staheli "is hereby appointed to act and fill the duties of the City Engineer . . ." (*id.*, 78–80):

> "In the case of Kennedy v. City of Gustine, 199 Cal. 251 [248 Pac. 910], we find a situation where the board of trustees of a city of the sixth class appointed C. C. Kennedy 'as city engineer, his compensation to be seven per cent of cost of construction work.' The agreement under which plaintiff in that case went to work provided:
>
> " 'That for and in consideration of the compensation to be paid by the party of the first part to the party of the second part at the times and in the manner hereinafter provided, the party of the first part hereby employs said party of the second part as City Engineer of the said City of Gustine, for the purpose of performing the engineering work and supervising the construction of certain street improvements in said City of Gustine, namely: The construction of curbs, sidewalks and pavement upon (naming certain streets) during the present and next succeeding calendar year'. Construing this agreement and determining liability thereunder, the court said (p. 255): 'It is clear, however, that the plaintiff was not an officer of the city, but that he was employed, not to discharge the general duties of the office of city engineer, but only the particular engineering work specified in the contract. . . . Any reference to him in the minutes or the contract or in the evidence as "city engineer" is not controlling. Whether a position, or office, is a public office depends "not upon what the particular office in question may be

called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation'." (Citing Coulter v. Pool, 187 Cal. 181, 186 [201 Pac. 120], and other California cases.)

"Although respondent was employed to fill the duties of the city engineer of Redondo Beach and resolution No. 719 provided as his compensation the sum of $175 per month as a *retaining fee* for general city engineering and city engineering advice, we are not convinced that the use of those words constituted him individually a city officer, particularly since he was not definitely appointed city engineer and in view of the fact that almost every conceivable kind of *city engineering work* as popularly understood *is left by the same resolution in the balance to await future development or possibly future disagreement.* Since respondent was engaged on a retainer basis to give general engineering advice in the first instance, and later, if required, to give special advice or special service *on compensation to be determined*, it seems reasonable to say that from this resolution arose a private contract with an individual rather than the creation of a public office." (Last two emphases added.)

Similarly, with regard to the matter under consideration, it is undisputed that (1) the firm is retained by and subject to the terms and conditions of a contract, (2) services are to be performed only upon the written authorization of the city manager, and (3) the method of compensation for services rendered by the firm is to be approved for each project by the city manager. Thus, as in the Staheli case, each project is left to await future development or possible future disagreement, for compensation to be determined.

Further problems arise with regard to the appointment of a corporation as a public officer. Unless otherwise provided, each public officer must first take and subscribe the constitutional oath. (Cal. Const., art. XX, § 3; Gov. Code, §§ 1360 & 36507.) In addition, a person who is not 18 years of age and a citizen of this state at the time of election or appointment is incapable of holding a civil office. (Gov. Code, § 1020.) While a corporation may be characterized as a citizen of the state of its creation (Keystone Driller Co. v. Superior Court (1903) 13 8 Cal. 738, 742), it is so considered only for the purpose of protecting the property rights of the incorporators (County of San Mateo v. Southern Pac. R. Co. (CC Cal. 1882) 13 F. 722, 747, *writ dism.* 116 U.S. 138).[1]

The salient fact remains, in any event, that the surveyors and other personnel who perform such services are employed and compensated by the firm. Whether or not the firm may be deemed a public officer, employee, or agent, it is not the city. In our view, therefore, the argument propounded is inconsistent with the plain meaning of section 1771 and with the nature and purpose of its requirements.

The prevailing wage prescription of section 1771 is contained in the first sentence

[1] Still another issue concerns the meaning of "business activity" under Corporations Code sections 206 and 207, for purposes of holding public office.

which applies unequivocally to "*all* workers employed on public works." The second sentence is an exception relating to "work carried out by a public agency with its own forces." This exception is specifically limited to work done by force account (Bishop v. City of San Jose (1969) 1 Cal. 3d 56, 65; O.G. Sansone Co. v. Department of Transportation (1976) 55 Cal. App. 3d 4 34, 459), i.e., by its own employees as distinguished from work performed pursuant to contract with a commercial firm for similar services (see, Webster's Third New Internat. Dict. (1961) p. 887; Jackson v. Pancake (1968) 266 Cal. App. 2d 307, 311).

Manifestly, employees of the firm are not those of the city. In this regard it should be recalled that statutory exceptions should be narrowly construed. (Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Contr. (1968) 261 Cal. App. 2d 181, 189; 66 Ops. Cal. Atty. Gen. 24, 26 (1983).) Further, expressly excluded from the exception is "work performed under contract." Hence, the rule applies that where statutory language is clear and unambiguous, there is no need for construction and the courts should not indulge in it. (Board of Supervisors v. Lonergan (1980) 27 Cal. 3d 855, 866; 66 Ops. Cal. Atty. Gen. 217, 221–222 (1983).)

Nor would the exemption of the firm's employees be consistent with the nature and purpose of the prevailing rate standards. With respect to such purpose, the court stated in O.G. Sansone Co. v. Department of Transportation, *supra*, 55 Cal. App. 3d at 458:

> "Little has been written in judicial opinions concerning the purpose of the California legislation. However, cases have expounded on the purpose of the Davis-Bacon Act (40 U.S.C. 276a et seq.) The Supreme Court stated in U.S. v. Binghamton Construction Co., 347 U.S. 171, at pages 176–177: 'The language of the [Davis-Bacon] Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects.' And in International U. of Operating Eng. Local 627 v. Arthurs (W.D. Okla. 1973) 355 F. Supp. 7, at page 8, it was stated: 'The purpose of the Davis-Bacon Act is to provide protection to local craftsmen who were losing work to contractors who recruited labor from distant cheap-labor areas. S.Rept. 963, Mar. 17, 1964 (to accompany H.R. 6041), 1964 U.S. Code Congressional and Administrative News, pp. 2339, 2340. Some contractors pay wages according to collective bargaining agreements. But even though these contractors usually are required to pay higher wage scales, they can still compete with nonunion contractors for public contract work because of the Davis-Bacon Act prevailing wage scale provision. Noncompliance with the Davis-Bacon Act makes it impossible for all contractors to compete. There is thus injury to the laborers and mechanics, as well as injury to contractors and labor organizations."
>
> "It has been said that the provision for payment of prevailing wages on state construction works serves as a public policy in that the state will benefit from 'the superior efficiency of well-paid labor working during reasonable hours' and that such benefit justifies the employment of men on 'less

favorable terms than could be secured by the stress of competition.' (65 Am.Jur.2d, Public Works and Contracts, § 199, p. 87.)"

If exempt, workers employed and compensated by the firm would enjoy neither the benefit of a salary established by law, nor of a salary subject to the constraints of section 1771. We perceive no such legislative oversight.

It is concluded that the prevailing wage provisions of Labor Code section 1771 apply to the employees of an engineering firm which contracts with a city to perform the duties of city engineer, except with respect to such duties which do not qualify as a public work.

Opinion No. 86-702—April 15, 1987

SUBJECT: AUTHORITY TO ESTABLISH SALARIES OF CALIFORNIA HOUSING FINANCE AGENCY EMPLOYEES—The California Housing Finance Agency does not have the authority to establish the salaries of its employees without the approval of the Department of Personnel Administration.

Requested by: DIRECTOR, DEPARTMENT OF PERSONNEL ADMINISTRATION

Opinion by: JOHN K. VAN DE KAMP, Attorney General
Anthony S. Da Vigo, Deputy

The Honorable James D. Mosman, Director, Department of Personnel Administration, has requested an opinion on the following question:

Does the California Housing Finance Agency have the authority to establish the salaries of its employees without the approval of the Department of Personnel Administration?

CONCLUSION

The California Housing Finance Agency does not have the authority to establish the salaries of its employees without the approval of the Department of Personnel Administration.

ANALYSIS

The present inquiry concerns the authority for the fixing of the salaries of employees of the California Housing Finance Agency. Specifically, it must be determined whether the establishment of such salaries by the agency is subject to the approval of the Department of Personnel Administration. The department's authority is found in Government Code section 19825, subdivision (a):

"*Notwithstanding any other provision of law*, whenever any state agency is authorized by special or general statute to fix the salary or compensation of

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	SB 588

UNFINISHED BUSINESS

Bill No: SB 588
Author: Burton (D)
Amended: 9/6/01
Vote: 21

SENATE LABOR & IND. RELATIONS COMMITTEE : 5-3, 4/25/01
AYES: Alarcon, Figueroa, Kuehl, Polanco, Romero
NOES: Margett, McClintock, Oller

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

SENATE FLOOR : 25-13, 5/21/01
AYES: Alarcon, Alpert, Bowen, Burton, Chesbro, Costa, Dunn, Escutia, Figueroa, Karnette, Kuehl, Machado, Murray, O'Connell, Ortiz, Peace, Perata, Polanco, Romero, Scott, Sher, Soto, Torlakson, Vasconcellos, Vincent
NOES: Ackerman, Battin, Brulte, Haynes, Johannessen, Knight, Margett, McClintock, McPherson, Monteith, Morrow, Oller, Poochigian

ASSEMBLY FLOOR : 50-28, 9/10/01 - See last page for vote

SUBJECT : Prevailing wages: payroll records

SOURCE : California-Nevada Conference of Operating Engineers

DIGEST : This bill permits federally-recognized joint labor-management committees access to certified payrolls on public works projects, and permits committees to seek civil court action to remedy prevailing wage violations.

CONTINUED

Assembly amendments (a) provide that in addition to social security numbers, "names" should also be deleted from the records provided to the committees, (b) clarify the civil action procedures, and (c) provide that courts may award restitution.

ANALYSIS : Existing state law requires the payment of prevailing wages to workers employed by private contractors on public works projects valued at $1,000 or more. When an awarding body decides to advertise a public works contract, it must obtain the applicable prevailing wage rates from the Director of the Department of Industrial Relations (DIR). The Divisions of Labor Standards Enforcement (DLSE) and Apprenticeship Standards (DAS) enforce various requirements.

Contractors and subcontractors are required to prepare a certified payroll containing specified information and to make the payroll available for inspection or to furnish it upon request to DLSE, DAS, and to a representative of the awarding body. Records obtained by state officials are open for public inspection, but employee names and other identifying information such as addresses, and social security numbers are deleted from view.

Existing federal law provides for the establishment of industry wide labor-management committees which have been jointly organized for, among other things, advocating industry practices in compliance with various laws.

This bill provides that a federally recognized joint labor-management committee may obtain a copy of a certified payroll from a contractor on a public works project, but with names and social security numbers deleted. If the committee discovers unpaid prevailing wages or fringe benefits due, and related penalties, it may file a civil action to collect them. Courts may award restitution to employees and attorney's fees and costs to the committee.

Prior legislation

This bill is similar to AB 2783 (Villaraigosa) of 2000 which was vetoed by the Governor. The Veto Message said,

in part:

"?.The bill contains no provisions that limit the uses to which joint labor management committees may put the personal information with which they are entrusted?.(T)he release of personal information to a joint labor-management committee requires neither the knowledge nor the consent of affected employees. Although the obvious intent of this legislation is that the information be utilized solely for the purpose of detecting the underpayment of workers on public works projects, joint labor-management committees are not bound to adhere to this goal, and the privacy of the affected employees is in no way assured. This is not the case with the public agencies charged with the enforcement of California's labor laws."

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: No

The Assembly Appropriations Committee analysis concluded that the fiscal effect of this bill was negligible.

SUPPORT : (Verified 5/14/01) (prior to 9/6 amendments)

California-Nevada Conference of Operating Engineers (source)
State Building and Construction Trades Council of California
California Labor Federation AFL-CIO
California Chamber of Commerce

OPPOSITION : (Verified 5/14/01)

Associated Builders and Contractors
California Manufacturers and Technology Association

ARGUMENTS IN SUPPORT : Proponents including the California-Nevada Conference of Operating Engineers, argue that union representatives or joint labor-management committees are unable to ascertain if the contractor is misclassifying and underpaying skilled workers when they seek to discover compliance with prevailing wage laws. This bill would provide important new mechanisms to assist the state in enforcing the public works law.

Supporters refer to estimates from the State Task Force on the Underground Economy that estimates between $2 billion and $5 billion in payroll and revenue goes unreported in the construction industry each year.

Because DLSE has only 20 field investigators and six

auditors in the public works unit, that agency cannot adequately enforce the law on more than 22,000 public works projects each year. Therefore, unethical contractors understand that the odds of being caught cheating on wages and payroll taxes is minimal. This bill will strengthen enforcement by providing committees with access to payroll records and a direct cause of action to enforce prevailing wage laws.

ARGUMENTS IN OPPOSITION : Opponents state that DLSE is more than capable of checking payroll records to guard against any duplications or misclassification of employees. Under the current administration, the DLSE has received major budget increases, as well as additional augmentations to increase staffing which should be sufficient to fulfill their duties. They see no empirical evidence that DLSE has failed to perform its current duties in a timely or satisfactory manner.

Opponents question the appropriateness of joint labor-management committees getting involved in prevailing wage enforcement activities. They argue that the purpose of these private committees is to promote a private benefit, not a public one.

The Associated Builders and Contractors argue that the committees endorsed and fostered by this bill represent unions and unionized businesses for the purpose of recruiting union membership. Also, by only deleting social security numbers, enormous privacy rights violations would still exist. Workers names and addresses should not be subject to public release for union recruiting of non-union contractors.

ASSEMBLY FLOOR :
AYES: Alquist, Aroner, Calderon, Canciamilla, Cardenas, Cardoza, Cedillo, Chan, Chavez, Chu, Cohn, Corbett,

Correa, Diaz, Dutra, Firebaugh, Florez, Frommer, Goldberg, Havice, Horton, Jackson, Keeley, Kehoe, Koretz, Liu, Longville, Lowenthal, Matthews, Migden, Nakano, Nation, Negrete McLeod, Oropeza, Papan, Pavley, Reyes, Salinas, Shelley, Simitian, Steinberg, Strom-Martin, Thomson, Vargas, Washington, Wayne, Wesson, Wiggins, Wright, Hertzberg
NOES: Aanestad, Ashburn, Bates, Bogh, Briggs, Bill Campbell, John Campbell, Cogdill, Cox, Daucher, Dickerson, Harman, Hollingsworth, Kelley, La Suer, Leach, Leonard, Leslie, Maldonado, Mountjoy, Robert Pacheco, Rod Pacheco, Pescetti, Richman, Runner, Strickland, Wyman,

Zettel

NC:sl 9/12/01 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

CALIFORNIA

* OFFICIAL VOTER * INFORMATION GUIDE

GENERAL ELECTION DATE

Tuesday, November 5, 2002

CALIFORNIA SECRETARY OF STATE

PROP 47 Kindergarten-University Public Education Facilities Bond Act of 2002.

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PROP 47
Official Title and Summary
Analysis
Arguments and Rebuttals
Text of Proposed Law
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PROP 52

Analysis by the Legislative Analyst

BACKGROUND

Public education in California consists of two distinct systems. One system includes local school districts that provide elementary and secondary (kindergarten through 12th grade, or "K–12") education to about 6.1 million pupils. The other system (commonly referred to as "higher education") includes local community colleges, the California State University (CSU), and the University of California (UC). The three segments of higher education provide education programs beyond the 12th grade to about 2.3 million students.

K–12 Schools

School Facilities Funding. The K–12 schools receive funding for construction and renovation of facilities from two main sources—the state and local general obligation bonds.

- ***State Funding.*** The state, through the School Facility Program (SFP), provides money for school districts to buy land and to construct, renovate, and modernize K–12 school buildings. Districts receive funding for construction and renovation based on the number of pupils who meet the eligibility criteria of the program. The cost of school construction projects is shared between the state and local school districts. The state pays 50 percent of the cost of new construction projects and 60 percent of the cost for approved modernization projects. (Local matches are not necessary in so-called "hardship" cases.) The state has funded the SFP by issuing general obligation bonds. Over the past decade, voters have approved a total of $11.5 billion in state bonds for K–12 school construction. About $550 million of these funds remain available for expenditure.
- ***Local General Obligation Bonds.*** School districts are authorized to sell general obligation bonds to finance school construction projects with the approval of 55 percent of the voters in the district. These bonds are paid off by taxes on real property located within the district. Over the last ten years, school districts have received voter approval to issue more than $23 billion of general obligation bonds.

Although school facilities have been funded primarily from state and local general obligation bonds, school districts also receive significant funds from:

- ***Developer Fees.*** State law authorizes local governments to impose developer fees on new construction. These fees are levied on new residential, commercial, and industrial developments. Statewide, school districts report having received an average of over $300 million a year in developer fees over the last ten years.
- ***Special Local Bonds (Known as "Mello-Roos" Bonds).*** School districts may form special districts in order to sell bonds for school construction projects. (These special districts generally do not encompass the entire school district.) The bonds, which require two-thirds voter approval, are paid off by charges assessed to property owners in the special district. Statewide, school districts have received on average about $150 million a year in special local bond proceeds over the past decade.

K–12 School Building Needs. Under the SFP, K–12 school districts must demonstrate the need for new or modernized facilities. Through May 2002, the districts have identified a need to construct new schools to house 1.2 million pupils and modernize schools for an additional 1.2 million pupils. We estimate the state cost to address all of these needs to be roughly $20 billion.

Higher Education

California's system of public higher education includes 140 campuses in the three segments listed below, serving about 2.3 million students:

- The California Community Colleges provide instruction to 1.7 million students at 108 campuses operated by 72 locally governed districts throughout the state. The community colleges grant associate degrees and also offer a variety of vocational skill courses.
- The CSU system has 23 campuses, with an enrollment of about 395,000 students. The system grants bachelor and master degrees, and a small number of joint doctoral degrees with UC.
- The UC has eight general campuses and one health sciences campus with a total enrollment of about 184,000 students. This system offers bachelor, master, and doctoral degrees, and is the primary state-supported agency for research.

Over the past decade, the voters have approved nearly $4.4 billion in general obligation bonds for capital improvements at public higher education campuses. The state also has provided almost $1.5 billion in lease revenue bonds for this same purpose.

In addition to these state bonds, the higher education segments have other sources of funding for capital projects.

- ***Local General Obligation Bonds.*** Community college districts are authorized to sell

general obligation bonds to finance school construction projects with the approval of 55 percent of the voters in the district. These bonds are paid off by taxes on real property located within the district. Over the last decade, community college districts have received local voter approval to issue about $5 billion of bonds for construction and renovation of facilities.

- ***Gifts and Grants.*** The CSU and UC in recent years together have received on average over $100 million annually in gifts and grants for construction of facilities.
- ***UC Research Revenue.*** The UC finances the construction of new research facilities by selling bonds and pledging future research revenue for their repayment. Currently, UC uses about $125 million a year of research revenue to pay off these bonds.

Higher Education Building Plans. Each year the institutions of higher education prepare capital outlay plans in which they identify project priorities over the next few years. Higher education capital outlay projects in the most recent plans total $4.4 billion for the period 2003–04 through 2006–07.

PROPOSAL

This measure allows the state to issue $13.05 billion of general obligation bonds for construction and renovation of K–12 school facilities ($11.4 billion) and higher education facilities ($1.65 billion). General obligation bonds are backed by the state, meaning that the state is obligated to pay the principal and interest costs on these bonds. General Fund revenues would be used to pay these costs. These revenues come primarily from state income and sales taxes. Figure 1 shows how these bond funds would be allocated to K–12 and higher education.

K–12 School Facilities

Figure 1 describes generally how the $11.4 billion for K–12 school projects would be allocated. However, the measure would permit changes in this allocation with the approval of the Legislature and Governor.

New Construction. A total of $6.35 billion would be available to buy land and construct *new* school buildings. Of this amount, $2.9 billion would be set aside for "backlog" projects—that is, projects for which districts had submitted applications on or before February 1, 2002, but that have not yet been funded. The remaining funds—$3.45 billion—would be available for new construction projects submitted after February 1, 2002. Districts would be required to pay for 50 percent of costs with local resources. The measure also provides that up to $100 million of the $3.45 billion in new construction funds is available for charter school facilities. (Charter schools are public schools that operate independently of many of the requirements of regular public schools.)

Modernization. The proposition makes $3.3 billion available for the reconstruction or modernization of *existing* school facilities. Of this amount, $1.9 billion would be available for backlog projects and $1.4 billion for new proposals. Districts would be required to pay 40 percent of project costs from local resources.

Critically Overcrowded Schools. This proposition directs a total of $1.7 billion to districts with schools which are considered critically overcrowded. These funds would go to schools that have a large number of pupils relative to the size of the school site.

Joint-Use Projects. The measure makes a total of $50 million available to fund joint-use projects. (An example of a joint-use project is a facility constructed for use by both a K–12 school district and a local library district.)

Higher Education Facilities

The measure includes $1.65 billion to construct new buildings and related infrastructure, alter existing buildings, and purchase equipment for use in these buildings for California's public higher education systems. The Governor and the Legislature would select the specific projects to be funded by the bond monies.

Related Bond Funding. The legislation which placed this proposition on the ballot provides $651.3 million in lease revenue bonds to fund specific projects. Lease revenue bonds are similar to state general obligation bonds except they do not require voter approval and are not backed by the full faith and credit of the state. This would fund $279 million for UC (7 projects), $191.3 million for CSU (4 projects), $170.5 million for the community colleges (11 projects), and $10.5 million for the California State Library (1 project).

Future Education Bond Act

The legislation which placed this proposition on the ballot authorizes a $12.3 billion bond measure to be placed on the 2004 primary election ballot. (If the voters do not approve this measure, the same bond issue would be placed on the November 2004 ballot.)

The bond measure would provide:

- $10 billion for K–12 school facilities (with roughly half for new construction and a fourth each for modernization and critically overcrowded schools).
- $2.3 billion for higher education (with $920 million for community colleges and $690 million each for UC and CSU).

FISCAL EFFECT

The cost of these bonds would depend on their interest rates and the time period over which they are repaid. If the $13.05 billion in bonds authorized by this proposition are sold at an interest rate of 5.25 percent (the current rate for this type of bond) and repaid over 30 years, the cost over the period would be about $26.2 billion to pay off both the principal ($13.05 billion) and interest ($13.15 billion). The average payment for principal and interest would be about $873 million per year.

Figure 1

Proposition 47
Uses of Bond Funds

(In Millions)	**Amount**
K-12	
New Construction:	
New projects	$3,450[a]
Backlog[b]	2,900
Modernization:	
New projects	1,400
Backlog[b]	1,900
Critically overcrowded schools	1,700
Joint use	50
Subtotal, K-12	($11,400[c])
Higher Education	
Community Colleges	$746
California State University	496
University of California	408
Subtotal, Higher Education	($1,650)
Total	**$13,050**

[a] Up to $100 million available for charter schools. Up to $25 million available for reimbursements to homebuyers for fees paid to school districts to fund new facilities, but only in the event Proposition 46 fails.
[b] Projects for which districts had submitted applications on or before February 1, 2002.
[c] Up to $20 million available for energy conservation projects.

Working together to improve the educational environment for California's children

School Facility Program Handbook

A guide to assist with applying for and obtaining grant funds

July 2007

State of California
Arnold Schwarzenegger, Governor

State and Consumer Services Agency
Rosario Marin, Secretary

Department of General Services
Will Bush, Director
Will Semmes, Chief Deputy Director

State Allocation Board
Office of Public School Construction
Rob Cook, Executive Officer – SAB/OPSC
Lori Morgan, Deputy Executive Officer – SAB/OPSC
Mavonne Garrity, Assistant Executive Officer – SAB

Prepared on behalf of the
State Allocation Board

by the
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Contents

Preface

Introduction

This handbook was developed by the Office of Public School Construction (OPSC) to assist school districts in applying for and obtaining "grant" funds for the new construction and modernization of schools under the provisions of the Leroy F. Greene School Facilities Act of 1998 (Senate Bill 50). It is intended to be an overview of the program for use by school districts, parents, architects, the Legislature, and other interested parties on how a district or county superintendent of schools becomes eligible and applies for State funding. This handbook provides direction on accessing the processes leading to project approvals, insight to the various features of the School Facility Program (SFP), and includes suggestions on how to make the funding system as efficient as possible. For information not contained in this handbook, districts should consult with their respective project managers for assistance; or refer to additional project specific information contained in the SFP Regulations. The SFP Regulations are located on the OPSC Web site at www.opsc.dgs.ca.gov. The OPSC project managers are assigned by county, and a complete listing of project manager assignments, including telephone numbers and e-mail addresses, are also included on our Web site.

Things to Know

This updated version of the handbook includes various regulation changes that occurred between 2005 and 2007 and include:

- Critically Overcrowded School Facilities Program Amendments (effective 10/27/2005)
- Small High School Program (effective 03/14/2006)
- Alternative Enrollment Projection Methods (effective 05/15/2006)
- Re-Designation of Energy Funds (effective 08/21/2006)
- General Site Development Additional Grant (effective 09/05/2006)
- Multi-Story Replacement of Single-Story Facilities Amendments (effective 11/03/2006)
- Modernization Handicapped Access/Fire Code Excessive Cost Hardship Grant Amendments (effective 04/25/2007)
- Charter School Facility Program Amendments (effective 05/17/2007)

Where to Begin

Section 1, "School Facility Program Overview" and Section 2, "The State Allocation Board, the Office of Public School Construction, and Other Involved Agencies" will provide general information. After reviewing these sections, the reader may want to review Section 4, "Application for Eligibility," because establishing eligibility is the first step in filing an application for either new construction or modernization funding. The remaining sections can be reviewed as the topics arise.

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Section 1

School Facility Program Overview

Introduction

The School Facility Program (SFP) was implemented in late 1998 and is a significant change from previous State facilities programs. The State funding is provided in the form of per pupil grants, with supplemental grants for site development, site acquisition, and other project specific costs when warranted. This process makes the calculation of the State participation quicker and less complicated. In most cases, the application can be reviewed, the appropriate grants calculated, and State Allocation Board (SAB) approval received in 60–90 days regardless of project size.

In addition to a less complicated application process, the SFP provides greater independence and flexibility to school districts to determine the scope of new construction or modernization projects. There is considerably less project oversight by State agencies than in previous State programs. In return, the program requires the school district to accept more responsibility for the outcome of the project, while allowing the district to receive the rewards of a well managed project. All State grants are considered to be the full and final apportionment by the SAB. Cost overruns, legal disputes, and other unanticipated costs are the responsibility of the district. On the other hand, all savings resulting from the district's efficient management of the project accrue to the district alone. Interest earned on the funds, both State and local, also belongs to the district. Savings and interest may be used by the district for any other capital outlay project in the district. See Section 13, "Additional SFP Requirements and Features" for more information on project savings.

The SFP provides funding grants for school districts to acquire school sites, construct new school facilities, or modernize existing school facilities. The two major funding types available are "new construction" and "modernization".[1] The new construction grant provides funding on a 50/50 State and local match basis. The modernization grant provides funding on a 60/40 basis. Districts that are unable to provide some or all of the local match requirement and are able to meet the financial hardship provisions may be eligible for additional State funding (see Section 10, "Financial Hardship").

To ensure that districts are providing adequate safe facilities to students, approval by both the Division of the State Architect (DSA) is required prior to signing a contract for any new construction, modernization and alteration projects for which State funding is requested. Education Code, Section 17072.30, requires that school districts obtain DSA approval of their project's plans and specifications prior to submitting a funding application to the OPSC. The DSA approval ensures that the plans and specifications are in compliance with California's requirements for structural safety, fire and life safety, and accessibility. Districts that sign construction contracts prior to obtaining DSA approval risk their project's eligibility for State funding. The only exception to this requirement is for relocatable buildings, for which districts may enter into a contract to acquire the plans and specifications; however construction cannot commence until DSA approval of the final plans and specifications has been obtained. The date of the DSA approval letter, not the DSA stamp, is considered a valid approval.

[1] Education Code, Sections 17072.10 and 17074.10, establish the new construction grant and modernization grant, respectively.

Implementation and Evolution of the School Facility Program

Senate Bill 50 (Greene) was chaptered into law on August 27, 1998, establishing the SFP. The legislation required that regulations be approved and in place for accepting and processing applications as soon as Proposition 1A was approved by the voters the following November. The SFP continues to evolve through legislative changes. Assembly Bill (AB) 16 and AB 14 provided for significant changes by requiring that regulations be approved and in place for accepting and processing applications as soon as Proposition 47 was approved by the voters in November 2002. These changes included funding for charter school facilities, critically overcrowded schools and joint-use projects. Some of the changes that impacted new construction funding include the suspension of Priority Points, an additional grant for energy efficiency, and several changes that impact the determination of eligibility. Some of the changes that impacted modernization funding include the change of the funding ratio between the State and the school district from 80 percent State and 20 percent district to 60 percent State and 40 percent school district, and additional grants for energy efficiency and the modernization of buildings 50 years old or older.

The passage of Proposition 55 in March 2004 provided an additional $12.3 billion for the construction and renovation of K–12 school facilities and higher education facilities. These funds made available through the School Facility Program, continue to make a difference in assisting school districts with overcrowding and accommodating future enrollment growth.

Proposition 1D provided an additional $7.3 billion in November 2006 which has already begun to assist school districts to repair and modernize older facilities. These funds will additionally assist with overcrowding and accommodate future enrollment growth.

Information on each category of funding can be found in the following sections:

SFP FUNDING CATEGORY	SECTION	PAGE
New Construction	5	23
Modernization	9	29
Financial Hardship	10	71

Funding for the School Facility Program

Helpful Hint:
A listing of school districts that have received SFP funding is available on the OPSC Web site at www.opsc.dgs.ca.gov.

Funding for projects approved in the SFP comes exclusively from statewide general obligation bonds approved by the voters of California. The first funding for the program was from Proposition 1A, approved in November 1998. That bond for $9.2 billion contained $6.7 billion for K–12 public school facilities. The second funding for the program was from Proposition 47, approved in November 2002. It was a $13.2 billion bond, the largest school bond in the history of the State. It contained $11.4 billion for K–12 public school facilities. In March 2004 a third bond was passed by California voters for another $12.3 billion. Of the $12.3 billion provided by Proposition 55, it contained $10 billion for K–12 public school facilities. At this time funds remain for new construction projects.

In November 2006 an additional $10.416 billion was passed by the voters. Of the $10.416 billion provided by Proposition 1D, $7.3 billion will be utilized by school districts to address overcrowding, provide career technical education facilities, accommodate future enrollment growth, renovate and modernize older school buildings and allow participation in community related joint-use projects. The 2006 bond measure is summarized as follows:

PROGRAM	BOND 2006
New Construction *	$ 1,900,000,000 †
Modernization *	3,300,000,000
Overcrowding Relief Grant	1,000,000,000
Joint Use	29,000,000
Career Technical Education Facilities Program	500,000,000
Charter Schools	500,000,000
High Performance Schools	100,000,000
Total K–12	$ 7,329,000,000

* Up to $200 million of the new construction and modernization funds specified for small high schools.

† Up to 10½ percent is available for seismic repairs, reconstruction, or replacement.

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Section 2

The State Allocation Board, the Office of Public School Construction, and Other Involved Agencies

State Allocation Board

Created in 1947 by the State Legislature, the State Allocation Board (SAB) is responsible for determining the allocation of State resources including proceeds from General Obligation Bond Issues and other designated State funds used for the new construction and modernization of public school facilities. The SAB is also charged with the responsibility for the administration of the State Relocatable Classroom Program, the Deferred Maintenance Program, and many other facilities related programs. Handbooks on these programs may be found on the Office of Public School Construction (OPSC) Web site at www.opsc.dgs.ca.gov. Printed copies may be obtained by contacting the OPSC directly.

The SAB meets monthly, typically at the State Capitol. At each meeting the SAB reviews and approves applications for eligibility and funding, acts on appeals, and adopts policies and regulations as they pertain to the programs that the SAB administers.

The SAB is comprised of ten members:

- The Director of the Department of Finance or designee (Traditional SAB Chair)
- The Director of the Department of General Services or designee
- The Superintendent of Public Instruction or designee
- One person appointed by the Governor
- Three State Senators; appointed by the Senate Rules Committee (two from the majority party and one from the minority party)
- Three State Assembly Members; appointed by the Speaker of the Assembly (two from the majority party and one from the minority party)

The current SAB members are:

- Mr. Michael Genest, Director, Department of Finance
- Mr. Will Bush, Director, Department of General Services
- Mr. Jack O'Connell, Superintendent of Public Instruction
- Ms. Rosario Girard, Governor's Appointee
- Senator Bob Margett
- Senator Jack Scott
- Senator Joe Simitian
- Assembly Member Gene Mullin
- Assembly Member Jean Fuller
- Assembly Member Kevin de León

The current SAB officers are:

- Rob Cook, Executive Officer
- Lori Morgan, Deputy Executive Officer
- Mavonne Garrity, Assistant Executive Officer

SAB Implementation Committee

The SAB Implementation Committee is an informal advisory body established by the SAB to assist the SAB and the OPSC with policy and legislation implementation. The committee membership is comprised of organizations representing the school facilities community which meets approximately once a month depending upon the workload. The SAB Assistant Executive Officer is the chair of the committee. Committee membership, as well as the time and location of future meetings, can be found on the OPSC Web site at www.opsc.dgs.ca.gov.

Office of Public School Construction

OPSC Mission:
"As staff to the State Allocation Board, the Office of Public School Construction facilitates the processing of school applications and makes funding available to qualifying school districts. These actions enable school districts to build safe and adequate school facilities for their children in an expeditious and cost-effective manner."

The OPSC serves the 1,000 plus K–12 public school districts in California. As staff to the SAB, the OPSC is responsible for allocating State funding for eligible new construction and modernization projects to provide safe and adequate facilities for California public school children. The OPSC is also responsible for the management of these funds and the expenditures made with them. It is also incumbent on the OPSC to prepare regulations, policies, and procedures for approval by the SAB that carry out the mandates of the law.

OPSC Responsibilities

The OPSC is charged with the responsibility of verifying that all applicant school districts meet specific criteria based on the type of eligibility or funding which is being requested and to work with school districts to assist them throughout the application process. The OPSC ensures that funds are allocated properly and in accordance with the law and decisions made by the SAB. Since November of 1998, the OPSC has processed over $28.8 billion in State apportionments to the SAB. The programs, funding, and approvals over that period are shown in Appendix 5, "Summary of Bond and Deferred Maintenance Allocations."

The OPSC prepares agendas for the SAB meetings. These agendas keep the SAB members, districts, staff, and other interested parties apprised of all actions taken by the SAB. The agenda serves as the underlying source document used by the State Controller's Office for the appropriate release of funds. The agenda further provides a historical record of all SAB decisions, and is used by school districts, facilities planners, architects, consultants, and others wishing to track the progress of specific projects, the availability of funds, and SAB regulations.

Helpful Hint:
The Directory of Services provides information regarding project manager county assignments, including telephone numbers and other contact information.

Management of the Office of Public School Construction

The OPSC is directed by an Executive Officer who is appointed by the Governor. The appointee also serves as the Executive Officer to the SAB. A Deputy Executive Officer is selected by the Executive Officer subject to the approval of the Director of General Services. The Deputy oversees the daily operation of the office. An Assistant Executive Officer is appointed by the SAB. Although not technically a member of the OPSC management, the Assistant Executive Officer works directly with the OPSC management team and acts as liaison between the SAB and the OPSC.

Other Agencies Involved

School districts planning to construct or modernize existing schools require the assistance of several local, State, and federal agencies. It is essential that those dealing with the school construction process have an understanding of the role each agency plays. The three primary State agencies that will be referred to in this guidebook, in addition to the SAB and the OPSC, are the Division of the State Architect (DSA), the California Department of Education (CDE) School Facilities Planning Division (SFPD), and the Department of Toxic Substances Control (DTSC). District representatives may also come into contact with many other agencies. A listing of some of the agencies that might be involved in a school project and their role is provided in Appendix 2, "Potential State Agency Involvement".

The agency information provided in this section is meant as a tool for school district representatives to become familiar with the primary State agencies involved in the school construction process. The OPSC encourages district representatives to contact each agency to obtain more information about their procedures and processes. To contact the agencies listed below, please see Appendix 1, "State Agency Contact Information."

Department of General Services, Division of the State Architect

The primary role of the DSA in the school construction process is to review plans and specifications to ensure that they comply with California's building codes, with an emphasis on structural and seismic safety. The review commences when the school district's architect submits working drawings to the DSA. The DSA reviews the working drawings to assure that the proposed structures meet codes and requirements for structure (seismic), fire and life safety, and universal design compliance.

DSA approval of all plans and specifications is required prior to a construction contract being signed for new construction, modernization or alteration of any school building for which a district is seeking State funding. The only exception to this requirement is for relocatable buildings, for which districts may enter into a contract to acquire the plans and specifications; however construction cannot commence until DSA approval has been obtained. The date of the DSA approval letter, not the DSA stamp, is considered a valid approval. Please refer to the Education Code, Section 17072.30, for further information.

California Department of Education, School Facilities Planning Division

The role of the SFPD is to review and approve school district sites and construction plans. The SFPD review begins when a school district plans to acquire a new school construction site. Prior to approving a site for school purposes, the SFPD reviews many factors, including, but not limited to, environmental hazards, proximity to airports, freeways, and power transmission lines. The review of construction plans by the SFPD focuses mainly on the educational adequacy of the proposed facility and whether the needs of students and faculty will be met. See Section 3, "Project Development Activities."

Department of Toxic Substances Control

The role of the DTSC in the school construction process begins with the SFPD's site approval process. The DTSC will assist the district with an assessment of any possible contamination, and, if necessary, with the development and implementation of a mitigation plan.

Department of Industrial Relations

The role of DIR in the school construction process is to enforce labor laws relating to contractors and employers.

The Labor Code[1] requires, prior to receiving a SFP fund release, a district to make a certification that a labor compliance program (LCP), that has been approved by the DIR, for the project apportioned under the SFP has been initiated and enforced if both of the following conditions exist:

- The district has a project which received an apportionment from the funding provided in Proposition 47[2] or Proposition 55; and,
- The construction phase of the project commences on or after April 1, 2003, as signified by the date of the Notice to Proceed.

The DIR provides a guidebook to assist districts in developing a LCP and has model LCPs available for view on its Web site at www.dir.ca.gov. The DIR also provides public works contract information regarding:

- LCP and the Labor Code
- Classification and Scope of Work
- Prevailing Wage Determination and Special Determination for a Specific Project
- Verification of the Status of an Individual Apprentice or an Apprenticeship Program

Questions regarding these matters and LCP approval may be directed to DIR at 415.703.4810.

[1] Refer to Labor Code, Section 1771.7

[2] Kindergarten-University Public Education Facilities Bond Act of 2002

Section 3

Project Development Activities

Introduction

The School Facility Program (SFP) provides funding to projects that are essentially through the design phase and are ready to begin construction. With the exception of certain advanced planning and site applications for financial or environmental hardship situations, applications for funding require plans approved by the Division of the State Architect (DSA) and by the California Department of Education (CDE). Applications for new construction funding may also require CDE approval of the project site. In most cases, a great deal of time, money, and effort has already been expended before the project ever reaches the Office of Public School Construction (OPSC). Most of the tasks involved in this section are not a part of the SFP and are not under the jurisdiction of the State Allocation Board (SAB). However, it is important that the district representative is aware of the options and requirements that may affect the district's project.

Establishing Eligibility

One of the first steps a district should consider in the school construction process is establishing eligibility for SFP funding on either a district-wide or high school attendance area basis. This will provide the district with the information needed to determine the possibility and scope of State funding assistance, the types of facilities needed, and the appropriate project site size. See Section 4, "Application for Eligibility" for more information about establishing eligibility.

Selecting Professional Services

The SFP grants include funding for many professional services related to the development of the school project. Some of the most obvious and commonly used services are provided by architects, civil and structural engineers, and construction managers. Under law, these professional services are different than the services provided by general contractors, painters, site grading subcontractors, and similar construction related work. Unlike construction contracts, professional service contracts are obtained through a qualifications-based selection process rather than a competitive bid process.

Because the design professional or other service provider will be engaged long before the application for project funding is submitted to the OPSC, it is critical district representatives are aware that professional services used on projects funded through the SFP must be obtained by a competitive selection process. Failure to do so can jeopardize the project funding.

The Competitive Selection Process

The SFP requires that applicant districts certify that contracts for the services of any architect, structural engineer, or other design professional that were entered into on or after November 4, 1998 for work on the

project were obtained through a competitive process. The term competitive does not mean that the selection has been bid, but rather that a formal qualifications-based selection process has occurred that resulted in the professional services contract.[1]

Neither the SAB nor the OPSC is qualified to interpret the Government Code requirements pertaining to the selection of professional services. The district is advised to seek legal counsel assistance to ensure that the process used fully complies with this requirement as well as other legal requirements[2] such as Disabled Veterans Business Enterprise requirements, and the Public Contract Code.

Eventually, the district will be required to certify that professional design services on the project were selected using a competitive process. This certification is made on the *Application for Funding* (Form SAB 50-04).

Compliance

The competitive selection requirement applies to a new construction or modernization project if:

- it is funded under the SFP, and
- professional services of an architect, structural engineer, or other design professional were used to complete the work in the project, and
- contracts for those services were signed on or after November 4, 1998.

Compliance with this requirement is very important. The law specifically mandates that the SAB shall not apportion funds to a district unless the competitive process for professional services has been used. If, during an audit at the project completion, it is determined that the competitive process was not used, the entire project grant could be found to have been attained illegally.

Districts that are unfamiliar with the process of hiring an architect should be aware that the American Institute of Architects (AIA) California Council has sample contracts available to assist districts. For more information, please contact the AIA at 916.448.9082.

Project Responsibilities

During the planning, design, and construction of a school facilities project, many individuals and firms come together to contribute to the project in specific ways. Unless responsibility is assigned by law, the decision about who should perform a given task generally rests with the district as owner. Frequently, however, the district may not be aware of the difference between the types of responsibilities, or even of the need to assign responsibilities and tasks related to the project. This lack of clarity may lead to a situation where a task is assigned to more than one individual or firm, creating a duplication of effort which can be wasteful and counterproductive.

As a result of this situation, a small working group was formed by the Joint Committee on School Facilities to address the issue. The Services Matrix is the result of the group's discussions (see Appendix 4, "Services Matrix"). District representatives may wish to consult the matrix to determine the responsibilities assigned to a project and to avoid duplication of effort.

[1] Section 11, commencing with Section 4525 of Division 5 of Title 1 of the Goverment Code.

[2] CEQA and Planning per Public Resources Code, Section 21151.2.

Cost Reduction

Helpful Hint:
The SAB publication on cost reduction is available on the OPSC Web site.

The SAB has developed cost reduction guidelines to assist school districts in reducing project construction costs. In April 2000, the SAB made available the *Public School Construction Cost Reduction Guidelines*. The guidelines are a compilation of hundreds of ideas introduced and discussed at a series of statewide meetings. The input into these guidelines comes from various sources, such as school district representatives, State agencies, architects, building industry representatives, construction managers, and consultants. The guidelines provide districts with ideas and new methods to contain and reduce costs and to maximize the return on expenditures. Along with cost reduction guidelines, other incentives within the program, such as the retention of savings, exist to promote efficiency in design and construction of school facility projects. (See Section 13, "Additional SFP Requirements and Features" for more information on project savings.) The *Public School Construction Cost Reduction Guidelines* are accessible on the OPSC Web site at www.opsc.dgs.ca.gov.

Design with Flexibility in Mind

The SAB approval is based on the plans and specifications that accompany the *Application for Funding* (Form SAB 50-04) and is full and final. Therefore, it is imperative that the apportionment is used for the scope of work contained in that specific set of plans.

When it comes to classrooms and minimum essential facilities (MEF), meaning libraries, gymnasiums, multi-purpose rooms, and toilets which are necessary and support the traditional classroom environment, there are limited circumstances where a project may deviate from the scope of work outlined in the plans that were included with the application and approved by the SAB (see "Change of Scope," in Section 13, "Additional SFP Requirements and Features," for more information on this topic). Because of this, it is extremely important to structure bids with flexibility so that projects can be modified in the face of positive or negative fluctuations in the bid climate or costs of materials. By including additive and deductive alternates in your plans and specifications, you will be able to handle both situations within the budget provided for your SFP project in a way that is consistent with SAB law and regulation.

Joint-Use Projects

The language in the law which creates the SFP requires that the applicant school district consider the joint use of core facilities. The SAB's *Public School Construction Cost Reduction Guidelines* contains a number of suggestions as to how a district might investigate such joint use possibilities. Grants received under the new construction program may be used to fund school facilities related joint-use projects. Typical joint-use projects include multi-purpose rooms, libraries, gymnasiums, or any other type of facilities that can be used by both the district and the community.

Propositions 55 and 1D provide funding for joint-use projects, specific criteria to access this funding was included in AB16 (Hertzberg) (see Section 8, "Joint-Use Projects" for more information).

Reusable Plans

The SFP requires the SAB to develop recommendations regarding the use of cost-effective, efficient, and reusable facility plans. Many districts have found that reusing some part or all of a school plan previously constructed in the district or in another district can lead to efficiencies in both the time required to prepare construction plans and the cost of constructing the facility. Such plan reuse is not always feasible, and, even when possible, may require considerable redesign work for the new site; however, in many circumstances the advantages can be significant.

To assist districts with exploring the feasibility of plan reuse for their new construction project, the SAB and the OPSC have developed an Internet-based "catalog" of plans that can be searched and browsed by anyone. The link on the OPSC Web site "Prototype School Designs," contains floor plans, renderings, and vital statistics for a number of projects ranging from complete schools to single classrooms and support buildings. Districts are encouraged to download information on any of the projects on the OPSC Web site without charge. Districts may then contact the architects responsible for the original projects to pursue adaptation of the facilities to their individual needs. Arrangements for use of the plans are made by the district with the design professional. Of course, all plans on the OPSC Web site are copyrighted by the designers or firms that submitted them. The SAB and OPSC do not participate in any way, except as a clearinghouse for plans of school facilities.

Project Financing

A district has several different options available to meet its 50 percent funding requirement for new construction and 40 percent funding requirement for modernization projects. Some financing mechanisms the district may consider are:

- General obligation bond funds
- Mello-Roos
- Developer fees
- Proceeds from the sale of surplus property
- Federal grants

Once a district has received a SFP apportionment and is ready for funds to be released on a project, they will need to certify on the *Fund Release Authorization* (Form SAB 50-05) that their contribution to the project has already been expended, is on deposit, or will be expended prior to the notice of completion for the project. (See Section 13, "Additional SFP Requirements and Features" for more information on the fund release process.)

Site Selection

The SFP provides that in addition to the basic grant for a new construction project, the district may also receive up to 50 percent of the cost of site acquisition (see Section 5, "New Construction Funding" or Section 10, "Financial Hardship"). In most cases, the district must have completed the process of identifying the site and must have approval of the site by the CDE prior to applying for site acquisition funding. Some separate site applications for financial or environmental hardships do not need this approval at the time of application. See further discussion under those topics in Section 5, "New Construction Funding". The identification and approval process falls under the jurisdiction and responsibility of agencies other than the SAB and the OPSC, and is therefore outside the scope of this guidebook. However, because the processes required can be a major factor in a timely application submittal for project funding, district representatives should be aware of some of the basic requirements for site selection as follows:

Identifying a Site

Selecting a site for a new construction project to be funded under the SFP is primarily a local process. The SAB has guidelines and regulations relating only to the funding limits related to site acquisition[3]. The CDE is given the authority in law to develop standards for school site acquisition related to the educational merit and the health and safety issues of the site. The CDE uses these standards to review a site and to determine if the site is an appropriate location for a school facility. The CDE approval is a requirement before the application for funding can be submitted to the OPSC and subsequently to the SAB for funding.

Site Approval

There are many components that make up the review and approval of a proposed school site. The CDE publication, *School Site Selection and Approval Guide*, addresses these components more completely than this guidebook can. Therefore, the district representative considering an application for a site under the SFP should consult the CDE or their publications. Contact information can be found in Appendix 1, "State Agency Contact Information."

[3] SFP Regulations, Sections 1859.74 through 1859.76.

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Section 4

Application for Eligibility

Introduction

The School Facility Program (SFP) provides State funding assistance for two major types of facilities construction projects: new construction and modernization. The process for accessing the State assistance for this funding is divided into two steps: an application for eligibility and an application for funding. Applications for eligibility are approved by the State Allocation Board (SAB) and this approval establishes that a school district or county office of education meets the criteria under law to receive assistance for new construction or modernization. Eligibility applications do not result in State funding. In order to receive the funding for an eligible project, the district representative must file a funding application with the Office of Public School Construction (OPSC) for approval by the SAB. See Section 5, "New Construction Funding" and Section 9, "Modernization Funding" for information on submitting applications for funding.

Helpful Hint:
Applications for eligibility may be filed in advance of applications for funding.

Applications for eligibility may be filed in advance of an application for funding, or the eligibility and funding requests may be filed concurrently at the preference of the district. In either case, an application for eligibility is the first step toward funding assistance through the SFP. The process must be done only once. Thereafter, the district need only update the eligibility information if additional new construction and modernization funding applications are submitted.

After the application for eligibility is reviewed by the OPSC, it is presented to the SAB for approval. The SAB's action establishes that the district has met the criteria set forth in law and regulation to receive State funding assistance for the construction of new facilities or the modernization of existing facilities. Throughout this section, references to the district also include a county office of education unless otherwise noted.

The discussions in this section are intended to describe the basic processes a district will encounter and use for establishing eligibility. Every possible situation cannot be dealt with in this overview. When preparing an application, the district representative should always contact the OPSC project manager to be sure that the district's approach is correct and will result in the most eligibility possible for State assistance. To learn more about the SFP, visit the OPSC Web site at www.opsc.dgs.ca.gov.

New Construction Eligibility

The underlying concept behind eligibility for new construction is straightforward. A district must demonstrate that existing seating capacity is insufficient to house the pupils existing and anticipated in the district using a five-year projection of enrollment. Once the new construction eligibility is determined, a "baseline" is created that remains in place as the basis of all future applications. The baseline is adjusted for changes in enrollment and for facilities added, and may be adjusted for other factors such as errors and omissions or amendments to the SFP Regulations. For a complete list of adjustments, refer to SFP Regulations, Section 1859.51. Except for these updates, the establishment of the eligibility baseline is a one-time process.

Establishing Eligibility on a District-Wide or High School Attendance Area Basis

Districts generally establish eligibility for new construction funding on a district-wide basis. For most districts this is the most beneficial method, and the vast majority of applications are filed in this manner. However, under certain circumstances, the district may have more eligibility if the applications are made on a High School Attendance Area (HSAA) basis using one or several attendance areas. This circumstance occurs when the building capacity in one HSAA prevents another from receiving maximum eligibility. For example, one attendance area may have surplus classroom capacity while another does not have the needed seats to meet the current and projected student enrollment. If the district were to file on a district-wide basis, there might be little or no overall eligibility, even though the students in one attendance are "unhoused" by the definitions established in the SFP. In this case, by filing on a HSAA, the eligibility would increase to allow construction of adequate facilities for the unhoused students.

The district may file using one high school attendance area, or at the district's option, it may combine two or more adjacent HSAAs, commonly called a "Super Attendance Area." In either case, the attendance areas must serve an existing, operating high school, and the district must demonstrate that at least one HSAA has negative eligibility at any grade level. Continuation or proposed high schools may not be used for this purpose. Once a district receives funding using a high school attendance area as the basis of its eligibility, it must continue to file future new construction applications on that basis for five years.

Eligibility Process

The SAB has adopted three forms to assist districts in collecting the information needed to establish eligibility. The following table outlines the three-step process a district uses to establish new construction eligibility:

Process for Establishing New Construction Eligibility

STEP	DOCUMENTATION	PURPOSE
1	Enrollment Certification/Projection Form SAB 50-01	Used to collect information about the district's current and historical enrollment and to project that data five years into the future.
2	Existing School Building Capacity Form SAB 50-02	Used to record all the teaching stations in the district that are adequate to house students.
3	Eligibility Determination Form SAB 50-03	Used to compare the information from the first two forms and to determine if the district is eligible for new construction or modernization grants.

The forms referred to in the table can be downloaded from the OPSC Web site at www.opsc.dgs.ca.gov in a format that allows them to be printed as blank forms or completed on the computer and printed for submission to the OPSC. An Excel spreadsheet titled *SAB 50-01, 02, 03 Combined Excel Worksheets* is also available on the OPSC Web site that will perform all the required calculations.

Step One—Enrollment Projections

It may take several years to take a new construction project from the initial determination of need to final completion of construction and occupancy. Because of this, the SFP provides a *projection* of enrollment five years into the future to determine eligibility for funding. The *Enrollment Certification/Projection* (Form SAB 50-01) is used to make this projection. This form assists the district with determining future needs, planning, arranging State and local funding, and constructing the project before the children to be served arrive. The method of projecting enrollment into the future involves using current and historical California Basic Educational Data System (CBEDS) enrollment data for the district. The data collected is then projected into the future for five years using a method known as a Cohort Survival Projection. A district can obtain CBEDS data from the California Department of Education (CDE).

A district may file on a HSAA basis utilizing one or more HSAA. If the district chooses to file an application on this basis the current and three previous years enrollment data in the HSAA or HSAAs (see section on High School Attendance Areas in this section) will need to be included on the Form SAB 50-01.

Once the district enters the required current and historical enrollment figures, the projection is done automatically on the Excel version of this form.

Supplemental Enrollment Figures. A district may supplement the cohort survival enrollment projection by the number of un-housed pupils that are anticipated as a result of dwelling units proposed to be built in the district or HSAA pursuant to approved and valid tentative subdivision maps. Essentially, districts that are experiencing unusual residential growth can factor in these additional students into the enrollment projection.

Helpful Hints:

- Make sure the maps being used are tentative tract maps, final maps or parcel maps (parcel maps can be used only for either apartment or condominium projects).
- Work closely with your local planning commission to ensure the maps are approved and valid.
- When reporting dwelling units on the Form SAB 50-01, be sure to reduce the number of proposed dwelling units by the number of homes that have been occupied or have had construction permits pulled that are twelve months or older from the date the permit was pulled.
- Use the dwelling unit spreadsheet provided on the OPSC Web site to ensure timely processing of the district's application.
- If you are unsure if you can include a tract map, or you have other evidence of approval not previously mentioned, please contact your Project Manager.

What is an Approved and Valid Tentative Subdivision Map? California State law provides a framework by which city or county planning authorities process residential development projects. Typically, this process begins at the Specific Map stage, then proceeds to the Tentative Tract Map stage and concludes at the Final Map stage. The OPSC recognizes that each city or county planning authority process may not entirely follow this process. However, State law requires a tentative subdivision map be approved and valid at the time of submittal for the purposes of augmenting the enrollment projection. The SAB and the OPSC will permit the use of the following maps to augment enrollment projections:

- » Tentative Tract Map
- » Final Map
- » Parcel Map—only when the construction involves an apartment complex or condominium building.
- » Other tract maps will be reviewed on a case-by-case basis.

Submittal Requirements. In order for districts to account for the additional students that will reside in new subdivisions represented by the maps listed above, a district will need to submit a Form SAB 50-01 and report the number of dwelling units to be constructed in the approved proposed subdivision. Additionally, the district must provide the approval dates of the maps by the local planning commission or approval authority; the number of dwelling units to be built in the subdivision; and one of the following:

- » an acceptable map with the local planning commission or approval authority stamp approving the map; or,
- » an acceptable map with the appropriate supporting documentation; or,
- » a spreadsheet listing all of the subdivisions reported on the Form SAB 50-01 with the appropriate supporting documentation.

When submitting supporting documentation it must include one of the following:

- » local planning commission or approval authority meeting minutes detailing the approval of the map; or,
- » a letter from the local planning commission or approval authority indicating that the tract map is approved and valid at the time of the submittal; or,
- » any other reasonable documentation from the local planning commission or approval authority that indicates the tract map is approved and valid.

The OPSC recognizes that local processes vary from county to county, thus the information provided from each planning authority varies. Districts still need to be aware that by signing the Form SAB 50-01, the district representative is certifying that the information provided meets the criteria set forth by law and regulation. If there is any confusion about the information provided by the planning authority, districts are encouraged to work with their project manager.

A yield factor from the various types of housing in the subdivision may be used to supplement the enrollment projection. As an alternative, the district may accept a state-wide average yield factor for calculation purposes. This factor is specified in the instructions on the Form SAB 50-01. Should the district wish to

use its own student yield factors, a copy of the district's study that justifies the student yield factors must be submitted with the Form SAB 50-01. The district's study should determine the elementary, middle and high school pupils generated by new residential units, in each category of pupils enrolled in the district. This study should be based on the historical student generation rates of new residential units constructed during the previous five years that are of a similar type of unit to those anticipated to be constructed in which the school district is located.

A supplement to the enrollment projection for proposed housing units is not available for county superintendent applications.

Small districts with current enrollment of less than 300 should be aware that they have an option for reporting their enrollment differently if it has decreased by more than 50 percent from the previous year enrollment. (For more information on using this option please refer to the Form SAB 50-01, Part A.)

Step Two—Existing School Building Capacity

The second part in determining the district's eligibility for new construction assistance is to document the capacity of the school district at the time the first application for eligibility is filed under the SFP. This capacity calculation is done only once. Districts may file capacity information on a district-wide basis or using a HSAA.

The Calculation of Capacity. The *Existing School Building Capacity* (Form SAB 50-02) is used to capture the information needed for the calculations, and the accompanying instructions give a detailed guide of how to complete the form. The Form SAB 50-02 is essentially a record of all the district's facilities. The SFP Regulations provide instructions on what spaces are to be included or excluded in the calculation of the district capacity.[1] It is important to understand that any project funded with local sources must be counted as existing capacity if the contract for construction of the project is signed before the original application for eligibility determination is made. There is an exception provided for projects if the contracts were signed between August 27, 1998 and November 18, 1998, and if the project did not have eligibility under the Lease-Purchase Program (LPP).

The process of calculating the districts' existing school building capacity is as follows:

1. The district completes a gross inventory of all spaces constructed or reconstructed to serve as an area to provide pupil instruction. The grade level of each classroom is also identified.
2. The gross inventory is adjusted by excluding certain spaces that are not considered available teaching stations under law or regulation. The classrooms remaining in the inventory are multiplied by a loading factor of 25 for elementary, 27 for middle and high school, 13 for non-severe, and 9 for severe classrooms to determine the pupil capacity.
3. A final calculation is done to increase the capacity by a specified amount if the district does not have a substantial number of students enrolled in multi-track year-round education. High school districts are not subject to this adjustment. The district may request a waiver from this adjustment from the CDE, School Facilities Planning Division.
4. A last adjustment occurs for those districts that receive Multi-Track Year-Round Education Operational Grants from the CDE. This increases the district capacity and reduces the final eligibility for the district in a number equivalent to the operational grants the district has most recently received from the CDE.

On-Site Reviews. The district must submit records of the teaching stations existing in the district or HSAA as part of the inventory process. These records generally consist of the following:

[1] SFP Regulations, Section 1859.30, "Gross Classroom Inventory."

» Diagrams of the facilities at each site in the district. These diagrams need not be highly detailed, but must include all permanent and relocatable classrooms at the site. Many districts use simple "fire-drill" maps for this purpose. The diagrams must be submitted with the application.
» Documentation supporting any exclusion claimed from the gross inventory. For instance, if the district claims that a portable is excluded because it has been leased for less than five years, a copy of the lease must be in the district's possession as supporting documentation.

Helpful Hints:
All of the OPSC worksheets are available on the OPSC Web site.

The district may wish to use an OPSC Site Analysis Worksheet to assist with recording all the classrooms in the gross inventory as well as recording the reasons for exclusions, if any. This document is not mandatory but may make the inventory process easier. It also streamlines the OPSC review of the eligibility application.

Step Three—Determining Eligibility

The last part in the new construction eligibility determination process is done on the *Eligibility Determination* (Form SAB 50-03). The existing school building capacity calculated in step two is subtracted from the enrollment projection determined in step one. The number of pupils left, if any, are considered "unhoused" for the purposes of the SFP. They represent the district's eligibility for new construction grant entitlement.

Eligibility Application Approval. Once the district has completed steps one through three, they are ready to submit the eligibility application package. The OPSC will conduct a preliminary review of the package to ensure that it is complete prior to adding the application to the workload list. A more detailed review will be completed prior to presentation to the SAB that may include an on-site visit to review the information included in the site diagrams. When the review is complete and the OPSC has validated the eligibility calculations, an item is presented to the SAB for consideration of approval.

In some cases, the OPSC may find that an application lacks required information. If this is the case, the district is asked to provide the needed information within a specified time. If the district is unable to comply, the application may be returned unprocessed. If this occurs, the district may resubmit the application at any time after the needed information is available.

Districts should review the SFP Application Submittal Requirements worksheet, located on the OPSC Web site, to ensure all required information is included with their application.

Alternative Enrollment Projection—AB 491, Chapter 710, Statutes of 2005 (Goldberg)

The most recent amendment to the SFP Regulations includes a provision for Alternative Enrollment Projections that can be used to supplement regular new construction eligibility determined by the Cohort Survival Projection. At the January 2006 meeting, the SAB approved the regulatory amendments and directed the OPSC to request approval of regulations from the Office of Administrative Law on an emergency basis.

This additional provision is available for school districts with two or more school sites each with a pupil population density greater than 115 pupils per acre for K–6 pupils and 90 pupils per acre for 7–12 grade pupils based on the 2004–05 school year enrollment. In addition, an applicant school district must demonstrate that it cannot meet its housing needs at the impacted school sites, after considering all existing eligibility mechanisms available from the Cohort Survival Projection.

School districts that meet the above criteria may submit a request for review of the Alternative Enrollment Projection method to the OPSC. Districts should conduct the projection in a way that best represents growth patterns of each district, and can use various data including, but not limited to, birth rates and census data. The request must include the minimum components described in SFP Regulations, Section 1859.40(b). Due to the complexity of the data that may be submitted, the law requires the Demographic Research Unit (DRU) of the Department of Finance to jointly review the Alternative Enrollment Projection methodologies with the OPSC.

Once the OPSC and the DRU approve the Alternative Enrollment Projection method, the OPSC will calculate the additional eligibility available to the district. Additional eligibility will be the difference between the Alternative Enrollment Projection and the cohort eligibility for the same enrollment reporting period, adjusted by the existing pupil capacity in excess of the projected enrollment according to the Cohort Survival Projection. In other words, alternative enrollment projection must offset any negative new construction eligibility determined under the "regular" method.

Once additional eligibility is determined, the district can utilize this eligibility on new construction projects that will relieve overcrowding, including but not limited to, the elimination of use of Concept 6 calendars, four track year-round calendars, or bussing in excess of 40 minutes. School districts may file new construction funding applications that utilize "regular" new construction eligibility as well as eligibility gained from the Alternative Enrollment Projection. The law provides up to $500 million from the remaining Proposition 55 new construction bond funds for projects that utilize Alternative Enrollment Projection eligibility.

Modernization Eligibility

Establishing eligibility for modernization in the SFP is more simplified than new construction. Applications are submitted on a site by site basis, rather than district-wide or HSAA, as is the case for new construction. To be eligible, a permanent building must be at least 25 years old and a relocatable building must be at least 20 years old. For purposes of determining the age of the building, the 20 year and the 25 year period shall begin 12 months after the plans for the building were approved by the Division of State Architect. In either case, the facility must not have been previously modernized with State funding. The district must also show that there are pupils assigned to the site who will use the facilities to be modernized. If the facility is currently unused, such as a closed school, it may also be eligible for modernization funding if the district intends to reopen it and assign students immediately.

Application Process

The SAB has adopted a single form to calculate modernization eligibility, the Form SAB 50-03. This is the same form used for new construction applications. It may be downloaded from the OPSC Web site in a format that allows it to be printed as a blank form or completed on a computer and printed for submission to the OPSC. In order to complete the Form SAB 50-03, the district representative will need a completed site diagram for the applicable school which contains the following information:

- The number of permanent classrooms.
- The number of portable classrooms.
- The ages of all permanent and portable classrooms.
- The grade level of each classroom, i.e., K–6, 7–8, 9–12, non-severe, or severe.
- The square footage for each enclosed facility on the site may be necessary (see paragraph below and the instructions on the Form SAB 50-03 for more information).

The instructions on the Form SAB 50-03 will guide the district through the process of calculating the eligibility at that site for modernization. If all the buildings are over 25/20 years old for permanent/relocatable buildings respectively and eligible for modernization, the grant eligibility is simply the number of children that are or can be housed at a site, whichever is less. However, for cases where there is a mixture of classrooms that are under and over the modernization age limits, two optional calculation methods are provided. One option is to count those facilities that are over the age requirement and the children that can be housed in them. The second option is to develop a ratio based on either the square footage or the number of classrooms by comparing the square footage of overage to underage buildings or the number of

overage to underage classrooms on the site. The ratio is then applied to the number of children enrolled at the site. If the district selects the option using a ratio of square footage, it will be necessary to provide the square footage information on the site diagrams as well.

Helpful Hints:
Did you know that the OPSC provides the current workload list on its Web site?

Eligibility Application Approval

Once the district has completed part three of the Form SAB 50-03, they are ready to submit the modernization eligibility application package. The OPSC will conduct a preliminary review of the package to ensure that it is complete before adding it to the workload list. A more detailed review will then be completed that may include an on-site visit to review the information included on the site diagrams. When the review is complete and the OPSC has validated the eligibility calculations, an item is presented to the SAB for consideration of approval.

In some cases, the OPSC may find that an application lacks required information. If this is the case, the district is asked to provide the needed information within a specified time. If the district is unable to comply, the application may be returned unprocessed. If this occurs, the district may resubmit the application at any time after the needed information is available. When the application is resubmitted it will be added to the workload list with the new receipt date.

Districts should review the SFP Application Submittal Requirements worksheet, located on the OPSC Web site, to ensure all required information is included with their application.

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Section 5

New Construction Funding

Introduction

After a district has established eligibility for a project as described in Section 4, the district may request funding for the design and construction of the facility. In most circumstances, the funding is approved after the district has acquired or identified a site for the project and after the plans for construction are approved by the Division of the State Architect (DSA) and the California Department of Education (CDE). The request for funding must be submitted prior to occupancy of any classroom in the construction contract for the project.

The funding for new construction projects is provided in the form of grants. The grants are made up of a new construction grant (pupil grant) and a number of supplemental grants. A brief description follows:

New Construction Grant. The new construction grant is intended to fund design, construction, testing, inspection, furniture and equipment, and other costs closely related to the actual construction of the school buildings. This amount is specified in law based on the grade level of the pupils served.

Supplemental Grants. Supplemental grants are special grants intended to recognize unique types of projects, geographic locations, and special project needs. These grants are based on formulas set forth in the School Facility Program (SFP) Regulations. There are many possible supplemental grants. All of them are discussed later in this section. Two of the most common are:

- Site Acquisition Grant—Funding for site purchase, relocation, escrow, and certain other site acquisition related costs.
- Site Development Grant—The cost related to preparing a site for construction, including grading and drainage. This grant also includes funding for certain off-site development items such as sidewalks, curbs and gutters, streets, and related improvements. General site work, such as onsite driveways, curbs and gutters, and parking are also allowable for new school projects and additions to existing school sites when additional acreage is acquired.

Each new construction project is reviewed and appropriate grants are applied by the Office of Public School Construction (OPSC). All new construction grants are matched equally by the district with local funding sources. In some cases, districts unable to contribute some or all of the local match may be eligible for financial hardship assistance. A district that intends to request financial hardship assistance, must obtain financial hardship status prior to submitting an application for funding. See Section 10, "Financial Hardship" for more information on this subject. Once the grants are determined for a project, a request is sent to the State Allocation Board (SAB) for a funding apportionment. After the apportionment is approved, the district may enter into a contract for the construction of the facility, if it has not already done so, and receive a release of the funds. To be eligible for funding, the new construction funding application must be submitted to the OPSC within 180 days of the district entering into a contract for construction of the facility.

In some cases, when a district has been approved for financial hardship assistance, the district may request a separate site or design apportionment. In this situation, the request may be made before plans are completed and approved by the DSA. Site and design funding is discussed later in this section. In addition, see Section 10, "Financial Hardship" for more information.

This section explains the funding application process, typical requirements, and how to determine the new construction grant amount. It is important to understand that the discussion in this section focuses on the most common situations. There are many variations that may apply to specific projects that can not be covered in this brief overview. As always, the district representative should meet with the OPSC project manager and discuss the district's plan in detail.

Available New Construction Funding

There are several types of funding requests that can be made under the new construction program. The district may request site and design apportionment separately when they meet Financial Hardship requirement or as a combined application when appropriate.

New Construction Adjusted Grant

A new construction adjusted grant is intended to provide the State's full share for all necessary project costs including the New Construction Grant (pupil grants), site acquisition, site utilities, off-site, and service site development. The new construction adjusted grant also includes applicable supplemental grants and adjustments as described later in this section. This grant is approved only after the site has been approved and the plans are also complete and fully approved.

Separate Design

Districts that qualify for financial hardship status may receive a separate apportionment for design costs. Design funding is intended to allow a district to hire an architect and prepare project plans for DSA approval. When the plans are complete and approved, the district may request the remaining new construction funding. The new construction adjusted grant will be reduced by the design apportionment previously made for the project.

Separate Site

Districts that qualify for financial hardship status may receive a separate apportionment for site acquisition. The site funding is intended to allow a district to acquire a site for the project. When the district is ready to request the remaining new construction funding, the new construction adjusted grant will be reduced by the site apportionment previously made for the project.

Separate Site—Environmental Hardship

If the Department of Toxic Substances Control (DTSC) certifies by letter that the time necessary to complete the remediation or removal of hazardous waste on the site to be acquired will exceed 180 days, the district may qualify as an environmental hardship. This means that the district is eligible for a separate apportionment for site acquisition, even though the district does not qualify as a financial hardship. More information is available in the SAB regulations and through the OPSC project manager.

Funding Process

After the district submits an eligibility application (see Section 4, "Application for Eligibility") the process of applying for funding is as follows:

- » the district submits a funding application package;
- » the OPSC reviews the package;
- » the SAB approves the apportionment;
- » the district requests a fund release and makes expenditures;
- » the district submits reports on expenditures;
- » the OPSC audits.

The application for new construction funding is made on a single form, the *Application for Funding* (Form SAB 50-04). The form serves as a vehicle to collect the information necessary to calculate the amount of grants applicable to the project, and also is a certification from the district regarding compliance with requirements of the law and the SFP Regulations. The district may submit the Form SAB 50-04 after the district has received approval by the CDE and the DSA of the proposed new construction project and the project site when applicable. In most cases, the district has determined its eligibility for new construction grants on the *Eligibility Determination* (Form SAB 50-03) before applying for funding. However, if the district has not established eligibility for the project previously, it may submit the eligibility package with the funding package.

The funding application is reviewed by the OPSC for completeness and placed on a statewide workload list in date received order. District representatives can view the workload list on the OPSC Web site at www.opsc.dgs.ca.gov. The applications for funding are then processed in date order for presentation to the SAB for consideration of an apportionment.

In some cases, the OPSC may find that an application lacks required information. The district is asked to provide the needed information within a specified time. If the district is unable to comply, the application may be returned unprocessed, and the district may resubmit the application at any time once the needed information is available.

When the SAB has no funds to apportion, the SAB will continue to accept and process applications based on the date the application is ready for apportionment. The applications will be placed on an unfunded list. An application for funding that is placed on an unfunded list is eligible for apportionment pending the availability of future funding. If the application is approved for a separate site apportionment for Environmental Hardship, the project will receive a date on the unfunded list based on the date the environmental hardship site apportionment was made for the project.

Preparing an Application

A complete application package is an essential element of the process of receiving funding for the district's projects. The information provided is the basis for determining the grant amounts that the district will receive. The following discussion outlines the major elements of a complete application for a new construction adjusted grant. Note that the same information is not necessary for all application types.

The complete application for new construction funding must be accepted by the OPSC prior to occupancy of any classroom in the construction contract for the project in order to be eligible for funding.

New construction and modernization funding applications require the Form SAB 50-04 and must be based on a previous eligibility approval or must have the eligibility application as a part of the package (see Sec-

tion 4, "Application for Eligibility"). Also, please note that districts requiring financial hardship assistance must receive that status before filing a funding application (see Section 10, "Financial Hardship" for further information). The table below delineates the supporting documents necessary for each type of new construction funding request.

New Construction Funding Required Documents

DOCUMENT	TYPE OF FUNDING			
	DESIGN ONLY	SITE ONLY	SITE AND DESIGN	CONSTRUCTION
Appraisal of property to be acquired when appropriate* (preliminary appraisal of property for separate site)		✖	✖	✖
Escrow closing statement or court order				✖
CDE approval of site* (contingent CDE approval of site for separate site)		✖	✖	✖
Final DSA plan approval				✖
CDE approval of plans				✖
Cost estimate for site development†				✖
Plan‡ and cost estimate for off-site development when funding is requested				✖

* If this document has been submitted previously, it need not be resubmitted.

† SFP Regulations, Section 1859.76, "Additional Grant for Site Development Costs."

‡ Plan must be approved by the local entity, see *Architectural Submittal Guidelines* for further information.

Helpful Hint:
When a district seeks SFP funding, the law stipulates that a district must hold title or an acceptable lease to all property acquired, constructed, or improved.

Application for Funding (Form SAB 50-04)

The Form SAB 50-04 serves as a vehicle for districts to request funding for design, site and/or construction for all new construction projects. The form provides the OPSC with specific project information to determine the new construction adjusted grant including, but not limited to the type of application; the grade level of the project; the number of pupils the project will house; whether or not a site is being acquired; and if any additional or supplemental grants are being requested. To complete the Form SAB 50-04 and to make the required certifications, the district representative will need at least the following supporting information:

Appraisal, Escrow Closing Statement, CDE Site Approval

An appraisal, escrow closing statement or court order, and CDE site approval letter are required if the application includes site purchase. If not, only the CDE approval letter may be required. The documents are described in detail under the heading "Site Acquisition" in the section titled "Supplemental Grants".

DSA-Approved Plans and Specifications

All new construction plans and specifications must be approved by the DSA. The DSA approval must be current and valid at the time of submittal of the application for funding to the OPSC. In addition, all final plans and specifications for new construction, modernization, or alteration of any school building for which the district is seeking State funding requires DSA approval prior to signing a construction contract. The DSA approval must be current and valid at the time of submittal of the application for funding to the OPSC. If a

district enters into a contract for construction prior to receiving DSA approval of the plans and specifications, the project may not be eligible for State funding. The date of the DSA approval letter, not the DSA stamp, is considered a valid approval. For more information, please refer to Education Code, Section 17072.30.

- As of October 2005, all funding applications must be accompanied by the DSA Final Plan Approval Letter.
- Plans should include all work eligible for funding through SFP and should be approved by DSA. If plans are submitted in AutoCAD format, a copy of DSA approval letter is required.
- Plans to be submitted include those for Site, Civil, City/County Street Development, Architectural (along with portable facilities), Structural, Electrical, Plumbing, Mechanical, and Landscape.
- New plans will not be accepted during the review process once OPSC acknowledged the School District Project Application as a complete package.

Cost Estimate for Site Development

A detailed cost estimate is required if the district is requesting additional grants for site development in its new construction funding application. For more information, please refer to the heading "Site Development" in the section titled "Supplemental Grants", discussed later in this section.

District Certifications

As previously mentioned, the Form SAB 50-04 is also an official certification to a number of SFP requirements. The form and the instructions to the form provide specific detail about the certifications; however, some of the issues to which the district representative will have to certify are as follows:

- The district has established a "Restricted Maintenance Account" (see Section 13, "Additional SFP Requirements and Features" for more information).
- Contracts for the services of an architect, structural engineer, or other design professional which were signed after November 4, 1998 were obtained pursuant to a qualifications based competitive process (see Section 3, "Project Development Activities").
- The district will fund their share of the project.
- If this request is for a large new construction or a large modernization project, the district has consulted with the career technical advisory committee established pursuant to Education Code, Section 8070, and it has considered the need for vocational and career technical facilities to adequately meet its program needs in accordance with Education Code, Sections 51224, 51225.3(b) and 52336.1.
- All large new construction funding applications for comprehensive high schools must be accompanied by evidence of compliance with Education Code, Section 17070.95. Documentation may include any of the following:
  - *Minutes from a public meeting by the school district's governing board documenting the discussion with and the recommendations of the local CTEAC regarding the CTE facility needs assessment.*
  - *Minutes from the meeting with the local CTEAC regarding the CTE facility needs assessment and recommendations.*
  - *Letter from the local CTEAC to the school district that identifies the subject of the discussion, the CTE facility needs assessment, and recommendations.*
- If the district is requesting an Additional Grant for Energy Efficiency pursuant to SFP Regulations, Sections 1859.71.3 or 1859.78.5, the increased costs for the energy efficiency components in the project exceeds the amount of funding otherwise available to the district.
- The district has or will initiate and enforce a Labor Compliance Program that has been approved by the Department of Industrial Relations, pursuant to Labor Code, Section 1771.7, if the project is funded from Proposition 47 or 55 and the Notice to Proceed for the construction phase of the project will be issued on or after April 1, 2003.
- Beginning with the 2005/2006 fiscal year, the district has complied with Education Code, Section 17070.75(e), by establishing a facilities inspection system to ensure that each of its schools is maintained in good repair (see Section 13, "Additional SFP Requirements and Features" for more information).

Finally, to reduce the need to submit extensive supporting documentation, the OPSC will ask that the architect of record or other design professional certify to the following:

» The date that the DSA approved the plans and specifications.
» That the cost estimate as submitted to the DSA for the work in the plans and specifications is at least 60 percent of the total grant provided by the total State and district matching share excluding any site acquisition costs provided.

CDE Approval of Final Plans

The plans submitted to the OPSC must have the approval of the CDE. The final plan approval letter from CDE must accompany the funding application.

New Construction Grant Amounts

The SFP was designed as a per-pupil grant program where each pupil, depending on the grade level, would receive a specific dollar amount. The new construction adjusted grant, at minimum, will consist of the new construction grant, which is prescribed in law relative to the grade level of the pupils. The grant can be increased by certain supplemental grants for which the district may be eligible. The following are the types of grants:

» New Construction Grant (pupil grants)
» Supplemental Grants

New Construction Grant

The new construction grant is intended to provide the State's share for necessary project costs including, but not limited to, funding for design, costs related to the approval of the plans and specifications by all required agencies, the construction of the buildings, general site development, educational technology, unconventional energy, change orders, tests, inspections, and furniture and equipment. The new construction grant does not provide for site acquisition, site utilities, off-site, and service site development as these costs vary due to location, size, topography, etc. The OPSC will review and determine these costs on a case-by-case basis, as discussed later in this section.

The new construction grant is based on the number of pupils in the project. There are a number of ways that the district can determine how many pupils will be assigned to a project, and therefore what the new construction grant will be. The most obvious way is by first determining the grade level of the project and then the number of classrooms to be included. Under the SFP, K–6 classrooms are loaded with 25 pupils, 7–12 classrooms are loaded with 27 pupils, severe classrooms are loaded with 9 pupils, and non-severe classrooms are loaded with 13 pupils. Assuming that the district has enough eligibility, it might decide to construct a ten-classroom addition along with bathrooms and other support facilities at an existing elementary school. The ten classrooms will house 250 children using the loading standards specified in the program. If the district has already established eligibility for at least that number of elementary students using the Form SAB 50-03, the district could request 250 grants for the project.

There may be a situation where the district may wish to ask for less grants than the classroom capacity of the project. For instance, the project described in the previous paragraph may be of relocatable construction and may be estimated to cost less than the amount of grants that would be generated by 250 students. The district may elect either of the following strategies:

» The district may reduce the grant request to fewer grants, yet still enough to completely fund the State share of the project. The advantage is that the district will retain the unused grants for a future project, perhaps at another site.
» The district may ask for all 250 grants, and use the grant amount not only to construct classrooms at the site, but also to construct other facility needs of the district at the site, such as administration, multi-purpose rooms, gymnasium, etc.
» The district may ask for all 250 grants, and use the savings from the project for other capital facilities projects in the district, provided the project is not receiving financial hardship assistance. The advantage to the district is that the project is built as planned, while other facilities needs are also met within the State funding for the original project. In this case, the district must ensure that the amount spent on the work in the plans and specifications for the original project equals at least 60 percent of the total State and local share of the project grants excluding any site acquisition costs provided. With this condition met, the district may use the savings on other district projects.

There are many variations on these approaches to determining grant amounts for a particular project. It is important that the district consult with the OPSC project manager to be sure that a specific approach is possible and within the guidelines of the law and regulations.

New Construction Grant Calculation

The new construction grant is determined by multiplying the pupils assigned to the project by the pupil grant established in law. The new construction grant is adjusted by the SAB annually (each January) based on the change in the Class B Construction Cost Index. The current amounts are as follows:

New Construction Basic Grant Amount

CLASSIFICATION	BASIC GRANT AMOUNT	COMMENTS
Elementary Pupil	$ 8,081	
Middle School Pupil	$ 8,546	Include grade six pupils if part of a 6–8 grade school.
High School Pupil	$10,873	
Special Day Class—Non-Severe	$16,095	
Special Day Class—Severe	$24,066	

The Special Day Class grant allowances are established at a level higher than basic new construction grant allowances as a means to cover building cost items such as enhanced or added electrical and plumbing fixtures, more accessible doors and grab bars, extra sinks, casework, restrooms, changing areas, living skills space and other facilities for students with exceptional needs.

Supplemental Grants

Supplemental grants are intended to recognize unique types of projects, geographic locations and special project needs. These grants are based on formulas set forth in the SFP Regulations. There are many possible supplemental grants as follows:

» Energy Efficiency
» Fire Code Requirements
» Geographic Location
» Labor Compliance Program

» Multi-level Construction
» New School Projects
» Project Assistance
» Replacement with Multi-Story Construction
» Site Acquisition
» Site Development
» Small High School Program
» Small Size Projects
» Special Education—Therapy
» Urban Locations, Impacted Sites, Security Requirements

The following is a brief explanation of the supplemental grants:

Energy Efficiency

A supplemental grant is available to districts with projects that have increased costs associated with plan design and other project components for school facility energy efficiency. The facilities in the proposed new construction project must exceed the nonresidential building energy efficiency standards as specified in Title 24, Part 6 of the California Code of Regulations by 15 percent. Current all energy efficiency funds have been exhausted. At the September 2006 SAB the remaining modernization energy funds were re-designated to fund the new construction energy projects.

Fire Code Requirements

The new construction grant will be increased for each pupil in a project that includes an automatic fire detection and alarm system. The current increase is as follows:

New Construction Grant Increase—Automatic Fire Detection and Alarm System

CLASSIFICATION	GRANT INCREASE
Elementary Pupil	$10
Middle School Pupil	$14
High School Pupil	$23

CLASSIFICATION	GRANT INCREASE
Special Day Class—Non-Severe	$30
Special Day Class—Severe	$44

The new construction grant will be increased for each pupil in a project that includes an automatic sprinkler system. The current increase is as follows:

New Construction Grant Increase—Automatic Sprinkler System

CLASSIFICATION	GRANT INCREASE
Elementary Pupil	$144
Middle School Pupil	$172
High School Pupil	$177

CLASSIFICATION	GRANT INCREASE
Special Day Class—Non-Severe	$305
Special Day Class—Severe	$454

The amounts shown above are the 50 percent State share and are adjusted annually in the same manner as the New Construction Grant.

Geographic Location

A supplemental grant is available to districts with projects that are located in areas of California that are remote, difficult to access, or lack a pool of contractors. A district may qualify and request an augmentation to the new construction grant due to their geographic location.[1]

Labor Compliance Program (LCP)

A labor compliance program, as specified by Labor Code, Section 1771.5, must be initiated and enforced for each project funded wholly or in part from Propositions 47 or 55 funds if the Notice to Proceed was issued on or after April 1, 2003. Additional funding is provided for these projects. The LCP grant is calculated on a sliding scale as follows:

Labor Compliance Program Grant

IF TOTAL PROJECT COST IS...		THEN THE TOTAL LCP COST IS...
AT LEAST	UP TO	
$ 0	$ 1 million	$ 16,000
$ 1 million	$ 2 million	$ 16,000 plus 0.016 multiplied by the amount over $1 million
$ 2 million	$ 3 million	$ 32,000 plus 0.0025 multiplied by the amount over $2 million
$ 3 million	$ 4 million	$ 34,500 plus 0.0015 multiplied by the amount over $3 million
$ 4 million	$ 6 million	$ 36,000 plus 0.0032 multiplied by the amount over $4 million
$ 6 million	$ 8 million	$ 42,400 plus 0.0031 multiplied by the amount over $6 million
$ 8 million	$13 million	$ 48,600 plus 0.0046 multiplied by the amount over $8 million
$13 million	$18 million	$ 71,600 plus 0.0044 multiplied by the amount over $13 million
$18 million	$48 million	$ 93,600 plus 0.0042 multiplied by the amount over $18 million
$48 million	N/A	$219,600 plus 0.004 multiplied by the amount over $48 million

The State's share will be 50 percent of the above result.

Multi-Level Construction

The SFP recognizes that districts face additional costs to construct multi-level school facilities on small sites. A supplemental grant is available for projects in densely populated areas, where site acquisition costs are high and land is scarce, to provide funds to alleviate and mitigate the impact of these small sites. If the useable site acreage for the project is less than 75 percent of the site size recommended by the CDE for the master planned project capacity, the new construction grant can be increased by 12 percent for each pupil housed in a multi-level building that will house pupils in all levels of the building.

[1] SFP Regulations, Section 1859.83, "Excessive Cost Hardship Grant."

New School Projects

Districts that will construct an entirely new school on a site without existing facilities may qualify for a supplemental grant. This grant is intended to provide funds to construct core facilities such as multi-purpose rooms, gymnasiums, libraries, kitchens, etc., for projects that have a minimal amount of classrooms, but not enough to generate a sufficient new construction grant to build these essential facilities. In March 2004, the SAB approved a separate new school allowance to meet the specific facility needs of alternative education schools, which are defined as community day, county community, county community day, and continuation high schools for the purposes of the SFP. The Alternative Education New School Allowance applies to all alternative education schools for which the plans and specifications were accepted by the DSA or after March 24, 2004. Please refer to the OPSC Web site for the current grant amounts.

Project Assistance

The SAB may provide additional project grants for project assistance to small school districts with enrollment of 2,500 pupils or less. The current additional grant of $5,168 may be used for costs associated with the preparation and submission of the SFP eligibility and funding applications, including costs related to support documentation such as site diagrams. The grant amount will be adjusted each year using the Class B index.

Replacement with Multi-Story Construction

As part of a SFP new construction project, a school district may demolish a single story facility and replace it with a multi-story facility on the same site. In addition to the new construction grant allowance, the SAB will provide a supplemental grant to fund 50 percent of the replacement cost of the single story facility(s) to be replaced provided that the site size is less than 75 percent of the recommended CDE site size, the pupil capacity at the site will be increased, the cost of the demolition and replacement is less than the cost of providing a new facility at a new site to house the increased pupil capacity, and the project has CDE approval.

Site Acquisition

The site acquisition grant can be used to acquire and develop new school sites or, under some circumstances, to reimburse or credit the district for a portion of the site acquisition costs originally borne by the district or in specific circumstances the current appraised value. Eligible costs for site acquisition are:

- Fifty percent of the lesser of the actual cost or the appraised value of the site.
- Fifty percent of the relocation cost.
- Two percent of the value of the site determined above, with a minimum of $25,000.
- Fifty percent of certain costs related to the DTSC review and oversight.
- Hazardous waste removal (within one and one half times the appraised value).

Note that if the district intends to use a site that was acquired in a priority one project under the Lease-Purchase Program (LPP), the OPSC will use the appraised value of the site as established under the LPP for the appraised value of the site under the SFP. The SFP apportionment will be offset by the LPP apportionment. A project that received site acquisition funds under the LPP as a priority two project is not eligible for site acquisition funds under the SFP.

Independent Appraisal Requirement. The district is required to submit one site appraisal with the Form SAB 50-04. A California licensed and duly-qualified appraiser must issue a current appraisal report for the proposed site using the Uniform Standards of Professional Appraisal Practice. The appraisal must be impartial and prepared for the district or its legal counsel.

The site must be appraised as if it were a clean site, safe from all contaminants in accordance with SFP Regulations, Section 1859.74.1, CDE guidelines, and Title 5, California Code of Regulations. The appraisal report must evaluate both the gross and net usable acreage and any severance damages.

Site improvements associated with grading the site to a mass graded or construction-ready condition without foundation or paving and proposed utilities stubbed to the site may be included in the appraisal. Other site improvements must be finished before close of escrow or 100 percent covered by a performance bond.

The appraisal date of valuation, or an update, may not predate by more than six months of the district's funding application to the OPSC. An SFP project which had the site funded as a LPP project shall use the value funded under the LPP.

DTSC Costs. Site acquisition costs may include up to 50 percent of the cost for the review, approval and oversight of the Phase One Environmental Site Assessment (POESA) and the Preliminary Endangerment Assessment (PEA). Note that these costs are prior to the actual clean-up costs, if any. Those costs may be included under some circumstances. See the paragraph entitled "Hazardous Waste Removal" below.

Hazardous Waste Removal. Site acquisition costs may be increased by up to one-half of the costs associated with the removal or remediation of hazardous waste on the site to be acquired. These costs may include the actual implementation of the response action required in the PEA, the cost of the preparation of the Response Action, and the cost for the DTSC review and oversight of the preparation and implementation of the Response Action. The increase in site acquisition may not exceed the difference between one and one half times the appraised value of the site as if no contamination existed and the actual cost of the contaminated site.

Relocation Expenses. Reasonable and necessary costs to relocate residential occupants and businesses from the proposed new school site, including purchasing fixtures and equipment, personal property, new machinery and equipment, and the installation of any improvements at the replacement residences or business locations are permitted as site acquisition costs.

Incidental Site and Hazardous Waste Removal for Leased Sites. If the application for funding includes a vacant leased site that was never used for school purposes, the site acquisition costs may be increased by up to one-half of the costs associated with the removal or remediation of hazardous waste on the site to be leased. These costs may include approved relocation expenses, the actual implementation of the Response Action required in the PEA, the cost of the preparation of the Response Action, and the cost for the DTSC review and oversight of the preparation and implementation of the Response Action. The increase in site acquisition may not exceed one and one half times the appraised value of the site determined by an appraisal made or updated no more than six months prior to the date the application was submitted to the OPSC.

Hazardous Waste Removal Required on an Existing School Site. Site acquisition funding may be available for the evaluation and response action in connection with hazardous substances at an existing school site in advance of submittal of the DSA approved plans.

Acquiring Title. Title to all property acquired, constructed, or improved with funds made available under the SFP must be held by the school district to which the SAB grants the funds. The title to the site need not be actually held by the district before funding; however, one of the following must be demonstrated:

- Purchase will be made from one or more private parties, companies, developers, or other entities, as evidenced by an escrow showing the pending transfer of ownership to the district.
- Court orders, especially orders of condemnation through the county court where the proposed new site lies, which include a Final Judgment, Stipulated Judgment and Order of Immediate Possession to allow occupancy, or Order of Prejudgement Possession.
- An escrow for the transfer of property in lieu of other legally required payments or fees due to the district. (Example: Districts sometimes obtain proposed new school site parcels from developers, with all or part of the "purchase" price comprised of the district forbearing from collecting school mitigation fees from the developers.)

Funding on Leased Land. The district may utilize leased sites with governmental agencies for certain specified periods of time. To receive new construction grants for facilities that are or will be located on real property leased by the district, the property must be leased from the federal government for a period of 25 years or another governmental agency for a period of 40 years. If the lease is with a governmental agency other than the federal government, a 30-year lease may be considered if there are no other educationally adequate sites available under a 40-year lease, the cost per year for a 30-year lease is not greater than a 40-year lease, or the district can provide satisfactory evidence to the SAB that a shorter term lease is necessary.

Site Development

In addition to the new construction grant, the SFP provides a supplemental grant for the purpose of developing the site where the project is to be located. Fifty percent of the site development costs are available for both new sites and for existing sites where additional facilities are being constructed with the exception of general site development. Funding for general site is allowable for new school projects and additions to existing sites, however, only when additional acreage is acquired. These development costs fall under four categories:

- Service site development improvements are performed within school property lines and may include eligible site clearance, rough grading, soil compaction, drainage, erosion control and multi-level, single level subterraean or under building parking structures. This portion of the site preparation is accomplished prior to the general site development and construction of buildings.
- Off-site improvements are located along the perimeter of two sides of the site including street grading and paving, storm drainage lines, curbs, gutters, sidewalks, and street lighting. These improvements are commonly dedicated for public use. If a district is requesting off-site improvements, the local entities having jurisdiction of areas where the off-site development is proposed must approve the related plans and specifications. These approved plans and specifications must be submitted to the OPSC at the time the application for funding is submitted.
- Utility service developments include improvements of water, sewer, gas, electric, and telephone from the closest existing utility connection.
- General site development includes onsite driveways, walks, parking, curbs and gutters, tennis/handball courts, running tracks, baseball, football, and soccer fields, etc. Funding for general site work is limited to $27,840 per usable acre plus a percentage of the base grant including specific additional grants (multi-level, automatic fire detection/alarm system, automatic sprinkler system, and excessive cost hardship grants). Districts receive a 6 percent increase for elementary and middle school projects and a 3.75 percent increase for high school projects.

It is important to understand that site development costs have restrictions on their use. The district representative should consult the SFP Regulations and the OPSC project manager if he or she is unsure if a particular item is an allowable cost before including the work in the project.

If a district is requesting a supplemental grant associated with site development on the Form SAB 50-04, verification must be submitted to support the request with the exception of general site development. To assist in gathering the supporting detail, the OPSC has developed a "Site Development Worksheet for Additional Grants" that is located on the OPSC Web site. The district may use this worksheet or similar method to submit this information to the OPSC.

Small High School Program

A supplemental grant is available for the construction of small high schools. The Small High School Program is a pilot program that will sunset on January 1, 2008 and is intended to fund small high schools with an enrollment of 500 pupils or less. Any new small high school may not be constructed where it would have otherwise been built due to sparse population in a geographical area and the applicant district must have a minimum of 500 pupil grants of new construction eligibility.

Small high school projects may be constructed on stand alone sites. Additionally, a small high school may be built on a site adjacent to an existing school, on the site of a large high school or on separate but adjacent sites sharing core facilities with the large high school. All small high schools funded from this program must have separate administrations and toilet area on the site.

Small Size Projects

A supplemental grant is available to districts with projects that house no more than 200 pupils. The grant is intended to provide additional funds for core facilities and to make up for the lack of economies of scale when districts build small projects. The new construction grant can be increased by 12 percent for a project that will house less than 101 pupils, or by four percent if the project will house over 100, but no more than 200 pupils.

Special Education—Therapy

The new construction grant will be increased for the area of therapy rooms, not to exceed 3,000 square feet, plus 750 square feet per additional Special Day Class classroom needed for severely disabled individuals with exceptional needs. The current unit cost per square foot of therapy area is as follows:

- $252 per square foot for toilet facilities
- $139 per square foot for other facilities

The amounts shown above are the 50 percent State share and are adjusted annually in the same manner as the new construction grant.

Urban Locations, Security Requirements and Impacted Sites

Districts with projects in urban locations on impacted sites may request a supplemental grant if all of the following conditions are met:

- The useable site acreage for the project is 60 percent or less of the site size recommended by the CDE for the net school building capacity for the project plus any existing enrollment at the site, if any.
- At least 60 percent of the classrooms in the project construction plans are in multi-story facilities.
- For new construction of a new school site, the value of the site being acquired is at least $750,000 per useable acre. This condition does not apply to new construction additions to existing school sites.

Urban locations on impacted sites are generally in areas of high property values or high population density, creating an environment difficult for districts to acquire ample real property, which causes increased project costs uniquely associated with urban construction. Districts with projects on these impacted sites are also faced with extra security requirements. The supplemental grant provides funds for security fences, watchpersons, increased premiums for insurance for contractors, and storage or daily delivery of construction materials to prevent theft and vandalism. If a district requests grants due to these circumstances, the OPSC will verify the district's eligibility pursuant to the CDE Final Plan Approval letter and by OPSC's review of the project construction plans and site appraisal.

If the above criteria are met, the urban supplemental grant is calculated on a sliding scale as follows:

New Construction Urban Grant Adjustment

IF...	THEN...
the useable acres are 60 percent of the CDE recommended site size, as described above...	the urban grant adjustment is 15 percent of the New Construction Grant and of the funding for additional grants for replaced facilities*, small size projects† and new school projects‡, and a 1.166 percent increase to the urban grant adjustment for each percentage decrease in the CDE recommended site size below 60 percent.

For new construction of a new school site, the adjustment shall not exceed 50 percent of the cost avoided with the purchase of a site smaller than the CDE recommended site size for the number of the pupil grants requested in the application§. This limit does not apply to new construction additions to existing school sites.

* SFP Regulations, Section 1859.73.2, "New Construction Additional Grant for Replaced Facilities"

† SFP Regulations, Section 1859.83(b), "Excessive Cost for Projects that House No More than 200 Pupils (Small Size Project)"

‡ SFP Regulations, Section 1859.83(c), "Excessive Cost to Construct a New School Project"

§ SFP Regulations, Section 1859.83(d)(2)(A), "Excessive Cost Due to Urban Location, Security Requirements and Impacted Site"

District Project Contribution

Every new construction application is a joint funding effort between the local school district and the State through the SFP. The State grant is discussed in the section entitled "New Construction Grant Amounts", earlier in this section. The total State grant represents 50 percent of the total project cost, with the district contributing the remaining 50 percent of the total project cost. The district contribution may come from virtually any source. The sole exception is that when savings from another SFP project is used as a match, the savings must be from a new construction project only. This restriction exists due to legal requirements pertaining to the bond funds, which the State uses as a program-funding source.

The district need not have the entire 50 percent local contribution on deposit at the time that the project apportionment is made. However, when the project fund release is requested, the district must certify that the district's matching share has been deposited in the County School Facility Fund; has been expended by the district for the project; or will be expended by the district prior to the Notice of Completion for the project. Thus the district has considerable flexibility in how the local share is arranged and contributed. The district representative should be aware, however, that regardless of when the share is contributed to the project, at closeout the district must be able to show that 50 percent of the expenditures on the project were from local sources. If the district is unable to demonstrate the 50 percent expenditure requirement has been met, the apportionment will be reduced.

Unable to Meet the Contribution

Districts that are unable to contribute the 50 percent local share of a project can pursue financial assistance through the financial hardship provisions of the SFP. Districts must submit financial data to the OPSC for pre-approval of financial hardship status (see Section 10, "Financial Hardship") before submitting a funding application. In addition, this pre-approval enables districts to request a separate apportionment for site acquisition and/or design costs, if necessary, any time after the application for eligibility determination has been filed and before its financial hardship status expires.

Effects of Reorganization

Districts who are affected by a reorganization election on or after November 4, 1998, may not file a funding application for new construction until after the notification of the reorganization election. If the district had established new construction eligibility prior to reorganization, it must adjust the baseline eligibility on the *Eligibility Determination* (Form SAB 50-03) prior to filing new applications. Alternatively, the district can choose to certify that the reorganization does not result in a loss of eligibility for the project requesting funding. Districts that are newly created by the result of a reorganization can submit a funding application after approval of the election by the CDE.

SAB Approval Process

The applications for funding are presented to the SAB for approval in the order of their OPSC receipt date. The SAB approval (action) can either be an apportionment or "unfunded" approval, depending on the availability of funds for new construction.

Fund Release

After the funding application is apportioned by the SAB, the next step in the process is the actual fund release to the County School Facilities Fund for use by the district.

The SFP grant is processed for release when the district submits a *Fund Release Authorization* (Form SAB 50-05). The Form SAB 50-05 submitted by the district is an important document that cannot be altered or modified by the OPSC. Therefore, an improperly completed Form SAB 50-05 will be returned with a letter of explanation to the school district for correction.

When a properly executed form is received, the OPSC sends a School Facilities Fund Release notification to the district representative and county office of education. The notification indicates the type of grant released, amount, school district, application number, school name, and date processed. In addition, the SFP Fund Release Report is posted monthly on the OPSC Web site. This report indicates the claim schedule number, the date the funds were released, and the dollar amount released.

It is important to understand that a Form SAB 50-05 must be submitted within 18 months of the SFP grant apportionment by the SAB, or the entire new construction or modernization grant will be rescinded without further SAB action. If this should happen, the pupils housed in the project will be added back to the district's eligibility and the district may re-file the application at any future time.

The Form SAB 50-05 can be downloaded from the OPSC Web site. The properly executed Form SAB 50-05 should be submitted to:

Office of Public School Construction
Accounting
1130 K Street, Suite 400
Sacramento, CA 95814

References

» California Code of Regulations, Section 6000, et seq.
» SFP Regulations, Section 1859.74, "Additional Grant for Site Acquisition" and 1859.74.1, "Site Acquisition Guidelines."
» SFP Regulations, Section 1859.83, "Excessive Cost Hardship Grant".

Section 6

Charter School Facilities

Introduction

In 2002, Article 12 in Assembly Bill (AB) 14, established a pilot program to provide charter schools with funding to construct new facilities, known as the "Charter School Facilities Program" (CSFP). With the successful passage of Proposition 47, this program received $100 million in bond funding. In 2004, Senate Bill 15 was passed to make revisions to the CSFP in order to maximize the number of projects funded with an additional $300 million in bond funding made available with the passage of Proposition 55. The most recent bill, AB 127, was passed in 2006 to further revise the CSFP and an additional $500 million was made available with the passage of Proposition 1D. The CSFP permits a charter school or school district filing on behalf of a charter to apply for a preliminary apportionment (reservation of funds) for the construction of new facilities and/or rehabilitation of existing district owned facilities that are at least 15 years old. To qualify for funding, a charter must be deemed financially sound by the California School Finance Authority (CSFA).

The preliminary apportionment for a CSFP project must be converted within a four-year period to an adjusted grant apportionment meeting all the School Facilities Program (SFP) criteria, unless a single one-year extension is granted.

Eligibility

To apply for funding under Proposition 47 and 55, the school district in which the charter is physically located must have had SFP new construction eligibility. Proposition 1D removed this requirement. Now, new construction eligibility is no longer required. However, the school district in which the charter school is physically located must certify to the number of district unhoused students a charter school will house in a new construction project. A charter school applying on its own behalf may apply once it has notified the superintendent and governing board of the district, where it is physically located, of its intent to apply in writing (with proof of delivery) 30 days prior to submitting the preliminary application to the Office of Public School Construction (OPSC). The notice to the district shall include the number of pupils the charter intends to house, a request that the school district certify to the number of the district's unhoused pupils that the charter project will house and a request that the district update its new construction eligibility for current enrollment.

The $100 million provided in Proposition 47 for the program was exhausted in July 2003. The next $300 million provided in Proposition 55 was exhausted in February, 2005. To apply for the funds made available with the passage of Proposition 1D, charter schools and districts must submit an *Application for Charter School Preliminary Apportionment* (Form SAB 50-09), to the OPSC by June 5, 2007. In addition, if funds become available through over reservation of preliminary apportionment or lease payments, the State Allocation Board (SAB) may establish additional application periods.

Application Process

A complete application is an essential element in the process of receiving a preliminary apportionment for the charter school or district's project. The information provided is the basis for determining the apportionment amounts that the charter school or district on behalf of the charter school will receive. The form provides the OPSC with the general project information to determine the future new construction or rehabilitation adjusted grant; the grade level of the project, the number of SFP pupils the project will serve, whether or not a site is to be acquired, and if any supplemental grants are requested.

The applicant will need to submit a Form SAB 50-09, and all other supporting documents (i.e., supporting historical documents for allowances requested on application, architect's drawing of existing facilities to be rehabilitated, etc.).

Once the OPSC receives the preliminary application, an initial review will be conducted to ensure that the pupil grants or rehabilitation square footage requested is commensurate with the project being built. In addition, the allowance requested on the application will be subject to review. In conjunction, the CSFA will be determining the financial soundness of the applicant. For further information regarding the criteria for financial soundness, please contact CSFA at www.treasurer.ca.gov/csfa.

For additional detail, please review the general and specific instructions on the Form SAB 50-09 and the application submittal requirements available on the OPSC Web site.

Funding Criteria

If the estimated total apportionment of all financially sound applicants approved by CSFA exceed the funds available, the SAB shall provide preliminary apportionments using the following criteria:

- Representative of the various geographical regions of the State.
- Representative of urban, rural, and suburban regions of the State.
- Representative of large, medium, and small charter schools throughout the State.
- Representative of the various grade levels of the pupils served by charter school applications.

Within each category above, preference is to be given to charters in overcrowded school districts, charters in low-income areas, not-for-profit charters, and for the use of existing district facilities. A preference points calculation system, based on the criteria set above, will be used in determining the projects that will be funded from each category. If more than one application is received that has the same criteria within a category, the SAB will fund based on which project has the highest preference points.

For the purposes of determining the preference points given for projects in overcrowded districts, the applicant will need to submit an *Enrollment Certification/Projection* (Form SAB 50-01), for the school district and any supporting documents required. An *Existing School Building Capacity* (Form SAB 50-02), and *Eligibility Determination* (Form SAB 50-03), will not need to be submitted unless the school district has not established new construction eligibility under the SFP. If the eligibility has not been established, the eligibility documents necessary to establish new construction eligibility will have to be submitted prior to the end of the filing period. (See Section 4, "Application for Eligibility.")

Preliminary Apportionment Components

The grants provided at the preliminary apportionment consist of the following:

NEW CONSTRUCTION	REHABILITATION
• Per Pupil base grant amount • Multi-level Construction Grant Amount • Site Acquisition • Site Development • Supplemental Grants • Inflator Factor	• Grant based on square footage • Elevators • Supplemental Grants • Inflator Factor

This amount shall then be the recommended preliminary apportionment for the proposed CSFP project presented to the SAB for a reservation of funds.

Preliminary Apportionment Determination for New Construction

To determine the funding for a new construction project, the preliminary apportionment would be divided into "construction" costs and "site acquisition" costs, as shown below:

CONSTRUCTION COSTS (FULL GRANT)	SITE ACQUISITION COSTS
• Base Grant • Multi-level Construction • Site Development • General Site Development • Small Size Project • Urban Allowance • Geographic Percentage Factor • Inflator Factor	• Site purchase • Site other 4 Percent • Hazardous Material Clean-up • Relocation and Department of Toxic Substance Control fees

Please see Section 5, "New Construction Funding," for a full explanation of the construction costs grants. The OPSC also has a calculator on its website for estimating the CSFP grant.

The current CSFP grant amounts are as follows:

CSFP Grant Amounts

CLASSIFICATION	CSFP PUPIL GRANTS (2007)
Elementary	$ 8,120
Middle School	$ 8,597
High School	$11,229

CLASSIFICATION	CSFP PUPIL GRANTS (2007)
Special Day Class—Non-Severe	$17,304
Special Day Class—Severe	$25,874

If a district requests a preliminary apportionment that includes a reservation for multi-level classroom construction, the CSFP pupil base grant will be increased by 12 percent to reserve the maximum allowance.

If the request for a preliminary apportionment includes estimated site development costs, the allowance shall be determined based upon either the State default amount of $70,000 per proposed net useable acre,

actual, or historical cost. The estimated site development cost shall be the amount for anticipated service-site, off-site and/or utilities for the project. For projects that are acquiring additional acreage, a general site allowance may be requested.

A district may request estimated excessive hardship costs for Geographic Location, Small Size Project or Urban Location, Security Requirements and Impacted Site.

The preliminary apportionment consisting of all applicable estimated allowances shall be increased by 32 percent in anticipation of cost increases in future years. The inflator factor is based upon the average per year Marshall Swift Class B Construction Cost Index. Site acquisition costs will not be subject to the inflator factor. This increase is not applicable to Proposition 55 apportionments.

Helpful Hint:
If you plan to file an application for the 2007 filing period, please contact your project manager for more information.

The preliminary apportionment for the estimated site acquisition shall be determined by the submittal of an appraisal or preliminary appraisal, when available. In addition, a separate allowance is available for toxic sites. The appraisal or preliminary appraisal should be made or updated no more than six months prior to the application submittal to the OPSC. In cases where a specific site has not been identified for the project, the median cost of the consummated sales transactions within the general location multiplied by the proposed net useable acreage to be acquired shall determine the property value reservation. In either case, the applicant must obtain a preliminary recommended site size letter from the California Department of Education (CDE). Before determining the median cost, the information for recorded sale transactions should be expressed in a per acre amount.

Additionally, the property value will be increased by four percent for title, escrow and survey fees. An allowance for estimated relocation and Department of Toxic Substance Control (DTSC) costs may be included.

Preliminary Apportionment Determination for Rehabilitation

The preliminary apportionment for a rehabilitation project and supplemental grants, if eligible, are shown below:

- Grant based on the square footage in the project
- Small Size Project
- Urban Allowance
- Geographic Percentage Factor
- Elevators
- Inflator Factor

The amount of funding will be determined by first adding the square footage of all the minimum essential facilities (multi-purpose room, library, gym or administration) and the square footage for the number of classrooms the charter school is entitled to use based on the State loading standards. The square footage in the project would then be multiplied by the current rehabilitation cost standard which is $140 per non-toilet area square foot and $252 for toilet square footage. This grant amount cannot exceed what a new construction project would receive based on the number and grade level of students to be served by the rehabilitation charter school project.

A district may request estimated excessive hardship costs for Geographic Location, Small Size Project, elevators or Urban Location, Security Requirements and Impacted Site.

The preliminary apportionment consisting of all applicable estimated allowances shall be increased in anticipation of cost increases in future years. The inflator factor is based upon the average per year Marshall Swift Class B Construction Cost Index.

Apportionment Conversion

The preliminary apportionment for a CSFP project must be converted within a four-year period to an adjusted grant apportionment meeting all the School Facilities Program (SFP) new construction program criteria required for such an apportionment, unless a single one-year extension is granted. A final apportionment request includes an *Application for Funding* (Form SAB 50-04) and all other documentation required for a complete adjusted grant application under the SFP provisions (see Section 5). At the time a new construction project is converted, the pupil request cannot exceed the number of pupils requested at the time of preliminary apportionment. Likewise, at the time a rehabilitation project is converted, the square footage cannot exceed the square footage requested at the time of preliminary apportionment.

Project Reductions/Increases

Once an application is submitted for a final apportionment, the project costs may be adjusted per the following:

Project Cost Adjustments

IF...	THEN...		
	PROPOSITION 47	PROPOSITION 55	PROPOSITION 1D
Preliminary apportionment sufficient to do project...	...project cost remains the same and final apportionment Board item will reflect preliminary apportionment amounts.		
Preliminary apportionment was more than needed...	...the overpayment shall be adjusted to reflect actual project costs on the final apportionment SAB item and the difference shall be returned to the unrestricted account to be used for other charter school facility purposes.		
Preliminary apportionment was insufficient and unrestricted funds remain in the account...	...a district may receive a project increase for eligible costs.	...the charter or district must come up with alternate means to complete the project. At the point of conversion, the preliminary apportionment amount will be the full and final apportionment.	...a district may receive a project increase for eligible costs.
Preliminary apportionment was insufficient and no unrestricted funds remain in the account...	...the preliminary apportionment amount will be the full and final apportionment. A district may elect to monitor the funds and wait until funds become available to convert the apportionment, provided it is before the four-year deadline.		...the preliminary apportionment amount will be the full and final apportionment. A district may elect to monitor the funds and wait until funds become available to convert the apportionment, provided it is before the four-year deadline.

Fund Release

Senate Bill 15 and AB 127 included provisions to allow advanced fund releases for site acquisition and separate design funding for the preliminary apportionments granted under Proposition 55 and Proposition 1D provided that the Charter School Agreements have been executed. The total advanced fund release for design funding can equal up to 20 percent of the preliminary apportionment total construction costs. The advanced fund release for site acquisition may be for up to the amount requested on the preliminary apportionment.

The CSFP provisions for a preliminary apportionment under Proposition 47 do not authorize any fund releases prior to submitting an application for final apportionment. Therefore, once a preliminary apportionment is received, all charter schools or districts on behalf of charter schools will need to ensure they can cover any costs incurred prior to filing an application for final apportionment.

Once a preliminary apportionment is converted to a final apportionment, the applicant has 18 months to apply for a fund release.

Closeout

When a CSFP project converts to a final apportionment, it will be subject to all SFP progress and auditing standards. A substantial progress report will be required at 18 months from the date the final apportionment was made. Annual expenditure reports will be required beginning one year from the date of the first fund release until the project is complete. The project is considered complete when 3 years elapse from the date of the final fund release for an elementary project, or 4 years for a middle or high school project, or when the school district declares the project complete, at which time final expenditure reports must be submitted. Any project savings must be returned to the State.

To learn more about the CSFP program, contact your OPSC project manager or visit the OPSC Web site at www.opsc.dgs.ca.gov.

Section 7

Critically Overcrowded School Facilities

Introduction

The Critically Overcrowded School Facilities (COS) program was created by Assembly Bill (AB) 16 (Hertzberg) in 2002 and is a significant addition to the School Facilities Program (SFP). The COS program permits school districts with critically overcrowded school sites, as determined by the California Department of Education (CDE), to apply for a preliminary apportionment (reservation of funds) for new construction projects to relieve overcrowding. The COS program's preliminary apportionment serves only as a reservation of funds for future State assistance in the form of grants. The preliminary apportionment for a COS project must be converted within a four-year period to a new construction adjusted grant apportionment meeting all the SFP new construction program criteria required for such an apportionment, unless a single one-year extension is granted.

Project Eligibility

A district with SFP new construction eligibility established as described in Section 4 and critically overcrowded school sites included on a list of source schools as determined by the CDE may apply for a preliminary apportionment for projects to relieve overcrowding. For information regarding the CDE Source School List contact Mr. Fred Yeager at 916.327.7148 or visit the CDE Web site at www.cde.ca.gov.

An *Application for Preliminary Apportionment* (Form SAB 50-08) may be submitted to the Office of Public School Construction (OPSC) between November 5, 2002 and May 1, 2003 for projects to be funded with the proceeds of the November 5, 2002 bond or 60 days prior to and 120 days after the 2004 direct primary election or the 2004 statewide general election as appropriate for projects to be funded with those bond proceeds. A critically overcrowded school facilities project must:

- Relieve overcrowding by increasing the pupil capacity of the district and may be either a stand alone new school project or an addition to an existing school site.
- Identify at least 75 percent of the proposed pupil occupancy of the project as coming from a source school(s).
- Be located within either the attendance area or a one-mile radius of an elementary source school ; or, for a secondary source school, within the attendance area or a three-mile radius. The CDE may grant a variance from the distance maximums if the district can demonstrate that the variance is necessary to adequately provide facilities for the identified source school pupils.

Source Schools

To qualify as a source school a school site utilizing the 2001/2002 California Basic Educational Data System (CBEDS) enrollment must have pupil density greater than 115 pupils per acre for grades Kindergarten to six and 90 pupils per acre for grades seven to twelve. The CDE is responsible for determining and maintaining the list of source schools. A district may report their school site information to the CDE by submitting

SFPD Form 4.16 (*Certification of School Site Net Useable Acres*). For a copy of the SFPD Form 4.16 and additional information regarding the CDE source school list, please visit the School Facilities section of the CDE Web site at www.cde.ca.gov.

Once included on the CDE source school list, determine a source school's pupil eligibility or Qualifying Pupils, by subtracting the school's site density at 150 percent of the CDE recommended pupils per acre from its latest CBEDS enrollment. The remainder is the number of Qualifying Pupils at the source school site, which may be used to meet the project eligibility requirements above. The source school Qualifying Pupils eligibility amounts will be tracked separately and adjusted for changes in future enrollment, site density, preliminary apportionments and rescinded apportionments.

Preparing An Application

A complete application is an essential element in the process of receiving a preliminary apportionment for the district's project. The information provided is the basis for determining the apportionment amounts that the district will receive. All applications must be based on a previous SFP new construction eligibility approval or must have the eligibility application as a part of the package (see Section 4, "Application for Eligibility"). Please note district's requesting financial hardship assistance must receive that status prior to filing an application (see Section 10, "Financial Hardship"). The Form SAB 50-08 serves as a vehicle for districts to request a preliminary apportionment for a new construction project. The form provides the OPSC with the general project information to determine the future new construction adjusted grant; the grade level of the project, the number of SFP and source school Qualifying Pupils the project will serve, whether or not a site is to be acquired, and if any supplemental grants are requested. To complete the Form SAB 50-08 the district representative will need some or all of the following information.

- Appraisal, Preliminary Appraisal, or Median Cost valuation of the property to be acquired.
- Relocation and Department of Toxic Substances Control cost documents.
- Cost Estimate for site development and approved site development and off-site plans (to substantiate actual or historical cost submittals).
- A copy of the certified CDE Source School List pages or CDE Source School certification letter.
- Copy of the latest information for the Source School(s) submitted approximately October 15th of each year to the California Department of Education to complete the California Basic Educational Data System (CBEDS).

For additional detail, please review the General and Specific instructions on the Form SAB 50-08 and the Application Submittal Requirements available on the OPSC Web site.

Preliminary Apportionment Components

A COS preliminary apportionment is intended to provide the estimated future State's share for all necessary project costs including site acquisition, site development and supplemental allowances. A district may request a preliminary apportionment for the following:

- COS Pupil Grants (New Construction Grant (per pupil) plus the increase for Fire Code requirements)
- Multi-level Classroom Construction
- Site Acquisition
- Site Development
- Project Increases
- Financial Hardship
- Inflation Factor

The COS Pupil Grant is calculated by multiplying the SFP pupils assigned to the project by the per-pupil grants established in law and the increase for Fire Code requirements. The COS Pupil Grants are adjusted by the State Allocation Board (SAB) annually (each January) based on the change in the Class B Construction Cost Index. The current COS grant amounts are as follows:

Current COS Grant Amounts

CLASSIFICATION	COS PUPIL GRANTS
Elementary	$ 8,091
Middle School	$ 8,560
High School	$10,896

CLASSIFICATION	COS PUPIL GRANTS
Special Day Class—Non-Severe	$16,125
Special Day Class—Severe	$24,110

If a district requests a preliminary apportionment that includes multi-level classroom construction, the New Construction Grant will be increased by 12 percent to reserve the maximum allowance.

The preliminary apportionment for the estimated site acquisition shall be determined by the submittal of an appraisal or preliminary appraisal, when available. The appraisal or preliminary appraisal should be made or updated no more than six months prior to the application submittal to the OPSC. In cases where a specific site has not been identified for the project; the median cost of the consummated sales transactions within the general location area multiplied by the proposed net useable acreage to be acquired shall determine the property value reservation. The proposed acquisition acreage amount must be compatible with CDE standards; and, before determining the median cost, the information for recorded sale transactions should be expressed in a per acre amount. In addition the property value will be increased by four percent for title, escrow and survey fees and by one-half for hazardous material/waste removal and remediation cost. An allowance for estimated relocation and DTSC costs may be requested, this will be based on either the State's default allowance of 21 percent of the property value, actual, or historical cost information.

If the request for a preliminary apportionment includes estimated site development costs, the allowance shall be determined based upon either the State's default amount of $70,000 per proposed net useable acre, actual, or historical cost. The estimated site development cost shall be the amount for anticipated service-site, off-site and/or utilities for the project.

A district may request estimated excessive hardship costs for Geographic Location, Small New School or Urban Location, Security Requirements and Impacted Site.

If the district has a valid financial hardship status for the COS project, the estimated State share amount shall be doubled to provide a reservation for the estimated district's matching share assistance. When the financial hardship review has determined that the district has contribution amounts, the preliminary apportionment amount will be reduced by that amount. However, before the preliminary apportionment is converted to a final apportionment, the district must re-qualify financial hardship status to determine its eligibility and contribution amount.

Apportionment Conversion

Converting a preliminary apportionment to a final apportionment request includes an *Application for Funding* (Form SAB 50-04) and all other documentation required for a complete new construction adjusted grant application under the SFP provisions (see Section 5, "New Construction Funding"). In addition, the pupils requested on the Form SAB 50-04 must be no less than 75 percent of and cannot exceed the number of pupils requested on the Form SAB 50-08. When a district converts the preliminary apportionment to a final apportionment the project must still be supported by SFP new construction eligibility; however, the Source School(s) Qualifying Pupil eligibility will not be re-evaluated. If the project is not currently supported by SFP new construction eligibility, Assembly Bills 2950 (Chapter 898, Statutes 2004) and 491 (Chapter 710, Statutes 2005) provide for an "alternative eligibility method", such as current enrollment, current residency data or a projection of residency data to justify the project. A school district requesting financial hardship status must qualify for that status and have all Capital Project Fund monies analyzed to determine if the school district is able to contribute toward its project.

Project Increases

When an application for final apportionment is made, that preliminary apportionment may be adjusted for increases only if there are sufficient reserve funds available in the COS facilities account to fund the increases. If reserve funds are not available, the increase amount will be placed on a "Final Apportionment Unfunded List" until such time that funds may become available within the COS facilities account to apportion the increases. However, if funds do not become available and the maximum time frame of five years has expired, the original preliminary apportionment becomes a full and final apportionment.

SAB Approval Process

If funds are insufficient to fully fund all of the preliminary applications received during an application filing period, the SAB shall first apportion to those projects that would house pupils from source schools with the highest density levels relative to the CDE standard.

Substantial Progress

Prior to converting a preliminary apportionment to a final apportionment, the district must report annually to the SAB on the progress of the COS project. The local governing school board must hold a public hearing annually discussing the progress toward completing the project. Included in the first annual report to the SAB, the district shall certify that the CDE has determined there is at least one approvable and adequate site for the COS project within the identified general location area. If the school district cannot certify to the approvable site, then the preliminary apportionment will be rescinded.

At the end of the fourth year, if a school district is unable to submit its application for final apportionment, it may apply for a single one-year extension provided that the COS project has a CDE contingent or final site approval and the final construction plans have been submitted to DSA for review and approval; or other evidence satisfactory to the SAB that substantial progress has been made towards completing the requirements for filing an application for final apportionment.

Fund Release

After completing the substantial progress requirements for the first annual report to the SAB, a district may request an advanced release of funds from a preliminary apportionment when certain criteria are met. An advanced fund release for design and/or site acquisition may be requested by districts with approved financial hardship status. If applicable, an advanced fund release for an enviromental hardship site aquisition may be requested for any project. Advanced fund releases may be requested by submitting a complete *Fund Release Authorization* (Form SAB 50-05). If the advanced request includes the release of funds for site acquisition, the district must also submit a Form SAB 50-08 to determine eligible costs. Once a preliminary apportionment is received, all districts will need to ensure they can cover any costs incurred, taking into account any advanced fund releases, prior to filing an application for final apportionment.

Closeout

When a COS project converts to a final apportionment, it will be subject to all SFP progress and auditing standards. A substantial progress report will be required at 18 months from the date the final apportionment was made. Annual expenditure reports will be required beginning one year from the date of the first fund release until the project is complete. The project is considered complete when 3 years elapse from the date of the final fund release for an elementary project, or 4 years for a high school project, or when the school district declares the project complete, at which time final expenditure reports must be submitted.

To learn more about the COS program, contact your OPSC project manager or visit the OPSC Web site at www.opsc.dgs.ca.gov.

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Section 8

Joint-Use Projects

Introduction

Senate Bill 15 amended the Joint-Use Program created by Assembly Bill 16 under the School Facility Program (SFP). Fifty million dollars was made available and partly apportioned in July 2003 for joint-use projects, and another $50 million was made available for apportionment at the August 2004 State Allocation Board (SAB), due to Proposition 55 passing in March 2004. These funds were partly apportioned in July 2005 and August 2006. An additional $29 million was made available for apportionment due to Proposition 1D passing in November 2006. Proposition 1D also provided the SAB authority to transfer up to $21 million in prior bond funds for the purpose of funding joint-use projects.

Qualifying projects will be submitted to the July 2007 SAB meeting for apportionment. If joint-use funds remain after the current funding cycle, they will be available for apportionment for qualifying joint-use projects at the July 2008 SAB meeting.

This program allows a school district to utilize funds from a joint-use partner to build a joint-use project the district would not otherwise be able to build due to lack of financial resources. There are two types of joint-use projects that the district may apply for, which are referred to as Type I and Type II.

A Type I joint-use project is part of a qualifying new construction project that will increase the size, creates extra cost, or does both beyond that necessary for school use of the:

- Multipurpose room
- Gymnasium
- Childcare facility
- Library
- Teacher Education facility

A Type II joint-use project is a stand-alone project or part of a modernization project located at a school site that does not have the type of facility or the existing facility is inadequate and will reconfigure[1] existing school buildings, construct new school buildings, or both to provide for:

- Multipurpose room
- Gymnasium
- Childcare facility
- Library

[1] Reconfigure means remodeling an existing school building within its current confines and/or the expansion of the square footage of the existing building and any necessary replacement of displaced classrooms or other Minimum Essential Facility (MEF). Reconfiguring an existing school building must not reduce the district's capacity or displace another MEF. An inadequate MEF must not be constructed to replace a reconfigured MEF. In any case involving the replacement of lost capacity or a minimum essential facility due to the reconfiguration of an existing building, the replacement must be a part of the plans submitted in support of the joint-use application, must occur concurrently, and cannot be part of a SFP new construction application.

» Teacher Education facility
» Pupil Academic Achievement facility[2]

The funding for joint-use projects is provided in the form of grants. With the exception of a Type I (Extra Cost), the grants are made up of a base grant and a number of supplemental grants. For a Type I (Extra Cost) project, the grant is a straight dollar amount based upon the cost estimate. The State share for a joint-use project is 50 percent of the eligible project costs, with the joint-use partner contributing a minimum of 25 percent of the eligible project costs and the district contributing 25 percent of the eligible project costs. If the district has passed a bond which specifies that the monies are to be used specifically for the joint-use project, the district may provide up to the full 50 percent local share.

The district must have joint-use eligibility and square footage eligibility (except for a Type I, Extra Cost) for the type of project they are applying for, before they can request joint-use funding. This section explains the eligibility requirements for each type of joint-use project, the funding application process, and how to determine the joint-use grant. This section focuses on the most common situations. Individual projects may have variations that are not covered in this section. The district representative is encouraged to contact the Office of Public School Construction (OPSC) project manager to discuss specific project details.

Project Eligibility

Before a district can submit an application for funding, the project must have project eligibility. Project eligibility is different for the two types of joint-use projects.

Type I Project Eligibility

To qualify as a Type I joint-use project, the district must meet the following criteria:

» The Joint-Use Partner is a governmental agency, an Institution of Higher Education, or a nonprofit organization.
» The project increases the size, creates extra cost, or does both for the:
  – *Multipurpose room*
  – *Gymnasium*
  – *Childcare facility*
  – *Library*
  – *Teacher Education facility*
» The district has entered into an approvable Joint-Use Agreement that meets the criteria of Education Code, Section 17077.42
» The joint-use project is part of a qualifying SFP new construction application
» The project has Square Footage Eligibility as specified in SFP Regulations, Section 1859.124 (except a Type I Extra Cost project)
» The facility is located at the school site of the SFP project
» The construction contract was executed after April 29, 2002
» The project has DSA approved plans
» The project has California Department of Education (CDE) approval of the plans

[2] Pupil Academic Achievement may be grandfathered in if the plans are accepted by the Division of the State Architect for review and approval prior to January 1, 2004.

Type II Project Eligibility

To qualify as a Type II joint-use project, the district must meet the following criteria:

- The Joint-Use Partner is a governmental agency, institution of Higher Education, or a nonprofit organization.
- The project reconfigures existing school buildings, constructs new buildings, or both to provide for the:
  - *Multipurpose room*
  - *Gymnasium*
  - *Childcare facility*
  - *Library*
  - *Teacher Education facility*
  - *Pupil Academic Achievement facility*[3]
- The district has entered into an approvable Joint-Use Agreement that meets the criteria of Education Code, Section 17077.42
- The project to reconfigure an existing building is part of a qualifying SFP modernization application located at the school site of the SFP project, or
- The project to reconfigure or construct a new school building is a stand-alone project located on the public K–12 school site
- The project has square footage eligibility as specified in SFP Regulations, Section 1859.124
- The school site does not have the type of facility or the existing facility is inadequate
- The construction contract was executed after April 29, 2002
- The project has DSA approved plans and CDE final plan approval if the project is part of a SFP modernization application, or
- The project has preliminary plans and CDE approval of the preliminary plans if it is a stand-alone project

Funding Process

Subject to available funds, applications are accepted for upcoming funding cycles from June 1st through May 31st each year.

A district may submit more than one application for each type. Type I Joint-Use projects are funded first and Type II Joint-Use projects are funded last. The district's first application within each type of joint-use project is ranked and funded with other district's first applications in date-received order. The district's second application is then ranked and funded with other district's second application in date-received order, and so on within each type of joint-use project, until funds are exhausted.

The following demonstrates the necessary steps for joint-use funding:

- The district submits an application for funding package
- The OPSC reviews the package
- The SAB approves and apportions the project in July
- The district submits DSA approved plans within one year from the date of apportionment (Type II Stand-Alone Project)
- The district requests a fund release and makes expenditures
- The district submits reports on expenditures
- The OPSC audits

[3] Only if plans and specifications were accepted by DSA prior to January 1, 2004.

The district must apply for joint-use funding on the *Application for Joint-Use Funding* (Form SAB 50-07). The Form SAB 50-07 not only provides the OPSC with the specific joint-use information such as type of joint-use project and square footage eligibility, but it also serves as a certification by the district that they meet specific criteria of the law and regulations.

The funding package will be reviewed by the OPSC for completeness and placed on a statewide workload list. District representatives can view the workload list on the OPSC Web site at www.opsc.dgs.ca.gov. If during the initial review, it is determined that information is missing, the district will be notified and given a timeframe to respond to the OPSC's request. In the event the OPSC does not receive the requested information within the given timeframe, the application will be returned to the district. The district may resubmit the application at anytime within the filing period, when they have all the components of a complete application.

Applications will be approved until there are no funds available. In this instance, all applications that do not receive funding will be returned to the district, and the district may resubmit the application in subsequent filing periods.

Preparing An Application

The following chart lists the supporting documents for each type of joint-use project that must be submitted with the Form SAB 50-07:

Joint-Use Funding Required Documents

	TYPE OF FUNDING		
DOCUMENT	TYPE I	TYPE II Part of SFP Modernization Project Reconfigure Existing School Buildings	TYPE II Stand-Alone Project Reconfigure/Construct New School Buildings
Joint-Use Agreement	✖	✖	✖
DSA Approved Plans	✖	✖	
Preliminary Plans			✖
CDE preliminary plan approval			✖
CDE final plan approval	✖	✖	
Cost estimate for site development	✖	✖	✖
Cost estimate for facility being built*	✖		

* If the project is for a Type I, Extra Cost

Joint-Use Grant Amounts

With the exception of a Type I project for Extra Cost, the joint-use grant will consist of a base grant for toilet and non-toilet facilities, which can be increased by certain supplemental grants. As of the date of this guidebook, the base grant is $252 per square for toilet area and $139 per square foot for non-toilet area. The grant amounts will be adjusted each year using the Class B index. Each project has a maximum state contribution of $1 million for an elementary school, $1.5 million for a middle school, and $2 million for a high school.

Supplemental Grants

The district can increase the joint-use grant with certain supplemental grants. The following is a brief explanation of the supplemental grants under the Joint-Use Program:

Geographic Location. A supplemental grant is available to projects located in areas of California that are remote, difficult to access, or lack a pool of contractors. The augmentation to the joint-use grant due to their geographic location can be found in Regulation Section 1859.83 (a).

Project Assistance. For a Type II stand-alone joint-use project, the SAB may provide additional project grants for project assistance to small school districts with enrollment of 2,500 pupils or less. The additional grant of $5,168 (as of the date of this guidebook) may be used for costs associated with the preparation and submission of the funding application. The grant will be adjusted each year using the Class B index.

Site Development. A supplemental grant is provided for the purpose of developing the site where the project is located. If the joint-use project is linked to a new construction project and site development costs are not covered under the new construction application because the site development is specific to the joint-use project, the district may apply for the site development under the joint-use project. If the joint-use project is a stand-alone project, the district may apply for applicable site development costs that pertain to the joint-use facility. Fifty percent of the following site development costs may be available for joint-use projects:

- Service site development improvements are performed within school property lines and may include site clearance, rough grading, soil compaction, drainage, and eligible erosion control. This portion of the site preparation is accomplished prior to the general site development and construction of buildings.
- Utility service development includes improvements of water, sewer, gas electric, and telephone from the closest existing utility connection to the project site meter or major building lateral location.

Off-site development is not an allowable expenditure under the Joint-Use Program.

Small Size Projects. A supplemental grant is available to districts with projects that house no more than 200 pupils. The grant is intended to provide additional funds for core facilities and to make up for the lack of economies of scale when districts build small projects. The joint-use grant can be increased by 12 percent if the qualifying new construction or modernization project is linked to houses less than 101 pupils, or four percent if the qualifying new construction or modernization project is linked to will house over 100, but no more than 200 pupils. If the project is a Type II stand-alone joint-use project, the district is entitled to an eight percent increase to the grant.

Type II Joint-Use Grant. A Type II joint-use project cannot have an existing facility or the existing facility must be inadequate. A facility is considered inadequate when the square footage of the existing facility is less than 60 percent of the square footage entitlement shown in the Chart of Square Footages in Regulation Section 1859.124.1. A Type II joint-use project must have square footage eligibility. If the existing facility meets the test of being inadequate, or there is not an existing facility, then the square footage eligibility for a Type II joint-use project is the amount determined using the Chart of Square Footages.

Once the square footage eligibility for a Type II is established, the grant can be determined. The base grant is calculated by adding the following:

» $252 for Toilet Square footage in the facility
» $139 for Non-toilet Square footage in the facility
» Fifty percent of applicable supplemental grants

If the district is building area beyond their square footage eligibility, the OPSC will prorate the grant by determining the percentage of the whole facility that represents the joint-use project, and the grant will be determined using that percentage.

Type I Joint-Use Grant (Extra Cost). There is no square footage eligibility for a Type I that contains Extra Cost of the facility. The grant for a Type I Extra Cost can be determined by taking 50 percent of the construction cost of the whole joint-use facility and any applicable service site development costs, and subtracting the base grant amounts of $252 for toilet area in the project and $139 for non-toilet area in the project. The difference is the extra cost.

Type I Joint-Use Grant (Increased Size). A Type I joint-use project that increases size must have square footage eligibility. The first step in determining the grant is to determine the square footage eligibility. The square footage eligibility for a Type I joint-use project that increases the size of the project is calculated by first determining what size facility the district is entitled to based upon the CBEDS and the Chart of Square Footages, located in Regulation Section 1859.124.1. Then simply subtract this amount from the actual square footage being built, and the difference is the square footage eligibility.

Once the square footage eligibility for a Type I is established, the grant can be determined. The first step in determining the grant is to take the square footage eligibility and divide it by the total square footage of the facility being built. This will determine the percentage of the whole joint-use facility that the increased size represents. The base grant then is calculated by multiplying this amount by:

» $252 for Toilet Square footage in the facility
» $139 for Non-Toilet Square footage in the facility

In addition to the above, the project may be eligible for 50 percent of applicable supplemental grants.

Type I Joint-Use Grant (Increased Size and Extra Cost). In some instances, a Type I project may be for both increased size and extra cost. The grant for a Type I project that increases the size and contains extra cost shall be calculated in the following manner:

» Start with the architect's cost estimate to construct the facility.
» Subtract the cost to build the standard size facility that the district would be entitled to based upon the Chart of Square Footages. Since this project is built beyond the standard size facility, first divide the square footage determined from the Chart of Square Footage, by the total joint-use facility. This amount will determine the percentage of the whole facility that represents the standard size facility the district would otherwise be eligible for. Once this amount is determined, multiply this amount by the toilet facility area and by $252 and by the non-toilet facility area and by $139. This amount then becomes the amount to build the standard size facility.
» The difference is the grant amount for increased size and extra cost.
» Add any applicable service site costs.

Urban Locations, Impacted Sites, Security Requirements. Districts with projects in urban locations, on impacted sites, or in areas with security issues, may request a supplemental grant. Contact your project manager for qualifying information.

Joint-Use Partner Project Contribution

The State and local contribution to a joint-use project remains 50/50. However, the Joint-Use Partner contribution has been reduced to a minimum of 25 percent of the eligible joint-use project costs with the remaining local contribution coming from any other district source that would not otherwise be available to the SAB. The district need not have the entire 25 percent joint-use partner contribution on deposit at the time that the project approval is made. However, when the project fund release is requested, the district must certify that the joint-use partner's matching share has been deposited in the County School Facility Fund; has been expended by the district for the project; or will be expended by the district prior to the Notice of Completion for the project. The district representative should be aware that regardless of when the share is contributed to the project, at closeout the district must be able to show that 25 percent of the expenditures on the project were from funds provided by the joint-use partner, unless the district has passed a local bond which specifies that the monies are to be used specifically for the joint-use project, then the district can opt to pay up to the full 50 percent local share of eligible costs. The State share will always be a maximum of 50 percent of the eligible project costs. If the district is unable to demonstrate the expenditure requirement, the apportionment will be reduced. Financial Hardship assistance towards the matching share for Financial Hardship districts will not be provided by the State.

If there are project costs beyond the eligible project costs, those costs can be paid by the district, joint-use partner, or any other local source.

Fund Release

After the funding application is approved and apportioned by the SAB, the next step in the process is the fund release to the County School Facilities Fund for use by the district.

The joint-use grant is processed for release when the district submits a *Fund Release Authorization* (Form SAB 50-05). The Form SAB 50-05 submitted by the district is an important document that cannot be altered or modified by the OPSC. Therefore, an improperly completed Form SAB 50-05 will be returned with a letter of explanation to the school district for correction.

When a properly executed form is received, the OPSC sends a School Facilities Fund Release notification to the district representative and county office of education. The notification indicates the type of grant released, amount, school district, application number, school name, and date processed.

It is important to understand that a Form SAB 50-05 must be submitted within 18 months of the joint-use grant apportionment by the SAB, or the grant will be rescinded without further SAB action. The only exception to this is if the joint-use project is a Type II (stand-alone project). If it is a Type II (stand-alone) joint-use project, the district has one year from the apportionment date to submit final DSA approved plans. Once the DSA approved plans are received by the OPSC, the district will have 18 months from that date to submit the Form SAB 50-05, or the grant will be rescinded without further SAB action.

The Form SAB 50-05 can be downloaded from the OPSC Web site. The properly executed Form SAB 50-05 should be submitted to:

Office of Public School Construction
Accounting
1130 K Street, Suite 400
Sacramento, CA 95814

References

» Education Code, Section 17077.42
» SFP Regulations, Section 1859.124.1, "Square Footage Facility Chart."
» SFP Regulations, Section 1859.83 (a), "Excessive Cost Hardship Grant, Excessive Cost due to Geographic Location."

Section 9

Modernization Funding

Introduction

The School Facility Program (SFP) provides funding assistance to school districts for the modernization of school facilities. The assistance is in the form of grants approved by the State Allocation Board (SAB), and requires a 40 percent local contribution. A district is eligible for grants when students are housed in permanent buildings 25 years old or older and relocatable classrooms 20 years old or older and the buildings have not been previously modernized with State funds. The grant amount is increased and funding for specific utility upgrades is allowed if permanent buildings to be modernized are 50 years old or over. See Section 4, "Application for Eligibility."

The modernization grant (pupil grant) amount is set in law and is based on the number of students housed in the over-age facilities. In addition to the basic grant amount, a district may be eligible for supplemental grants depending on the type and location of the project. In some cases, districts unable to contribute some or all of the local match may be eligible for financial hardship. See Section 10, "Financial Hardship" for more information on this subject. Once the grants are determined for a project, a request is sent to the SAB for a modernization adjusted grant apportionment.

The modernization grant can be used to fund a large variety of work at an eligible school site. Air conditioning, insulation, roof replacement, as well as the purchase of new furniture and equipment are just a few of the eligible expenditures of modernization grants. A district may even use the grants to demolish and replace existing facilities of like kind. However, modernization funding may not be spent for construction of a new facility, except in very limited cases generally related to universal design compliance issues, or for site development.

This section explains the funding application process, typical requirements, and how to determine the modernization adjusted grant amount. It is important to understand that the discussion in this section focuses on the most common situations. There are many variations that may apply to specific projects that can not be covered in this brief overview. As always, the district representative should meet with the Office of Public School Construction (OPSC) project manager and discuss the district plan in detail.

Available Modernization Funding

There are two types of funding applications which may be made under the modernization program:

Modernization Adjusted Grant. A modernization adjusted grant is intended to provide the State's full share for all necessary project costs. In a typical project, a modernization adjusted grant includes the modernization grant (pupil grant) and any applicable supplemental grants as described in this section under "Supplemental Grants".

Separate Design. A separate design apportionment is available for districts that qualify for financial hardship. This apportionment represents 25 percent of the modernization grant[1]. Separate design funding is intended to allow a district to hire an architect to prepare the project plans for Division of the State Architect (DSA) approval. When the plans are complete and approved, and the district is ready to request the remaining modernization adjusted grant, it will be reduced by the design apportionment previously made.

Funding Process

After applying for and receiving approval of modernization eligibility, the process of applying for funding is as follows:

- » the district submits a funding application package;
- » the OPSC reviews the package;
- » the SAB approves the apportionment;
- » the district requests a fund release and makes expenditures;
- » the district submits reports on expenditures to the OPSC;
- » the OPSC audits.

The application for modernization funding is made on a single form, the *Application for Funding* (Form SAB 50-04). The form serves as a vehicle to collect the information necessary to calculate the amount of grants applicable to the project, and also is a certification from the district regarding compliance with requirements of law and the SFP Regulations. The district is ready to submit the application for funding after receiving approval by the California Department of Education (CDE) and the DSA of the plans for the proposed modernization project. In most cases, the district has determined its eligibility for modernization grants on the *Eligibility Determination* (Form SAB 50-03) before applying for funding. However, if the district has not established eligibility for the project previously, it may submit the eligibility application with the funding application (see Section 4, "Application for Eligibility").

The funding application is reviewed by the OPSC for completeness and placed on a workload list by date order received. District representatives can view the status of projects from the workload list that can be found on the OPSC Web site at www.opsc.dgs.ca.gov. The funding applications are then processed in date order for presentation to the SAB for consideration of apportionment. Note that at this time, the OPSC will reduce the funding request by the amount of previous apportionments to the project made under the SFP or Lease-Purchase Program (LPP).

In some cases, the OPSC may find that an application lacks required information. If this is the case, the district is asked to provide the needed information within a specified time. If the district is unable to comply, the application may be returned unprocessed. If this occurs, the district may resubmit the application at any time after the needed information is available. When the application is resubmitted it will be added to the workload list with the new receipt date.

When the SAB has no funds to apportion, the OPSC will continue to accept and process applications based on the date the application is received. The SAB will approve the application for placement on an unfunded list. An application for funding that is placed on an unfunded list is eligible for reimbursement pending the possible availability of future funding.

[1] SFP Regulations, Section 1859.81.1, "Separate Apportionment for Site Acquisition and Design Cost."

Preparing An Application

A complete application package is an essential element of the process of receiving funding for the district's project. The information provided is the basis for determining the grant amounts that the district will receive. The following discussion outlines the major elements of a complete application. This information is not necessary for a separate design funding request, unless noted.

All applications require a complete Form SAB 50-04 and must be based on a previous eligibility approved or must have the eligibility approved as part of the package (see Section 3, "Project Development Activities"). Eligibility for 50 year old buildings is not separate from the other eligibility at the site. If the district is requesting increased funding for pupils housed in 50-year old buildings, site diagrams with the ages and square footages of the buildings in the project must be provided with the application package. Also, please note that districts requiring financial hardship assistance must receive that status before filing a funding application (see Section 10, "Financial Hardship"). To complete the Form SAB 50-04 and to make the required certifications, the district representative will need at least the following supporting information.

Final DSA Approved Plans and Specifications

Education Code Section 17072.30 requires DSA approval of all final plans and specifications for new construction, modernization, or alteration of any school building for which the district is seeking State funding. If a district enters into a construction contract prior to receiving DSA approval of the plans and specifications, the project may not be eligible for State Funding. The date of the DSA approval letter, not the DSA stamp, is considered a valid approval. The DSA approval must be current and valid at the time of submittal of the application for funding to the OPSC. Plans should include all work eligible for funding through the SFP. If plans are submitted in AutoCAD format, a copy of the DSA approval letter is required.

- As of October 2005, all funding applications must be accompanied by the DSA Final Plan Approval Letter.
- Submit all plans necessary to substantiate modernization work. In addition, submit plans for work associated with excessive cost hardship requests listed on the Application for Funding (Form SAB 50-04) for rehabilitation/mitigation, accessibility, fire code, and elevators.
- It is acceptable to submit the specifications on a diskette that is IBM compatible.

Assessibility/Fire Code Requirements Checklist

This completed checklist must be submitted to the DSA when submitting projects that contain access compliance and/or fire code work. Once the checklist has been signed by the DSA, as part of the plan approval process, districts must submit it to the OPSC as part of its complete application package.

Cost Estimate

A complete construction cost estimate signed by the architect or design professional is required for the modernization project. The construction cost as submitted to the DSA must equal at least 60 percent of the total project cost (district and State share).

CDE Plan Approval Letter

The CDE must approve plans for modernization projects before they can be considered for funding under the SFP. The district should contact the School Facilities Planning Division (SFPD) of the CDE as early as possible in the planning process.

District Certifications

As previously mentioned, the Form SAB 50-04 is also an official certification to a number of SFP requirements. The form and the instructions to the form provide specific detail about the certifications; however, some of the issues to which the district representative will have to certify are as follows:

- The district has established a "Restricted Maintenance Account" (see Section 13, "Additional SFP Requirements and Features" for more information).
- The facilities to be modernized were not previously modernized under the LPP.
- Contracts for the services of an architect, structural engineer, or other design professional which were signed after November 4, 1998 were obtained pursuant to a qualifications based competitive process (see Section 3, "Project Development Activities" for more information).
- The property to be modernized using SFP funds is either owned by the district or county superintendent or it is leased from another governmental entity. If the property is leased, the lease is for at least 40 years from a non-federal governmental agency or 25 years from a federal governmental agency. The cost of the lease is not an eligible cost under the SFP.
- If this request is for a large new construction or a large modernization project, the district has consulted with the career technical advisory committee established pursuant to Education Code, Section 8070, and it has considered the need for vocational and career technical facilities to adequately meet its program needs in accordance with Education Code, Sections 51224, 51225.3(b) and 52336.1.
- All large modernization funding applications for comprehensive high schools must be accompanied by evidence of compliance with Education Code, Section 17070.95. Documentation may include any of the following:
  - *Minutes from a public meeting by the school district's governing board documenting the discussion with and the recommendations of the local CTEAC regarding the CTE facility needs assessment.*
  - *Minutes from the meeting with the local CTEAC regarding the CTE facility needs assessment and recommendations.*
  - *Letter from the local CTEAC to the school district that identifies the subject of the discussion, the CTE facility needs assessment, and recommendations.*
- If the district is requesting an Additional Grant for Energy Efficiency pursuant to SFP Regulations, Sections 1859.71.3 or 1859.78.5, the increased costs for the energy efficiency components in the project exceeds the amount of funding otherwise available to the district.
- The district has or will initiate and enforce a Labor Compliance Program that has been approved by the Department of Industrial Relations, pursuant to Labor Code, Section 1771.7, if the project is funded from Proposition 47 or 55 and the Notice to Proceed for the construction phase of the project will be issued on or after April 1, 2003.
- Beginning with the 2005/2006 fiscal year, the district has complied with Education Code, Section 17070.75(e), by establishing a facilities inspection system to ensure that each of its schools is maintained in good repair (see Section 13, "Additional SFP Requirements and Features" for more information).
- The district has considered the potential for the presence of lead-containing materials in the modernization project and will follow all relevant federal, state, and local standards for the management of any identified lead.

Finally, to reduce the need to submit extensive supporting documentation, the OPSC will ask that the architect of record or other design professional certify to the following:

- The date that the DSA approved the plans and specifications.
- The number of classrooms demolished and not replaced and the number of classrooms constructed. (This is necessary to verify that no new construction, except the replacement of demolished facilities, is done with modernization funds.)
- That the cost estimate for the work in the plans and specifications as submitted to the DSA is at least 60 percent of the total grant provided by the State's and district's matching share.

Modernization Grant Amounts

The modernization grant is based on the number of pupils assigned to the project. This number may simply be the number of students enrolled at the site where the modernization will occur. This is usually true when all of the buildings at the site are 25 years or older for permanent buildings and 20 years or older for relocatable structures. In cases where only some of the buildings at the site are over age, and therefore eligible for modernization, the number of pupils assigned to the modernization project will probably be less than the total pupils on the site. The Form SAB 50-04 will assist the district in determining the proper number of pupils to be included in the application. When this number is determined, it is then possible to calculate the modernization grant amount as described in the next section. The following are the types of grants:

» Modernization Grant
  – *Modernization Grant for 50-Year-Old Buildings*
» Supplemental Grants

Modernization Grant

The pupil grant amount is intended to provide the State's share for all essential project costs, which include but are not limited to funding for design, the modernization of the building, education technology, unconventional energy, tests, inspections, and furniture and equipment. To calculate the district's modernization share, multiply the modernization grant by 0.6667.

Modernization Grant Calculation

The modernization grant for each pupil housed in buildings to be modernized is established by law.[2] The grant amount is adjusted every year in January, based on changes to the Class B construction cost index, by action of the SAB. As of January 2007, the modernization grants, which represent the State's 60 percent share of the project, are as follows:

Modernization Grant Amount

CLASSIFICATION	MODERNIZATION GRANT AMOUNT	COMMENTS
Elementary Pupil	$ 3,262	
Middle School Pupil	$ 3,450	Include grade six pupils if part of a 6–8 grade school.
High School Pupil	$ 4,516	
Special Day Class – Non-Severe	$ 6,953	
Special Day Class – Severe	$10,391	
State Special School	$17,325	

[2] Education Code, Section 17074.10.

Modernization Grant for 50-Year-Old Buildings

CLASSIFICATION	BASIC GRANT AMOUNT
Elementary	$ 4,530
Middle School	$ 4,792
High School	$ 6,274

CLASSIFICATION	BASIC GRANT AMOUNT
Special Day Class—Non-Severe	$ 9,656
Special Day Class—Severe	$14,440
State Special School	$24,066

A modernization grant request must be for at least 101 pupil grants, or the remaining modernization eligibility at that school site if less than 101 grants are available.

Supplemental Grants

The supplements are intended to recognize special costs associated with projects of a certain type or located in certain areas. The district also uses the Form SAB 50-04 to supply information related to the supplemental grants. There are many possible supplemental grants as follows:

» Elevators
» Energy Efficiency
» Fire Code Requirements
» Geographic Location
» Handicap Access and Fire Code Compliance
» Labor Compliance Program
» Project Assistance
» Rehabilitation
» Site Development for 50-Year-Old Buildings
» Small School High Program
» Small Size Projects
» Urban Locations, Impacted Sites, Security Requirements

The following is a brief explanation of the supplemental grants:

Elevators

If the DSA requires 2-stop elevators in the modernization project, the modernization grant will be increased by $87,121 for each two-stop elevator. The district must attach the DSA letter that requires the elevators be included in the project for handicap access compliance. The modernization grant will be increased by $15,680 for each additional stop required.[3] The grant amount will be adjusted annually using the Class B index.

Energy Efficiency

A supplemental grant is available to districts with projects that have increased costs associated with plan design and other project components for school facility energy efficiency. The facilities in the proposed project must exceed the nonresidential building energy efficiency standards as specified in Title 24, Part 6

[3] SFP Regulations, Section 1859.83(f), (1) and (3), "Excessive Cost Hardship Grant."

of the California Code of Regulations by at least 10 percent. Currently all energy efficiency funds have been exhausted. At the September 2006 SAB the remaining modernization energy funds were re-designated to fund the new construction energy projects.

Fire Code Requirements

The modernization grant will be increased for each pupil in a project that includes an automatic fire detection and alarm system. The current increase is as follows:

Modernization Grant increase—Automatic Fire Detection and Alarm System

CLASSIFICATION	GRANT INCREASE
Elementary	$104
Middle School	$104
High School	$104

CLASSIFICATION	GRANT INCREASE
Special Day Class—Non-Severe	$195
Special Day Class—Severe	$291

The amounts shown above are the 60 percent State share and are adjusted annually in the same manner as the Modernization Grant.

Geographic Location

A supplemental grant is available to districts with projects that are located in areas of California that are remote, difficult to access, or lack a pool of contractors. A district may qualify and request an augmentation to the modernization grant because of their geographic location.

Handicap Access and Fire Code Compliance

The excessive cost hardship grant for access compliance[4] is based on actual hard costs as reported by the district on the accessibility/fire code requirements checklist. These costs must be the minimum work necessary to receive approval from the Access Compliance Unit of the DSA and must be verified by the DSA and the OPSC. The grant is calculated by taking the difference of the verified actual hard costs and subtracting seven percent of the sum of the State and district share of the project's modernization base grant (when the Lease Purchase Program converted to the SFP, it was the intent that seven percent of the modernization base grant covered access compliance work). However, there is a cap that may not be exceeded.

If the construction costs of a modernization project exceed 50 percent of its replacement cost, the building must be brought into compliance with the current building code as part of the Title 24 requirements. Therefore, the maximum a district can receive for access compliance is the difference between the new construction base grant (which represents approximately 50 percent of the replacement cost) and the sum of the State and district share of the modernization project's base grant.

The chart below illustrates how the excessive cost hardship grant cap is calculated based on one pupil grant, and how the seven percent is applied:

[4] SFP Regulations, Section 1859.83(f), "Excessive Cost Hardship Grant."

Calculation of Maximum Grant (Cap)—Based on One Elementary Pupil

STATE AND DISTRICT SHARE OF NEW CONSTRUCTION BASE GRANT AT 50 PERCENT	*subtract*	STATE AND DISTRICT SHARE OF MODERNIZATION BASE GRANT	*equals*	MAXIMUM GRANT ALLOWABLE FOR ACCESSIBILITY REQUIREMENTS
$8,081		$5,437		$2,644

This chart provides examples of the calculation of the excessive cost hardship grant:

Examples of Calculation of the Excessive Cost Hardship Grant

IF THE MINIMUM ACCESSIBILITY WORK VERIFIED BY DSA IS:		7 PERCENT OF STATE AND DISTRICT SHARE OF MODERNIZATION BASE GRANT		DIFFERENCE	EXCESSIVE COST @ 100 PERCENT
$2,000	*subtract*	$ 381	*equals*	$1,619	$1,619
$3,500	*subtract*	$ 381	*equals*	$3,119	$2,644 (cap)
$ 350	*subtract*	$ 381	*equals*	–$ 31	$ 0

Modernization projects that consist of replacement of buildings in like-kind instead of modernizing them will be eligible for an excessive cost hardship grant equal to three percent of the modernization base grant only.

Labor Compliance Program (LCP)

A labor compliance program, as specified by Labor Code Section 1771.5, must be initiated and enforced for each project funded wholly or in part from Propositions 47 or 55 funds if the Notice to Proceed was issued on or after April 1, 2003. Additional funding is provided for these projects. The LCP grant is calculated on a sliding scale as follows:

Labor Compliance Program Grant

IF TOTAL PROJECT COST IS...		THEN THE TOTAL LCP COST IS...
AT LEAST	UP TO	
$ 0	$ 1 million	$ 16,000
$ 1 million	$ 2 million	$ 16,000 plus 0.016 multiplied by the amount over $1 million
$ 2 million	$ 3 million	$ 32,000 plus 0.0025 multiplied by the amount over $2 million
$ 3 million	$ 4 million	$ 34,500 plus 0.0015 multiplied by the amount over $3 million
$ 4 million	$ 6 million	$ 36,000 plus 0.0032 multiplied by the amount over $4 million
$ 6 million	$ 8 million	$ 42,400 plus 0.0031 multiplied by the amount over $6 million
$ 8 million	$13 million	$ 48,600 plus 0.0046 multiplied by the amount over $8 million
$13 million	$18 million	$ 71,600 plus 0.0044 multiplied by the amount over $13 million
$18 million	$48 million	$ 93,600 plus 0.0042 multiplied by the amount over $18 million
$48 million	N/A	$219,600 plus 0.004 multiplied by the amount over $48 million

The State's share will be 60 percent of the above result.

Project Assistance

The SAB may provide additional project grants for project assistance to small school districts with enrollment of 2,500 pupils or less. The current additional grant of $2,755 may be used for costs associated with the preparation and submission of the SFP eligibility and funding applications, including costs related to support documentation such as site diagrams. The grant amount will be adjusted each year using the Class B index. The district can find the current amount on the OPSC Web site.

Rehabilitation

A district may apply for the rehabilitation of facilities that the SAB has determined are an imminent health and safety risk to the pupils, if the cost/benefit analysis to mitigate the problem and remain in the building is less than 50 percent of the current replacement cost. If the district qualifies, the district is eligible for funding of rehabilitation costs as a modernization project.

Site Development for 50-Year-Old Buildings

A supplement grant is provided for the purpose of upgrading existing utilities as necessary for the modernization of 50 year or older permanent buildings. Sixty percent of the estimated utility costs, up to a maximum of twenty percent of the Modernization Grants (pupil grant), are available. Allowable utility cost fall under five categories:[5]

- Water
- Sewage
- Gas
- Electric
- Communication systems

It is important to understand that site development costs have restrictions on their use. The district representative should consult the SFP Regulations and the OPSC project manager if he or she is unsure if a particular item is an allowable cost before including the work in the project.

If a district is requesting a supplemental grant associated with site development on the Form SAB 50-04, verification must be submitted to support the request. To assist in gathering the supporting detail, the OPSC has developed a Site Development Worksheet for Additional Grants that is located on the OPSC Web site. The district may use this worksheet or similar method to submit this information to the OPSC.

Small High School Program

The Small High School Program is a pilot program that will sunset on January 1, 2008. A supplemental grant is available for the reconfiguration of large high schools into small high schools. The reconfiguration must result in at least two or more small high schools. Each small high school created may receive a supplemental grant up to $500,000 for costs related to the reconfiguration.

Small Size Projects

A supplemental grant is available to districts with projects that house no more than 200 pupils. The grant is intended to provide additional funds to modernize core facilities and to make up for the lack of economies of scale for small projects. The modernization grant can be increased by 12 percent for a project that will house less than 101 pupils, or by four percent if the project will house over 100, but no more than 200 pupils.

5 SFP Regulations, Section 1859.78.7, "Modernization Additional Grant for Site Development Necessary for 50 Years or Older Permanent Buildings."

Urban Locations, Security Requirements and Impacted Sites

Districts with projects in urban locations on impacted sites may request a supplemental grant if:

» The useable site acreage for the project is 60 percent or less of the site size recommended by the CDE based on current CBEDS Report at the site at the time of the CDE final plan approval for the modernization project.

Urban locations on impacted sites are generally in areas of high population density. Districts with projects on these impacted sites are also faced with extra security requirements. The supplemental grant provides funds for security fences, watchpersons, increased premiums for insurance for contractors, and storage or daily delivery of construction materials to prevent theft and vandalism. If a district requests grants due to these circumstances, the OPSC will verify the district's eligibility pursuant to the CDE Final Plan Approval letter.

If the above criterion is met, the urban supplemental grant is calculated on a sliding scale as follows:

Modernization Urban Grant Adjustment

IF...	THEN...
the useable acres are 60 percent of the CDE recommended site size, as described above...	the urban grant adjustment is 15 percent of the Modernization Grant and of the funding for small size projects† and new school projects*, and a 0.333 percent increase to the urban grant adjustment for each percentage decrease in the CDE recommended site size below 60 percent.

* SFP Regulations, Section 1859.83(b), "Excessive Cost for Projects that House No More than 200 Pupils (Small Size Project)"

District Project Contribution

Every modernization application is a joint funding effort between the local school district and the State though the SFP. The State grant is discussed in the section entitled "Modernization Grant", earlier in this section. The total State grant represents 60 percent of the total project cost, with the district contributing the remaining 40 percent of the necessary funding.

The district contribution may come from virtually any source. The sole exception is that when savings from another SFP project are used as match, it must be from a modernization project only. This restriction exists due to legal requirements pertaining to the bond funds, which the State uses as a program-funding source.

The district need not have the entire 40 percent local contribution on deposit at the time that the project approval is made. However, at the time of the project fund release, the district must certify that the district's matching share has been deposited in the County School Facility Fund; has been expended by the district for the project; or will be expended by the district prior to the Notice of Completion for the project. Thus the district has considerable flexibility in how the local share is arranged and contributed. The district representative should be aware, however, that regardless of when the share is contributed to the project, the district must be able to show at closeout that 40 percent of the expenditures on the project were from local sources. If the district is unable to demonstrate the 40 percent expenditure requirement has been met, the apportionment will be reduced.

Unable to Meet the Contribution

Districts that are unable to contribute all of the 40 percent local share of a project, can pursue financial assistance through the financial hardship provisions of the SFP. Districts must submit financial data to the OPSC for "pre-approval" of financial hardship status (see Section 10, "Financial Hardship") before submitting a funding application. In addition, this "pre-approval" enables districts to request a separate apportionment for design costs, if necessary.

SAB Approval Process

The SAB approval can either be an apportionment or "unfunded" approval, depending on the availability of funds for modernization. If there are no funds available, the project will be placed on a list of unfunded projects to await possible future funding.

Fund Release

After the funding application is apportioned by the SAB, the next step in the process is the actual fund release to the County School Facilities Fund for use by the district.

The SFP grant is processed for release when the district submits a *Fund Release Authorization* (Form SAB 50-05). The Form SAB 50-05 submitted by the district is an important document that cannot be altered or modified by the OPSC. Therefore, an improperly completed Form SAB 50-05 will be returned with a letter of explanation to the school district for correction.

When a properly executed form is received, the OPSC sends a School Facilities Fund Release notification to the district representative and county office of education. The notification indicates the type of grant released, amount, school district, application number, school name, and date processed.

It is important to understand that a Form SAB 50-05 must be submitted within 18 months of the SFP grant apportionment by the SAB, or the entire new construction or modernization adjusted grant will be rescinded without further SAB action. If this should happen, the pupils housed in the project will be added back to the district's eligibility and the district may re-file the application at any future time.

The Form SAB 50-05 can be downloaded from the OPSC Web site. The properly executed Form SAB 50-05 should be submitted to:

Office of Public School Construction
Accounting
1130 K Street, Suite 400
Sacramento, CA 95814

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Section 10

Financial Hardship

Introduction

Financial hardship assistance is available for those districts that cannot provide all or part of their funding share of a School Facility Program (SFP) project. In order to receive financial hardship assistance, a district must have made all reasonable efforts to raise local funding and must also demonstrate that it is unable to contribute all or a portion of the matching share requirement.

If the district meets the financial hardship criteria, it is eligible for financial assistance for new construction or modernization projects. It may also be eligible for a separate apportionment for the following:

» For new construction or modernization projects, an early apportionment for design costs.
» For new construction projects, an early apportionment for site acquisition.

A district seeking financial assistance must have an approved financial hardship status prior to submitting an *Application for Funding* (Form SAB 50-04) for either a new construction or modernization grant request. In order to obtain this approval the district must provide verification that a reasonable effort was made to meet the district's matching share requirement, and must have confirmation from the Office of Public School Construction (OPSC) that the district is unable to contribute the entire matching share requirement. When this is accomplished, the OPSC will recommend that the district be approved as a financial hardship and will send a 'pre-approval' letter to the district.

Qualifying for Financial Hardship Assistance

To apply for financial hardship, send a letter to the OPSC Financial Hardship Audit Unit stating why the district is requesting financial hardship. Along with the letter, the district must submit the following documents:

Documentation for Financial Hardship Application

LEGAL REQUIREMENT	FINANCIAL DOCUMENTATION REQUIRED
Levy maximum developer fee allowed	School Board Resolution regarding developer fees
Demonstrate local effort to raise revenues	Evidence of at least one of the following: • Debt level at 60 percent of bonding capacity • Total district bonding capacity less than $5 million • The district had a successful registered voter bond election for at least the maximum allowed under Proposition 39 within the previous 2 years. • Other evidence which demonstrates that all reasonable local efforts have been made as approved by the State Allocation Board (SAB)

continued on following page...

Documentation for Financial Hardship Application...

LEGAL REQUIREMENT	FINANCIAL DOCUMENTATION REQUIRED
Financial inability to contribute the match	Evidence that facility funds are not available: • Financial Hardship Project Worksheet • Financial Hardship Worksheet • Latest independent audit reports • Encumbrances • Expenditure reports • Listing of the district's unused sites • Forms SAB 50-01 and SAB 50-02 for "interim housing" deduction calculation for new construction projects only • Written estimation of interim housing needs

If the financial hardship package is incomplete, a letter will be sent to the district requesting the necessary documentation to make the request complete. If the requested information is not submitted in a timely manner, the request will be returned unprocessed. The district may re-file the request whenever the missing documents become available.

County offices of education do not need to provide documentation regarding developer fees or evidence of reasonable effort to raise local funds.

Financial Hardship Assistance Request

In order to qualify for financial hardship assistance, the school district must demonstrate that it has made all reasonable efforts at the local level. The district must also provide evidence that it is unable to pay all or a portion of the district's share of the project. The process of providing the required evidence is discussed in this section.

Evidence of Reasonable Effort to Fund Matching Share

As previously mentioned, the law requires that a district seeking financial hardship assistance must demonstrate that all reasonable efforts have been made to raise local revenues for the SFP matching requirement. The SAB has adopted regulations that set criteria to determine that this requirement is met. The district must be levying developer fees at the maximum rate justified by law and must verify it meets at least one of the following:

Bonding Capacity and Indebtedness Threshold. The current outstanding indebtedness of the district, at time of financial hardship request, is at least 60 percent of the district's total bonding capacity. A district with a total bonding capacity of less than $5 million meets this requirement regardless of the level of indebtedness. Outstanding indebtedness includes General Obligation Bonds, Mello-Roos Bonds, School Facility Improvement District Bonds and Certificates of Participation (COPs) that was issued for capital outlay school facility purposes, on which the district is paying a debt service.

The required documentation needed is a certification from the county auditor controller stating the district's assessed valuation, outstanding indebtedness, and remaining bonding capacity.

Voter Bond Election. The district had a successful registered voter bond election for at least the maximum amount allowed under Proposition 39 within the previous two years from the date of request for financial hardship status. The proceeds from the bond election that represent the maximum amount allowed under the provisions of Proposition 39 must be used to fund the district's matching share requirement for SFP project(s).

The required documentation needed:

- Copy of ballot issue.
- Original bond election estimates that support the amount of bond for which the district sought election.
- Date of election; amount of bond; purpose of bond; percent of "Yes" vote on bond.
- Copy from County Auditor-Controller certifying the district's current bonding capacity and outstanding indebtedness.

County Superintendent of Schools. A county superintendent of schools automatically meets the reasonable effort. The County Superintendent must then complete a financial review to determine the level of financial assistance needed.

Other Evidence of Reasonable Effort. If the district does not meet the reasonable effort requirements outlined above, it may present to the SAB other evidence of reasonable efforts to fund its matching share. This can be done using a *School District Appeal Request* (Form SAB 189). This form and instructions for completing the form are available on the OPSC Web site. In addition to the completed Form SAB 189, the district must also submit updated Financial Hardship Worksheets for each fund within the Capital Project Funds and the latest independent audit report. If the hardship justification is approved by the SAB, the district may then file its request for financial hardship using the approved SAB item as evidence of having met the reasonable effort test to fund its matching share for its projects. The district must then submit all of the requested financial documents necessary for a final financial hardship review, as described in the table "Documentation for Financial Hardship Application" on page 71.

Financial Review

The OPSC will conduct an analysis of the district's financial information to verify that the district is unable to provide all or a portion of the necessary matching funds for an eligible project. The analysis will include the applicant's financial records including those maintained by the California Department of Education (CDE) and the county office of education. The review will determine whether available non-operational funds and savings from other SFP projects are sufficient to fund all or a portion of the matching share requirements on a project. See SFP Regulations, Section 1859.81, for more information on the financial review.

Financial Hardship Project Worksheet. This is used by the OPSC to estimate the district's share of the project. The district must submit a separate Financial Hardship Project Worksheet for each project for which it is requesting financial assistance. The worksheet can be found on the OPSC Web site.

Financial Hardship Worksheet. This worksheet is used by the OPSC to determine the amount of the cash contribution to be provided by the district. These worksheets are based on the latest independent audit report and then brought current to application date with subsequent transactions that have occurred in the funds. Detail of the expenditures made for the subsequent events must accompany this worksheet. If this is not submitted, all of the expenditures shown will be disallowed and deemed as "funds available".

On the worksheet, the district will identify restricted funds such as class size reduction, as well as the purpose for any restrictions on funds, and will identify all bonds and COPs authorized and sold to date of financial hardship request. If the district has unsold bonds or COPs, possible restrictions on the use of these funds should be noted.

Latest Independent Audit Report. The district's latest independent audit report is used by the OPSC to verify the financial condition of the district. The district must submit the entire audit report.

Developer Fee Information

The district must be levying developer fees at the maximum rate justified under law or have an alternative revenue source equal to or greater than the developer fee otherwise justified.[1] As evidence, please include a copy of the resolution from the district's school board authorizing the levying of the fee. If the district is not levying the maximum fee allowed by law in accordance with current statute, include a copy of the district's recent Implementation Study and/or the Needs Analysis to support the amount being levied or justification for an alternative revenue source.

If the district entered into an agreement with a city, county, or other government entity regarding developer fees, please submit a copy of that agreement. In addition, please submit documents showing the amount of fees that could have been collected during the time frame of the agreement versus the amount that was actually collected and shown as revenue for the district.

If the district received any benefit, building, land, etc., in lieu of developer fees please submit documentation regarding the "in lieu" received and the value of the developer fees that were negated due to the "in lieu" agreement(s). If the district did not enter into agreements regarding developer fees, please submit a statement to that effect.

The current developer fees can be found on the OPSC Web site at www.opsc.dgs.ca.gov. Developer fee amounts are adjusted every even numbered year at the January SAB meeting based on an index specified in law. In order to maintain financial hardship eligibility, districts must implement the new developer fee within six months after an index change.

Encumbrances. The district must provide contracts and all other documentation supporting any encumbrances or obligations the district is claiming. All funds identified that have not been expended or encumbered by a contractual agreement for a specific capital outlay purpose prior to the initial request for financial hardship status shall be deemed available as a matching contribution.

Interim Housing Deduction from Available District Funding. From the funds available as a matching contribution, the district may retain $28,709 per classroom in each enrollment reporting period for the cost to provide interim housing for the currently unhoused pupils of the district. In addition, from the funds available as a matching contribution, the district may also retain $28,709 per approvable portable toilet unit in each reporting period for the cost to provide interim toilet facilities for the currently unhoused pupils of the district. This amount is adjusted annually. The current amount can be found on the OPSC Web site.

If the district is requesting an "interim housing" deduction from available funds, it needs to submit in writing an estimation of the district's interim housing needs for the year. The interim housing deduction and any related expenditures will be audited in the future.

Expenditure Reports. The district must submit expenditure reports, *Summary of Expenditures and Construction Progress* (Form SAB 184) and *Detailed Listing of Warrants Issued by the District* (Form SAB 184A), for each project for which the district is requesting financial hardship. If no funds have been spent on a project, the district must submit a statement to that effect. The OPSC will review any prior apportionment and the expenditures reported. All expenditures above and beyond a prior apportionment will be considered as a matching contribution. The SAB will not reimburse the district for expenditures made prior to the financial hardship approval.

Listing of the District's Unused Sites. The district must submit a listing of the district's unused sites and intended use. If the district has no unused sites, submit a statement to that effect.

[1] Education Code Section 17075.10.

Approval of Financial Hardship Assistance

Once the financial hardship review is complete, the OPSC will send a letter to the district stating the available funds and expenditures that will be considered available for match purposes. If the district disagrees with the OPSC's findings, the district may submit additional information for consideration. Once the district has been approved for financial hardship (has a pre-approval letter), the district may submit its Form SAB 50-04, for the projects and specific phases listed in the financial hardship approval letter.

When a district is approved for financial hardship, the approval is valid for six months. If, within the six months, the district wishes to submit additional applications or phases of a previously approved project, it must have a pre-approval letter for those additional specific projects or subsequent phases prior to filing the Form SAB 50-04. To obtain pre-approval within the six months, the district must submit a Financial Hardship Project Worksheet for the project along with expenditure reports. The district does not need to update other financial information unless the six month period is past.

If the district's request for financial hardship status is denied by the Board, the district may be eligible for rental payments of $2,000 per year per classroom under the Emergency School Classroom Law of 1979 for a two year period when relocatable classroom buildings are available and the district provides financial documentation satisfactory to the Board that it is unable to afford the full rental amount.

Subsequent Financial Hardship Request

Once a district receives funding as a financial hardship, the district should be aware that for a period of three years, all capital facilities funding received by the district from any source will be considered available for the matching share on a future financial hardship request. The exceptions are:

- Approved interim housing expenditures;
- Funding to pay for multi-year encumbrances approved at the initial financial hardship approval;
- Funding that is transferred into a Special Reserve Fund and is used for the purpose of the Federal Renovation Program;
- School Facilities Needs Assessment Grant Program; or the
- Emergency Repair Program.

Renewal of Financial Hardship Assistance

If the district does not submit an *Application for Funding* (Form SAB 50-04) within six months of the OPSC notification of approval of financial hardship status, the district must re-qualify for financial hardship status by submitting a new request for financial hardship status.

The district will need to update its financial information by providing all required documentation as listed in the table "Documentation for Financial Hardship Application" on page 71 .

Financial Hardship Review for Financial Hardship Projects on Unfunded List

If a district's project(s) has been included on an unfunded list for more than 180 calendar days, a review of the district's funds will be made to determine if additional district funds are available to fund the district's matching share of the project(s).

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Section 11

Facility Hardship Grant

Introduction

Under very limited circumstances, a need to replace or construct new facilities may exist for reasons other than enrollment growth. For instance, a classroom or support facility may no longer be safe to occupy due to a structural failure or other severe health threat. To address these unusual situations, the State Allocation Board (SAB) has developed a facility hardship grant. The purpose of the grant is to assist districts with funding where it has been determined that the district has a critical need for pupil housing because the condition of the facilities, or the lack of facilities, presents an imminent threat to the health and safety of the pupils.

By definition a facility hardship is an unusual, often unique situation. It is difficult to describe a "normal" process since each request must be reviewed and analyzed on a case-by-case basis. This section outlines the process, but by no means addresses all possible facility hardship situations. When a significant and serious threat exists to the health and safety of students or staff in any public school environment or if an existing facility has been destroyed by natural disaster, the district should contact the Office of Public School Construction (OPSC) project manager for guidance.

Eligibility for Facility Hardship Grants

To be eligible for a facility hardship grant the district must demonstrate that one of two conditions exists: facilities must be replaced due to an imminent health and safety threat, or existing facilities have been lost to fire, flood, earthquake or other disaster. If the district is to qualify for a facility hardship grant under one of these two conditions, the district wide enrollment must justify a continuing need for these facilities, pursuant to the School Facility Program (SFP) Regulation, Section 1859.82.

Replacement Due to Imminent Health or Safety Hazard

In this case, existing facilities must be replaced to ensure the health and safety of the pupils because of circumstances such as the following:

- The existing facilities have serious structural deficiencies, which must be repaired or corrected as specified by the Division of the State Architect (DSA); or
- An imminent hazard exists because the existing facilities are in close proximity to a major freeway, airport, electrical facility, high power transmission lines, dam, pipeline, industrial facility, adverse air quality emission source; or
- There are existing traffic safety problems or the pupils live in a remote area and transportation to existing facilities is not possible or poses a serious threat to the health and safety of the pupils; or
- Environmental health hazards such as dangerous levels of mold contamination; or
- Other situations exist which pose a threat to the health and safety of the pupils.

A facility hardship approval to replace facilities is limited to the most severe instances of need. Clear demonstration is needed that the health and safety of the children is in jeopardy.

Documentation. Typical supporting documentation should be in the form of written statements/reports by a qualified industry expert or specialist appropriate for the specific area of concern. This documentation must then be reviewed and written concurrence provided by the appropriate State agency expert that has jurisdiction relating to the problem area. For example, air quality threats might involve a certified professional on staff at the State Department of Health; traffic problems might be supported by the California Highway Patrol, and so forth. If structural deficiencies are the basis of the health and safety threat, a licensed structural engineer's report is required that substantiates the structural deficiencies which were out of compliance with codes in place at the time of original construction. The structural report must be accompanied by a letter of concurrence by the DSA. In any case, the statement provided to the OPSC must indicate how the problem poses an immediate threat to the health and safety of the children. Refer to Appendix 2, "Potential State Agency Involvement" for possible contact information.

Cost/Benefit Analysis. If the district has substantiated a health and safety issue and wishes to replace existing facilities, a cost/benefit analysis must be prepared and submitted to the OPSC. The analysis should include only the minimum work necessary to mitigate the identified health or safety problems and compare these with the SFP standard for Current Replacement Cost. The cost/benefit analysis may include applicable site development costs.

If the request is for replacement facilities that are needed as a result of structural deficiencies, the cost/benefit analysis must also include a report from a licensed design professional identifying the minimum work necessary to obtain the DSA's approval. The cost/benefit analysis must include a narrative of the structural deficiencies and a description of the repair approach required to perform the minimum work necessary to mitigate the health and safety threat to obtain DSA approval. The analysis must also include a detailed cost estimate for the minimum work necessary described in the narrative. "Soft costs" such as architect fees, testing and inspection may be included in the cost estimate as a separate line item but should not be included in the cost/benefit analysis. The analysis and detailed cost estimate must be signed by the authoring licensed design professional.

If the total cost to mitigate the health or safety problem and remain in the facility exceeds 50 percent of the current replacement cost of the facility, it can be considered for abandonment and replacement. However, if the cost to remain in the facility is less than 50 percent of the current replacement cost, the district may qualify for rehabilitation. A qualifying replacement project will receive 50 percent of the eligible cost. A rehabilitation project will receive 60 percent of eligible costs. For more information on rehabilitation, refer to Section 9, "Modernization Funding."

Facilities Lost or Destroyed as a Result of a Disaster

A district may apply for the replacement of school facilities that were lost or destroyed as a result of a disaster, such as fire, flood or earthquake, for the following facility types:

- Classroom or related facility
- Library/media center
- Multi-purpose room
- School administration
- Gymnasium
- Toilet

Qualifying facilities must be required to ensure the health and safety of the pupils and must no longer be useable for school purposes as recommended by the California Department of Education and approved by the State Allocation Board (SAB). The district is also required to demonstrate satisfactorily to the SAB that the facility was uninsurable or the cost of insurance was prohibitive.

Documentation. Supporting documentation for facility hardship requests for the replacement of lost or destroyed facilities would include the following:

- Photos and written verification from the appropriate expert that documents the loss or the extent of damage to the school facility.
- Copy of the district's insurance policy that documents the level and type of coverage provided.
- Written verification from the district's insurance carrier that documents the amount of funds that the district has and/or will recover as a result of the disaster.
- If the facility is damaged, as opposed to entirely destroyed, the district must submit a licensed structural engineer's report, as outlined in this section, illustrating the extent of the damage and that the facility poses an immediate threat to the health and safety of the students and staff. The district would also be required to submit a cost/benefit analysis, as outlined in this section, signed by the authoring licensed design professional. The OPSC requires the district submit the DSA's concurrence with the report.

Application and Approval Process

In addition to the documentation supporting the health and safety issue and the cost/benefit analysis, as applicable, all facility hardship requests must also include the following:

- An Application for Funding (Form SAB 50-04) completed as applicable to make the initial request for conceptual approval by the State Allocation Board for the specific facility hardship type.
- A School District Appeal Request (Form SAB 189) that summarizes the district's request for a facility hardship including how the condition presents an imminent threat to the health and safety of the students and staff.
- A plot diagram that indicates the overall site layout, the facilities designation of the buildings and square footage. The diagram should indicate the specific structures at the school site for which the facility hardship request is being submitted.

After the analysis of the report(s) and review of the cost by the OPSC, an item will be prepared for presentation to the SAB for consideration of conceptual approval. If the SAB approves the district's request for new or replacement facilities, the district is eligible for funding as a new construction project. The district can then proceed with hiring an architect in order to complete plans, obtain DSA approval, and apply for funding grants. A district that receives a conceptual approval has 18 months, or 24 months if a new replacement school site is required, to submit a complete funding application (including DSA plan approvals, cost estimates, etc.). Funding for a facility hardship is subject to the availability of funds.

Interim Housing

In the event of an emergency or for districts in need of short-term interim housing to meet their facility needs, districts may seek assistance from the OPSC. Our project managers will evaluate each request on a case-by-case basis and will work with districts to find them interim housing as the SAB has approved the phase out of the State Relocatable Classroom Program. If a district is in need of immediate facilities to replace those damaged by a natural disaster, the OPSC can administratively expedite the approval of new construction funding applications through the Natural Disaster Plan, which allows districts to purchase relocatable classrooms quicker to address their facility needs. Again, our project managers will assist districts with processing these type of applications to ensure facilities are received in a timely fashion.

References

» SFP Regulations, Section 1859.76, "Additional Grant for Site Development Costs."
» SFP Regulations, section 1859.82, "Facility Hardship Grant."
» SFP Regulations, Section 1859.83, "Excessive Cost Hardship Grant."

Section 12

Program Accountability

Introduction

The School Facility Program (SFP) has significantly increased program flexibility and responsibility at the local level, while reducing the State's oversight role. In general, the State's fiscal concerns are limited to verifying that the expenditures and certifications of program requirements made by the district for the project comply with the law, that the district followed applicable State requirements pertaining to construction and to verify that the project progresses in a timely manner as specified in statute. To assist with this oversight, a district is required to submit expenditure reports and evidence of progress during the construction of the project. On a project that requires less than a year to complete, only an expenditure report is required.

Progress Report

The SFP requires that an approved project be constructed within certain time frames. To ensure that this happens, evidence of progress is generally due after funds are released to the district for the project.[1] The specific evidence required and the timeframe for submitting such evidence depends on the type of funding received. The possible types of funding include Separate Design (Financial Hardship), Separate Site (Financial Hardship), Separate Site (Environmental Hardship), and/or Adjusted Grant. The following table defines the specific criteria for meeting the substantial progress requirement and indicates the filing time requirements based on the type of funding received.

[1] In cases where separate environmental hardship funds are involved, the due date is based on the apportionment date instead of the fund release date.

Substantial Progress Reports

FUNDING RECEIVED	EVIDENCE OF PROGRESS DUE DATE	EVIDENCE OF PROGRESS REQUIRED
Separate Design (Financial Hardship project only)	18 months from Fund Release	One of the following: • Submittal of a complete Adjusted Grant funding application package to the Office of Public School Construction (OPSC). • Submittal of a district certification that complete plans and specifications have been submitted to the Division of the State Architect (DSA). • Submittal of a complete Separate Site funding application package to the OPSC. Or: • Submittal of a narrative of evidence, satisfactory to the State Allocation Board (SAB), detailing why complete plans have not been submitted to the DSA.
Separate Site (Financial Hardship)	18 months from Fund Release*	Submittal of a progress report certifying that all of the following have been achieved: • Obtain the final site appraisal. • Complete all California Environmental Quality Act (CEQA) requirements. • Obtain final California Department of Education (CDE) site approval. • Obtain final escrow instructions or evidence the district has filed condemnation proceedings and intends to request an order of possession of the site. Or: • Submittal of a narrative of evidence, satisfactory to the SAB, detailing the circumstances (beyond district control) which precluded progress from being achieved.
Separate Site (Environmental Hardship)	12 months from the apportionment date or anniversary of conversion from Separate Site Financial Hardship, and on each subsequent anniversary if necessary.	Submittal of one of the following: • A progress report satisfying the same criteria set forth for Separate Site (Financial Hardship) funding. • A request for an extension (which is supported by written letters of concurrence from the Department of Toxic Substance Control (DTSC) and the CDE). • Other reasonable evidence of effort the district has made.
Adjusted Grant	18 months from Fund Release†	Submittal of a progress report certifying one of the following: • 75 percent of site development work necessary prior to construction is complete. • 90 percent of construction activities have been contracted for. • 50 percent of construction activities are complete. Or: • Submittal of a narrative of evidence, satisfactory to the SAB, detailing the circumstances (beyond district control) which precluded progress from being achieved.

* If toxic substance issues are delaying site progress, the district may convert the site apportionment to an Environmental Hardship apportionment. Environmental hardship projects may request annual extensions with appropriate substantiation.

† The progress-reporting requirement for Adjusted Grant funding can be suspended if one of the following occur before the reporting deadline:
- The district submits a Notice of Completion for the project. If more than one construction contractor is involved in the project, a Notice of Completion is required for each construction contract.
- The district submits an Expenditure Report (Form SAB 50-06), which shows that the project is substantially close to 100 percent completion.

Substantial Progress Audit

Upon receipt of the substantial progress report, the Office of Public School Construction (OPSC) will analyze the information and will notify the district within 60 days if it intends to recommend to the State Allocation Board (SAB) that the evidence submitted does not demonstrate substantial progress. If the OPSC does not respond to the district within 60 days of submittal, the OPSC concurs with the district that substantial progress has been made.

Expenditure Report

Throughout the construction period of a project, the district will file one or more expenditure reports. The first expenditure report is due one year after the first fund release or upon completion of the project, whichever occurs first. Additional expenditure reports are due annually from the date the first report is due until the project is complete. A project is considered complete when either of the following occur:

- The notice of completion for the project has been filed.
- Three years from the date of the final fund release for an elementary school project or four years from the date of the final fund release for a middle or high school project.

Preparing the Expenditure Report

A district submits a record of project expenditures by using the *Expenditure Report* (Form SAB 50-06). This form allows the district to report all expenditures from district and State funds in summary form. To support the Expenditure Report, the OPSC has developed an Expenditure Worksheet which is available on the OPSC Web site at www.opsc.dgs.ca.gov. The district is encouraged to use this worksheet to gather and record the expenditure detail and to accompany the Form SAB 50-06.

Expenditure Audit

Within two years of receipt of the final expenditure report from the district, the OPSC must initiate an audit of the expenditures. If the district is not notified by the OPSC within that time frame that an audit will be made, the expenditures submitted by the district and certifications made on the Forms SAB 50-04 and SAB 50-05 will be accepted. If the OPSC has notified the district that an audit will be made, the OPSC must complete the audit within six months, unless additional documentation requested from the district has not been received.

Eligible Expenditures

The following table lists those expenditures that are typically eligible costs under the SFP:

Eligible Expenditures

EXPENDITURE	NEW CONSTRUCTION	MODERNIZATION
Acquisition and installation of portable classrooms	✖	✖*
Acquisition and conversion of an existing government or privately-owned building, or privately-financed school building	✖	
Construction	✖	✖
Construction management	✖	✖
Demolition	✖	✖
Design	✖	✖
Engineering	✖	✖
Fire safety improvement		✖
Force account labor costs that comply with Public Contract Code	✖	✖
Furniture and Equipment (including telecommunication equipment to increase school security)	✖	✖
Identification, assessment, or abatement of hazardous asbestos		✖
Inspection	✖	✖
Labor Compliance Program oversight costs	✖	✖
Landscaping	✖	
Legal fees associated with the reviews of bid documents, securing a site, and site condemnation	✖	✖
Necessary utility costs	✖	✖
Plan checking	✖	✖
Playground safety improvements		✖
Purchase and installation of air-conditioning equipment and insulation materials and related costs	✖	✖
Replacement of portable classrooms		✖
Seismic safety improvements		✖
Site acquisition	✖	
Site development	✖	✖†
Testing	✖	✖
Upgrading of electrical systems or the wiring or cabling of classrooms in order to accommodate educational technology		✖
Utility connection and other fees	✖	✖

* Permissible if it is a like-kind replacement of a portable classroom.

† For 50 years or older modernization projects utilities work only, for permanent facilities, per SFP Regulations, Section 1859.78.7.

Site Closeout Reviews

Districts that obtain additional grants for sites that require hazardous waste removal substantiated by a Response Action will be eligible to receive up to 50 percent of one and one-half times the value of the site to monitor and clean the site. Additional costs beyond this new cap will be subject to provisions contained in section 1859.74.2 and following. For those projects where the *Application for Funding* (Form SAB 50-04), is received on or after January 1, 2004, additional costs beyond the cap are subject to adjustment whether or not the additional grants for hazardous waste removal were requested on the Form SAB 50-04.

Ineligible Expenditures

District representative should be aware that some expenditures are not permitted under the SFP. If the district representative is uncertain about a specific expenditure, the OPSC audit staff can assist the district accordingly.

The following is a list of the expenditures that may potentially be disallowed during an SFP final expenditure audit:

- Administrative and overhead costs.
- District force account labor that does not comply with the Public Contract Code.
- Modernization expenditures for:
  - *New building area that does not replace building area of "like kind."*
  - *New site development that is not for replacement, repair or additions to existing site development work.*
  - *Removal of hazardous waste from a modernization project that exceeds ten percent of the total modernization apportionment.*
  - *Costs on leased facilities unless owned by another district or county superintendent.*
  - *Acquisition and development of real estate.*
  - *Demolition costs not attributable to replacement of "like kind" building area.*
- Any expenditure that cannot be reasonably attributed to a project.
- Relocation costs that do not conform to Title 25, California Code of Regulations, Section 6000, et. seq. (see SFP Regulations, Section 1859.74(a)(1)).
- Expenditures associated with a "use of grant" (see SFP Regulations, Section 1859.77.2) SAB approval that were not constructed as specified in the original approval.
- Campus supervision that goes beyond construction site security.
- Expenditures on a financial hardship project that exceed the district's grant amount plus interest for the project.
- Interim housing expenditures associated with a new construction project subject to certain limitations.
- Relocation costs such as goodwill that is not court ordered, and the difference between the salvage value and new value of furniture and equipment costs when the business vendor retains the furniture and equipment.
- Legal fees not associated with securing a site and site condemnation, and contracts bid documentation.
- Expenditures associated with facility hardship SAB approvals that were not constructed as originally approved (see SFP Regulations, Section 1859.82).

References

- SFP Regulations, Sections 17074.25 and 1859.79.2 for modernization projects (Expenditures).
- As provided in SFP Regulations, Sections 1859.74, 1859.74.1 and 1859.75 (Site Acquisition).

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Section 13

Additional SFP Requirements and Features

Introduction

There are a number of topics related to the School Facility Program (SFP) that do not fit neatly into one of the other program sections. These topics are gathered here for easy reference. They may apply to new construction, critically overcrowded school facilities, joint use, and modernization or only to one program, as noted in the discussion.

General Information

Class B Index

The grant amounts in the SFP are adjusted each January based on the change in the Class B Index. This index is developed using cost data published by the Marshall Swift Company relating to buildings of primarily steel and concrete construction.

SAB Appeal Process

In some cases a school district's application may appear to be outside the standards of the SFP and the Office of Public School Construction (OPSC) is unable to recommend approval. When this occurs, a district can appeal directly to the State Allocation Board (SAB) using a *School District Appeal Request* (Form SAB 189). On this form, the district states why the SAB should grant the district's appeal based on law, regulation, or SAB policy.

Prior to the item being scheduled for SAB consideration, the OPSC will review and analyze the appeal as to legal issues, program impact, funding ramifications, and public policy considerations. Based on the evidence submitted by the district, the OPSC may support the district's request, deny the request, or provide alternative recommendations to the SAB. In any case, all of the recommendations made by OPSC to the SAB will be based on supporting laws, regulations, or legal opinions. Districts generally have a representative available at the SAB meeting to provide testimony, if needed. This process applies to all applications.

Change of Scope

The constant fluctuation of costs of materials and labor puts a great deal of pressure on school district staff who are planning construction projects, especially for financial hardship districts that do not have other funds available to cover cost overruns. Because SAB approval is based on the accompanying plans and specifications, there are limited circumstances where a SFP project may deviate from the scope of work outlined in the plans that were included with the application (see "Design with Flexibility in Mind" in Section 3, "Project Development Activities," for more information on this topic).

Additions

It is important to keep in mind that the project may not include the addition of area not proposed in the plans approved by the SAB. This applies to classrooms, MEF and non-classroom, non-MEF space. As stipulated in Regulation Section 1859.51(i)(5), the project may include the construction of more classrooms than needed to house the pupils requested in the application as specified, but these classrooms must have been in the plans submitted with the application. The flexible structuring of the bid documents will accommodate the districts' need to make decisions based on the bid results.

If the project is *non-financial hardship*, then any project savings may be retained and used for any high priority capital facilities needs or as part of the district's contribution to a future SFP project. This approach would provide an alternative method to later add facilities, if the district had not included the additional desired facilities in the plans for the project approved by the SAB. However, the law stipulates that classrooms provided by State or local funding shall be adjusted from the districts' SFP new construction baseline.

Reductions, Deletions or Modifications

Some flexibility is a recognized part of SFP construction projects. However, to continue with a project as approved by the Board, the original intent or project scope must be maintained. If modifications are considered by a district, it is critical that the affected State agencies be part of the process and that certain project requirements continue to be met. The State agencies are coordinating efforts in this area to assist districts when these situations arise. Some extenuating circumstances may be considered by the SAB, as outlined below.

Extenuating Circumstances

CHANGE PROPOSED	PROCEDURE
Deletion of Classrooms	Permitted if: • The capacity (based on the State loading standard) is sufficient to house the pupils requested in the application • CDE and DSA have approved the change • The project meets the 60 percent commensurate requirement
Reduction of MEF Area Facility remains but the square footage is reduced	Permitted if: • The remaining area proposed meets minimum MEF square footage requirements • DSA and CDE have approved the change • The project meets the 60 percent commensurate requirement • Original intent/purpose of project is maintained
Deletion of MEF Area New School Allowance may be reduced or eliminated	Permitted if: • Case-by-case review and approval by CDE • DSA has approved the change • Case-by-case consideration and approval by the Office of Public School Construction (OPSC)/SAB • The project meets the 60 percent commensurate requirement
Deletion of Non-Classroom, Non-MEF Area	Permitted if: • DSA and CDE have approved the change • The project meets the 60 percent commensurate requirement
Permanent to Modular Construction	Permitted if: • DSA and CDE have approved the changes • The project meets the 60 percent commensurate requirement • Original intent/purpose of project is maintained

Extenuating Circumstances...

CHANGE PROPOSED	PROCEDURE
Modular to Permanent Construction	Not permitted as part of the original project, because the project would receive an inequitable funding advantage due to the timing of the DSA plan approval. Districts may consider reapplication, so the desired type of construction can be built.
Changing the Placement of a Building i.e., site conditions discovered in the footprint of construction warrant building placement alteration; however, the building size and function does not change	Permitted if: • DSA and CDE have approved the change • Original intent/purpose of project is maintained

Project Savings

Districts that do not receive financial hardship assistance may retain project savings achieved by utilizing cost saving measures and efficient project management. A district may utilize these project "savings" for other high priority facility capital outlay purposes in the district.

Savings for Non-Financial Hardship Districts

Districts may expend the savings for any of its high priority capital facility needs. A district may also use the savings as a part of the match for other SFP projects, with the only requirement being that the district's share of the savings must be used towards a project of like kind. For example, the State's share of the savings on a new construction project may only be used to match another new construction project, and the State's share of the savings from a modernization project may only be used to match another modernization project.

Savings for Financial Hardship Districts

Any savings from a project that received financial hardship assistance must be used to reduce the financial hardship grant of that project or a future financial hardship project within the district. If the district has no other financial hardship projects, the savings must be remitted to the State within a period of three years. If the district has other projects and retains the savings amount, but the savings is not applied to another financial hardship within three years from the date savings is determined through audit, the savings amount plus interest earned must be returned to the State.

If the district spends more than the State grant plus district matching share, including earned interest on a financial hardship project, the district must do one of the following:

» Reduce the financial hardship contribution on that project by submitting the overspent amount; or
» Apply the overspent amount to reduce the financial hardship contribution on a future project within three years of project closeout; or
» Retain the overspent amount if a financial hardship application is not submitted for a period of three years from the date of the last financial hardship approval.

Restricted Maintenance Account

The SFP requires participating school districts to assure that a State funded project is kept in good repair. To meet this requirement, school districts must establish and maintain a restricted maintenance account within the district's general fund to be used for ongoing and major maintenance of school buildings. Each school district must publicly approve an ongoing and major maintenance plan that outlines the use of funds deposited into the maintenance account.

Each fiscal year and for a period of 20 years after receiving funds through the SFP, the district must deposit in the maintenance account no less than three percent of the district's total general fund budget. Unified school districts with an average daily attendance (ADA) of 1200 or less, elementary school districts with an ADA of 900 or less, and high school districts with an ADA of 300 or less may deposit less than the three percent minimum by certifying that the district can reasonably maintain its facilities with a lesser dollar level maintenance account.

Verification that districts have complied with this requirement will be made through the California Department of Education (CDE) at the time of audit and beyond, and will be based upon budget information submitted by the districts to the CDE.

Facilities Inspection System (Williams Settlement Requirement)

Beginning with the 2005/2006 fiscal year, school districts and county offices of education are required to establish a Facilities Inspection System (FIS) as a condition of participation in the School Facility Program, pursuant to Senate Bill 550 which modified Education Code, Section 17070.75(e). The requirements of the FIS are not defined in law other than to state the system should ensure that each school of the district or county office of education is maintained in good repair.[1] The design of the FIS should be determined at the local level. The one exception is for the school sites meeting the requirements of Education Code, Section 17592.70(b). The needs assessments conducted at these school sites are to be the baseline for the FIS (Education Code, Section 17592.70(d)(3)). To implement this requirement, the OPSC has included certification language on the *Application for Funding* (Form SAB 50-04), the *Application for Joint-Use Funding* (Form SAB 50-07), and the *Application for Charter School Preliminary Apportionment* (Form SAB 50-09).

References

- Education Code, Section 17070.75(a)
- SFP Regulations, Section 1859.91, "Implementation of Priority Points Due to Insufficient State Funds."
- SFP Regulations, Section 1859.92, "Priority Points for New Construction Projects."

[1] The Interim Evaluation Instrument, adopted on January 24, 2007 by the State Allocation Board, defines "good repair."

Appendix 1

State Agency Contact Information

Department of General Services

Office of Public School Construction (OPSC)
Ms. Lori Morgan, Acting Executive Officer
1130 K Street, Suite 400
Sacramento, CA 95814
916.445.3377 Tel
916.324.0623 Fax
www.opsc.dgs.ca.gov

Division of the State Architect (DSA)
Mr. David Thorman, FAIA, State Architect
1102 Q Street, Suite 5100
Sacramento, CA 95814
916.445.4167 Tel
916.324.0207 Fax
www.dsa.dgs.ca.gov

DSA Regional Offices

Los Angeles Basin
700 North Alameda Street, Suite 5-500
Los Angeles, CA 90012
213.897.3995 Tel

Sacramento
1102 Q Street, Suite 5200
Sacramento, CA 95814
916.445.8730 Tel

San Diego
16680 West Bernardo Drive
San Diego, CA 92127
858.674.5400 Tel

San Francisco Bay Area
1515 Clay Street, Suite 1201
Oakland, CA 94612
510.622.3101 Tel

California Department of Education

School Facility Planning Division
Ms. Kathleen Moore, Director
1430 N Street, Suite 1201
Sacramento, CA 95814
916.322.2470 Tel
916.322.3954 Fax
www.cde.ca.gov/facilities/

Department of Toxic Substances Control

Ms. Maureen Gorsen, Director
1001 I Street
Sacramento, CA 95814-2828
916.324.1826 Tel
www.dtsc.ca.gov

Department of Industrial Relations

Mr. John Rea, Acting Director
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102
415.703.5050 Tel
www.dir.ca.gov

Appendix 2
Potential State Agency Involvement

This listing is only a sample of potential State agency involvement. There are many other agencies throughout the State that may become involved in the school construction process.

Potential State Agency Involvement List

AGENCY NAME/CONTACT INFORMATION	ROLE
California Energy Commission **www.energy.ca.gov** • Bright School Program Elizabeth Shirakh 916.654.4089	Helps schools identify ways to reduce energy use in school facilities.
Department of General Services **Office of Small Business Certification and Resources** **www.pd.dgs.ca.gov/smbus** • Disabled Veteran Business Enterprise Participation Program 916.375.4940	Provides a listing of certified DVBE firms. Note: The DVBE Program administered by the Department of General Services does not apply to school district's contracts.
Department of Health Services www.dhs.ca.gov • California Indoor Air Quality Program 510.620.2800	Provides assistance and training to school districts that have air quality problems.
Department of Transportation www.dot.ca.gov • District Transportation Planning Division 916.653.0913	Determines whether a school is likely to have an impact on the State transportation system or any of its facilities.
Office of Emergency Services Hazard Mitigation **www.oes.ca.gov** • Public Assistance 916.845.8200	Provides funds for school construction projects that reduce or eliminate future damage from disasters (seismic retrofit, modernization, flood control). Administer both federal and state funding for repair and replacement of eligible facilities damaged by a disaster event.
Office of Planning and Research **www.opr.ca.gov** • State Clearinghouse 916.445.0613 state.clearinghouse@opr.ca.gov	Distributes state required environmental documentation to various governmental agencies for review and comment as part of the CEQA process.

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Appendix 3
School Facility Program Required Forms

The following forms are used in conjunction with the School Facility Program (SFP). It is the user's responsibility to check the Office of Public School Construction (OPSC) Web site (SAB Forms) for the most current version of the form as older versions of the form may not be accepted.

- Enrollment Certification/Projection (Form SAB 50-01)
- Existing School Building Capacity (Form SAB 50-02)
- Eligibility Determination (Form SAB 50-03)
- Application for Funding (Form SAB 50-04)
- Fund Release Authorization (Form SAB 50-05)
- Expenditure Report (Form SAB 50-06)
- Application for Joint-Use Funding (Form SAB 50-07)
- Application for Preliminary Apportionment (Form SAB 50-08)
- Application for Charter School Preliminary Apportionment (Form SAB 50-09)

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Appendix 4
Services Matrix

During the planning, design, and construction of a school facilities project, many individuals and firms come together to contribute to the project in specific ways. Unless responsibility is assigned by law, the decision about who should perform a given task generally rests with the school district as owner. A lack of clarity regarding responsibilities may lead to a situation where a task is assigned to more than one individual or firm, creating a duplication of effort which can be wasteful and counterproductive.

The Services Matrix is the work of a small group formed by the Joint Committee on School Facilities. District representatives may wish to consult the matrix to determine all of the responsibilities to be assigned on a project and to avoid duplication of effort.

The Services Matrix attempts to accomplish four principle objectives:

- Identify those tasks in a typical school construction or renovation project which must be performed by specific team members.
- Identify the tasks which cannot be performed by certain team members.
- Identify tasks which may be assigned to any of several team members at the owner's discretion.
- Provide the owner with a tool for use in making decisions about task assignments and preparing contracts for services.

The Services Matrix addresses a project which has a construction manager as one team member. In projects where this is not the case, the tasks assigned to the construction manager could typically be performed by either the architect, inspector of record, or the owner.

Services Matrix: Pre-Design Phase

The Services Matrix addresses a project which has a construction manager as one team member. In projects where this is not the case, the tasks assigned to the construction manager could typically be performed by either the architect, inspector of record, or the owner.

	RESPONSIBLE PARTY					
TASK	OWNER	ARCHITECT/ ENGINEER	CONST MGMT/ MULTI-PRIME	INSPECTOR OF RECORD	DSA	CONTRACTOR
Design professional selection	●	✖	◗	✖	✖	✖
Master project schedule (concept thru occupancy) and schedule monitoring	●	◗	◗	✖	✖	✖
Complete district specifications and standards	●	◗	◗	✖	✖	✖
Existing record drawings	●	◗	◗	✖	✖	✖
Site surveys	●	◗	◗	✖	✖	✖
Soils investigation	●	◗	◗	✖	✖	✖
Hazard materials data, EIRs, etc.	●	◗	◗	✖	✖	✖
Appraisals	●	◗	◗	✖	✖	✖
Detailed written program	●	◗	◗	✖	✖	✖
Base sheets for "As builts" (existing buildings only)	◗	●	◗	✖	✖	✖
Site investigations to gather data on existing conditions	◗	●	◗	✖	✖	✖
Data collection/meetings with facilities staff	◗	●	◗	✖	✖	✖
Data collection/meetings with design committee	◗	●	◗	✖	✖	✖
Priorities for any additional funding	●	◗	◗	✖	✖	✖
Project budgets/cost analysis	●	◗	◗	✖	✖	✖
Preparation of Office of Public School Construction (OPSC) applications	●	◗	◗	✖	✖	✖
Investigation of Division of the State Architect (DSA) requirements/status	◗	●	◗	✖	✖	✖
Investigation of SFM requirements/status	◗	●	◗	✖	✖	✖
Investigation of California Department of Education (CDE) requirements	◗	●	◗	✖	✖	✖
Investigation of applicable requirements of local agencies having jurisdiction (i.e., health, fire, public works, utilities, etc.)	◗	●	◗	✖	✖	✖
Develop Information Management Plan	●	◗	◗	✖	✖	✖
Develop Cost Management Plan	●	◗	◗	✖	✖	✖

Matrix Key

✖ Party cannot be responsible
◗ Party may be assigned responsibility (Owner's choice)
● Party is typically responsible
■ Party must be responsible, task not assignable to others

Services Matrix: Design Phase

TASK	RESPONSIBLE PARTY					
	OWNER	ARCHITECT/ ENGINEER	CONST MGMT/ MULTI-PRIME	INSPECTOR OF RECORD	DSA	CONTRACTOR
Schematic Design Drawings	✖	■	✖	✖	✖	✖
Design Development Drawings	✖	■	✖	✖	✖	✖
Cost Estimating and Budget Tracking	◗	◗	●	✖	✖	✖
Value Engineering	◗	◗	●	✖	✖	✖
Preparation of Construction Document production schedule	◗	●	◗	✖	✖	✖
Master Project Schedule monitoring/reporting	◗	◗	●	✖	✖	✖
Preparation of final Construction Documents (drawings and technical specifications)	✖	■	✖	✖	✖	✖
Preparation of "boiler plate" Specifications (invitation to Bid, Proposals, General Conditions, Supplemental Special Conditions)	◗	●	◗	✖	✖	✖
Preparation of Alternate (Cost Adjustments)	✖	■	✖	✖	✖	✖
Quality Control and coordination of Construction Documents	✖	■	✖	✖	✖	✖
Preparation of OPSC application documents	●	◗	◗	✖	✖	✖
DSA Plan Review submittals and approvals	✖	■	✖	✖	✖	✖
Local Agency Plan Review submittal and approvals	✖	■	✖	✖	✖	✖
Independent Coordination and Constructibility Plan Review	◗	◗	●	◗	✖	✖
Maintenance and Operations Staff Plan Review	■	✖	✖	✖	✖	✖
Facilities Staff Plan Review	■	✖	✖	✖	✖	✖
Design Committee Plan Review	■	✖	✖	✖	✖	✖
Packaging of Documents for bidding	✖	✖	■	✖	✖	✖
OPSC Plan Review submittals and approvals	◗	●	◗	◗	✖	✖
California Department of Education Plan Review and approvals	◗	●	◗	◗	✖	✖
Coordinate results of various reviews, resolve conflicting comments	✖	■	✖	✖	✖	✖
Verify that all plan review issues are resolved	✖	■	✖	✖	✖	✖
Cash Flow projection reports	◗	◗	●	✖	✖	✖
Tracking OPSC funding status	●	◗	◗	✖	✖	✖
Construction Market Study	◗	◗	●	✖	✖	✖
Develop Contractor Work Scopes (Multi-Prime only)	✖	✖	■	✖	✖	✖
Prepare Cost Estimates by Work Scope (Multi-Prime only)	✖	✖	■	✖	✖	✖

Matrix Key

✖ Party cannot be responsible
◗ Party may be assigned responsibility (Owner's choice)
● Party is typically responsible
■ Party must be responsible, task not assignable to others

Services Matrix: Bid and Award Phase

TASK	RESPONSIBLE PARTY					
	OWNER	ARCHITECT/ ENGINEER	CONST MGMT/ MULTI-PRIME	INSPECTOR OF RECORD	DSA	CONTRACTOR
Reproduction and distribution of Bid Documents	◗	●	◗	✖	✖	✖
Advertising and Legal notices	●	◗	◗	✖	✖	✖
Contractor marketing/bidder's interest campaign	✖	◗	●	✖	✖	✖
Contractor pre-qualification	●	◗	◗	✖	✖	✖
Pre-Bid meeting (Single Contact)	✖	●	◗	✖	✖	✖
Pre-Bid meeting (Multi-Prime Construction Management Contract)	✖	◗	●	✖	✖	✖
Answer bidder's questions/interpret bid documents	✖	■	✖	✖	✖	✖
Addenda	✖	■	✖	✖	✖	✖
Bid opening	●	◗	◗	✖	✖	✖
Recommendation for award to Owner	✖	●	◗	✖	✖	✖
Preparation of OPSC post-bid documents	◗	●	✖	✖	✖	✖
Draft and Issue contract	●	◗	◗	✖	✖	✖
Review Contractor insurance and bonds	●	◗	◗	✖	✖	✖
Issue Notice to Proceed	●	◗	◗	✖	✖	✖
Prepare reports to District Bond Committee	●	◗	◗	✖	✖	✖
Public Relations activities/presentations	●	◗	◗	✖	✖	✖
Pre-construction meeting	◗	◗	●	◗	✖	✖
Contract Administration and coordination of multiple trade contractors (Multi-Prime Construction Management only)	✖	✖	■	✖	✖	✖
Continuous On-Site Supervision for Owner	✖	✖	■	✖	✖	✖
Continuous On-Site Supervision for Contractor	✖	✖	✖	✖	✖	■
Construction Schedule	✖	✖	✖	✖	✖	■
Monitor On-Site Safety Program	✖	✖	●	✖	✖	◗
Off-site construction permit acquisition	✖	✖	✖	✖	✖	■
Evaluations and approval of substitution requests	✖	■	✖	✖	✖	✖
Cash Flow projection reports	✖	◗	●	✖	✖	✖
Submittal/Shop Drawing Schedule	✖	◗	●	✖	✖	◗
Review and approval of Submittals/Shop Drawings	✖	■	✖	✖	✖	✖
Answering Requests for Information (RFIs)	✖	■	✖	✖	✖	✖

Matrix Key

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Services Matrix: Bid and Award Phase...

TASK	RESPONSIBLE PARTY					
	OWNER	ARCHITECT/ ENGINEER	CONST MGMT/ MULTI-PRIME	INSPECTOR OF RECORD	DSA	CONTRACTOR
Tracking of RFIs	✖	◗	●	◗	✖	◗
Evaluation of Change Order requests—costs and/or time extensions	◗	◗	●	◗	✖	✖
Approval of Change Orders	✖	■	✖	✖	✖	✖
Tracking status of all Change Order requests	✖	◗	●	◗	✖	✖
Review/Observation of overall quality of Construction work	✖	●	◗	◗	◗	✖
Review/Observation of technical aspects of compliance with construction documents	✖	●	✖	◗	◗	✖
Review and Approve Contractor's solutions/recommendations for correction of observed non-conforming work	✖	●	✖	◗	◗	✖
Review of Contractor's Schedule of Values and Pay Requests	◗	◗	●	◗	✖	✖
Approval of progress payment requests	◗	●	✖	◗	✖	✖
Site/staff interface and coordination (at existing facilities)	◗	◗	●	◗	✖	◗
Coordinate interim housing (at existing facilities)	◗	◗	●	◗	✖	◗
Hazardous material inspection (at existing facilities)	■	✖	✖	✖	✖	✖
Means, methods and materials of construction	✖	✖	✖	✖	✖	■
Construction progress/site meetings	◗	◗	●	◗	✖	◗
Coordination of technical inspections and testing	✖	✖	✖	●	◗	◗
DSA required progress reports	◗	●	✖	◗	✖	◗
Coordination with DSA and SFM inspectors	✖	✖	✖	●	◗	✖
Resolution of Owner/Contractor disputes	●	◗	◗	◗	✖	✖
Scheduling of start-up, testing, adjusting and balancing of equipment	✖	✖	●	◗	✖	✖
Cleanup	✖	✖	✖	✖	✖	■
Preparation of Punchlist	◗	●	◗	◗	✖	✖
Punchlist work completion	✖	✖	✖	✖	✖	■
Punchlist of completed work	◗	●	◗	◗	◗	✖
DSA close-out documents	◗	●	◗	◗	◗	◗
OPSC close-out documents	●	◗	◗	✖	✖	✖
Documentation of "as built" changes to drawings	✖	◗	◗	●	✖	◗

Matrix Key

- ✖ Party cannot be responsible
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- ● Party is typically responsible
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Services Matrix: Bid and Award Phase...

TASK	RESPONSIBLE PARTY					
	OWNER	ARCHITECT/ ENGINEER	CONST MGMT/ MULTI-PRIME	INSPECTOR OF RECORD	DSA	CONTRACTOR
Preparation on final "as built" drawings	✖	◗	◗	◗	✖	●
Occupancy/Fire Marshal	◗	◗	◗	●	✖	◗
Warranty, operation and maintenance certificates, documentations and materials	◗	●	◗	✖	✖	✖
Schedule training sessions for district maintenance staff	◗	◗	●	✖	✖	✖
Warranty inspection and report (prior to 12 month expiration)	●	◗	◗	✖	✖	✖

Matrix Key

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● Party is typically responsible
▩ Party must be responsible, task not assignable to others

Appendix 5

Summary of Bond and Deferred Maintenance Allocations

The programs, funding, and approvals over the period since 1990 are shown in the following table:

Summary of Bond Allocations

	NOVEMBER 1998	NOVEMBER 2002	MARCH 2004	NOVEMBER 2006	TOTAL
New Construction	$ 2,900,000,000	$ 6,250,000,000[1]	$ 4,960,000,000	$ 1,900,000,000[5,6]	$16,010,000,000
Modernization	2,100,000,000	3,300,000,000[2]	2,250,000,000	3,300,000,000[5]	10,950,000,000
Charter Schools	—	100,000,000	300,000,000	500,000,000	900,000,000
Career Technical Education	—	—	—	500,000,000	500,000,000
Overcrowding Relief	—	—	—	1,000,000,000	1,000,000,000
High Performance Schools	—	—	—	100,000,000	100,000,000
Hardship	1,000,000,000	—	—	—	1,000,000,000
Class-Size Reduction	700,000,000	—	—	—	700,000,000
Critically Overcrowded Schools	—	1,700,000,000	2,440,000,000	—	4,190,000,000
Joint Use	—	50,000,000	50,000,000	29,000,000	129,000,000
Total Bond Funds	$ 6,700,000,000	$11,400,000,000	$10,000,000,000[3]	$ 7,329,000,000	$35,429,000,000

[1] $14.2 million for energy efficiency.

[2] $5.8 for energy efficiency.

[3] $20 million for energy efficiency set aside for new construction and modernization.

[4] No more than $250,000,000 of the sum of the appropriations for new construction and modernization shall be used to fund the smaller learning communities and small high schools.

[5] Up to 10½ percent ($199.5 million) shall be available for purposes of seismic repair, construction, or replacement, pursuant to Education Code, Section 17075.10.

Summary of Deferred Maintenance Allocations (Millions of Dollars)

	1998–99	1999–00	2000–01	2001–02	2002–03	2003–04	2004–05	2005–06	TOTAL
Excess Repayments	$ 29.3	$ 25.7	$ 20.7	$ 18.1	$ 15.6	$ 14.0	$ 13.5	$ 276.4	$ 448.3
Legislation/Other Sources	137.6	143.7	176.1	176.3	208.0	85.5	254.0	8.0	1,289.2
Total	$ 166.9	$ 169.4	$ 196.8	$ 194.4	$ 223.6	$ 99.5	$ 267.5	$ 284.4	$1,737.5

Working together to improve the educational environment for California's children

Deferred Maintenance Program Handbook

A guide to assist school districts in applying for and obtaining "grant" funds for the purposes of performing deferred maintenance work on school facilities

June 2007

State of California
Arnold Schwarzenegger, Governor

State and Consumer Services Agency
Rosario Marin, Secretary

Department of General Services
Will Bush, Director
Will Semmes, Chief Deputy Director

State Allocation Board
Office of Public School Construction
Rob Cook, Executive Officer – SAB/OPSC
Lori Morgan, Deputy Executive Officer – SAB/OPSC
Mavonne Garrity, Assistant Executive Officer – SAB

Prepared on behalf of the
State Allocation Board

by the
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Contents

Preface

Introduction

This handbook was developed by the Office of Public School Construction (OPSC) to assist school districts in applying for and obtaining "grant" funds for the purposes of performing deferred maintenance work on school facilities. It is intended to be an overview of the program for use by school districts, architects, and other interested parties on how a district or county superintendent of schools becomes eligible and applies for the two different types of State funding available. However, it is not meant to be a step-by-step discussion of every conceivable application process, project type, or the eligibility of expenditures. For complete project specific information review the Deferred Maintenance Program (DMP) Regulations located on the OPSC Web site at www.opsc.dgs.ca.gov and, most importantly, contact your Deferred Maintenance project manager.

Things To Know

This edition of the *Deferred Maintenance Program Handbook* is a result of changes to the program based on new legislation and the State Allocation Board's (SAB) regulation changes. These changes were undertaken by the OPSC in an effort to strive for unity within regulations, forms, previous SAB policies, and handbook.

Things the reader should keep in mind are:

- Lead Abatement. Inspection, sampling, analysis, control, management, and removal of lead-containing materials.
- Clean Restroom Legislation (SB 892). Legislation which added Section 35292.5 to the EC requiring district's to maintain their restroom facilities. Failure to comply with this Section may result in the withholding of the district's Deferred Maintenance Basic Grant apportionment.
- Please refer to Regulation Section 1866 if you are unfamiliar with a term used in this handbook.

Where To Begin

Section 1, Deferred Maintenance Program Overview; Section 2, Five Year Plan and Basic Grant; Section 4, Project Expenditures along with the appendices contains the information that affects most districts. These sections will provide the reader with the essential program elements to receive the Basic Grant, for which all districts may apply. Section 3, Extreme Hardship Grant is an additional grant beyond the district's Basic Grant and may be available to a district if it has a project meeting the requirements stated in the introduction section of this section.

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Section 1

Deferred Maintenance Program Overview

Introduction

The Deferred Maintenance Program (DMP) provides State matching funds, on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of existing school building components so that the educational process may safely continue. Typically, this includes roofing, plumbing, heating, air conditioning, electrical systems, wall systems, floor systems, etc. An annual Basic Grant is provided to districts for the major repair or replacement work listed on the *Five Year Plan* (Form SAB 40-20), which is a projection of deferred maintenance work to be performed on a district wide basis over the next five years. An Extreme Hardship Grant is provided in addition to the Basic Grant if the district has a critical project on the five year plan that must be completed within one year due to health and safety or structural reasons.

The Law and Regulations

The DMP is subject to the provisions of California Education Code (EC), Section 17582 through 17588 and 17591 through 17592.5 and the State Allocation Board (SAB) Regulations, Title 2, California Administrative Code, Sections 1866 through 1866.14. Applicant districts are responsible for complying with all laws and regulations for any project undertaken pursuant to the requirements of the DMP. If the district's project contains work that requires Division of the State Architect (DSA) approval, the final plans and specifications for the project must have DSA approval prior to a district signing a contract for construction. If a district enters into a contract for construction prior to receiving DSA approval of the plans and specifications, State funding may not be provided.

In making an apportionment, the SAB shall assume no legal responsibility for any lawsuits or liens filed against an applicant school district. Neither the State nor any State department or agency thereof, in making an apportionment, shall be required to assume any responsibility not otherwise imposed upon it by law.

Program Funding

The DMP receives it's funding annually. Funding is made available primarily from three sources:

- Excess repayments from the State School Building Aid Program (SSBAP).
- State School Site Utilization Funds.
- Funds provided through the Budget Act for the State School Deferred Maintenance Fund.

In recent years, program funding has mainly relied on the funds provided through the Budget Act. This is due to the decrease of funding in the SSBAP and site utilization funds as payments into these programs dwindle. Unallocated carryover from the prior fiscal year is also used to fund the program.

Available Funding Types

The apportionment types allowed under the Deferred Maintenance Law are:

Apportionment Types

TYPE	EDUCATION CODE	PAGE
Basic Grant	Section 17584(a)	4
Extreme Hardship Grant	Section 17587*	7

* Not less than one-half of all funds made available by EC Section 17587 is to be apportioned to school districts that had an average daily attendance of less than 2,501 during the prior fiscal year.

The amount of funding available for both grant types fluctuates each fiscal year. An item to apportion both the Basic Grants and Extreme Hardship Grants is generally taken to the SAB for approval after December 1st.

Eligible Deferred Maintenance Projects

The DMP is made up of 12 project categories or types of work that are outlined in EC Section 17582 or otherwise approved by SAB. Most of the project categories are building systems that are necessary components of a facility, without which the building would not be able to function for school purposes. A deferred maintenance project must conform to one of these categories in order for a district to place a project on the five year plan or apply for an Extreme Hardship Grant. For sample project types, please refer to Appendix 1.

Program Participation

Entities that operate as a K–12 public elementary, unified, or high school districts, county superintendent of schools, or one of the regional occupational centers identified in law beginning with EC Section 17582, may participate in the DMP.

Disabled Veteran Business Enterprises Policy

Participation goals are not currently required for projects funded by this program.

Clean Restroom Legislation (SB 892)

Senate Bill 892, Chapter 909, Statutes 2004, added Section 35292.5 to the EC. This Section relates to the sufficiency and availability of restroom facilities in public schools. The OPSC provides a procedure for concerned parties to file complaints regarding the condition of public school restrooms. If a school district has been found to be in violation of EC Section 35292.5, it must take the appropriate action to correct the violation(s) and submit an SAB Form 892R, *Response to Restroom Maintenance Complaint* to the OPSC. Failure to address the violation outlined in the complaint may result in the withholding of the district's Deferred Maintenance Basic Grant apportionment.

Section 2

Five Year Plan and Basic Grant

Introduction

A Basic Grant is available to eligible districts that have a current *Five Year Plan*, Form SAB 40-20 approved by the State Allocation Board (SAB) that encompasses the fiscal year of funding. The Basic Grant and the district's matching share is to be used for projects listed on the SAB approved *Five Year Plan*, Form SAB 40-20.

Helpful Hint:
The SAB does not fund the projects on the district's five year plan but rather approves the five year plan and the proposed projects.

Five Year Plan: Submittals and Revisions

A *Five Year Plan* is good for a period of five fiscal years. The intent of the plan is to forecast deferred maintenance projects within the district over the next five years. It is not intended to be an expenditure report; therefore the project costs reported should be estimates. The district does not have to perform all the work listed on the plan. New or revised plans for the current fiscal year shall be submitted to the Office of Public School Construction (OPSC) by the last working day in June for that fiscal year.

The *Five Year Plan* allows for a district to designate an individual that has been approved by the District's Governing Board to act on behalf of the district and which the OPSC can contact regarding the DMP. If Part One of the *Five Year Plan* is not completed, the district superintendent must sign the form and OPSC's point of contact will be the superintendent.

Beginning with the 2005–2006 fiscal year, school districts and county offices of education are required to establish a Facilities Inspection System (FIS) as a condition of participation in the DMP, pursuant to Senate Bill 550 which modified Education Code (EC) Section 17070.75(e). The requirements of the FIS are not defined in law other than to state the system should ensure that each school of the district or county office of education is maintained in good repair.[1] The design of the FIS should be determined at the local level. The one exception is for the school sites that were identified by the California Department of Education (CDE) as ranked in deciles one to three based on the 2003 Academic Performance Index and were newly constructed prior to January 1, 2000. (The CDE published a list of the schools ranked in deciles one to three and can be found on their Web site at www.cde.ca.gov.) The needs assessments conducted at these school sites are to be the baseline for the FIS (EC Section 17592.70(d)(3)). To implement this requirement, the OPSC has included certification language on the *Five Year Plan*.

Prior to submitting a new or revised version of the plan, the proposals and plans for expenditure of funds for the deferred maintenance of school district facilities must be discussed in a public hearing at a regularly scheduled school board meeting.[2] The district will be asked in the certification section of the form to enter the date this occurred. Each time a revised plan is submitted to the OPSC, this requirement must be adhered to.

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1 The Facilities Inspection Tool, adopted on June 27, 2007 by the SAB, defines good repair.
2 Regulation Section 1866.4(3)

A district may amend its approved Five Year Plan as needed for the current and future fiscal years. Plan revisions are not required for estimated cost changes or for moving a project already listed on the plan into a different fiscal year. A revised plan should be submitted to the OPSC for any one of the following:

- The plan has expired.
- Deferred maintenance work will be performed that is currently not listed on the plan or at a school not on the plan.
- If the exact same work was entirely paid for under the School Facility Program (SFP) Modernization or Federal Renovation Program the plan would need to be resubmitted removing the project(s).

The fiscal year in which a district revises the plan will become the starting year for the plan and will project four fiscal years out. The OPSC will not accept revisions to the *Five Year Plan* for prior fiscal years.

Eligible Projects

To place a project on the *Five Year Plan* it must meet all the following criteria:

- Be either a repair and replacement project for one of the school facility components stated in law or approved by the SAB; which have approached or exceeded their normal life expectancy; and,
- Located within district owned facilities that are used for school purposes.

Helpful Hint:
In order to use a facility for school purposes, it must be either Division of State Architect (DSA) approved or have a waiver.

Components with a history of continued repairs indicating a shortened life expectancy may be included as eligible items. Districts currently leasing relocatables from the State Relocatable Classroom Program are exempted from the requirement of "district-owned" and can include deferred maintenance projects for these facilities on the district's *Five Year Plan* provided it meets the remaining requirements stated above.

For County Office of Education (COE) only, a law change expanded the facilities in which deferred maintenance funding could be used.[3] The law defined school buildings for county offices to include those facilities that are exempt from the Field Act. If the county is leasing a facility, which meets this requirement, the lease must require the COE to maintain the facility in order to expend deferred maintenance funds on the building.

Basic Grant

The maximum amount provided by law for the Basic Grant is based on a formula detailed in EC Section 17584(a). The calculation of the maximum amounts is made by the California Department of Education (CDE).

The funding level for County Superintendents of Schools (CSS) will be calculated using the formula of one-half of one percent of their total general funds and adult education funds budgeted by CSSs for the fiscal year, exclusive of any amounts budgeted for capital outlay, debt service, or revenues that are passed through to other local educational agencies.

Basic Grant Apportionment

The SAB apportions funds for the DMP one year in the arrears. Based on the amount of funds available, a district or COE may receive the maximum amount calculated by the CDE, known as the "Maximum Basic Grant" or a prorated amount, known as the "Prorated Basic Grant". The apportionment is subject to the district matching the allocated State funds.

[3] EC Section 17582(a)

A district that receives an Extreme Hardship Grant will receive the Maximum Basic Grant to contribute to its critical project. For more information on extreme hardship funding requirements, please refer to page 10.

Deposit of District Funds

In order to receive State Deferred Maintenance funds, the governing board of a school district is required to establish a restricted fund referred to as the "District Deferred Maintenance Fund" (DDMF).

Annually, districts participating in the DMP will make a deposit into the DDMF and have their COE certify the funds on deposit. By the COE submitting the *Certification of Deposit*, Form SAB 40-21, which is due to the OPSC 60 days after SAB apportionment of the Basic Grant, the district shall receive matching State funding on a dollar for dollar basis, up to the amount apportioned. Any money deposited into this fund and any interest earned must be used for projects listed on the district's SAB approved Five Year Plan. This fund is subject to an annual audit at the local level.

The district's deposit must be a cash contribution from any non-restricted fund, unmatched carryover, or from the district's restricted Ongoing and Major Maintenance Account.[4] Annual deposits to that account in excess of two and one-half (2½) percent of the district general fund budget may be counted towards the district's matching share.

Matching the Maximum

If a district does not deposit the Maximum Basic Grant as calculated by the CDE, EC Section 17584.1(b) requires the district's local governing board to submit a report (by the following March 1st) to the Legislature. The report is to include a schedule of the deferred maintenance needs for the current fiscal year and an explanation of how the district plans on meeting its current need without depositing the Maximum Basic Grant. For specific information regarding the report requirements, please refer to EC Section 17584.1.

Also, it is important to note that school districts with schools eligible to participate in the Emergency Repair Program must deposit an amount equal to the maximum basic grant to be eligible to receive funding from that program pursuant to the Emergency Repair Program Regulation Section 1859.328.

Transfer of Excess Funds and Carryover

Districts are encouraged to use any unmatched State funds on other deferred maintenance projects listed on the approved Five Year Plan. However, EC Section 17583 allows a district to transfer any unmatched State funds to other expenditure classifications in the district. If a district elects to transfer funds to purposes other than deferred maintenance, a school board resolution approving the transfer by a two-thirds vote is required. Districts are required to file the resolution with the county superintendent of schools and the county auditor. A report pursuant to EC Section 17584.1 will need to be filed if the district transfers any unmatched State funds out of the DDMF.

If the district elects not to transfer the excess funds deposited to another expenditure classification, the excess funds deposited may be carried over and used to offset some or all of the match required for a subsequent fiscal year. Carryover that has been reported on the *Certification of Deposits*, Form SAB 40-21 is considered matched and therefore cannot be applied as carryover in subsequent fiscal years.

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[4] Regulation Section 1866.4.3

Fund Release

Once the OPSC receives the Certification of Deposits, Form SAB 40-21 from the COE, the OPSC will generate a fund release. A State warrant (not to exceed the lesser of the amount apportioned or the deposit by the district) will be issued in the county's name by the State Controller's Office for deposit into the district's fund. Funds can be expected within three weeks of OPSC's receipt of the Form SAB 40-21. If the district receives an Extreme Hardship Grant the Basic Grant will not be released until the *Fund Release Authorization* (Form SAB 40-23) is processed.

Section 3
Extreme Hardship Grant

Important Note:
The OPSC must determine the hardship project is eligible for State funding prior to the start of construction. A project started prior to this determination will not be recommended for apportionment by the SAB. If the project meets the requirements of a Priority One as stated in Regulation Section 1866.5.3(c), contact OPSC immediately.

Introduction

Applications for an Extreme Hardship Grant are accepted on a continuous basis throughout the fiscal year. Those received prior to the last working day in June are ensured consideration in the next funding cycle. An extreme hardship exists when the SAB determines the existence of all of the following:

- **Financial Test:** The total estimated cost of the critical project is greater than two times the district's maximum basic grant; and,
- **Health and Safety Test:** The district has a critical project on its Five Year Plan which, if not completed in one year could result in serious damage to the remainder of the facility or would result in a serious hazard to the health and safety of the pupils.

Eligible Project

An application may include work to repair or replace an existing school building component, located within existing district owned classrooms and/or subsidiary facilities and other non-classroom space located on a school site. Each facility component (i.e., roofing) at a school site makes up one project. A district with only one school may include other essential work (i.e., multiple components), as long as all projects individually meet the above tests, without being subject to the multiple project district contribution requirements stated on page 10.

Extreme Hardship Application Package

Helpful Hint:
If the district has additional reports from a roofing company, environmental or mechanical engineer, submitting those in addition to the architect or structural engineers report will help OPSC in it's review of project eligibility.

The following documents are required in order for the application to be deemed complete.

Required Documents for a Complete Application

FORM NUMBER	DOCUMENT
SAB 40-20	A revised Five Year Plan, Form SAB 40-20 including the critical project and identifying it in Column 9 of the form.
SAB 40-22	Extreme Hardship Funding Application with all costs rounded to the nearest dollar. Final costs must match the totals shown on the architect's cost estimate.
None	Detailed cost estimate prepared by a licensed architect or contractor showing quantity and unit cost breakdowns (rounded to the nearest dollar) supporting the construction costs listed. The cost estimate shall be subject to review by the OPSC for conformance with the Saylor Current Construction Cost publication and at the OPSC's direction, the DSA. Items in the cost estimate shall be limited to only the minimum work necessary to mitigate the problem. Lump sums are not allowed.

continued on following page

Required Documents for a Complete Application...

FORM NUMBER	DOCUMENT
None	Licensed architect or structural engineer's report detailing: 1. How the project qualifies as a hardship as defined in EC Section 17587. 2. A recommended solution to correct the problem. 3. Detailed description of work being performed.
None	Plot plan identifying location of work with all buildings or areas of work clearly labeled.

A district with only one school that is applying for more than one project category will need to submit an *Extreme Hardship Funding Application*, Form SAB 40-22, for each project category and an SAB 40-22 that combines all the projects into one request.

The Extreme Hardship application package is reviewed by the Office of Public School Construction (OPSC) for completeness and placed on a Deferred Maintenance Extreme Hardship workload list by received date order. The workload list can be viewed on the OPSC Web site at www.opsc.dgs.ca.gov. The applications are then processed in date order for presentation to the SAB for consideration.

In some cases, the OPSC may find that an application lacks required information. If this is the case, the OPSC will return the application unprocessed with notification of the missing documents. Should this occur, the district may resubmit the application once the required information is available.

Multiple Extreme Hardship Funding Requests

A district may submit more than one *Extreme Hardship Funding Application*, Form SAB 40-22 in a fiscal year as long as each project meets the financial, and health and safety test.

Assignment of Application Number

Upon submittal of an Extreme Hardship Funding Application, Form SAB 40-22, an application number will be assigned to the project. Following the prefix "40", this number will be the five digit code in the California Public School Directory, the last two digits of the beginning fiscal year, in which the district is applying for funding, and lastly the number of projects submitted by the district. For example:

» 40/99999-02-01

The above number would represent a district's first 2002/2003 Fiscal Year critical project. Districts should use this number when corresponding with the SAB/OPSC.

OPSC Review

After the acceptance of the complete application, the OPSC will process it based on the date received. The OPSC will then conduct a site visit to verify the conditions stated in the architect's or structural engineers report. A follow-up letter after the site visit may be sent requesting additional information. Once all the back-up for the project is received, the OPSC will determine if the project meets the tests stated in law and will notify the district of it's findings. Construction may begin after the OPSC site visit, however, there is no guarantee of OPSC's recommendation for funding until the district has received written notification. Projects that meet the requirements will be presented to the SAB for approval.

Determination of Extreme Hardship Grant and District Contribution 2002/2003 FY Projects and Beyond

The total estimated cost of the critical project will determine how the extreme hardship grant is calculated and the amount of funding the district will contribute to the project. The following chart details the different district contribution requirements for a critical project:

Helpful Hint:
Cost increases for 2002/2003 Fiscal Year projects and beyond where the revised total project cost exceeds $1,000,000, will be subject to the new district contribution requirements.

District Contribution for a Critical Project

DISTRICT'S MAXIMUM BASIC GRANT AND STATE'S MATCH	TOTAL PROJECT COST	PROJECT NUMBER	DISTRICT CONTRIBUTION REQUIREMENT
Under $1,000,000	Under $1,000,000	First Project	Maximum Basic Grant and State's matching share for the fiscal year the project was funded.
Under $1,000,000	Above $1,000,000	First Project	Maximum Basic Grant and State's matching share for the fiscal year the project was funded AND 50 percent of all costs above $1,000,000.
Under $1,000,000	Any Amount	Second and Subsequent Projects or additional projects from a different fiscal year receiving funding.	Fifty percent of the total project cost.
Above $1,000,000	Above $1,000,000	First Project	Maximum Basic Grant for the fiscal year the project was funded AND 50 percent of all remaining costs.
Above $1,000,000	Above $1,000,000	Second and Subsequent Projects or additional projects from a different fiscal year receiving funding.	Fifty percent of the total project cost.

SAB Approval Process

Projects will be presented to the SAB on a continuous basis throughout the fiscal year. The SAB approval/action can either be funded or "unfunded" depending upon the extent of Deferred Maintenance funds available. If the approval is "unfunded" the district will be placed on an "unfunded" list by priority order and complete application received date order. If the critical project receives an "unfunded" approval, the extreme hardship grant will be an estimated amount calculated based on the maximum known at the time of approval and will be recalculated using the maximums available at the time of funding. Once funding becomes available, projects will be funded based on how the application was placed on the "unfunded" list. Only projects that meet the financial test at the time of funding will receive hardship funding. If the request does not meet the criteria, the district may still complete the project with its Basic Grant and State's matching share.

Funding Priorities

Once an application is recieved by the OPSC it is assigned a priority status. The SAB will utilize the following funding prioritization for Extreme Hardship Grants:

Funding Priorities

PRIORITY	DESCRIPTION OF PROJECTS
1	The immediate closure of a facility due to health and safety or structural problems that precludes pupils from remaining in the facility. School board resolution required, refer to Regulation Section 1866.5.3(c).
2	All other eligible deferred maintenance projects, in date order.

Fund Release

After the SAB apportions the Extreme Hardship Grant, the district will need to deposit an amount equal to the maximum Basic Grant into the District Deferred Maintenance Fund and submit the *Fund Release Authorization*, Form SAB 40-23 along with the supporting documentation. This form is due to the OPSC within one year of SAB apportionment of the project. The OPSC will then process fund releases based on the supporting documentation in date received order. The Extreme Hardship Grant may be prorated if the documents submitted only cover a portion of the project.

After the SAB has apportioned the Deferred Maintenance Extreme Hardship Grant, the OPSC will release the amount apportioned to the appropriate county treasury after the district has complied with the requirements of the Fund Release Authorization, Form SAB 40-23, and submitted it to the OPSC. The district must designate the method for the release of funds and submit the required documents with the Fund Release Authorization to release extreme hardship project funds:

Documents Required to Release Funds

DESIGNATED METHOD OF FUND RELEASE	DOCUMENTS REQUIRED
Release of Funds Based on Bids Only	• A copy of the complete bid package including any addenda. • A copy of the proposed contract. • Plans and specifications for the project(s). Approved Division of the State Architect (DSA) plans are needed for those projects that contain work that must be approved by the DSA. • The district certifies that its matching share has been deposited in the District Deferred Maintenance Fund.
Partial Release of Funds	In addition to the above documents: • The district must designate that the documentation submitted represents a request of funds for the entire scope of the project as approved by the SAB or provide the percentage of work under contract or bid and the dollar value for the documents submitted. Percentage of work under contract or bid: _____ % Value of request for release of funds: $ _____
Release of Funds Based on Awarded and Signed Contracts	• A copy of the complete bid package including any addenda. • A copy of the signed and awarded contract. • A summary listing of all the bidders and amount of the bids the district received for the project upon which the contract was awarded. • Plans and specifications for the project(s). Approved DSA plans are needed for those projects that contain work that must be approved by the DSA. • All fully executed change orders. • The district certifies that its matching share has been deposited in the District Deferred Maintenance Fund.

Documents Required to Release Funds...

DESIGNATED METHOD OF FUND RELEASE	DOCUMENTS REQUIRED
Partial Release of Funds	In addition to the above documents: • The district must designate that the documentation submitted represents a request of funds for the entire scope of the project as approved by the SAB or provide the percentage of work under contract or bid and the dollar value for the documents submitted. Percentage of work under contract or bid: _____ % Value of request for release of funds: $ _____

Time Limit on Apportionment and Progress Report

The district has one year from the SAB apportionment of the Extreme Hardship Grant to submit the documents for a release of funds and to complete the project. If within six months of SAB apportionment, the district has not submitted the documents for fund release, a narrative report must be submitted to the OPSC. The report must contain the information requested in Regulation Section 1866.5.8(c). A district may request from the SAB a one-time, time extension from the one year requirement under specific circumstances detailed in Regulation Section 1866.5.8(d).

Project Increases

A district may be eligible for an Extreme Hardship Grant increase to its critical project if the bid or subsequent re-bids are higher than the total estimated cost of the project or additional related work is encountered within the scope of the original project (i.e., change orders). The following documents are required for an increase to a project:

Required Documents for an Increase to a Project

TYPE OF INCREASE	DOCUMENTS REQUIRED TO SUPPORT THE INCREASE
Additional Related Work Note: Only expenditures for work outlined in the application and approved by the SAB will be recognized as eligible.	• An amended Extreme Hardship Funding Application, Form SAB 40-22, reflecting current project costs. • A revised licensed architect/structural engineer's report detailing why the additional work or cost is necessary. • A revised detailed cost estimate from the architect or contractor, which outlines the cost of the work completed under the initial approval, as well as the additional related work and cost necessary to complete the project. • A copy of the low bid and project specifications. • A copy of the signed and awarded contracts. • Copies of all fully executed change orders. • Plot plan showing the location of the work approved under the original application and then identifying the location of the additional related work.
Low Bids exceeds Total Project Cost	• An amended Extreme Hardship Funding Application, Form SAB 40-22, reflecting current project costs. • A revised licensed architect/structural engineer's report detailing why the additional work or cost is necessary. • A copy of the low bid and project specifications. • A copy of the signed and awarded contracts. • Plot plan showing the location of the work included in the bid.

Increases for work that was not originally contained in the scope of the project are not eligible. However, if the work has not been completed, the district may submit a new application for the additional work. The OPSC will review the application to determine the eligibility of the project.

Expenditure Audit

A final audit is initiated when all project expenditures have been made, but no more than one year after the submittal of the Expenditure Report, Form SAB 40-24.[5] This form is due to the OPSC within two years from the date any funds were released for the project. The OPSC shall complete the audit of expenditures within six months, unless awaiting additional documentation from the district.

A worksheet is available to assist the district in providing detailed expenditure information. The *Detailed Listing of Warrants Issued by the District for Deferred Maintenance Hardship Projects*, Form SAB 184ADM, can be found on the OPSC's Web site.

Documents Required For Extreme Hardship Post Audit

The following documents are required for extreme hardship final audit:

Required Documents for Final Audit

DOCUMENT NUMBER	DOCUMENTS NAME
SAB 40-24	Expenditure Report
None	Signed and awarded contract(s)
None	Completion notices(s) showing date recorded
None	All invoices except those paid to the main construction contractor
None	A detailed listing of each expenditure. The district may use the Form SAB 184ADM to assist the district in reporting these expenditures.

Ineligible Extreme Hardship Expenditures

The following are some examples of ineligible extreme hardship expenditures:

- Enhancements. For example, if a district has a shingle roof, which qualifies for replacement, it must be replaced with a shingle roof. If the district wishes to replace it with a metal roof, the State will not fund the project, unless (1) the cost is the same or less than that of a shingle roof or (2) the district agrees to fund the difference between the cost of a shingle roof and the cost of a metal roof. Generally, replacements should be like for like unless prohibited by DSA or by local ordinance.
- Reimbursement of architect/structural engineer's fees more than five months prior to OPSC's acceptance of the complete application.
- Service warranties.
- Equipment rental.
- Work done on buildings not owned by the district.

[5] The one-year audit requirement only applies to projects receiving an apportionment after July 1, 2002.

- Work done on buildings not approved by the Division of the State Architect when appropriate.
- Repairs on portable buildings that exceed 50 percent of the replacement cost. The request may be submitted to the SFP as a modernization project.

Fund Reconciliation and Cost Analysis

When a complete audit of all expenditures reported by the district has been conducted by the OPSC, a "Deferred Maintenance Program Hardship Project Cost Analysis" report will be issued. This report reflects a summary of the total eligible State funded project costs. In addition, any adjustment made to the district's Form SAB 40-24 and Form SAB 184ADM will also appear in this report. During this process, the district is required to review the report and respond to inquires made by the OPSC.

Closing Action/Release of Funds

The project's final closing action consists of one of the following:

Final Closing Actions

IF...	THEN...
the final eligible State funded costs are within the eligible costs authorized by the SAB...	the OPSC closing action will be executed administratively.
the final eligible costs are in excess of the eligible costs authorized by the SAB...	the OPSC closing action will require SAB approval.

Once the final closing action has been completed by the OPSC, additional expenditures will not be recognized.

Release of Funds/Refund

Funds due to the district as a result of the closing action will be released to the district. If the closing action determines that a refund is due to the State, a request will be made to the district for the refund.

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Section 4

Project Expenditures

Introduction

The governing board of each district shall have complete control over the funds deposited and the earnings of funds once deposited into the District Deferred Maintenance Fund. Expenditures made from this fund must be expended for projects shown on the district's approved five year plan and be eligible deferred maintenance projects.

Legal Requirements

All work must be bid in accordance with the Public Contract Code. All contracts must comply with the Education Code, Government Code, Public Contract Code, California Code of Regulations (Title 24), and any local legal requirements. Please note also that for projects containing work that requires Division of the State Architect (DSA) approval, the final plans and specifications for the project must have DSA approval prior to a district signing a contract for construction. If a district enters into a contract for construction prior to receiving DSA approval of the plans and specifications, State funding may not be provided.

For an emergency contract to be awarded under the provisions of the Public Contract Code, Section 20113, the district must:

- obtain approval from its School Board, by unanimous vote; and,
- obtain approval by the County Superintendent of Schools; and,
- comply with the legal requirements for any bonds or security; and,
- obtain contract approval by legal counsel.

In addition, should the a district enter into an energy services contract (performance agreement) as defined in Government Code Section 4217.10, in order for the OPSC to complete a fund release review the district needs to submit additional documentation as follows:

- A copy of the minutes from the public hearing at which the energy services contract was awarded.
- An opinion from the district's legal counsel verifying that the project is eligible to proceed as an energy services contract as defined in Government Code Section 4217.10 et seq.
- An opinion from the district's legal counsel approving the energy services contract as to form.
- A copy of the DSA approved final plans and specifications for the project.
- A copy of the signed and awarded energy services contract including a description of the scope of the completed extreme hardship project.

Helpful Hint:
If the district bids both the deferred maintenance work and modernization work together be sure to separate the costs for the two types of work so that appropriate costs can be identified at the time of audit.

Deferred Maintenance and Modernization

A district may choose to use both deferred maintenance funding in conjunction with School Facility Program Modernization funds in order to complete a project, provided the work complies with the requirements of deferred maintenance. Depending on the type of Deferred Maintenance funding (Basic Grant or Extreme Hardship Grant) the district will need to comply with the following specific requirements:

- Districts anticipating expenditures of a project being performed in conjunction with a School Facility Program (SFP) modernization project, must have the project on the district's approved Deferred Maintenance Five Year Plan. It is recommended that the district identify in the comments section of the form that a portion of the work will be using SFP modernization grants. In addition, the detail kept on file at the district should be updated to reflect actual projects costs expended from each fund for the purpose of auditing.
- If the district's application for an extreme hardship grant involves proposed work also included in a School Facility Program (SFP) modernization application that has been funded, included on the Modernization Unfunded or Workload List, the district must certify that, after reducing the work to be funded with the extreme hardship grant from the SFP modernization project's cost estimate the remaining work in the modernization project is at least 60 percent of the total SFP grant amount provided by the state and the district's matching share. The cost estimate may not include planning, test, inspection or furniture or equipment. If the district cannot make this certification for a funded SFP Modernization application the extreme hardship grant will not be released. If the SFP modernization project is on the Unfunded or Workload List it must be withdrawn prior to the release of the extreme hardship grant to the district.

Professional Services

Architect and structural engineer (A/E) fees shall be allowed as an eligible Basic Grant expenditure under the following conditions:

- An existing system design is faulty and replacement in kind would not alleviate future damage (i.e., a flat roof is redesigned to a sloped system to alleviate recurring leakage and interior damage).
- An obsolete, ineffective system is abandoned due to the district's inability to obtain parts.
- Technological changes prevent portions of the existing system from being used in conjunction with the replacement system and design changes are necessary to accommodate the new system.
- The Division of the State Architect, Office of Regulation Services (DSA/ORS), requires structural changes.

Extreme Hardship: Architect/Structural Engineer

As part of the application requirements of an Extreme Hardship Grant, the district must retain the services of a licensed architect or structural engineer (A/E). The combined compensation for A/E service fees are limited to a maximum of 12 percent of the construction cost when those costs do not exceed $500,000. If the construction costs exceed $500,000, the allowable A/E fees will be calculated based on the sliding scale outlined in Appendix 4, Architect/Structural Engineer Fee Schedule, page 25. For purposes of calculating the A/E service fees, the computed cost is the total award from construction contracts, plus the cost of all approved additive contract change orders (with the exception of items resulting from errors and omissions on the part of the architect). Although these allowances are eligible, the district is encouraged to negotiate the best possible terms for all professional services.

Force Account Labor

Force account labor may be recognized as an eligible deferred maintenance expenditure under the following conditions:

- The personnel was hired on a temporary basis to do work solely listed on the SAB approved Five Year Plan, Form SAB 40-20.

A district may not reimburse its general fund with deferred maintenance funds by charging labor from a deferred maintenance project done by regular district employees. Charges for materials may be recognized as long as they are not items classified as supplies in the School Accounting Manual.

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Appendix 1

Typical School Facilities Components

The following chart provides examples of deferred maintenance projects under each eligible project category. Please note, this is not a complete listing of all eligible projects and other projects may qualify as an eligible expenditure under one of the following school building components. The work must be like-kind components or materials unless the district can demonstrate that an alternative building material or system performs the same function as the existing materials or system, the existing materials are obsolete or no longer available, or the proposed replacement materials are more cost effective or economical than like-kind materials. Please refer to Regulation Section 1866.5.

Typical School Facilities Components

SCHOOL FACILITY COMPONENT	CONDITIONS
Floor Covering: 1. Carpeting 2. Asphalt Tile and Vinyl Asbestos Tile 3. Hardwood Floors	
Painting: 1. Interior of classrooms, library, offices, hallways, cafeteria, restrooms, etc. 2. Exterior stucco, masonry, wood, and metal trim	
Electrical: 1. Panels and boards 2. Signal systems, including fire alarms and public address 3. Conductors and cables	Must be connected to the main bell system; cannot be free standing.
Classroom Lighting: 1. Substandard incandescent lighting and obsolete fluorescent lighting 2. Fixtures	Light bulb replacement not allowed.
Roofing: 1. Large sections or whole buildings of roofing systems 2. Flashings, gutters, and downspouts 3. Ceiling tiles	Replacement of roofing systems must be for like kind material, pitch, etc.
Plumbing: 1. Piping within boundaries 2. Underground gas, water 3. Sewer, leech fields 4. Well replacement	

continued on following page.

Typical School Facilities Components...

SCHOOL FACILITY COMPONENT	CONDITIONS
Heating/Ventilation/Air-Conditioning: 1. Heating a. Gas-fired unvented wall heaters b. Other heating systems I. Boilers II. Piping c. Individual heating units except gas-fired wall heaters 2. Ventilation and Air-Conditioning Systems a. Central systems b. Individual units c. Cafeteria and automotive fume exhaust systems	
Wall Systems: 1. Doors including hardware 2. Window Assemblies (including wood sash) 3. Indoor gym bleachers that pull out from wall 4. Siding 5. Restroom partitions (attached to wall)	
Paving: 1. Asphalt a. Slurry coat b. Seal 2. Concrete	Like kind replacement only
Underground Toxic Tank: 1. Removal 2. Clean-up	May include ground water monitoring costs if required by public agency
Asbestos: 1. Inspection, sampling, and analysis 2. Removal or encapsulation	When friable
Lead: 1. Inspection, sampling, and analysis 2. Removal or control management	When present in lead containing materials.

Appendix 2
Frequently Asked Questions

Q. **How may I obtain current information and forms for the Deferred Maintenance Program?**

On our Web site at www.opsc.dgs.ca.gov; or, by contacting your Deferred Maintenance Program Project Manager at 916.445.3160.

Q. **Can interest earned by a district be used as part of the district deposit in subsequent years?**

If the district does not have a critical project, one-half of the interest amount may be applied toward the district deposit. However, if it does have a critical project, the full amount of interest earnings must be applied to the Extreme Hardship Grant or returned to the State.

Q. **Will my deferred maintenance project require DSA approval?**

The district should contact the DSA for guidance. For projects that contains work that requires Division of the State Architect (DSA) approval, the final plans and specifications for the project must have DSA approval prior to a district signing a contract for construction. If a district enters into a contract for construction prior to receiving DSA approval of the plans and specifications, State funding may not be provided.

Q. **On our Five-Year Plan (Form SAB 40-20), can the following items be included: 1) asbestos inspection, 2) door hardware, and 3) carpets?**

1. Asbestos inspection: Yes, to determine the presence of asbestos except for in the case of annual testing. Routine asbestos inspections generally deemed an administrative cost.

2. Door hardware: Yes, it may be included in the category of "wall systems".

3. Carpets: Yes, it may be included in the category of "floor covering".

Q. **Does the district have to bid the project if an emergency situation occurs?**

For an "emergency" contract to be awarded under the provisions of the Public Contract Code, Section 20113, the district must:

- obtain approval from its School Board, by unanimous vote; and,
- obtain approval by the County Superintendent of Schools; and,
- comply with the legal requirements for any bonds or security; and,
- obtain contract approval by legal counsel.

Q. How can I find out if my repair projects qualify for Deferred Maintenance?

Pages 19 and 20 of this handbook give examples of which projects are eligible for Deferred Maintenance. If you don't find your project listed on these pages, please contact a Deferred Maintenance Project Manager for assistance.

Q. Why does my second hardship project have to be twice the Basic Apportionment amount?

Every project must meet the financial and health and safety "test" to be considered a viable hardship project as required in Regulation Section 1866.5.

Q. Is there a "cap" or limit to the cost of a project?

There is no limit to the cost of a project. However, in addition to contributing the district's maximum basic grant funds and State matching funds to the project, the district must also fund 50 percent of any amount over $1,000,000.

Q. When will the district receive the funds for its hardship project that was approved by the SAB at the December Board meeting?

Once the project has been approved by the SAB for funding, the district may submit a Fund Release Authorization, Form SAB 40-23, to the OPSC to release the funds. The district must also be able to demonstrate that the project has been competitively bid and that a contract has been signed for the work to be performed, showing the actual amount of the bids and the contract awarded, to receive these funds.

Q. Why are the basic apportionment funds held by OPSC until the Hardship Fund Release Authorization is submitted by the district?

The district must use its entire deferred maintenance basic apportionment funds for their first (yearly) hardship project. If the total project costs are more than two times the basic apportionment, the amount over the basic and State match is considered the hardship portion of the project, and is therefore funded out of Deferred Maintenance Hardship funds.

Appendix 3

Grant Cycles, Forms and Filing Deadlines

Grant Cycles

Basic Grant Funding Cycle

1. **District:** Either has a current Five Year Plan approved by the SAB or submits to the OPSC a revised plan that includes the current fiscal year.
2. **OPSC/SAB:** Presents the district's Five Year Plan to the SAB for approval (if needed). SAB approval.
3. **OPSC/SAB:** Establishes an apportionment listing of districts receiving the basic grant in the Fall following the end of the fiscal year. Approves and apportions the listing for Basic funds for the previous fiscal year.
4. **District:** Deposit funds in its District Deferred Maintenance Fund for the prior fiscal year.
5. **County Office of Education:** Certifies the amount deposited on the Certification of Deposit (Form SAB 40-21) by district or county superintendent of schools and submits the form to the OPSC within 60 days of SAB apportionment.
6. **OPSC:** Process the release of funds, for the previous fiscal year, through State Controller's office, not to exceed the lesser of the amount apportioned or the amount deposited by the district.

Extreme Hardship Grant Funding Cycle

1. **District:** Submits funding application for an Extreme Hardship Grant by the last working day in June.
2. **OPSC/SAB:** Processes application and performs site visit of project prior to the start of construction. SAB approval.
3. **OPSC/SAB:** Based on funds available, OPSC establishes an apportionment listing of districts receiving an extreme hardship grant in the Fall following the end of the fiscal year. SAB approval.
4. **District:** Submits the Fund Release Authorization, Form SAB 40-23, within one year of SAB apportionment. Narrative report due if within 6 months fund release documents not submitted to OPSC.
5. **OPSC:** Processes a fund release for the Extreme Hardship Grant.
6. **OPSC:** Project audit.

Program Forms and Filing Deadlines

FORM	FORM SUBMITTAL DEADLINES
Five Year Plan, Form SAB 40-20	Last working day in June for the current fiscal year.
Certification of Deposits, Form SAB 40-21	Sixty days from SAB apportionment of the Basic Grant.
Extreme Hardship Funding Application, Form SAB 40-22	Last working day in June for the current fiscal year.
Fund Release Authorization, Form SAB 40-23	Within one year from SAB apportionment of Extreme Hardship Grant.
Expenditure Report, Form SAB 40-24	Within two years from the date any funds were released.

Appendix 3

Architect/Structural Engineer Fee Schedule

(Extreme Hardship Only)

The following schedule is used to determine the maximum reimbursable architect or structural engineer fees allowed by the SAB. The rates below are applied to the amount of the project construction contract including change orders.

Maximum Reimbursable Architect Fees

AMOUNT OF THE CONSTRUCTION CONTRACT	MAXIMUM PERCENTAGE
First $500,000	12%
Next $500,000	11½%
Next $1,000,000	11%
Next $4,000,000	10%
Over $6,000,000	9%

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Appendix 5
Applicable Education Code Sections

California Education Code

SECTION	DESCRIPTION
17582	Provides provisions for the establishment of the District Deferred Maintenance Fund (DDMF) and subsequent expenditures.
17583	Allows for the transfer of excess local funds from the DDMF.
17584	Establishes the calculation method for the Deferred Maintenance Maximum Basic Grant as calculated by the California Department of Education.
17584.1	Sets criteria that the district's Five Year Plan be discussed in a public hearing at a regularly scheduled school board meeting and set reporting requirements for districts that do not set aside the Maximum Basic Grant as calculated pursuant to EC Section 17584.
17585	Establishes guidelines for school districts to receive an additional apportionment from the State, if funds are available for projects listed on their Five Year Plan.
17587	Establishes application and funding criteria for districts that are eligible for an Extreme Hardship Grant.
17588	Establishes the method for determining an Extreme Hardship Grant.
17591	Establishes guidelines for districts regarding the filing and approval of the Five Year Plan.
17592.5	Provides the authority to allocate deferred maintenance funds for two regional occupational centers.

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Appendix 6

Ineligible Deferred Maintenance Expenditures

Allowable expenditures consist of major repair or replacement of existing school building components. The following are examples of ineligible deferred maintenance expenditures:

- Projects not included on the SAB approved Five Year Plan
- Projects being performed solely to bring the facility component up to current code
- Repair and maintenance of furniture and equipment (e.g., kitchen equipment, office and movable desks)
- Ongoing preventative maintenance (e.g., periodic inspection and cleaning, replacement of bulbs and minor repairs, individual floor tiles, individual ceiling tiles, etc.)
- Installation of new items that did not previously exist
- Consultant or project management fees
- Energy conservation
- Landscaping, fencing, irrigation, and sprinkler systems
- Athletic stadium equipment (bleachers, score boards, etc.)
- Window curtains and blinds, stage curtains, or black out curtains
- Tables and counter tops (unless permanently attached to a wall)
- Whiteboards, chalkboards, and blackboards
- Playground equipment
- Replacement of portable buildings
- Maintenance or repair of swimming pools
- Administrative Costs
- Technology and telephone cables, panels, and wiring

Please be advised that the above listing is only a sample of ineligible projects and does not encompass all the ineligible expenditures concerning the Deferred Maintenance Program.

California
PRIMARY ELECTION
Tuesday, March 2, 2004

CERTIFICATE OF CORRECTNESS

I, Kevin Shelley, Secretary of State of the State of California, do hereby certify that the measures included herein will be submitted to the electors of the State of California at the Primary Election to be held throughout the State on March 2, 2004, and that this guide has been correctly prepared in accordance with the law.

Witness my hand and the Great Seal of the State in Sacramento, California, this 8th day of December, 2003.

Kevin Shelley

Kevin Shelley
Secretary of State







Official Voter Information Guide

SECRETARY OF STATE

Dear Fellow Voter,

When we cast our votes, we shape the future of our state.

But like you, I want to make sure that I have as much information as possible before I make such an important decision. I know that it can be very difficult to find information on the candidates and on the election process.

That's why I have created a new voter information source at www.MyVoteCounts.org.

This website contains vital information on the upcoming election and links to important sources where you can learn more about the candidates and issues. I hope you will visit www.MyVoteCounts.org and use the site as a resource before you vote.

myVOTE
COUNTS
www.MyVoteCounts.org

CONTENTS

VOTER BILL OF RIGHTS

1. You have the right to cast a ballot if you are a valid registered voter.
   A valid registered voter means a United States citizen who is a resident in this state, who is at least 18 years of age and not in prison or on parole for conviction of a felony, and who is registered to vote at his or her current residence address.
2. You have the right to cast a provisional ballot if your name is not listed on the voting rolls.
3. You have the right to cast a ballot if you are present and in line at the polling place prior to the close of the polls.
4. You have the right to cast a secret ballot free from intimidation.
5. You have the right to receive a new ballot if, prior to casting your ballot, you believe you made a mistake.
   If at any time before you finally cast your ballot, you feel you have made a mistake, you have the right to exchange the spoiled ballot for a new ballot. Absentee voters may also request and receive a new ballot if they return their spoiled ballot to an elections official prior to the closing of the polls on Election Day.
6. You have the right to receive assistance in casting your ballot, if you are unable to vote without assistance.
7. You have the right to return a completed absentee ballot to any precinct in the county.
8. You have the right to election materials in another language, if there are sufficient residents in your precinct to warrant production.
9. You have the right to ask questions about election procedures and observe the elections process.
   You have the right to ask questions of the precinct board and election officials regarding election procedures and to receive an answer or be directed to the appropriate official for an answer. However, if persistent questioning disrupts the execution of their duties, the board or election officials may discontinue responding to questions.
10. You have the right to report any illegal or fraudulent activity to a local elections official or to the Secretary of State's Office.

If you believe you have been denied any of these rights, or if you are aware of any election fraud or misconduct, please call the Secretary of State's confidential toll-free

VOTER PROTECTION HOTLINE

1-800-345-VOTE (8683)

PROP 55 Kindergarten–University Public Education Facilities Bond Act of 2004.

Bond Act
Put on the Ballot by the Legislature

Summary

This twelve billion three hundred million dollar ($12,300,000,000) bond issue will provide funding for necessary education facilities to relieve overcrowding and to repair older schools. Funds will be targeted to areas of the greatest need and must be spent according to strict accountability measures. Funds will also be used to upgrade and build new classrooms in the California Community Colleges, the California State University, and the University of California, to provide adequate higher education facilities to accommodate the growing student enrollment. These bonds may be used only for eligible projects. Fiscal Impact: State costs of about $24.7 billion to pay off both the principal ($12.3 billion) and interest ($12.4 billion) costs on the bonds. Payments of about $823 million per year.

What Your Vote Means

Yes

A **YES** vote on this measure means: The state could sell $12.3 billion in general obligation bonds for the construction and renovation of public education facilities (kindergarten through college).

No

A **NO** vote on this measure means: The state could not sell $12.3 billion in general obligation bonds for these purposes.

Arguments

Pro

Provide kids with clean, safe classrooms to improve student learning. Prop. 55 will FIX RUNDOWN CLASSROOMS and BUILD NEW SCHOOLS. STRICT ACCOUNTABILITY and AUDITS guard against waste and mismanagement. California Teachers Association, California Taxpayers' Association, State PTA, California Chamber of Commerce: "Invest in kids and their future. Yes on 55."

Con

California faces the worst financial crisis in its history. We need new schools, not more debt for taxpayers. Proposition 55 is fundamentally flawed, poorly drafted, and grossly unfair. It favors Los Angeles Unified School District at the expense of the rest of the state and it will raise our taxes.

For Additional Information

For

Yes on 55—Californians for Accountability and Better Schools
1121 L Street, Suite 803
Sacramento, CA 95814
888-563-0055
information@yeson55.com
www.Yeson55.com

Against

Thomas N. Hudson, Executive Director
California Taxpayer Protection Committee
9971 Baseline Road
Elverta, CA 95626-9411
916-991-9300
Fax: 209-254-5466
taxfighters@yahoo.com
www.ProtectTaxpayers.com

PROP 56 State Budget, Related Taxes, and Reserve. Voting Requirements. Penalties. Initiative Constitutional Amendment and Statute.

Put on the Ballot by Petition Signatures

Summary

Permits enactment of budget and budget-related tax/appropriation bills with 55% vote. Legislature, Governor forfeit compensation each day budget is late. Fiscal Impact: Varying impacts from lowering the vote requirement for budget-related measures—including changes in spending and potentially significant increases in state tax revenues in some years. Impacts would depend on the composition and actions of future Legislatures.

What Your Vote Means

Yes

A **YES** vote on this measure means: The Legislature could pass the state budget and tax increase measures related to the budget by a 55 percent vote. Other changes to the budget process would be made.

No

A **NO** vote on this measure means: The state budget and tax increase measures would continue to require a two-thirds vote for passage. The budget process would remain the same.

Arguments

Pro

Proposition 56 is real budget reform. It holds legislators accountable by withholding their pay when the budget is late, informing voters of how their money is spent, lowering the threshold to pass a budget from 2/3 to 55%, and requiring a real "rainy day" fund to help balance the budget.

Con

Prop. 56 *masquerades* as accountability, but actually *eliminates the 2/3 legislative vote needed before politicians can increase taxes.* If Prop. 56 passes, expect HIGHER CAR TAXES, GAS TAXES, INCOME TAXES, SALES TAXES, TAXES on HOMEOWNERS. Don't give Sacramento a *BLANK CHECK.* California Taxpayers' Association recommends: *NO, NO, NO on 56!*

For Additional Information

For

Yes on Prop 56
1510 J Street, #210
Sacramento, CA 95814
916-443-7817
www.budgetaccountabilitynow.org

Against

Californians Against Higher Taxes—No on 56, a coalition of Taxpayers, Consumers, Businesses, Retailers
11300 West Olympic Blvd., Suite 840
Los Angeles, CA 90064
310-996-2678
info@NoBlankChecks.com
www.NoBlankChecks.com

PROPOSITION 55

Kindergarten–University Public Education Facilities Bond Act of 2004.

OFFICIAL TITLE AND SUMMARY

Prepared by the Attorney General

Kindergarten–University Public Education
Facilities Bond Act of 2004.

- This act provides for a bond issue of twelve billion three hundred million dollars ($12,300,000,000) to fund necessary education facilities to relieve overcrowding and to repair older schools.
- Funds will be targeted to areas of greatest need and must be spent according to strict accountability measures.
- Funds will also be used to upgrade and build new classrooms in the California Community Colleges, the California State University, and the University of California, to provide adequate higher education facilities to accommodate growing student enrollment.
- Appropriates money from General Fund to pay off bonds.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- State costs of about $24.7 billion to pay off both the principal ($12.3 billion) and interest ($12.4 billion) costs on the bonds. Payments of about $823 million per year.

Final Votes Cast by the Legislature on AB 16 (Proposition 55)

Assembly:	Ayes 71	Noes 8
Senate:	Ayes 27	Noes 11

ANALYSIS BY THE LEGISLATIVE ANALYST (CONT.)

to property owners in the special district. Statewide, school districts have received on average about $270 million a year in special local bond proceeds over the past ten years.

K–12 School Building Needs. Under the SFP, K–12 school districts must demonstrate the need for new or modernized facilities. Through September 2004, the districts have identified a need to construct new schools to house nearly 1 million pupils and modernize schools for an additional 1.1 million pupils. The state cost to address these needs is estimated to be roughly $16 billion.

Higher Education

California's system of public higher education includes 141 campuses in the three segments listed below, serving about 1.6 million students:

- The CCCs provide instruction to 1.1 million students at 108 campuses operated by 72 locally governed districts throughout the state. The community colleges grant associate degrees and also offer a variety of vocational skill courses.
- The CSU has 23 campuses, with an enrollment of about 331,000 students. The system grants bachelor and master degrees, and a small number of joint doctoral degrees with UC.
- The UC has nine general campuses, one health sciences campus, and various affiliated institutions, with a total enrollment of about 201,000 students. This system offers bachelor, master, and doctoral degrees, and is the primary state-supported agency for conducting research.

Over the past decade, the voters have approved $5.1 billion in general obligation bonds for capital improvements at public higher education campuses. Virtually all of these funds have been committed to specific projects. The state also has provided almost $1.6 billion in lease revenue bonds (authorized by the Legislature) for this same purpose.

In addition to these state bonds, the higher education segments have other sources of funding for capital projects.

FIGURE 1

PROPOSITION 55
USES OF BOND FUNDS

	Amount (In Millions)
K–12	
New construction projects	$5,260[a]
Modernization projects	2,250
Critically overcrowded schools	2,440
Joint use	50
Subtotal, K–12	($10,000)[b]
Higher Education	
Community Colleges	$920
California State University	690
University of California	690
Subtotal, Higher Education	($2,300)
TOTAL	**$12,300**

[a] Up to $300 million available for charter schools.
[b] Up to $20 million available for energy conservation projects.

- ***Local General Obligation Bonds.*** Community college districts are authorized to sell general obligation bonds to finance school construction projects with the approval of 55 percent of the voters in the district. These bonds are paid off by taxes on real property located within the district. Over the last decade, community college districts have received local voter approval to issue over $7 billion of bonds for construction and renovation of facilities.
- ***Gifts and Grants.*** The CSU and UC in recent years together have received on average over $100 million annually in gifts and grants for construction of facilities.
- ***UC Research Revenue.*** The UC finances the construction of new research facilities by selling bonds and pledging future research revenue for their repayment. Currently, UC uses about $130 million a year of research revenue to pay off these bonds.

Higher Education Building Plans. Each year the institutions of higher education prepare capital outlay plans in which they identify project priorities over the next few years. Higher education capital

ANALYSIS BY THE LEGISLATIVE ANALYST (CONT.)

outlay projects in the most recent plans total $5.3 billion for the period 2003–04 through 2007–08.

Proposal

This measure allows the state to issue $12.3 billion of general obligation bonds for construction and renovation of K–12 school facilities ($10 billion) and higher education facilities ($2.3 billion). Figure 1 shows how these bond funds would be allocated to K–12 and higher education.

Future Education Bond Act. If the voters do not approve this measure, state law requires the same bond issue to be placed on the November 2004 ballot.

K–12 School Facilities

Figure 1 describes generally how the $10 billion for K–12 school projects would be allocated. However, the measure would permit changes in this allocation with the approval of the Legislature and Governor.

New Construction. A total of $5.26 billion would be available to buy land and construct *new* school buildings. A district would be required to pay for 50 percent of costs with local resources unless it qualifies for state hardship funding. The measure also provides that up to $300 million of these new construction funds is available for charter school facilities. (Charter schools are public schools that operate independently of many of the requirements of regular public schools.)

Modernization. The proposition makes $2.25 billion available for the reconstruction or modernization of *existing* school facilities. Districts would be required to pay 40 percent of project costs from local resources.

Critically Overcrowded Schools. This proposition directs a total of $2.44 billion to districts with schools which are considered critically overcrowded. These funds would go to schools that have a large number of pupils relative to the size of the school site.

Joint-Use Projects. The measure makes a total of $50 million available to fund joint-use projects. (An example of a joint-use project is a facility constructed for use by both a K–12 school district and a local library district.)

Higher Education Facilities

The measure includes $2.3 billion to construct new buildings and related infrastructure, alter existing buildings, and purchase equipment for use in these buildings for California's public higher education systems. As Figure 1 shows, the measure allocates $690 million each to UC and CSU and $920 million to CCCs. The Governor and the Legislature would select the specific projects to be funded by the bond monies.

Fiscal Effect

The cost of these bonds would depend on their interest rates and the time period over which they are repaid. If the $12.3 billion in bonds authorized by this proposition is sold at an interest rate of 5.25 percent (the current rate for this type of bond) and repaid over 30 years, the cost over the period would be about $24.7 billion to pay off both the principal ($12.3 billion) and interest ($12.4 billion). The average payment for principal and interest would be about $823 million per year.

ARGUMENT in Favor of Proposition 55

Our kids deserve clean, safe classrooms if we expect them to succeed. But many students are asked to learn in classrooms that are rundown and overcrowded.

California needs to invest in education to invest in the future of our children. Fixing rundown classrooms and building new schools to reduce overcrowding is one way to help students improve test scores and meet higher standards.

Passing Proposition 55 will invest in our kids' future and enact strict accountability standards that make sure school bond funds go directly to repair and build new classrooms where they're most needed.

PARENTS SUPPORT Proposition 55 because it FIXES OLD AND OUTDATED CLASSROOMS in need of repair.

Recent surveys show that one million children attend schools with bathrooms that don't work. Our kids deserve better. Prop. 55:

- FIXES LEAKY ROOFS, REPAIRS BROKEN BATHROOMS, and puts heating and air conditioning in classrooms.
- Helps make sure kids go to school in SAFE BUILDINGS that meet earthquake and fire standards.

LOCAL TEACHERS SUPPORT Proposition 55 because it PROVIDES COMMUNITIES MATCHING STATE FUNDS TO BUILD NEW LOCAL SCHOOLS.

California needs to build more than 22,000 classrooms to relieve overcrowding and deal with increasing student enrollment. Proposition 55 provides matching state funds for local school projects and will:

- BUILD NEW LOCAL SCHOOLS up and down the state.
- BUILD NEW CLASSROOMS to relieve overcrowding and reduce class sizes.

The CALIFORNIA TAXPAYERS' ASSOCIATION supports Proposition 55's STRICT ACCOUNTABILITY PROVISIONS.

- INDEPENDENT AUDITS, COST CONTROLS and other accountability requirements guard against waste and mismanagement and provide oversight of ALL school projects.
- Funds can only be spent to repair or build schools, NOT on bureaucracy or waste.

The CALIFORNIA STATE PTA supports Proposition 55 because it TARGETS FUNDS WHERE THEY'RE NEEDED MOST.

- Prop. 55 provides specific funding to build *new schools in areas where classrooms are severely overcrowded.*
- New and growing communities also receive their *fair share* to build the schools and classrooms they need.

The CALIFORNIA STATE UNIVERSITY, California COMMUNITY COLLEGES and UNIVERSITY OF CALIFORNIA support Proposition 55.

- Proposition 55 provides funds for colleges and universities to build classrooms and modernize research facilities that help create jobs and grow California's economy.

The CALIFORNIA CHAMBER OF COMMERCE supports Proposition 55 because it INVESTS IN OUR ECONOMY AND OUR FUTURE WORKFORCE.

- School construction is a direct investment in the economy. Proposition 55 projects will CREATE HUNDREDS OF THOUSANDS OF NEW JOBS throughout California.
- Prop. 55 provides money to *wire classrooms* and give students the tools they need to become tomorrow's leaders.

Passing Proposition 55 will invest in our kids' future by fixing rundown classrooms and building new schools. Strict accountability requirements ensure funds are spent only on school repair and construction.

And Prop. 55 is a general obligation bond that WILL NOT RAISE TAXES.

Join Republicans, Democrats and Independents, local teachers, taxpayer organizations, community groups, local businesses, the California Chamber of Commerce, California State PTA and millions of Californians who support our schools.

VOTE YES ON PROPOSITION 55.

BARBARA KERR, *President*
California Teachers Association

LARRY McCARTHY, *President*
California Taxpayers' Association

BILL HAUCK, *Co-Chair*
Californians for Accountability and Better Schools

REBUTTAL to Argument in Favor of Proposition 55

We need to make school construction a priority for California—without increasing our debt.

The proponents' ridiculous claim that this bond "will not raise taxes" is a preposterous misrepresentation. Bond funds can only be repaid with tax dollars. We must either cut services or increase taxes to repay this bond.

Fortunately, there is a better way to build schools. This year, the state spent $3,542,000,000 for school construction (equivalent to 3.5% of the state's $101,174,000,000 budget). If we spent just 5% of the next five budgets on school construction, we would raise TWICE as much money as this bond. We could build twice as many schools and save taxpayers more than $12 billion in interest!

We don't need new debt or higher taxes. We just need to tell Sacramento to make school construction a priority.

Proponents claim that funds from Proposition 55 "can only be spent to repair or build schools, NOT on bureaucracy or waste." This is nonsense. School construction in California is plagued by waste, bureaucracy, and ridiculous government mandates. This bond does nothing to eliminate bureaucracy, waste or mandates.

The proponents promise to build schools "up and down the state," but they don't mention that the money will only be spent in districts wealthy enough to raise the 40% matching funds. HALF OF ALL SCHOOL DISTRICTS RECEIVED NOTHING FROM THE LAST SCHOOL BOND. There is no guarantee that your school district will receive a penny from this bond, but you will be forced to pay it back.

RICO OLLER, *State Senator*
First Senate District

LEW UHLER, *President*
National Tax-Limitation Committee

HENRY A. HOUGH, *Senior Vice President*
60-Plus Association

ARGUMENT Against Proposition 55

California is facing the most severe financial crisis in the history of any state. Last year, California's budget deficit nearly equaled the *combined* deficits of all other states. Our state's credit rating is the very worst in the nation and our bonds are slipping toward "junk bond" status. To make matters worse, former Governor Davis and the Legislature borrowed more than $13 billion last year just to pay the bills. Next year's estimated budget deficit is already over $10 billion and the bad news keeps coming. We are in such dire fiscal straits that the Treasurer has not been able to issue $28 billion of the $73 billion in statewide bonds that have already been approved.

The results of this financial mismanagement are staggering. For decades, we will be forced to pay higher taxes just to pay back what we have already borrowed. Even without new bonds, our crippling debt load will make it much more difficult for government to respond to natural disasters and recessions. Today's schoolchildren will still be paying for this bond long after their own children have graduated!

At a time when Governor Schwarzenegger and the Legislature struggle to find ways to pay for the $73,000,000,000 in previously approved debt, this measure would dig us deeper into a financial hole. At $12,300,000,000, Proposition 55 rivals the largest bond in the history of any American state. We simply cannot afford it.

It is time for us to take a new look at the way we build schools in California. The effect of compound interest and the fees paid to lawyers, Wall Street bond traders, and bureaucrats generally doubles the cost of facilities built with bonds. This bond does not even contain an interest rate cap, so the true costs could be much higher, especially if California voters approve additional bonds in this election. WE COULD BUILD MANY MORE SCHOOLS IF WE ADOPTED A MORE FISCALLY RESPONSIBLE APPROACH. Since California has thousands and thousands of public schools, why not simply build and renovate some number each year? That way, we wouldn't need to go into debt or threaten our financial stability. We just need to impress upon Sacramento that school construction is a priority.

Before voting, please take a close look at the bond's language. The drafters cleverly set aside more than a quarter of the bond funds for the Los Angeles Unified School District. Only 12% of our state's schoolchildren attend school there. This isn't fair and it isn't right.

To add insult to injury, Proposition 55 requires local school districts to provide 40% matching funds to receive ANY money. Does your school district have a huge budget surplus? Unless you live in a wealthy community with surplus cash for the required 40% matching funds, you and your children may never see a penny from this $12,300,000,000 bond, but you will certainly be required to pay higher taxes to pay back the money for the next 30 years.

Please VOTE NO on Proposition 55.

SENATOR RICO OLLER
First Senate District

REBUTTAL to Argument Against Proposition 55

California can and must continue to invest in education and our kids' future. Proposition 55 will do just that. Don't be fooled by the opponent's distortion of the facts.

Providing safe, clean classrooms will improve student performance and help our children succeed.

CALIFORNIA STATE TREASURER Phil Angelides says, *"California's economy is capable of supporting Proposition 55. It's a sound, prudent investment that will contribute to our future economic prosperity."*

THE CALIFORNIA TAXPAYERS' ASSOCIATION says, *"Proposition 55 is a fiscally responsible way to finance school repair and construction."*

The opponent DELIBERATELY MISREPRESENTED the facts. The truth:

- Every district is eligible for only its FAIR SHARE of Prop. 55 based on need. No district, in Los Angeles or elsewhere, will get more than its fair share.
- Proposition 55 TARGETS FUNDS where they're needed most—districts with critically overcrowded and rundown schools. Visit *www.Yeson55.com* for a list of Prop. 55 projects and projects financed by the last statewide school bond.
- STRICT ACCOUNTABILITY requirements, COST CONTROLS and independent AUDITS safeguard against waste and mismanagement.
- Proposition 55 provides matching funding to local districts. Without Prop. 55, many communities *cannot* move forward with school repair and construction.
- Proposition 55 is a general obligation bond that WILL NOT RAISE TAXES.

California needs to build 22,000 classrooms to deal with overcrowding and increasing enrollment. Tens of thousands of schools need basic repairs—fixing leaky roofs and broken bathrooms, installing heating and air conditioning.

Vote YES on 55 to FIX RUNDOWN SCHOOLS, build NEW CLASSROOMS and IMPROVE STUDENT LEARNING.

CARLA NIÑO, *President*
California State PTA

ALLAN ZAREMBERG, *President*
California Chamber of Commerce

CATHERINE L. UNGER, *President*
Board of Governors, California Community Colleges

EXHIBIT CC

ITEM 5

TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code Sections 1720, 1720.2, 1720.3, 1726, 1727, 1733, 1735, 1741, 1742, 1742.1, 1743, 1750, 1770, 1771, 1771.5, 1771.6, 1771.7, 1772, 1773, 1773.1, 1773.2, 1773.3, 1773.5, 1773.6, 1775, 1776, 1777.1, 1777.5, 1777.6, 1777.7, 1812, 1813, 1861

Public Contract Code Section 22002

Statutes 2002, Chapter 868 (AB 1506); Statutes 2001, Chapter 938 (SB 975); Statutes 2001, Chapter 804 (SB 588); Statutes 2000, Chapter 954 (AB 1646); Statutes 2000, Chapter 920 (AB 1883); Statutes 2000, Chapter 881 (SB 1999); Statutes 2000, Chapter 875 (AB 2481); Statutes 2000, Chapter 135 (AB 2539); Statutes 1999, Chapter 903 (AB 921); Statutes 1999, Chapter 220 (AB 302); Statutes 1999, Chapter 83 (SB 966); Statutes 1999, Chapter 30 (SB 16); Statutes 1998, Chapter 485 (AB 2803); Statutes 1998, Chapter 443 (AB 1569); Statutes 1997, Chapter 757 (SB 1328); Statutes 1997, Chapter 17 (SB 947); Statutes 1993, Chapter 589 (AB 2211); Statutes 1992, Chapter 1342 (SB 222); Statutes 1992, Chapter 913 (AB 1077); Statutes 1989, Chapter 1224 (AB 114); Statutes 1989, Chapter 278 (AB 2483); Statutes 1988, Chapter 160 (SB 2637); Statutes 1983, Chapter 1054 (AB 1666); Statutes 1983, Chapter 681 (AB 2037); Statutes 1981, Chapter 449 (AB 1242); Statutes 1980, Chapter 992 (AB 3165); Statutes 1980, Chapter 962 (AB 2557); Statutes 1979, Chapter 373 (SB 925); Statutes 1978, Chapter 1249 (AB 3174); Statutes 1977, Chapter 423 (SB 406); Statutes 1976, Chapter 1179 (AB 3676); Statutes 1976, Chapter 1174 (AB 3365); Statutes 1976, Chapter 861 (SB 1953); Statutes 1976, Chapter 599 (AB 1125); Statutes 1976, Chapter 538 (AB 2466); Statutes 1976, Chapter 281 (AB 2363)

Title 8, California Code of Regulations Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802, 17201-17212, 17220-17229, 17230-17237, 17240-17253, 17260-17264
(Reg. 1956, No. 08; Reg. 1972, No. 13; Reg. 1972, No. 23; Reg. 1977, No.02; Reg. 1977, No. 49; Reg. 1978, No. 06; Reg. 1979, No. 19; Reg. 1980, No. 06; Reg. 1981, No. 09; Reg. 1982, No. 51; Reg. 1986, No. 07; Reg.1988, No. 35; Reg. 1990, No. 14; Reg. 1990, No. 42; Reg. 1991, No. 12; Reg. 1992, No. 13; Reg. 1996, No. 52; Reg. 1999, No. 08; Reg. 1999, No. 25; Reg. 1999, No. 41; Reg. 2000, No. 03; Reg. 2000, No. 18; and Reg. 2002, No. 03)

School Facility Program Substantial Progress and Expenditure Audit Guide – May 2003
(Prepared by the Office of Public School Construction)

AB 1506 Labor Compliance Program Guidebook – February 2003
(Prepared by the Division of Labor Standards Enforcement)

Antioch Unified School District Labor Compliance Program
January 17, 2003

Prevailing Wage Rate

01-TC-28

Clovis Unified School District, Claimant

EXECUTIVE SUMMARY

This test claim addresses changes to the California Prevailing Wage Law (CPWL), which is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds." Contractors for public works projects that exceed $1,000 are required to pay local prevailing wages to construction workers on those projects. The requirement to pay prevailing wages is only applicable to work performed under contract, and is not applicable to work carried out by a public agency with its own forces; the requirement is applicable to contracts let for maintenance work. Local prevailing wage rates are set by the Director of the Department of Industrial Relations.

The Test Claim Statutes, Regulations and Alleged Executive Orders Impose a Partially Reimbursable State-Mandated Program on K-12 School Districts or Community College Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution

The provisions of the CPWL are only applicable when a district contracts with a private entity to carry out a public works project. The cases have consistently held that when a district makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed. The underlying decision to undertake a public works project is mandated by the state only when the public works project is for the purpose of repair or maintenance of school buildings or property. The underlying decision to contract for such a project is mandated by the state under the Public Contract Code, only when the project is not an emergency as defined and under other specified conditions related to the size of the student body and cost of the project.

The test claim statutes and regulations mandate certain activities when the CPWL provisions are triggered under the above circumstances, and some of those activities impose a new program or higher level of service on districts within the meaning of article XIII B, section 6 of the California Constitution. For some of those activities, however, the test claim statutes and regulations allow the districts to levy fees sufficient to pay for the costs of the newly-mandated activities, and Government Code section 17556, subdivision (d), is applicable to deny reimbursement for them. The remaining three activities do impose costs mandated by the state, thus imposing a partially reimbursable state-mandated program on K-12 school districts and community college districts.

Conclusion

Staff concludes that Labor Code section 1776, subdivisions (g) and (h), and section 16403, subdivision (a), of the Department of Industrial Relations' regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, but only when those activities are triggered by projects for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and

81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113, and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000. (Pub. Contract Code, § 20114.)
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654, and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000. (Pub. Contract Code, § 20655.)
3. For any K-12 school district or community college district that is subject to the Uniform Public Contract Cost Accounting Act (UPCCAA), when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.[1] (Pub. Contract Code, § 22032.)

Only the following activities for the foregoing projects are reimbursable:

- Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Department of Industrial Relations' Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249).)

Any grant funds available to awarding bodies under the deferred maintenance program, or any other eligible grant program, when used for the newly mandated activities in this test claim, shall be identified in the parameters and guidelines as possible offsetting revenues.

None of the other test claim statutes, regulations or alleged executive orders that were pled mandate a new program or higher level of service subject to article XIII B, section 6.

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[1] Prior to January 1, 2007, the dollar limit for public projects that could be performed by the district with its own forces was $25,000.

Recommendation

Staff recommends the Commission adopt this analysis to partially approve the test claim.

STAFF ANALYSIS

Claimant

Clovis Unified School District

Chronology

06/28/02	Clovis Unified School District ("Claimant") filed test claim with the Commission on State Mandates ("Commission")
07/08/02	Commission staff deemed the test claim complete
08/14/02	The Department of Industrial Relations requested an extension of time, for an additional 90 days, to file comments on the test claim
08/15/02	Commission staff approved extension of time, to November 13, 2002, to file comments on the test claim
08/19/02	Claimant filed missing pages of the test claim with the Commission
11/05/02	The Department of Finance requested an extension of time, for an additional 60 days, to file comments on the test claim
11/06/02	Commission staff approved extension of time, to January 15, 2003, to file comments on the test claim
01/13/03	The Department of Finance requested an extension of time to file comments on the test claim
01/15/03	Commission staff approved extension of time, to January 31, 2003, to file comments on the test claim
01/15/03	The Department of Industrial Relations filed comments on the test claim
01/15/03	The State Building and Construction Trades Council of California, AFL-CIO, filed comments on the test claim
01/29/03	The Department of Finance requested an extension of time to file comments on the test claim
01/30/03	Commission staff approved extension of time, to February 18, 2003, to file comments on the test claim
02/18/03	Claimant filed rebuttal comments on the test claim
02/18/03	The Department of Finance filed comments on the test claim
03/20/03	Claimant filed comments on the test claim
04/02/03	The Department of Industrial Relations filed comments on the test claim
07/31/03	Claimant filed amendment to the test claim
08/14/03	Commission staff deemed the amendment to the test claim complete
08/18/03	The Department of Industrial Relations filed comments on the test claim
09/05/03	The Department of Finance requested a 30-day extension to file comments on the test claim

09/12/03	The Department of Industrial Relations requested an extension of time, for an additional 21 days, to file comments on the test claim
09/15/03	The Department of General Services, Office of Public School Construction, filed comments on the test claim
09/16/03	Commission staff approved extension of time, to October 6, 2003, for the Department of Industrial relations to file comments on the test claim
09/18/03	Claimant filed rebuttal comments on the test claim
10/07/03	The Department of Industrial Relations filed comments on the test claim
10/09/03	The Department of Industrial Relations filed a verification for its August 18, 2003 comments on the test claim
10/14/03	The Department of Finance requested an extension of time, for an additional 30 days, to file comments on the test claim
10/15/03	Commission staff approved extension of time, to November 5, 2003, to file comments on the test claim
10/20/03	Claimant filed rebuttal comments on the test claim
11/06/03	Claimant filed rebuttal comments on the test claim
11/05/03	The Department of Finance filed comments on the test claim
12/08/03	Claimant filed rebuttal comments on the test claim
01/28/04	The Department of Industrial Relations requested an extension of time, for an additional 30 days, to file comments on the test claim
01/30/04	Commission staff approved extension of time, to March 3, 2004, to file comments on the test claim
07/11/07	Commission staff requested claimant to provide specific versions of regulations claimed
07/23/07	The Department of Industrial Relations requested postponement of the December 6, 2007 hearing on the test claim
07/26/07	Commission staff denied the request to postpone hearing the test claim
07/25/07	Claimant requested an extension of time, for an additional four weeks, to file regulations information requested by Commission staff
08/01/07	Commission staff approved extension of time, to August 29, 2007, to file the information requested
08/30/07	Claimant submitted additional regulations information requested by Commission staff
03/11/08	Commission staff issued draft staff analysis
03/28/08	The Department of Industrial Relations requested an extension of time to file comments on the draft staff analysis.

03/28/08	Commission staff approved the request for an extension of time, for an additional two weeks, to file comments on the draft staff analysis
04/01/08	The Department of General Services, Office of Public School Construction, filed comments on the draft staff analysis
04/14/08	The Department of Industrial Relations filed comments on the draft staff analysis
04/15/08	The Department of Finance filed comments on the draft staff analysis
05/27/08	The Department of Industrial Relations requested that the hearing be postponed to August 1, 2008
05/28/08	Commission staff approved the request to postpone the hearing to August 1, 2008
07/18/08	Commission staff issued the final staff analysis

Background

This test claim addresses 36 statutory changes to the California Prevailing Wage Law (CPWL),[2] involving 33 Labor Code sections and more than 90 regulatory provisions, which have taken place since 1975. The CPWL is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds."[3] Contractors for public works projects that exceed $1,000 are required to pay local prevailing wages to construction workers on those projects.[4] The requirement to pay prevailing wages is only applicable to work performed under contract, and is not applicable to work carried out by a public agency with its own forces; the requirement is applicable to contracts let for maintenance work.[5] Local prevailing wage rates are set by the Director of the Department of Industrial Relations.[6]

In addition to state agencies, the CPWL applies to "political subdivisions," which include any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.[7] Thus, the CPWL applies to both school districts and community college districts. The agency or authority awarding the contract for public work is known as the "awarding body."[8]

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[2] Labor Code sections 1720 et seq.

[3] *Road Sprinkler Fitters, Local Union 669 v. G & G Fire Sprinkler, Inc.* (2002) 102 Cal.App.4th 765, 776.

[4] Labor Code section 1771.

[5] *Ibid.*

[6] Labor Code section 1770.

[7] Labor Code section 1721.

[8] Labor Code section 1720.

The overall purpose of the CPWL is to benefit and protect employees on public works projects.[9] Its specific goals are to: 1) protect employees from substandard wages that might be paid if contractors could recruit from cheap-labor areas; 2) permit union contractors to compete with nonunion contractors; 3) benefit the public through the superior efficiency of well-paid employees; and 4) compensate nonpublic employees with higher wages for the absence of job security and benefits enjoyed by public employees.[10]

The CPWL does not generally cover federal projects. Those projects are addressed in the federal Davis-Bacon Act (40 USC § 276a(a)), which was enacted for a similar purpose, i.e., to protect local wage standards by preventing federal contractors from basing their bids on wages lower than those prevailing in the area.[11] However, the application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies.[12]

Public Works Defined

The Labor Code generally defines "public works" as construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds,[13] and includes: 1) design and preconstruction work;[14] 2) work done for irrigation, utility, reclamation and improvement districts;[15] 3) street, sewer, or other improvement work for public agencies;[16] 4) laying of carpet;[17] 5) certain public transportation demonstration projects;[18] and 6) hauling of refuse from a public works site to an outside disposal location.[19] Public works projects also include maintenance,[20] as defined.[21]

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[9] *Lusardi Construction Co. v. Aubry* (1992) 1 Cal 4th 976, 987.

[10] *Ibid.*

[11] *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883.

[12] Title 8, California Code of Regulations, section 16001, subdivision (b).

[13] Labor Code section 1720, subdivision (a)(1).

[14] *Ibid.*

[15] Labor Code section 1720, subdivision (a)(2).

[16] Labor Code section 1720, subdivision (a)(3).

[17] Labor Code section 1720, subdivisions (a)(4) and (a)(5).

[18] Labor Code section 1720, subdivision (a)(6).

[19] Labor Code section 1720.3.

[20] Labor Code section 1771; Title 8, California Code of Regulations, section 16001, subdivision (f).

[21] "Maintenance" is defined as: (1) routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system, or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired; and (2) carpentry, electrical, plumbing, glazing, touchup painting, and

The Labor Code also defines "paid for in whole or in part out of public funds" as payment of funds directly to or on behalf of a public works contractor, subcontractor or developer,[22] including various other types of payments,[23] and provides several types of projects that are excluded from that definition.[24]

Prevailing Wage Rates

Prevailing wage rates are set by the Director of the Department of Industrial Relations (DIR),[25] generally by reviewing local wage rates established by collective bargaining agreements and rates that may have been predetermined for federal public works.[26] The awarding body for any contract for public works is required to specify in the call for bids, the bid specifications and the contract itself, what the prevailing wage rate is for each craft, classification or type of worker needed to execute the contract.[27] In lieu of specifying the wage rates in the call for bids, bid specifications and the contract itself, the awarding body may include a statement in those documents that copies of the prevailing wage rates are on file at its principal office, which shall be made available to any interested party on request.[28] The awarding body is required to post at each job site a copy of the determination by the DIR Director of the prevailing wage rates.[29]

Prospective bidders, representatives of any craft classification or type of worker involved, or the awarding body may challenge the declared prevailing wage rates with DIR within 20 days after commencement of advertising of the bids.[30] The Director of DIR begins an investigation and within 20 days, or longer if agreed upon by all the parties, makes a determination and transmits it in writing to the awarding body and the interested parties, which delays the closing date for submitting bids or starting of work until five days after the determination.[31] The

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other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures. Janitorial services of a routine, recurring or usual nature are excluded. (tit. 8, Cal. Code Regs., § 16000.)

[22] Labor Code section 1720, subdivision (b)(1).

[23] Labor Code section 1720, subdivisions (b)(2) through (b)(6).

[24] Labor Code section 1720, subdivision (c).

[25] Labor Code section 1770.

[26] Labor Code section 1773.

[27] Labor Code section 1773.2.

[28] *Ibid.*

[29] *Ibid.*

[30] Labor Code section 1773.4.

[31] *Ibid.*

Director's determination is final, and shall be considered the determination of the awarding body.[32]

Payroll Records

Contractors and subcontractors subject to the CPWL are required to keep accurate payroll records showing name, address, social security number, work classification, straight time and overtime hours worked each day and week and actual wages paid to each worker in connection with the public work,[33] and provide certified copies or make such records available for inspection, upon request of the employee, the awarding body, Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards.[34] Requests by the public are required to be made through the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement,[35] and shall be redacted to prevent disclosure of an individual's name, address and social security number.[36] The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the entity through which the request was made.[37] The awarding body is required to insert stipulations in the contract to effectuate these provisions.[38]

Discrimination on Public Works Employment Prohibited

Labor Code section 1735 prohibits contractors from discriminating on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for a violation of the CPWL.

Enforcement of CPWL

The awarding body is required to "take cognizance" of violations of the CPWL committed in the course of the public works contract, and shall promptly report any suspected violations to the Labor Commissioner.[39]

The Labor Commissioner is charged with enforcing the CPWL.[40] If the Labor Commissioner determines after an investigation that there has been a violation of the CPWL, the Labor Commissioner issues a civil wage and penalty assessment to the contractor or subcontractor or both.[41] Prior to July 1, 2001, the only way to challenge such an assessment was in court. On and after July 1, 2001, contractors or subcontractors may obtain review of a civil wage and

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[32] *Ibid.*

[33] Labor Code section 1776, subdivision (a).

[34] Labor Code section 1776, subdivision (b).

[35] Labor Code section 1776, subdivision (b)(3).

[36] Labor Code section 1776, subdivision (e).

[37] Labor Code section 1776, subdivision (b)(3).

[38] Labor Code section 1776, subdivision (h).

[39] Labor Code section 1726.

[40] Labor Code section 1741.

[41] *Ibid.*

penalty assessment through an informal settlement meeting with the Labor Commissioner,[42] or via an administrative hearing.[43] Until January 1, 2009, hearings are conducted before the DIR Director with an impartial hearing officer; thereafter the hearing will be conducted by an administrative law judge.[44] An affected contractor or subcontractor may appeal the administrative decision within 45 days of service of the decision by filing a petition for writ of mandate under Code of Civil Procedure section 1094.5.[45] This process provides the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner.[46]

When the Labor Commissioner issues a civil wage and penalty assessment, the awarding body is required to withhold and retain such moneys from contractor payments sufficient to satisfy the assessment.[47] The amounts withheld cannot be disbursed until receipt of a final order that is no longer subject to judicial review.[48] The awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner.[49]

Labor Compliance Program

The awarding body can avoid paying prevailing wages for public works projects of $25,000 or less when the project is for construction, and $15,000 or less when the project is for alteration, demolition, repair or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program (LCP) for all of its public works projects.[50] As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.[51]

If the awarding body enforces the CPWL as an LCP, the awarding body is entitled to keep any penalties assessed. Before taking any action, the awarding body is required to provide notice

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[42] Labor Code section 1742.1, subdivision (b).

[43] Labor Code section 1742, subdivisions (a) and (b).

[44] Labor Code section 1742, as amended by Statutes 2004, chapter 685.

[45] Labor Code section 1742, subdivision (c).

[46] Labor Code section 1742, subdivision (g).

[47] Labor Code section 1727, subdivision (a).

[48] Labor Code section 1727, subdivision (b).

[49] Labor Code section 1742, subdivision (f).

[50] Labor Code section 1771.5, subdivision (a).

[51] Labor Code section 1771.5, subdivision (b).

of the withholding of any contract payments to the contractor and any subcontractor.[52] The same process for review of a civil wage and penalty assessment made by the Labor Commissioner, as set forth in Labor Code sections 1742 and 1742.1, is invoked.[53] Any amount recovered from the contractor shall first satisfy the wage claim, before being applied to penalties, and if insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.[54] Wages for workers who cannot be located are placed in the Industrial Relations Unpaid Wage Fund and held in trust.[55] Penalties of not more than $50 per day for each worker paid less than the prevailing wage rates[56] are paid into the general fund of the awarding body that enforced the CPWL.[57]

Awarding bodies that choose to use funds derived from the Kindergarten-University Public Education Facilities Bond Acts of 2002[58] or 2004[59] for public works projects are required to adopt and enforce an LCP or contract with a third party to adopt and enforce an LCP.[60] These funds are allocated through the School Facility Program established by Chapter 12.5 of the Education Code. The State Allocation Board was required to increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the LCP.[61] Awarding bodies that choose to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of 2006,[62] however, are not subject to this requirement.

Employment of Apprentices on Public Works Projects

Properly registered apprentices are allowed to work on public works projects and must be paid prevailing wages for apprentices in the trade.[63] Apprenticeship standards are established by the DIR Division of Apprenticeship Standards,[64] and ratios of apprentices to journey level workers in a particular craft or trade on the public work are established by the particular apprenticeship program.[65] Contractors must meet various requirements with regard to

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[52] Labor Code section 1771.6, subdivision (a).

[53] Labor Code section 1771.6, subdivisions (b) and (c).

[54] Labor Code section 1771.6, subdivision (d).

[55] Labor Code section 1771.6, subdivision (e).

[56] Labor Code section 1775.

[57] Labor Code section 1771.6, subdivision (e).

[58] Proposition 47, approved by the voters at the November 5, 2002 statewide general election.

[59] Proposition 55, approved by the voters at the March 2004 statewide direct primary election.

[60] Labor Code section 1771.7, subdivision (a).

[61] Labor Code section 1771.7, subdivision (e).

[62] Proposition 1D, approved by the voters at the November 7, 2006 statewide general election.

[63] Labor Code section 1777.5, subdivisions (a) and (b).

[64] Labor Code section 1777.5, subdivision (c).

[65] Labor Code section 1777.5, subdivision (g).

employing apprentices, and the awarding body is required to include stipulations to that effect in the contract.[66]

School Facility Construction, Repairs and Funding

Beginning in 1947, the Legislature authorized the State Allocation Board to allocate funds for building and repairing schools. Legislation enacted in the late 1940s and early 1950s established a loan-grant program "to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the public school system..."[67] The State Department of General Services[68] administers and the State Allocation Board (SAB) allocates and apportions the funds made available to the districts with priority given to districts where the children will benefit most from additional facilities.[69]

The School Facilities Act[70] establishes a state program to provide state per pupil funding for new construction and modernization of existing school facilities[71] to be administered by the SAB.[72]

The Education Code sets out requirements that potential school building sites must meet.[73] Prior to commencing acquisition of real property for a new schoolsite or addition to an existing schoolsite, the governing board of a school district is required to evaluate property at a public hearing using the site selection standards established by the Department of Education.[74] Moreover, in the exercise of its police power, the state may through legislative action control the protection of public health, safety, and comfort in the erection of school buildings.[75] The Department of General Services is generally required to supervise the design and construction of any school building or the reconstruction or alteration of or addition to any school building.[76] Nevertheless, *whether* a school district decides to engage in a project to construct a school building is within the discretion of its governing board.[77]

Education Code section 17366 states the Legislature's intent to provide safe educational facilities for California schoolchildren as follows:

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[66] Labor Code section 1777.5, subdivision (n).

[67] Education Code sections 15700, et seq.

[68] Education Code section 15702.

[69] Education Code section 15704.

[70] Education Code sections 17070.10 et seq.

[71] Title 2, California Code of Regulations, section 1859.

[72] Education Code section 17070.35.

[73] Education Code sections 17210, et seq.

[74] Education Code sections 17211 and 17251.

[75] *Hall v. City of Taft* (1956) 47 Cal.2d 177, 184.

[76] Education Code section 17280.

[77] *People v. Oken* (1958) 159 Cal.App.2d 456, 460.

> [T]he Legislature intends that the governing board of each school district adopt a plan for the orderly repair, reconstruction, or replacement of school buildings not repaired, reconstructed, or replaced in accordance with this article.

Whenever the structural condition of any school building has been examined by designated entities or under the authorization of law and a report of the examination has been made to the governing board showing the building is unsafe for use, the governing board is required to immediately prepare an estimate of the cost necessary to make such repairs to the building(s) as are necessary, or, if necessary, to reconstruct or replace the building so that the building when repaired or reconstructed, or any building erected to replace it, shall meet such standards of structural safety as are established in accordance with law.[78] Using the information from the examination and report, the governing board is required to establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings.[79] If the governing board of the school district complies with these provisions, no member of that governing board may be held personally liable for injury to persons or damage to property resulting from the fact that a school building was not constructed under the requirements of Education Code sections 17280 et seq.[80]

Education Code section 17593 requires K-12 school districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Education Code section 17002 defines "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction. The instrument shall not require capital enhancements beyond the standards for which the facility was designed and constructed.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. ...

Thus, both K-12 school districts and community college districts are required by statute to repair the school property of their districts.

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[78] Education Code section 17367.

[79] *Ibid.*

[80] Education Code section 17371.

The Education Code provides for deferred maintenance funding from the state, on a dollar-for-dollar matching basis, to K-12 school districts and community college districts.[81] Typical deferred maintenance projects include roofing, plumbing, heating, air conditioning, electrical and floor systems. For K-12 school districts, an annual Basic Grant is provided to districts for major repair or replacement listed on the district's Five Year Plan, and an Extreme Hardship Grant is provided in addition to the Basic Grant where a critical project must be completed within one year for health and safety or structural reasons.[82] Community college projects are also subject to a five-year maintenance plan submitted to the Chancellor, and the Chancellor allocates requested funding based on three criteria: 1) projects necessary to meet safety requirements and to correct hazardous conditions; 2) scheduled maintenance necessary to prevent substantially increased maintenance or replacement costs in the future; and 3) projects necessary to prevent disruption of instructional programs.[83]

The Education Code authorizes the County Superintendent of Schools to provide for the maintenance and repair of the property of school districts under his or her jurisdiction that elect to take advantage of this service by paying into the school maintenance and repair fund established for this purpose.[84] The superintendent is authorized to hire labor for such maintenance and repair:

> The superintendent of schools of the county may employ such extra help as is necessary to perform the labor for the maintenance and repair work, as well as to provide for the supervision and transportation of the labor together with the equipment and materials for the work. The cost price of the maintenance and repair services to any school district is the original cost thereof and in addition a sum sufficient to reimburse the county superintendent of schools for all supervision, transportation, equipment, and other expenses, but the sum added shall not in any case exceed 10 percent of the cost of labor and supplies.[85]

Contracting for Public Works Projects

The Public Contract Code establishes contracting requirements for school districts and community college districts.[86] Depending on the purpose of the project and estimated dollar amount, the district may be required to contract out to the lowest responsible bidder to accomplish the project. The major requirements are outlined below.

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[81] Education Code sections 17582-17588 and 84660.

[82] Deferred Maintenance Program Handbook, prepared on behalf of the State Allocation Board by the Office of Public School Construction, June 2007, page 1.

[83] California Code of Regulations, title 5, sections 57200 et seq.

[84] Education Code section 1266.

[85] Education Code section 1269.

[86] Public Contract Code sections 20110 et seq. and 20650 et seq.

The governing board of any school district or any community college district shall let any contracts involving an expenditure of more than $50,000[87] to the lowest responsible bidder,[88] for any of the following: 1) the purchase of equipment, materials, or supplies to be furnished, sold or leased to the district; 2) services, except construction services; or 3) repairs, including maintenance,[89] that are not a public project as defined in section 22002, subdivision (c).[90, 91] Any contract for a public project, as defined, involving an expenditure of $15,000 or more shall be let to the lowest responsible bidder who shall give security as required by the board or the board shall reject all bids.[92]

Notwithstanding the preceding requirements, in the case of an emergency when any repairs, alterations, work, or improvement is necessary to any facility of the college or public schools to permit the continuance of existing classes, or to avoid danger to life or property, the governing board of a school district or community college district may, by unanimous vote, with the approval of the county superintendent of schools, either: 1) make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing materials or

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[87] Adjusted annually for inflation pursuant to Public Contract Code sections 20111, subdivision (d), and 20651, subdivision (d).

[88] The lowest responsible bidder shall provide security as the board requires, or all bids shall be rejected. (Pub. Contract Code, § 20111 and 20651.)

[89] Public Contract Code sections 21115 and 20656 define "maintenance" as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." It includes but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." It does not include, among other types of work: "janitorial or custodial services and protection of the sort provided by guards or other security forces." It further does not include painting, repainting, or decorating other than touchup, but instead it is the intent of the Legislature that such activities be controlled directly by the provisions of section 20114 or 20655.

[90] Public Contract Code sections 20111, subdivision (a), and 20651, subdivision (a).

[91] Section 22002, subdivision (c) defines "public project" as:
(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
(2) Painting or repainting of any publicly owned, lease, or operated facility.
(3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

[92] Public Contract Code sections 20111, subdivision (b), and 20651, subdivision (b).

supplies without advertising for or inviting bids; or 2) without regard to the number of hours needed for the job, authorize the use of day labor or force account to carry out the project.[93]

Moreover, the governing board of a school district or community college district may make repairs, alteration, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance by day labor or by force account[94] whenever the total number of hours on the job does not exceed 350 hours; for any school district having an average daily attendance of 35,000 or more, or for any community college district whose number of full-time equivalent students is 15,000 or greater, the governing board may perform the above activities by day labor or force account whenever the total number of hours on the job does not exceed 750 hours or when the cost of material for the job does not exceed $21,000.[95]

The Uniform Public Construction Cost Accounting Act (UPCCAA)[96]

The Uniform Public Construction Cost Accounting Act was enacted to "promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state."[97] The Act provides for developing such cost accounting standards by the California Uniform Construction Cost Accounting Commission, and an alternative method for the bidding of public works projects by public entities.[98] A public agency whose governing board has by resolution elected to become subject to this Act may use its own employees to perform projects of $30,000 or less.[99]

Test Claim Statutes, Regulations and Alleged Executive Orders

Statutes

The test claim statutes encompass changes to the CPWL in the Labor Code beginning in 1976. The relevant provisions are summarized below.

Labor Code Sections 1720, 1720.2 and 1720.3: New types of public works projects were added with these sections:

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[93] Public Contract Code sections 20113 and 20654.

[94] In the context of the CPWL, work done by "force account" means work done by the local agency's own employees as distinguished from work performed pursuant to contract with a commercial firm for similar services. (70 Ops.Cal.Atty.Gen. 92, 97 (1987).)

[95] Public Contract Code sections 20114 and 20655.

[96] Public Contract Code sections 22000 et seq.

[97] Public Contract Code section 22001.

[98] *Ibid.*

[99] Public Contract Code section 22032; prior to January 1, 2007, the dollar limit for public projects that could be performed by the district was $25,000.

- Section 1720 was modified to add public transportation demonstration projects, design and preconstruction, including land surveying,[100] and installation projects.
- Section 1720.2 was amended to include projects done under private contract where the property subject to the contract is privately owned but upon completion of the construction work more than 50 percent of the property is leased to the state or a political subdivision for its use, and the construction work is performed according to plans or specifications furnished by the state or a political subdivision with a lease agreement that is entered into between a lessor and the state or political subdivision as lessee, during or upon completion of the project.
- Section 1720.3 was amended to include the removal of refuse from the public works construction site.

Labor Code Section 1726: A requirement was added for the awarding body, which was already required to "take cognizance" of violations, to promptly *report* suspected violations to the Labor Commissioner. The section was further amended to state that if the awarding body determines as a result of its own investigation (under a Labor Compliance Program) that there has been a violation and withholds contract payments, the Labor Compliance Program procedures in section 1771.6 shall be followed.

Labor Code Section 1727: This section was amended to state that if the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a *subcontractor's* violations, the *contractor* is required to withhold money upon request of the Labor Commissioner and transfer that money to the awarding body. In either case, the awarding body is limited to disbursing such withheld assessments until after receipt of a final order that is no longer subject to judicial review.

Labor Code Section 1735: This section, as added and amended, prohibits discrimination on public works employment for specified categories of persons, and every contractor violating the section is subject to all the penalties imposed for violations of the chapter.

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[100] Design and preconstruction was added by Statutes 2000, Chapter 881. The Senate Rules Committee Analysis stated that the bill codified current DIR practice and regulation by including construction inspectors and land surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project. (Senate Rules Committee, Office of Senate Floor Analyses, SB 1999, August 29, 2000, page 2.) On June 9, 2000, the DIR issued a decision (Public Works Case No. 99-046) finding that construction inspectors hired to do inspection for compliance with applicable building codes and other standards for a public works project were deemed to be employed upon public works and therefore entitled to prevailing wage. This DIR decision was the subject of a lawsuit, *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, which held that even though the DIR had interpreted preexisting statute to include the pre-construction activities as public works and argued that the new statute merely clarified existing law, the Supreme Court found the change in the statute operated prospectively only.

Labor Code Sections 1733, 1741, 1742, 1742.1 and 1743: These sections provide for an administrative process to challenge wage and penalty assessments as set forth:

- Section 1733, relating to court challenges to wage and penalty assessments, was repealed since a new administrative procedure was established.
- Section 1741 established that the Labor Commissioner, after an investigation, shall issue a civil wage and penalty assessment on contractors and/or subcontractors that violate the CPWL, and sets the procedures for issuing the assessment.
- Section 1742 provided that contractors or subcontractors may obtain review of a civil wage and penalty assessment by the Labor Commissioner, and established procedures and additional appeal provisions. The hearing is conducted before the DIR Director with an impartial hearing officer until January 1, 2009; thereafter the hearing is conducted by an administrative law judge. Subdivision (f) provides that the awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner. Subdivision (g) provides that the section is the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner or the awarding body when it acts under a Labor Compliance Program pursuant to section 1771.5.
- Section 1742.1 established procedures to allow for the contractor or subcontractor to meet with the Labor Commissioner to settle a dispute over the civil wage and penalty assessment without the need for formal proceedings. Additional procedures were established to require the awarding body, when enforcing under a Labor Compliance Program, to afford the contractor or subcontractor, upon request of such contractor or subcontractor, the opportunity to meet with the awarding body to attempt to settle any dispute without the need for formal proceedings.
- Section 1743 provided that the contractor and subcontractor shall be joint and severally liable for all amounts due pursuant to a final order, but the Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

Labor Code Section 1750: This section allows the second lowest bidder a right of action against a successful bidder, when the successful bidder has violated the Unemployment Insurance Code. It does not require any activities of awarding bodies.

Labor Code Sections 1770, 1773, 1773.1, 1773.2, 1773.5 and 1773.6: These sections were amended to require the Director of the Department of Industrial Relations to determine the general prevailing rate of per diem wages, using specified criteria, rather than the pre-1975 requirement of having this responsibility rest with the awarding body. Section 1773.2 was thus amended to remove the requirement that the awarding body annually publish prevailing wage rate determinations in the newspaper. Section 1773.5, which previously gave the Director of DIR authority to establish rules and regulations, was amended to add "including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

Labor Code Section 1771: This section was amended to establish the threshold dollar amount for contracts subject to prevailing wages at $1,000.

Labor Code Sections 1771.5, 1771.6 and 1771.7: These new sections established the ability of an awarding body to elect to initiate and enforce a Labor Compliance Program (LCP). In

exchange, payment of prevailing wages is not required for any public works project of $25,000 or less when the project is for construction, or for any public works project of $15,000 or less when the project is for alteration, demolition, repair or maintenance work. An awarding body that establishes an LCP is also allowed to keep any fines or penalties assessed when it takes enforcement action. As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred. A contractor may appeal an enforcement action by a political subdivision to the Director of DIR.

Section 1771.6 was repealed and added to establish notice and withholding procedures for an awarding body that elects to enforce the CPWL under an LCP.

Section 1771.7 was repealed and later added to require that an awarding body that chooses to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or 2004 for a public works project shall initiate and enforce, or contract with a third party to initiate and enforce, an LCP with respect to that public works project. The provision applies to public works that commence on or after April 1, 2003.

Any awarding body choosing to use such bond funds is required to make a written finding that the awarding body has initiated and enforced, or has contracted with a third party to initiate and enforce, the Labor Compliance Program. If the awarding body is a school district, the governing body of that district shall transmit to the State Allocation Board a copy of the finding. If the awarding body is a community college district, that awarding body shall transmit a copy of the written finding to the Director of the Department of Industrial Relations.

Labor Code Section 1772: This section, which existed prior to 1975, establishes that workers employed by contractors or subcontractors in the execution of any public works project are deemed to be employed on the public work.

Labor Code Section 1775: This section was amended to increase penalty amounts assessed by the Labor Commissioner to be paid by contractors and/or subcontractors for violations of the requirement to pay prevailing wages, and to delete a requirement that the awarding body provide notice to a worker making a wage claim that there is insufficient money available from the contractor to pay such claim. Additionally, the section was changed to extend to subcontractors the liability for insufficient wage payments, and to require contractors to withhold monies due a subcontractor for such insufficient payments that are the subject of a claim filed with the Division of Labor Standards Enforcement.

Labor Code Section 1776: This section was amended to expand the requirements for contractors and subcontractors to keep certified payroll records for public works projects and furnish copies of those records to the awarding body, the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards. The amendments also require that copies of such payroll records be made available to the public through the awarding body, the Division of Labor Standards Enforcement or the Division of Apprenticeship Standards (but not by the contractor or subcontractor); if the records have not already been made available to

those entities, then the requesting party is required to reimburse the costs of preparation by the contractor, subcontractors and the entity through which the request was made. Any records made available to the public must be marked or obliterated to prevent disclosure of an individual's name, address or social security number. Any records made available to a joint labor-management committee must be marked or obliterated to prevent disclosure of an individual's social security number. The body awarding the contract is required to place stipulations to effectuate these provisions in the contract. In addition, the Director of the Department of Industrial Relations was required to adopt regulations consistent with the California Public Records Act and the Information Practices Act of 1977 governing release of the records including establishment of reasonable fees to be charged for reproducing copies of the records.

Labor Code Section 1777.1: This section was added and amended to deny a contractor or subcontractor the ability to bid on or be awarded a contract for a public works project, or perform work as a subcontractor on a public works project, when the contractor or subcontractor is found by the Labor Commissioner to be in violation of prevailing wage requirements with intent to defraud or in willful violation of the requirements. The section was also modified to require the Labor Commissioner to semi-annually publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project.

Labor Code Sections 1773.3, 1777.5, 1777.6 and 1777.7: These sections generally address apprenticeship requirements that must be met by contractors, and penalties that may be assessed for violation of those requirements. Section 1773.3, a renumbered version of pre-1975 Labor Code section 3098, requires an awarding body whose public works contract will employ apprentices to send a copy of the award to the Division of Apprenticeship Standards within five days of the award.

Labor Code Sections 1812 and 1813: These provisions, which existed prior to 1975, deal with contractor violations of the 8-hour work day limit and 40-hour work week limit. Section 1813 requires the awarding body to cause stipulations regarding these requirements to be placed in the contract, to take cognizance of violations and to report such violations to the Division of Labor Standards Enforcement.

Labor Code Section 1861: This section, which existed prior to 1975, requires contractors to sign and file with the awarding body a certification that the contractor will provide workers' compensation or equivalent insurance.

Public Contract Code Section 22002 (previously section 21002): For purposes of contracting by public agencies and school districts, this section added a definition of "public project:"

> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, lease, or operated facility.
> (2) Painting or repainting of any publicly owned, leased, or operated facility.
> (3) Construction, erection, improvement or repair of dams, reservoirs, powerplants and electrical transmission lines of 230,000 volts or higher that are publicly owned utility systems.

"Public project" does not include maintenance work; for purposes of the section, "maintenance work" includes:

> (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
> (2) Minor repainting.
> (3) Resurfacing of streets and highways at less than one inch.
> (4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

For purposes of the chapter, "facility" is defined as any plant, building, structure, ground facility, publicly owned utility system as limited above, real property, streets and highways, or other public work improvement.

Regulations

California Code of Regulations, Title 8, sections 16000 through 17264, as pled in the test claim, implement and make specific the statutory provisions cited above.

Alleged Executive Orders

School Facility Program Substantial Progress and Expenditure Audit Guide (May 2003): This document, prepared by the Department of General Services' Office of Public School Construction (OPSC), was developed to assist school districts in meeting program reporting requirements for the School Facilities Program (SFP).

Section 3.9 of the document states that for SFP projects that require the district to implement a Labor Compliance Program, the district must submit a copy of the Department of Industrial Relations approved Labor Compliance Program to which the project conformed and, if applicable, a copy of the third party provider contract. The district must also be prepared to submit, upon request: 1) all bid invitation and contracts that must contain language alluding to Labor Code section 1770 through 1780 compliance and verification; 2) evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set in Labor Code section 1770 through 1780; and 3) evidence of weekly submittals of certified copies of payroll for all contractors and subcontractors. If the district uses its own employees to implement and administer the Labor Compliance Program, the district must account for the name of the district employee performing the Labor Compliance Program duties, the salary and benefits of that employee including transportation costs, and a specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

AB 1506 Labor Compliance Program Guidebook (February 2003): The guidebook was issued by the DIR to address newly enacted Labor Code section 1771.7. Page 3 of the document states:

> This guidebook was prepared by the [Division of Labor Standards Enforcement] and knowledgeable individuals in the private and public sector with a wide range of experience in school district issues, construction projects, public works and labor compliance. This guidebook was intended to facilitate requests to the DIR director from awarding

bodies seeking approval of their own LCPs to conform to the requirements of Labor Code section 1771.7.

This guidebook is not intended to be used as a substitute for the full text of statutes and regulations which comprise the prevailing wage system, or the continually developing body of law which prevailing wage enforcement has generated over the past six decades and will continue to generate in the future. Rather, this information should be viewed as a framework for implementation of an effective LCP designed to enforce prevailing wage requirements consistent with the practice of DLSE.

The guidebook summarizes the relevant provisions of the Labor Code and Title 8, California Code of Regulations, provides instructional materials and practical advice for implementing an LCP, identifies contact and resource information, includes appendices with recommended forms, commonly used terms and a checklist of labor law requirements.

Antioch Unified School District Labor Compliance Program (January 17, 2003): This document was provided as an example of a recently approved LCP, and the DIR stated in its transmittal of the document that Antioch's LCP manual "could be a model for other districts because it contains the most up-to-date information about compliance with labor standards on public works projects."

Prior Test Claim

On December 6, 2007, the Commission heard and denied the *Prevailing Wages (03-TC-13)* test claim, filed by the City of Newport Beach. This test claim alleged various changes to the CPWL, but was applicable only to local agencies and did not show that the underlying decisions to undertake public works projects subject to the CPWL are mandated by the state. The Statement of Decision found the following:

> The provisions of the CPWL are only applicable when a local agency contracts with a private entity to carry out a public works project. The test claim statutes and regulations modified several provisions of the CPWL, and local agencies that contract out for their public works projects are affected by these changes. However, the cases have consistently held that when a local agency makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed.
>
> Public works projects can arise in a myriad of ways, but there is no evidence in the record or in law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. In fact, like the exercise of eminent domain in *City of Merced*, the local agency has discretion to undertake public works projects. The courts have underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision that requires the costs to be incurred. Therefore, the Commission finds that the test claim statutes and regulations do not mandate a new program or higher level of service, and thus do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6.

Claimant's Position

Claimant asserts that the test claim statutes and regulations result in school districts and community college districts incurring costs mandated by the state by creating new state-mandated duties related to the uniquely governmental function of providing for public works. When contracting with third parties for public works as an awarding body, school districts, county offices of education and community colleges are required to do the following:

1. Obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for public works, pursuant to Labor Code section 1773 and Title 8, California Code of Regulations, section 16202.
2. Ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations, pursuant to Title 8, California Code of Regulations, section 16204.
3. Request from the Director of Industrial Relations a coverage determination regarding a specific project or type of work to be performed, pursuant to Title 8, California Code of Regulations, section 16001.
4. File a petition for review of a determination of the Director of Industrial Relations of any rate or rates, pursuant to Title 8, California Code of Regulations, section 16302.
5. Appeal an incorrect determination made by the Director of Industrial Relations, pursuant to Labor Code section 1773.4 and Title 8, California Code of Regulations, section 16002.5.
6. Pursuant to Labor Code section 1773.2, include a statement of prevailing rates of per diem wages in the call and advertisements for bids, the bid specifications and in the public works contract itself, or, in lieu of those requirements, the district may include in the call for bids, bid specifications and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in its principal office, and in that case the district must post the statement of prevailing wages at all job sites.
7. Maintain records of ineligible contractors and subcontractors and refuse to grant them public works projects of the district, pursuant to Labor Code section 1777.1 and Title 8, California Code of Regulations, sections 16800 through 16802.
8. Send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies, pursuant to Labor Code section 1777.3.
9. Inspect and audit payroll records of contractors and subcontractors working on district public works projects, when necessary or requested by the Director of Industrial Relations, pursuant to Labor Code section 1776.
10. Obtain and provide copies of the payroll records of the contractors and subcontractors working on district public works projects, when requested by appropriate parties; the records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number, pursuant to Labor Code section 1776 and Title 8, California Code of Regulations, section 16402.

11. Pay the reasonable fees of a third party when contracting with that third party to initiate and enforce a Labor Compliance Program (LCP), pursuant to Labor Code sections 1771.5 and 1771.7.

12. For works commencing on or after April 1, 2003, oversee compliance with all the requirements of Labor Code sections 1771.5 and 1771.7, Title 8, California Code of Regulations, sections 16425 through16439, and Chapters 2, 3 and 5 of the AB 1506 Labor Compliance Program Guidebook ("Program Guidebook") when contracting with a third party to initiate and enforce an LCP, including but not necessarily limited to the withholding of contract payments and collecting and disbursing penalties and wages at the direction of the third party LCP.

13. Pursuant to Title 8, California Code of Regulations, section 16426, subdivision (a), when seeking approval of an LCP, submit evidence of the district's ability to operate its LCP and offering evidence on the following factors:

    a. Experience and training of the awarding body's personnel on public works labor compliance issues.

    b. The average number of public works contracts the awarding body annually administers.

    c. Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved.

    d. The awarding body's record of taking cognizance of Labor Code violations and withholding in the preceding five years.

    e. The availability of legal support for the LCP.

    f. The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body.

    g. The method by which the awarding body will transmit notices to the Labor Commissioner of willful violations as defined in Labor Code section 1777.1, subdivision (d).

14. Complete a request for approval deemed by the Director of DIR to be deficient, or make other corrections as required, and resubmitting the request for approval of a LCP, pursuant to Title 8, California Code of Regulations, section 16426, subdivision (b).

15. Submit a request for an extension of an LCP at least 30 days prior to the anniversary date of the initial approval, pursuant to Title 8, California Code of Regulations, section 16426, subdivision (c).

16. Make a written finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, an LCP as described in Labor Code section 1771.5, subdivision (b), pursuant to Labor Code section 1771.7, subdivision (d)(1). Transmit a copy of such written finding for school districts to the State Allocation Board, in the manner determined by that board, pursuant to Labor Code section 1771.7, subdivision (d)(2)(A). Transmit a copy of such written

finding for community college districts to the Director of DIR, in the manner determined by DIR, pursuant to Labor Code section 1771.7, subdivision (d)(3).

17. Comply with all the requirements of an LCP, when initiated and enforced by the district, pursuant to Labor Code sections 1771.5 or 1771.7 (for works commencing on or after April 1, 2003), Title 8, California Code of Regulations, sections 16425 through 16439, and Chapters 2, 3, and 5 of the Program Guidebook. These requirements include:

    a. Place in all bid invitations and public works contracts appropriate language concerning the requirements of the prevailing wage laws comprising Labor Code sections 1720 through 1861.

    b. Conduct a pre-job conference with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract.

    c. Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

    d. Review and, if appropriate, audit payroll records to verify compliance with prevailing wage laws. These investigations shall be conducted by monitoring certified payroll records, investigating complaints from workers, and monitoring agencies and contractors, pursuant to the Program Guidebook, Chapter 4, Parts (A) and (B). Upon conclusion of the audit, prepare audits and findings and obtain the approval of recommended forfeitures from the Labor Commissioner.

    e. Withhold contract payments when payroll records are delinquent or inadequate.

    f. Withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred. Withhold contract payments when payroll records are delinquent or inadequate, pursuant to Chapter 3 of the Program Guidebook.

    g. Serve on the contractor, any affected subcontractor, and any bonding company issuing a bond securing the payment of wages, a Notice of Withholding of Contract Payments using the form attached in Appendix 2 of the Program Guidebook.

    h. Mail a notice to DIR on a form titled Notice of Transmittal, found in Appendix 3 of the Program Guidebook, pursuant to Chapter 4 of the Program Guidebook.

    i. When a party requests review, mail a form titled Notice of Opportunity to Review Evidence, found in Appendix 4 of the Program Guidebook, pursuant to Chapter 4 of the Program Guidebook.

18. Provide contractors and subcontractors, bonding companies and sureties with Notice of Withholding of Contract Payments, using the form found in Appendix 2 of the Program Guidebook, when minimum wage law violations are discovered by the district, pursuant to Labor Code section 1771.6 and Title 8, California Code of Regulations, section 17220. The notice shall be in writing and include the following information:

a. a description of the nature of the violation and basis for the notice;

b. the amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1, using the form found in Appendix 4 of the Program Guidebook;

c. the name and address of the office to whom a Request for Review may be sent;

d. information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments;

e. notice of Opportunity to request a settlement meeting under Title 8, California Code of Regulations, section 17221; and

f. a statement appearing in bold, or another type face that makes it stand out from other text, to the effect that failure to submit a timely request for review will result in a final order that is binding on the contractor and subcontractor, and on the bonding company.

19. Complete and mail a Notice of Transmittal, as found in Appendix 3 of the Program Guidebook, to the DIR to begin the administrative review process.

20. Defend Notices to Withhold Contract Payments in administrative review proceedings and in court, pursuant to Chapter 4, paragraph iv(d) of the Program Guidebook.

21. Pursuant to Chapter 6 of the Program Guidebook, when investigating worker complaints of underpayment of prevailing wage rates: a) gather supporting documents from all available sources and analyze them for authenticity; and b) conduct a complete certified payroll record and/or project audit. This includes reviewing certified payroll records for errors, inconsistencies, discrepancies, falsification, misclassification, under-reporting, and any other omissions that render the records inaccurate where needed by comparing the inspector of records' daily log with all available records.

22. Pursuant to Chapter 6 of the Program Guidebook, conduct investigations on an as-needed basis by:

a. Calculating back wages and penalties.

b. Reviewing findings with the contractor and any subcontractor.

c. Writing a complete summary of the investigation with a statement of findings and recommended action for submission to DIR's Division f Labor Standards Enforcement for approval of withholdings.

d. Conducting settlement negotiations.

e. Testifying on behalf of the school district in appeal hearings and litigation.

f. Attending pre-bid and job-start meetings and monitoring active construction projects.

g. Interviewing workers to validate complaints.

23. Pursuant to Chapter 9 of the Program Guidebook, conduct audits on a random or as-needed basis, to include comparing certified payroll records to source documents such as front and back copies of canceled checks, time cards, copies of pay check stubs, payroll registers, personnel sign in sheets, daily logs and any other document which authenticates or corroborates that which has been reported.

24. Pursuant to Chapter 9 of the Program Guidebook, prepare cases and documentation to include:

    a. Copies of workers' complaints.

    b. Copies of all correspondence to the contractor.

    c. Certified payroll records.

    d. Inspector's daily log.

    e. Correct prevailing wage determination and applicable increases.

    f. Scope of work for trade classifications used.

    g. Tabulation of bids.

    h. Notice to proceed.

    i. Notice of Completion (if applicable).

    j. Surety company information.

    k. Contractor's previous record of violations (if applicable).

    l. The Notice of Withholding of Contract Payments (if applicable).

    m. Release of Notice of Withholding of Contract Payments (if applicable).

    n. Memo(s) to file.

25. Pursuant to Section 3.9 of the School Facility Program Substantial Progress and Expenditure Audit Guide ("Audit Guide"), in the event of any postaward audit of a school district by the State Allocation Board, pursuant to Labor Code section 1771.7, subdivision (d)(2)(C), submit a copy of the DIR approved LCP to which the project conformed and a copy of any third party provider contract.

26. Pursuant to Section 3.9 of the Audit Guide, at the time of an OSPC audit, be prepared to submit, upon request, the following:

    a. All bid invitations and contracts that must contain language alluding to Labor Code sections 1770 through 1780 compliance and verification.

    b. Evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set forth in Labor Code sections 1770 through 1780.

    c. Evidence of weekly submittals of certified copies of payrolls for all contractors and subcontractors.

27. Pursuant to Section 3.9 of the Audit Guide, if a district elects to use its own employees for its LCP, provide the following additional information:
    a. The name of the district employee performing the LCP duties.
    b. The salary and benefits of the employee including transportation costs.
    c. A specific breakdown of hours spent by project subject to the LCP requirements.
28. Report any suspected violations of the prevailing wage laws to the Labor Commissioner, pursuant to Labor Code section 1726.
29. Withhold contract payments for underpaid wages and for penalties when, through the district's own investigation, the district determines a violation of prevailing wage laws has occurred, pursuant to Labor Code section 1726.
30. Withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner, pursuant to Labor Code section 1727.
31. Retain amounts withheld to satisfy a Civil Wage and Penalty Assessment until receiving a final order no longer subject to judicial review, pursuant to Labor Code section 1727.
32. After July 1, 2001, comply with all due process requirements for the benefit of contractors and subcontractors when amounts are withheld pursuant to a Civil Wage and Penalty Assessment or a Notice of Withholding of Contract Payments, including the providing of proper and timely notices, allowing review of evidence relied upon, appearance and participation at hearings and the appeals therefrom, pursuant to Labor Code section 1742 and Title 8, California Code of Regulations, section 17220.
33. After July 1, 2001, respond to petitions for writs of mandate filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including the retention of counsel to file timely responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment, pursuant to Labor Code section 1742.
34. Grant and participate in settlement meetings requested by contractors or subcontractors in an attempt to settle any disputed issue before formal hearing procedures, pursuant to Labor Code section 1742.1 and Title 8, California Code of Regulations, section 16413.
35. As a necessary party, appear and participate in legal proceedings resulting from any action against contractor or subcontractor filed by a joint labor-management committee for failure to pay prevailing wages, pursuant to Labor Code section 1771.2.
36. Furnish copies of payroll records of a contractor or subcontractor to a joint labor-management committee, when requested, obliterated only to prevent disclosure of social security numbers, pursuant to Labor Code section 1776.

Claimant stated in the original test claim it is estimated that the district has incurred, or will incur, in excess of $200 in staffing and other costs in excess of revenues annually, for the

period from July 1, 2000 through June 2002, to implement the new duties mandated by the state, for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement. In an amendment filed on July 31, 2003, page 7 of the Second Declaration of William McGuire states:

> To the extent that Clovis Unified School District commences a public works project subject to Labor Code Section 1771.7, it is estimated that Clovis Unified School District will incur in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

In that amendment, an additional declaration was provided by Thomas J. Donner from the Santa Monica Community College District alleging costs mandated by the state.

Claimant filed rebuttal comments to the comments submitted by the Department of Finance, the Department of Industrial Relations, and the Department of General Services, Office of Public School Construction. These rebuttal comments are addressed, as necessary, in the following analysis. Claimant did not file any comments on the draft staff analysis.

Position of Department of Finance

The Department of Justice filed comments on behalf of the Department of Finance, generally stating that the test claim statutes do not impose a new program or higher level of service on school districts or community college districts since there is no reimbursable mandate for costs of programs or services incurred as a result of the exercise of local discretion, citing *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783. The Department then provides a specific response to each claim; those responses are addressed, as necessary, in the following analysis.

With regard to the test claim amendment addressing Labor Code section 1771.7, the Department states the section does not create a state mandate because districts voluntarily participate in the underlying program, i.e., the construction of schools with state bond money, citing *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 740. Even assuming there was a mandate, the Department points out that the state has provided additional funds for the costs of LCPs, and LCPs also generate revenues and costs savings. The Department argues that the claimant has not shown that it has any costs above these additional funds, revenues and cost savings.

The Department concurred with the draft staff analysis and made the following additional comments:

> [W]e note that the State School Deferred Maintenance Program (Education Code section 17582, et seq.) and the Community Colleges Facility Deferred Maintenance and Special Repair Program (Education Code section 84660 et seq.) provide State-matching funds, on a dollar-for-dollar basis, to assist school and community college districts with expenditures for major repair or replacement of existing school building components. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have received funding

to cover the State's share of any related costs resulting from the activities as recommended by the Commission to be a reimbursable state-mandated program on pages 70-71 of the draft staff analysis. We suggest the Commission consider the availability of funding provided from the State School Deferred Maintenance Program and the Community Colleges Facility Deferred Maintenance and Special Repair Program to school districts and community colleges as offsetting revenues, should the Commission adopt a decision finding a reimbursable mandate.

These comments are addressed, as necessary, in the following analysis.

Position of Department of Industrial Relations (DIR)

The DIR states that, since 1975, the state has taken on more of local agencies' historic responsibilities for determining and enforcing prevailing wages to make the prevailing wage duties clearer and less onerous, and leaving behind only minimal recordkeeping tasks. This type of shift from local agencies to the state does not trigger reimbursement under the requirements of article XIII B of the California Constitution. DIR points out that to the extent there has been any expansion in the scope of public works, the consequent obligation to pay prevailing wages directly affects private contractors and only indirectly affects local governments. DIR then provides specific responses to each claim, which are addressed, as necessary, in the following analysis.

In additional comments, DIR applies the principles of the *Department of Finance v. Commission on State Mandates (Kern High School District)* case to the test claim, concluding that claimant has not met its burden of showing districts are compelled to participate in the underlying programs, i.e., either engage in construction of school facilities or engage in such projects via contract. DIR further notes that state funding for school construction is already provided through the State Allocation Board, which allocates money to districts based on formulas that pay between 40% to 80% of the cost of construction. DIR argues that the claimant has not made a credible case that such funding does not take care of whatever costs they have incurred.

With regard to the test claim amendment addressing Labor Code section 1771.7, the DIR states that no reimbursement is required because the newly created LCPs are voluntary programs for local school districts, and districts already receive state construction bond funding for their activities from the State Allocation Board. DIR further points out that district LCPs also are allowed to retain any penalties assessed and collected while enforcing the CPWL.

The DIR filed comments on the draft staff analysis stating that:

- Any mandate that exists is so negligible as to not require subvention pursuant to *Kern High School District*, since partial state funding already exists for maintenance and repair projects in school districts and community college districts, and such funding can be used for the newly mandated tasks.
- Retaining certified payroll records for six months at most results in a negligible increase in levels of service, which should be considered de minimis.
- Inserting a clause in public works contracts pursuant to Labor Code section 1776, subdivision (h), at most results in a negligible increase in levels of service.

- Retaining contract payments for certified payroll record violations pursuant to Labor Code section 1776, subdivision (g), is not a mandate since it does not require any activity of the awarding body. Additionally, this requirement does not result in a new program or higher level of service because the obligation already was subsumed in Labor Code section 1727 which required "the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to ... the terms of this chapter," and Labor Code section 1776, subdivision (g), is part of the same chapter as section 1727.
- Regarding the requirement that districts put certain projects out for bid, Public Contract Code section 22030 allows a school district or community college district to decide whether to subject itself to the thresholds set forth in the Uniform Public Construction Cost Accounting Act (UPCCAA) or the other work limits thresholds set forth in sections 20114 or 20655 of the Public Contract Code. Therefore, any project that does not create a mandate to contract with private parties under both sets of thresholds should not be considered a mandate for subvention purposes.
- The Commission should require a new declaration from the claimant to justify the test claim, since in the limited circumstances in which a mandate might exist to contract with private parties for a public project, the three alleged mandates cause virtually no increased costs.

These comments are addressed, as necessary, in the following analysis.

Position of Department of General Services, Office of Public School Construction

The Office of Public School Construction (OSPC), in commenting on the test claim amendment addressing Labor Code section 1771.7, states that participation by a school district in the School Facility Program (SFP), established by Chapter 12.5 of the Education Code, is voluntary:

> The Education Code does not compel a district to obtain funding from the State through the SFP as a condition of building schools. School districts may choose to build facilities through the use of district raised funds. Program elements are only required if a district chooses to participate in the program. Additionally, Labor Code ... Section 1771.7 states "an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of 2002 ... for a public works project, shall initiate and enforce ... a labor compliance program".[101]

The OSPC further states that the State Allocation Board (SAB) has authority to increase the per pupil grant amount to accommodate the State's share for the additional costs due to the initiation and enforcement of an LCP; the increases were approved by the SAB on July 2, 2003, and are currently being provided.

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[101] Comments from Department of General Services, Office of Public School Construction, Luisa M. Park, Executive Officer, September 15, 2003, page 1.

OSPC filed an amendment to its September 15, 2003 comments addressing new bond money for public school construction that subsequently became available. The comments were amended to state:

> ... Additionally, Labor Code ... Section 1771.7 states "an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of *either* 2002 *or 2004* ... for a public works project, shall initiate and enforce ... a labor compliance program."
>
> The OSPC further states that the State Allocation Board (SAB) has authority to increase the per pupil grant amount to accommodate the State's share for the additional costs due to the initiation and enforcement of a LCP *for school projects funded from Proposition 47 or Proposition 55. Proposition 1D does not require school districts to enforce a LCP; therefore, projects that include LCPs are not eligible for funding increases under this bond.*

These comments are addressed as necessary in the following analysis.

Interested Person -- State Building and Construction Trades Council of California (AFL-CIO)

The State Building and Construction Trades Council (SBCTC) filed comments on the test claim as an interested person, pursuant to Title 2, California Code of Regulations, section 1181.1, subdivision (*l*). The SBCTC states that the test claim should be denied for the following reasons:

1. Any "mandate" imposed by the CPWL is on private contractors, not the local agency. It is possible that if private contractors have higher labor costs, such costs might be passed on to their customers; however, the contractor's cost of paying higher wages to workers on a project may well be offset by the increased skill and productivity of those workers. Several recent studies conclude that the prevailing wage law does not actually increase total school construction costs, and the claimant has presented no evidence to the contrary. SBCTC provided a copy of one study: "A Comparison of Public School Construction Costs" by Peter Philips, Ph.D., Professor of Economics, University of Utah, February, 2001.[102]
2. Although the CPWL does impose minor direct costs on school districts to administer and enforce the law, what has occurred since 1975 is the opposite of an unfunded state mandate since the state has taken upon itself responsibilities that were formerly borne by local agencies — i.e., determining prevailing wage rates and enforcing the CPWL.
3. It is correct to state that there has been some expansion in the definition of "public work" since 1975; however, many of the changes to that definition were actually clarifications of the pre-1975 statutory language and claimant has not presented any evidence that these minor changes have had any practical effect on school district construction projects.

The SBCTC did not file comments on the draft staff analysis.

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[102] The claimant is not seeking reimbursement for the cost of increased salaries, which would not be reimbursable in any case pursuant to *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[103] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[104] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[105]

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[106] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[107]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[108] To determine if the program is new or imposes a higher level of service, the test claim requirements must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes.[109] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[110]

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[103] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[104] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735.

[105] *County of San Diego v. State of California* (*County of San Diego*) (1997) 15 Cal.4th 68, 81.

[106] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[107] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[108] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[109] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[110] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[111]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[112] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[113]

The analysis addresses the following issues:

- Do the test claim statutes, regulations or alleged executive orders impose a state-mandated program on K-12 school districts or community college districts within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes or regulations impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes or regulations impose costs mandated by the state within the meaning of Government Code section 17514 and article XIII B, section 6 of the California Constitution?

Issue 1: Do the test claim statutes, regulations or alleged executive orders impose a state-mandated program on K-12 school districts or community college districts within the meaning of article XIII B, section 6 of the California Constitution?

For the test claim statutes, regulations or alleged executive orders to impose a state-mandated program, the language must order or command a school district or community college district to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the district has made an underlying discretionary decision causing the requirements to apply, or where participation in the underlying program is voluntary, courts have held that resulting new requirements do not constitute a reimbursable state mandate.[114] Stated another way, a reimbursable state mandate is created when the test claim statutes or regulations establish conditions under which the state, rather than a local entity, has made the decision requiring the district to incur the costs of the new program.[115]

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[111] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[112] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[113] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817 (*City of San Jose*).

[114] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[115] *San Diego Unified School Dist., supra* (2004) 33 Cal.4th 859, 880.

The claimant asserts the test claim statutes, regulations and alleged executive orders require districts to perform new activities to comply with state prevailing wage requirements, the costs of which are reimbursable under article XIII B, section 6. Since the provisions of the CPWL are only applicable to public works projects performed under contract, and not to work carried out by a public agency with its own forces,[116] the analysis must first address whether the state is requiring a school district or community college district to engage in any public works projects or to contract out for such projects. Then, the alleged new activities must be analyzed to determine whether they are required or mandated by the plain language of the test claim statutes, regulations, or alleged executive orders.

Do Districts Have Discretion to Undertake Public Works Projects?

Types of Public Works Projects Subject to CPWL

The Labor Code sets forth the types of projects that are considered "public works," subject to the CPWL. Prior to 1975, public works projects subject to prevailing wages generally included: 1) construction; 2) alteration; 3) demolition; 4) repair work; 5) work done for irrigation, utility, reclamation and improvement districts; 6) street, sewer or other improvement work; 7) laying of carpet; and 8) maintenance work.[117] Since 1975, the test claim statutes added new types of public works projects:

- Labor Code section 1720 was modified to add:
  - public transportation demonstration projects (effective August 7, 1989);
  - design and preconstruction, including land surveying (effective January 1, 2001); and
  - installation projects (effective January 1, 2002).
- Effective January 1, 1981, Labor Code section 1720.2 was amended to include projects done under private contract where the property subject to the contract is privately owned but upon completion of the construction work more than 50 percent of the property is leased to the state or a political subdivision for its use *and* the construction work is performed according to plans or specifications furnished by the state or a political subdivision with a lease agreement that is entered into between a lessor and the state or political subdivision as lessee during or upon completion of the project.
- Effective January 1, 2000, Labor Code section 1720.3 was amended to state that contracts for the removal of refuse from a public works construction site entered into by "any political subdivision" – which includes K-12 school districts and community college districts – are public works projects.

Each of these new types of public works projects is now subject to the CPWL.[118] The timing for CPWL coverage is significant here for purposes of the mandates analysis. The pre-existing

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[116] Labor Code section 1771.

[117] Labor Code sections 1720 and 1771 in effect as of January 1, 1975.

[118] Labor Code section 1771: "... not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed ... shall be paid to all workers employed on public works."

public works projects were already subject to the pre-existing CPWL administrative requirements, while the new public works projects only became subject to and therefore triggered the pre-existing requirements at the time they were enacted.[119] Thus, for pre-existing public works projects, only the *newly-imposed* CPWL administrative requirements that are claimed could be subject to reimbursement. For *newly-covered* public works projects, however, all CPWL administrative requirements *that are claimed*, both pre-existing and new, could be subject to reimbursement.

Discretion to Undertake Public Works Projects

The foregoing provisions show that the CPWL covers a broad range of public works projects. The decision to undertake such projects could arise in a myriad of ways, from a district-level decision to an initiative enacted by the voters.

With regard to K-12 school districts, Education Code section 17593 requires those districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Moreover, Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Education Code section 17002 defines "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction. The instrument shall not require capital enhancements beyond the standards for which the facility was designed and constructed.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. ...

Thus, both K-12 school districts and community college districts are required by statute to repair the school property of their districts. Since "property" includes "any external thing over which the rights of possession, use, and enjoyment are exercised,"[120] the requirement to repair includes real property as well as facilities owned by the district. Moreover, because the term

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[119] See footnote 97 regarding effective date for CPWL coverage of design and pre-construction, including land surveying.

[120] Black's Law Dictionary, Seventh Edition, 1999, page 1232, column 2.

"repair" is defined as "to restore to sound condition after damage or injury" and "to renew or refresh,"[121] staff finds that "repair" includes "maintenance" for purposes of these provisions.

These statutes, therefore, require K-12 school districts and community college districts to repair and maintain their facilities and property.

Aside from the above statutory requirements, however, there is no evidence in the test claim statutes, regulations, alleged executive orders, or in the record that the state has required districts to undertake other public works projects that *do not* involve repair or maintenance, including the newly-covered public works projects. In fact, with regard to new construction of school buildings, the Second District Court of Appeal has stated: "Where, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[122]

Absent such legal compulsion, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[123]

In the case of *San Diego Unified School Dist.*, the test claim statutes required school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[124] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[125] Regarding expulsion recommendations that were discretionary on the part of the district, the court stated that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[126] Ultimately, however, the Supreme Court decided the discretionary expulsion issue on an alternative basis.[127]

There is no evidence in the record to indicate that failure to undertake public works projects that are not otherwise required by statute would result in certain and severe penalties such as double taxation or other draconian consequences as set out in the *Kern* case. Nor does the

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[121] Webster's II, New Collegiate Dictionary, 1999, page 939, column 2.

[122] *People v. Oken, supra,* 159 Cal.App.2d 456, 460.

[123] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

[124] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[125] *Id.* at pages 881-882.

[126] *Id.* at page 887, footnote 22.

[127] *Id.* at page 888.

record show that the circumstances here are similar to those faced by the *San Diego* court regarding school safety. Although school safety was mentioned in the context of the statutory repair and maintenance requirements, nothing in the record indicates that failure to undertake *other* public works projects that are not required in statute would result in unsafe schools.

Instead, staff finds that public works projects that are entered into for purposes other than repair and maintenance are discretionary, analogous to the situation in *City of Merced.* There, the issue before the court was whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill, when a local agency exercised the power of eminent domain.[128] The court stated:

> Whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[129]

The Supreme Court in *Kern High School District* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[130]

The Code of Civil Procedure provision that was cited in *City of Merced* states:

> Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.[131]

The Law Revision Commission's comment on this provision stated:

> Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent

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[128] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

[129] *Id.* at 783.

[130] *Kern High School District, supra,* 30 Cal.4th 727, 743.

[131] Code of Civil Procedure section 1230.030.

> domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. ...[132]

The holding in *City of Merced* applies in this instance. A K-12 school district's or community college district's decision to undertake a public works project, other than for repair or maintenance of school buildings and property, is analogous to the discretionary decision to acquire property via eminent domain, and there is no evidence in the law or in the record that districts are practically compelled to engage in such public works projects.

Therefore, staff finds that the state has required K-12 school districts and community college districts to undertake public works projects to repair or maintain facilities and property of K-12 school districts and community college districts, pursuant to Education Code sections 17002, 17565, 17593 and 81601. The state has *not* required these districts to undertake any other public works projects. Consequently, any prevailing wage requirements, *when triggered by a public works project that does not address repair or maintenance*, are not mandated by the state and are not subject to article XIII B, section 6.

Moreover, since repair and maintenance types of public works projects were covered by the CPWL prior to 1975, only those CPWL administrative requirements claimed that were imposed *on or after January 1, 1975*, could be subject to reimbursement.

Do Districts Have Discretion to Contract for Repair or Maintenance Public Works Projects?

Since the requirement to pay prevailing wages is limited to work performed under contract, the next question is whether the state requires K-12 school districts or community college districts to contract for public works projects for repair or maintenance of school facilities or property, or whether the district can use its own forces for the project. As more fully described below, the state sometimes requires districts to contract for repair and maintenance of school facilities and property, depending upon project variables and the laws under which the district operates.

The Public Contract Code governs when districts are required to contract with private entities, and generally requires school districts and community college districts to contract with the lowest responsible bidder for construction, repairs and maintenance.[133] There are exceptions, however. For instance, when emergency repairs are needed for any facility to permit the continuance of existing classes or to avoid danger to life or property, the governing board of a school district or community college district is allowed to use its own forces to make such repairs.[134] In addition, the governing board of a school district or community college district is allowed to use its own forces to make repairs and other improvements under certain labor hour or material cost limits. For K-12 school districts, Public Contract Code section 20114 provides the following labor hour or material cost limits:

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[132] California Law Revision Commission comment, 19 West's Annotated Code of Civil Procedure (1982 ed.) following section 1230.030, p. 414.

[133] Public Contract Code sections 20111 and 20651.

[134] Public Contract Code sections 20113 and 20654.

(a) In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20115[135, 136] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20115, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of material does not exceed twenty-one thousand dollars ($21,000).
(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

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[135] Public Contract Code section 20115 defines "maintenance" in this instance as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purpose in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." This includes, but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." These provisions express the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20114.

[136] For purposes of the Labor Code, "maintenance" is similarly defined:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
(2) Carpentry, electrical, plumbing, glazing, touchup painting, and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continually usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.
EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.
EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.
(3) Landscape maintenance. See Public Contract Code Section 21002 [subsequently renumbered to section 22002].
EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded. (Title 8, Cal. Code Regs., tit. 8, § 16000.)

For community college districts, Public Contract Code section 20655 provides the following labor hour or material cost limits:

> (a) In each community college district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20656[137] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any district whose number of full-time equivalent students is 15,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20656, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of materials does not exceed twenty-one thousand dollars ($21,000).
> (b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

Notwithstanding the above provisions, a flat dollar threshold for public projects, as defined in Public Contract Code section 22002,[138] is established when a K-12 school district or

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[137] Public Contract Code section 20656 defines "maintenance" for this purpose in the same manner as Public Contract Code section 20115. Section 20656 expresses the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20655.

[138] Subdivision (c) defines "public project" as:

> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and *repair* work involving any publicly owned, leased, or operated facility.[138]
> (2) Painting or repainting of any publicly owned, lease, or operated facility.
> (3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher. (Emphasis added.)

Subdivision (d) states that "public project" does not include "maintenance work" which includes all of the following:

> (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
> (2) Minor repainting.
> (3) Resurfacing of streets and highways at less than one inch.
> (4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.
> (5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams,

community college district operates under the Uniform Public Construction Cost Accounting Act (UPCCAA).[139] Public Contract Code section 22001 sets forth the following findings and declarations regarding the UPCCAA:

> The Legislature finds and declares that there is a statewide need to promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state. This chapter provides for the development of cost accounting standards and an alternative method for the bidding of public works projects by public entities.

Section 22030 provides that the UPCCAA is only applicable to a district whose governing board has by resolution elected to become subject to its procedures and has notified the State Controller of the election. Once the district has elected to become subject to the UPCCAA, in the event of a conflict with any other provision of law relative to bidding procedures, the alternative bidding procedures and cost threshold under the UPCCAA for public projects, as defined, shall apply.[140]

The UPCCAA provides that public projects, which exclude maintenance, of $30,000 or less may be performed by a school district or community college district by its own forces.[141] In cases of emergency when repair or replacements are necessary, the work may be done by a district with its own forces.[142] Thus, for those districts subject to the UPCCAA, when the public project is not an emergency, contracting is required for a public project, as defined, when the cost of such project will exceed $30,000. When the project is for maintenance or other work that does not fall within the definition of public project, districts subject to the UPCCAA *may* use the bidding procedures set forth under the UPCCAA and in that situation would likewise be required to contract when the cost of the project will exceed $30,000.[143] Here, repair or maintenance projects – those that are legally required by Education Code sections 17002, 17565, 17593 and 81601 as noted above – could fall under the UPCCAA definition for public project, or may not. But in either case, for districts subject to the UPCCAA, when the project is not an emergency, contracting is required only when the cost of the project will exceed $30,000.

The Department of Industrial Relations (DIR) states that section 22030 of the Public Contract Code allows a school district to decide whether to subject itself to the UPCCAA thresholds or the K-12 and community college thresholds and thus being subject to one or the other is a

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> reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

[139] Public Contract Code sections 22000 et seq.

[140] Public Contract Code section 22030.

[141] Public Contract Code section 22032; prior to January 1, 2007, the dollar limit for public projects that could be performed by the district was $25,000.

[142] Public Contract Code section 22035.

[143] Public Contract Code section 22003.

choice.[144] DIR concludes that "any project that does not create a mandate to contract with private parties under both sets of thresholds should not be considered a mandate for subvention purposes."[145]

Staff agrees that there is a choice on the part of the school district to become subject to the UPCCAA. However, staff disagrees with DIR's conclusion that unless the project is required to be contracted under both sets of thresholds it should not be considered a mandate for subvention purposes.

A district choosing the UPCCAA is subject to an entirely different set of bidding and accounting procedures for public projects, as defined, and is required to adopt an informal bidding ordinance for public projects of $125,000 or less.[146] And, where there is a conflict with any other provision of law relative to bidding procedures on public projects, the alternative bidding procedures set forth in the UPCCAA, including the $30,000 threshold, are controlling.[147] Thus, once the election is made, both the state and local UPCCAA rules are in place.

DIR appears to be reading a requirement into the law that is not there. A basic rule of statutory construction requires that a statute be given its plain meaning, and express requirements that the Legislature has not placed in the statute may not by implication be brought into a statute's interpretation.[148] The Legislature has given districts a choice to be subject to the UPCCAA, and a public works project is *either* subject to the labor hour/material cost thresholds, which vary significantly depending on the size of the district and the type of project, *or* the UPCCAA $30,000 project threshold, but not both. In either case, the CPWL program requirements will be triggered at the applicable threshold, and variables from the project itself will determine whether the threshold is reached. A district's decision to fall within the UPCCAA – a decision that may not have anything to do with a particular public project – does not operate as a trigger or a limit to what may be reimbursable. To require the district to apply both sets of thresholds each time it undertakes a project for purposes of determining the point at which subvention is allowed is not consistent with mandates case law or the purpose of article XIII B, section 6. Consequently, staff concludes that the threshold at which a project must be let to contract depends upon the applicable Public Contract Code bidding procedures under which the district operates.

Accordingly, staff finds that the state has required K-12 school districts and community college districts to undertake public works projects to repair or maintain their facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, via contract under the following circumstances:

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[144] Letter from Anthony Mischel, Attorney At Law, Department of Industrial Relations, April 14, 2008, page 4.

[145] *Ibid.*

[146] Public Contract Code section 22034.

[147] Public Contract Code section 22030.

[148] *In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.
3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Thus, repair or maintenance public works projects, but only when contracted for under the circumstances set forth above, are not discretionary. Moreover, since repair and maintenance public works projects were covered by the CPWL prior to 1975, only those CPWL administrative requirements claimed, that were imposed *on or after January 1, 1975*, could be subject to reimbursement.

Do the Test Claim Statutes, Regulations and Alleged Executive Orders Mandate Any Activities When a District is Required to Contract for Repairs or Maintenance of School Buildings or Property?

The next question is whether the plain language of the test claim statutes, regulations or alleged executive orders, on or after January 1, 1975, mandates any activities on K-12 school districts or community college districts when a district is required by law to contract for repair or maintenance public works projects.

A. Determining Prevailing Wage Coverage and Rates

1. Obtain Correct Prevailing Wage Rates – Labor Code Section 1773 and Title 8, California Code of Regulations, Sections 16202 and 16204

Labor Code section 1773 states in relevant part:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director of Industrial Relations.

Section 16202 of the regulations states in relevant part:

(a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

Section 16204 of the regulations, dealing with effective dates of rate determinations and rates, states in relevant part:

(a)(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

The plain language of this regulation requires the awarding body to "ensure" that the correct determination is used. This provision does not impose the activity of ensuring that the Director of Industrial Relations made a correct determination, as claimant asserts; rather it imposes the activity of ensuring that the appropriate wage rates, as determined by Director of Industrial Relations and as obtained by the awarding body, are properly used in the contract.

Thus, the plain language of the statute and regulations cited require the awarding body to obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract.

2. Coverage Determinations – Title 8, California Code of Regulations, Section 16001

Section 16001 of the regulations states in relevant part:

(a)(1) Any interested party ... *may* file with the Director of Industrial Relations ... a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as a public works under the Labor Code. ...

(2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director ... any documents, arguments, or authorities it *wishes* to have considered in the coverage determination process. (Emphasis added.)

Thus, the plain language of this provision shows that an awarding body may, but is not required to, request a coverage determination from the Director of Industrial Relations. The awarding body must provide documentation to the Director by a date certain if it *wishes* to have that documentation considered. Thus, no activities are required of the awarding body by this regulation.

3. Review of Prevailing Wage Rate Determination – Title 8, California Code of Regulations, Section 16302

Section 16302 of the regulations provides that an interested party, including an awarding body, "*may* file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director ..." (Emphasis added.) Thus, the awarding body is not required to file such a petition, and no activities are required.

4. Appeal of Public Work Coverage Determination – Labor Code Section 1773.4 and Title 8, California Code of Regulations, Section 16002.5

Section 16002.5 of the regulations, as it interprets Labor Code section 1773.4, provides that an interested party, including an awarding body, "*may* appeal to the Director of Industrial Relations … a determination of coverage under the public works laws … regarding either a specific project or type of work …" (Emphasis added.) Thus, the awarding body is not required to make such appeal, and no activities are required.

B. Notices and Reports

1. Statement of Prevailing Wage Rates – Labor Code Section 1773.2

Labor Code section 1773.2 states:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.
>
> In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

Labor Code section 1773.2 does impose on the awarding body the activity of providing notice, in either of the fashions set forth.

2. Ineligible Contractors and Subcontractors – Labor Code Section 1777.1 and Title 8, California Code of Regulations, Sections 16800 through 16802.

Labor Code section 1777.1, subdivision (d), requires the Labor Commissioner, not less than semi-annually, to "publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project …" Sections 16800 through 16802 set forth procedures for the Division of Labor Standards Enforcement to investigate and conduct hearings for debarment of contractors and subcontractors.

The plain language of the test claim statute and regulations does not impose any activities on the awarding body.

3. Notice Regarding Apprenticeship Standards – Labor Code Sections 1773.3 and 1777.5, Subdivision (n)

Labor Code section 1773.3 states:

> An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. … Within five days of a finding of any discrepancy regarding the ratio of apprentices

to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

Section 1777.5 sets apprenticeship standards. Subdivision (n) states:

> The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

The plain language of the test claim statute requires the awarding body, when apprentices will be used in the contract, to include language in the contract regarding apprenticeship requirements and provide a copy of the contract award to the Division of Apprenticeship Standards.

4. Take Cognizance of and Report Suspected Violations — Labor Code Section 1726

Labor Code section 1726 states in relevant part:

> The body awarding the contract for public work shall take cognizance of violations of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

Thus, the plain language of this test claim statute requires the awarding body to take cognizance of and report any suspected violations to the Labor Commissioner.

D. Payroll Records – Labor Code Section 1776 and Title 8, California Code of Regulations, Sections 16400 - 16403

Labor Code section 1776 states in relevant part:

> (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury ...
>
> (b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:
>
> (1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.
>
> (2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) *shall* be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

...

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement *shall* be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal labor Management Cooperation Act of 1978 ... *shall* be marked or obliterated only to prevent disclosure of an individual's social security number. ...

...

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties *shall* be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract *shall* cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act ... and the Information Practices Act of 1977 ... governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section. (Emphasis added.)

Section 16400 of the regulations states in relevant part:

> (c) Acknowledgment of Request. The public entity receiving a request for payroll records *shall* acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.
>
> (d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:
>
> (1) Specify the records to be provided and the form upon which the information is to be provided;
>
> (2) Conspicuous notice of the following:
>
> (A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and
>
> (B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty-five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;
>
> (3) Cost of preparation as provided in Section 16402; and
>
> (4) Provide for inspection.
>
> (e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice. (Emphasis added.)

Section 16401 provides that the format for reporting payroll records by the contractor shall be on a form provided by the public entity and that copies of such forms are available at any office of the Division of Labor Standards Enforcement throughout the state. The section also provides specified words for the required certification, but allows the public entity to require a more strict or extensive form of certification.

Section 16402 of the regulations states:

> The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of

cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

Section 16403 of the regulations states:

> (a) Records received from the employing contractor *shall* be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;
>
> (b) copies provided to the public upon written request *shall* be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;
>
> (c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information. (Emphasis added.)

In summary, requests by the public for certified payroll records can only be made through the awarding body, the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards, and any copies provided to the public shall be redacted to prevent disclosure of an individual's name, address, social security number and other private information. Once the awarding body receives a request for the records from the public, the awarding body is required to send an acknowledgment to the requesting party and indicate to the requestor the costs for preparing the records. The awarding body's request to the contractor for the records must include specified information. The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the awarding body or other entity through which the request was made; the regulation establishes those costs, and requires that payment be made by the person seeking the record prior to release of the documents to cover the actual costs of preparation. The regulations further require that the awarding body keep unredacted copies of any such payroll records on file for at least 6 months following completion and acceptance of the project, or longer if the project is disputed. Upon request of the Division of Apprenticeship Standards or the Division of Labor Standards, the awarding body is required to withhold from contractor progress payments any penalties for the contractor's noncompliance. The body awarding the contract is also required to include in the contract stipulations regarding the contractor's requirements regarding payroll records.

With regard to providing certified payroll records to a joint labor-management committee under Labor Code section 1776, subdivision (e), it is unclear from the plain language of the statute whether such records must be provided by the awarding body or if such records may be provided by the contractor, since subdivision (b)(3) states: "The public shall not be given access to the records at the principal office of the contractor."

In interpreting statutes, the primary rule is to ascertain the intent of the Legislature so as to effectuate the purpose of the statute.[149] The first step is to examine the statutory language, giving the words their usual and ordinary meaning.[150] If there is ambiguity, extrinsic sources including legislative history may be used so that the general purpose of the statute is promoted rather than defeated.[151]

In this case, the Legislature enacted statutes to allow a joint labor-management committee the ability to independently enforce prevailing wage requirements under Labor Code section 1771.2.[152] As part of that enactment, section 1776 was modified to address certified payroll records released to a joint labor-management committee. The Senate Rules Committee bill analysis stated:

> This bill provides that a federally recognized joint labor-management committee may obtain a copy of a certified payroll from a *contractor* on a public works project, but with names and social security numbers deleted. If the committee discovers unpaid prevailing wages or fringe benefits due, and related penalties, it may file a civil action to collect them. ...[153] (Emphasis added.)

Thus it is clear from the legislative history that the provisions were intended to allow the joint labor-management committee to obtain certified payroll records directly from the contractor rather than the awarding body.

Therefore, the test claim statutes and regulations require awarding bodies to perform the following activities:

- Upon a request made to the awarding body by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
  - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
  - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b));
  - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
  - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).

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[149] *Estate of Griswold* (2001) 25 Cal 4th 904, 910.

[150] *Id.* at 911.

[151] *Ibid.*

[152] Statutes 2001, chapter 804.

[153] Senate Rules Committee, Office of Senate Floor Analyses, Senate Bill No. (SB) 588 Bill Analysis, September 12, 2001, page 2.

- Withhold penalties from contractor progress payments for noncompliance with section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).)

DIR asserts that withholding penalties from contractor progress payments for certified payroll record violations pursuant to Labor Code section 1776, subdivision (g), is not a mandate because it does not require any action by an awarding body. Instead, DIR argues, the same analysis of Labor Code section 1727 applies here, i.e., where the plain language of the test claim statute *prohibits* the awarding body from disbursing withheld money, no activities are required.

DIR misconstrues the mandate analysis of Labor Code section 1727 in E.2. below. There, the analysis found that the plain language of the statute *does* require the awarding body to engage in the activity of withholding money from contractor payments to satisfy a civil wage and penalty assessment issued by the Labor Commissioner. The plain language of that section also *prohibits* disbursement of such funds to any entity – either the Labor Commissioner or the contractor – until a final order that is no longer subject to judicial review is issued. Thus, the analyses of the two sections are consistent and Labor Code section 1776, subdivision (g), and does in fact mandate the awarding body to withhold penalties from contractor progress payments for noncompliance with section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement.

E. Withholdings

1. Withhold Contract Payments Based on District Determination – Labor Code Section 1726

Labor Code section 1726 states in relevant part that "if the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed." The plain language of this statute does not require the awarding body to engage in the activity of investigating a potential violation of the chapter.

2. Withhold and Retain Contract Payments to Satisfy Civil Wage and Penalty Assessments – Labor Code Section 1727

Labor Code section 1727 states:

> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.
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> (b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor

under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed until receipt of a final order that is no longer subject to judicial review.

Thus, the plain language of the statute requires the awarding body to withhold from contractor payments the amount necessary to satisfy a civil wage and penalty assessment issued by the Labor Commissioner, or receive from the contractor any money withheld for such purpose by the contractor from the subcontractor. However, where the plain language of the test claim statute *prohibits* the awarding body from disbursing the withheld money until a final order that is no longer subject to judicial review, no activities are required of the awarding body.

3. Release Withheld Funds – Labor Code Section 1742, Subdivision (f)

Labor Code section 1742, subdivision (f), states in relevant part that "[a]n awarding body that has withheld funds in response to a civil wage and penalty assessment ... shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds ... to the Labor Commissioner."

The plain language of this statute requires the activity of releasing funds to the Labor Commissioner upon receipt of the final order.

F. Labor Compliance Program

Claimant pled several activities required of districts when they implement a Labor Compliance Program pursuant to Labor Code section 1771.5.[154] Ordinarily, the prevailing wage requirements are applicable for every public works project that exceeds $1,000.[155] Section 1771.5 states in pertinent part that if an awarding body *elects* to initiate and enforce a Labor Compliance Program, the awarding body can avoid prevailing wage requirements for public works projects of up to $25,000 for construction work or up to $15,000 for alteration, demolition, repair or maintenance work. Section 1771.7 further provides that an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004 *shall* initiate and enforce a Labor Compliance Program. Nothing in the plain language of section 1771.5 *requires* the awarding body to elect to initiate or enforce, and therefore undertake any activities related to, a Labor Compliance Program, nor does the plain language of sections 1771.5 or 1771.7 *require* the awarding body to use funds derived from the referenced bond measures. Staff therefore finds there is no "legal" compulsion for K-12 school districts or community colleges to initiate and enforce a Labor Compliance Program.

Absent such legal compulsion, the courts have ruled at times that "practical" compulsion might be found. As noted above, the Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court

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[154] With regard to initiating and enforcing a Labor Compliance Program, claimant pled Labor Code sections 1771.5, 1771.6 and 1771.7, Title 8, California Code of Regulations sections 16425 – 16439 and 17220 – 17221, "AB 1506 Labor Compliance Program Guidebook," "School Facility Program Substantial Progress and Expenditure Audit Guide," and "Antioch Unified School District Labor Compliance Program."

[155] Labor Code section 1771.

determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[156]

The Department of General Services, Office of Public School Construction, asserts that the law does not compel a district to obtain funding from the state as a condition of building schools, and school districts may choose to build facilities through the use of district raised funds. Claimant argues that the use of *district* raised funds is not realistic, citing several Education Code provisions which "strictly limit" the district's ability to issue local school bonds and manifest the Legislature's intent that the state should provide financing for school construction. Claimant summarized the argument as follows:

> In summary, the last 60 years of legislative history shows repeated and consistent recognition that school districts are unable to meet the school construction needs of their pupils. The history repeatedly reveals an admission that the education of school children is the primary responsibility of the state. The history of the inability of school districts and the obligation of the state to educate children results in the above recited litany of state money for school construction at low or no interest rates, repayment requirements of less than the amounts apportioned, and repayment terms unavailable anywhere else. Education of children is an obligation and function of the state. Classrooms are required to provide that education. Therefore, building classrooms is a state obligation.[157]

In the foregoing analysis regarding public works projects, however, staff found that the only public works projects mandated by the state are projects the districts undertake for repair and maintenance. Since no compulsion to undertake other types of public works projects was found, the only issue here is whether K-12 school districts and community college districts are compelled to use Kindergarten-University Public Education Facilities Bond Act of 2002 and 2004 funds for repair and maintenance projects, thereby triggering the requirement for the district to implement an LCP. For the reasons stated below, staff finds no such compulsion exists under the test claim statutes, regulations, or alleged executive orders, or under other law or in the record.

Claimant argues that requiring the district to use district-raised funds rather than state funds "results in non-legal compulsion in the form of double taxation which is prohibited by *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70-76."[158] That California Supreme Court case dealt with a claim seeking subvention of costs imposed as a result of a state statute which extended federally-mandated coverage of the state's unemployment insurance law to include state and local agencies.[159] The court noted that federal law provides powerful incentives to enactment of unemployment insurance protection by the individual states, i.e., "certified" state programs, and described the current situation as follows:

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[156] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

[157] Claimant comments, submitted October 20, 2003, page 10.

[158] *Ibid.*

[159] *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 51.

> In current form, the Federal Unemployment Tax Act (hereafter FUTA) ... assesses an annual tax upon the gross wages paid by covered private employers nationwide. The tax rate, which has varied over the years, stands at 6.2 percent for calendar year 1990. (Citations omitted.) However, employers in a state with a federally "certified" unemployment insurance program may credit their contributions to the state system against up to 90 percent of the federal tax. ... A "certified" state program also qualifies for federal administrative funds. (Citations omitted.)[160]

One of the questions before the court was whether the new state law, because of the federal incentives for enacting it, was in fact a "federal" mandate.[161] The court ruled that the state statute in question was actually a federal mandate; since the statute was not subject to the tax and spend limitations of articles XIII A and B, the local agency could tax and spend as necessary to meet expenses of the new legislation.[162] The court reasoned that "certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense,"[163] and provided the following explanation:

> If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty – full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.
>
> ....
>
> Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[164]

Claimant points out that in November of 2002 the voters approved Proposition 47, the Kindergarten-University Public Education Facilities Bond Act of 2002, which allocated more than $8 billion for new construction and more than $3 billion for the modernization of school facilities, which is a state general obligation bond measure to be repaid by taxation levied on all residents of the state, including school district constituents.[165] In response to the Office of

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[160] *Id.* at 58.

[161] *Id.* at 70.

[162] *Id.* at 76.

[163] *Id.* at 73-74.

[164] *Id.* at 74.

[165] Claimant comments, submitted October 20, 2003, page 14.

Public School Construction's suggestion that a school district has the discretion to build new facilities through the use of district raised funds, claimant argues that any district raised funds "would need to be repaid from taxes raised only from the constituents of that school district."[166] Claimant further argues that since any election to use district funds does not relieve the residents of that district from still paying taxes to reduce the state bonds, the citizens of the district would then be subject to "double taxation."[167] Claimant concludes that the "only reasonable alternative to school districts is to use available Proposition 47 state funds and to enforce a labor compliance program."[168]

Staff disagrees that using local general obligation bonds constitutes the "intolerable expense" of "double taxation" as described by the Supreme Court in *City of Sacramento*, or that school districts have no reasonable alternative to using funds available from Proposition 47 (2002 Kindergarten-University measure) or Proposition 55 (2004 Kindergarten-University measure). In fact, the ballot measure that enacted Proposition 47 states that, in addition to funding from state and local general obligation bonds, school districts also receive significant funds from developer fees and special local bonds known as "Mello-Roos" bonds.[169] The School Facility Program Handbook, which provides assistance to districts in applying for and obtaining these bond funds, notes that additional sources of funds for districts include, in addition to general obligation bonds, proceeds from the sale of surplus property and federal grants.[170] Under the Deferred Maintenance Program, K-12 school districts and community college districts can receive state matching funds, on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of existing school building components so that the educational process may safely continue.[171] None of these additional sources of funds triggers the requirement to initiate and establish an LCP.

Moreover, the purposes for the 2002 and 2004 bond measures, as stated in the ballot materials, were to provide funds for K-12 school districts to buy land, construct new buildings, reconstruct or modernize existing buildings, provide relief for critically overcrowded schools, and construct buildings for joint use; and for community college districts, the funds were intended to construct new buildings and related infrastructure, alter existing buildings, and purchase equipment for use in these buildings.[172]

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[166] *Ibid.*

[167] *Ibid.*

[168] *Ibid.*

[169] Official Voter Information Guide, General Election Tuesday, November 5, 2002, Proposition 47, Analysis by the Legislative Analyst, page 1.

[170] School Facility Program Handbook, A guide to assist with applying for and obtaining grant funds, prepared by the Office of Public School Construction, July 2007, page 12.

[171] Education Code sections 17582 – 17588 and 84660 et seq.; Deferred Maintenance Program Handbook, A guide to assist school districts in applying for and obtaining "grant" funds for the purposes of performing deferred maintenance work on school facilities, prepared by the Office of Public School Construction, June 2007, page 1.

[172] Official Voter Information Guide, General Election, Tuesday, November 5, 2002, Proposition 47, Analysis by the Legislative Analyst, page 2; Official Voter Information Guide,

Thus, although some of the 2002 and 2004 bond funds will likely be used for repairs, that was not their primary purpose. Furthermore, as noted above, K-12 school districts and community college districts have several funding alternatives to accomplish repair and maintenance. The Supreme Court in *Kern* stated that school districts, in the exercise of their discretion, will make the choices that are ultimately the most beneficial for the district:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[173]

Therefore, staff finds there is no evidence in the record or in law to demonstrate that districts are legally or practically compelled to use Kindergarten-University Public Education Facilities Bond Act of 2002 or 2004 funds to undertake repair or maintenance public works projects. Since none of the activities that flow from implementation of an LCP pursuant to the test claim statutes, regulations or alleged executive orders[174] have been triggered by a state-mandated requirement, none of those statutes, regulations or alleged executive orders are subject to article XIII B, section 6.

G. Hearings and Court Proceedings

Claimant pled several activities related to a new administrative hearing process pursuant to Labor Code sections 1742 and 1742.1 and Title 8, California Code of Regulations, sections 16413 and 17220, et seq. This new process was established for contractors and subcontractors to obtain review of civil wage and penalty assessments issued by the Labor Commissioner, or decisions of the awarding body to withhold contract payments when enforcing under a Labor Compliance Program pursuant to Labor Code section 1771.5, or under Labor Code section 1726.

Labor Code section 1742 states in relevant part:

> (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the

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California Primary Election, Tuesday, March 2, 2004, Proposition 55, Analysis by the Legislative Analyst, page 6.

[173] *Kern High School Dist., supra,* 30 Cal. 4th 727, 753.

[174] Labor Code sections 1771.5, 1771.6 and 1771.7, Title 8, California Code of Regulations sections 16425 – 16439 and 17220 – 17221, "AB 1506 Labor Compliance Program Guidebook," "School Facility Program Substantial Progress and Expenditure Audit Guide," and "Antioch Unified School District Labor Compliance Program."

assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b)(1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge ... The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be

given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

...

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

...

Section 16413 of the regulations further establishes procedures for a contractor or subcontractor to follow when requesting a hearing under Labor Code section 1742.

Labor Code section 1742.1 requires the Labor Commissioner to afford the affected contractor or subcontractor, upon his or her request, to meet with the Labor Commissioner to attempt to settle the dispute without the need for formal proceedings. The section further states in relevant part:

> The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6 [i.e., under a Labor Compliance Program], afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. ...

Sections 17220 et seq. of the regulations set forth procedures for an awarding body to follow when enforcing under a Labor Compliance Program pursuant to Labor Code section 1771.6.

The plain language of Labor Code sections 1742 and 1742.1, and the regulations cited, does not require awarding bodies to engage in any hearing activities, respond to writs of mandate, or participate in settlement meetings, unless the awarding body is voluntarily exercising enforcement authority under Labor Code section 1726 or 1771.5.[175] As noted above, Labor Code section 1726 *does not* require an awarding body to investigate potential violations of the chapter, nor does Labor Code section 1771.5 require an awarding body to initiate and enforce a Labor Compliance Program. Since both of these underlying activities are discretionary, Labor Code sections 1742 and 1742.1, and sections 16413 and 17220 et seq. of the regulations, do not mandate any activities on the awarding body.

Labor Code section 1771.2 allows a joint labor-management committee, established pursuant to federal law, to bring an action in court against an employer, i.e., a contractor or subcontractor, that fails to pay the prevailing wage to its employees as required. Nothing in that statute requires the awarding body to appear or participate in legal proceedings from such action by the joint labor-management committee. Thus, Labor Code section 1771.2 does not mandate any activities on the awarding body.

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[175] Labor Code section 1771.6, Title 8, California Code of Regulations, section 17202, subdivision (c).

Summary of Required Activities

Therefore, staff finds only the following activities are required by the plain language of the test claim statutes and regulations:

- Obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract. (Lab. Code, § 1773, tit. 8, Cal. Code Regs., §§ 16202 & 16204.)
- Include a statement of prevailing rates of per diem wages in the call and advertisement for bids, the bid specifications, and in the public works contract itself, or, in lieu of those requirements, the district may include in the call for bids, bid specifications, and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in the awarding body's principal office, and in that case the district must post the statement at all job sites. (Lab. Code, § 1773.2.)
- Provide a copy of the contract award to the Division of Apprenticeship Standards, when apprentices will be used in the contract, and include language in the contract regarding apprenticeship requirements. (Lab. Code, §§ 1773.3 & 1777.5, subd. (n).)
- Take cognizance of violations of the prevailing wage laws in the course of the execution of the contract, and report any suspected violations to the Labor Commissioner. (Lab. Code, § 1726.)
- Regarding certified payroll records, perform the following activities:
    - Upon a request made to the awarding body by the public for payroll records:
        - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
        - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
        - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b))
        - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
        - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
    - Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
    - Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).).

- Withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner and receive from the contractor any money withheld for such purpose by the contractor from the subcontractor. (Lab. Code, § 1727.)
- Transmit funds withheld in response to a civil wage and penalty assessment to the Labor Commissioner upon receipt of a certified copy of a final order that is no longer subject to judicial review. (Lab. Code, § 1742, subd. (f))

Staff further finds that these activities are only mandated by the state for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.
3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Issue 2: Do the test claim statutes or regulations impose a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

A "new program or higher level of service" is imposed when the mandated activities: a) are new in comparison with the pre-existing scheme; *and* b) result in an increase in the actual level or quality of governmental services provided by the district.[176] To make this determination, the mandated activities must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes or regulations.

[176] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

Obtain Prevailing Wage Rate (Lab. Code, § 1773, Cal. Code Regs, tit. 8, §§ 16202 & 16204)

The statute and regulations require the awarding body to obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract.

Prior to 1975, Labor Code section 1773 stated in relevant part:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall *ascertain* the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract. ...
>
> In determining such rates, the *awarding body* shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the *awarding body* shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.
>
> If the *awarding body* determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the *awarding body* may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the *awarding body* determines that another rate should be adopted. (Emphasis added.)[177]

The Department of Industrial Relations explains how this pre-existing process worked:

> Labor Code section 1773 required the local agency to consider the "rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works." [Citations.] If these two mandatory sources of information were insufficient to determine the rate actually prevailing, local agencies had to "obtain and consider further data from the labor organizations and employers or employer associations concerned." *Id.* Local agencies had to obtain further information on what rates to pay each craft for overtime and holiday work, depending on which collective bargaining agreement, if any, applied.[178]

In this pre-existing law, the burden was on the awarding body to ascertain and determine the prevailing wage rates for public works projects.

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[177] Statutes 1971, chapter 785.

[178] Department of Industrial Relations comments, submitted January 15, 2003, page 9.

Labor Code section 1773 now requires the awarding body to "obtain" the general prevailing rate of per diem wages from the Director of Industrial Relations.[179] Section 16202 of the regulations requires the awarding body to request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination.

Thus, the test claim statute and regulation shifted this responsibility for ascertaining and determining prevailing wage rates *from* the awarding body *to* the Director of Industrial Relations. The Department of Industrial Relations explains the current process as follows:

> Currently, the Director performs this arduous task of determining what are prevailing wages. [Citations.] The definition of prevailing wages has not changed substantially since prior to 1975, including the requirement that the wages be set for each local geographic area. The Director, through the Division of Labor Statistics and Research ("DLSR") publishes general prevailing wage determinations twice each year for each craft or trade, by county. [Citations.] In addition, DLSR provides special determinations when requested. [Citations.] This work costs the Department approximately $2,071,082.39 per year, based on the prior two and a half fiscal years. [Citations.] This is work local agencies no longer do. Instead, local agencies are required simply to check the most recent determination before advertising a request for bids.

With regard to the obligation to "ensure" that the correct rate is used, the Department states:

> Prior to 1975, when local agencies determined local prevailing wages, the duty to obtain the correct prevailing wage was subsumed in the requirement that agencies ensure they were using the correct rate. However, any interested party could request review of the local agency's determination, and the local agency then had to justify its determination. [Citations.]
>
> In exchange for the Director's making rate determinations, local agencies now obtain the correct prevailing wages from the Director. [Citations.] This task no longer requires local agencies to do the actual investigations, surveys, and calculation ("determination") of the prevailing wage. That is, while the local agencies assume the burden of sending a letter, making a phone call, or checking the Department's website, this writing, sending or calling is substantially less expensive than was their prior obligation to investigate and calculate prevailing wages for each craft or trade on public works projects. ...[180]

The Supreme Court has stated that a reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided.[181] Here that has not occurred. Rather, the test claim statute accomplishes a shift of responsibility *from* school

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[179] Statutes 1976, chapter 281.

[180] *Id.* at page 10.

[181] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

districts *to* the state. And, although the district is left with the responsibility for obtaining the prevailing wage rates from the state and continuing to ensure that the proper rate is used in the contract, this result constitutes not a higher level of service but a lower level of service on the part of the district.[182]

Based on the foregoing, staff finds Labor Code section 1773 and sections 16202 and 16204, mandating the activity of obtaining the prevailing wage rates from the Department of Industrial Relations and ensuring the proper rate is used in the contract, do not impose a new program or higher level of service on school districts.

Statement of Prevailing Wages (Lab. Code, § 1773.2)

The statute requires the awarding body to include a statement of prevailing rates of per diem wages in the call and advertisement for bids, the bid specifications, and in the public works contract itself, or, in lieu of those requirements, the awarding body may include in the call for bids, bid specifications, and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in the awarding body's principal office, and in that case must post the statement at all job sites.

Prior to 1975, Labor Code section 1773.2 stated:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract.
>
> In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy of the prevailing rate of per diem wages on file at its principal office, in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year, and in such event, the awarding body shall cause a copy thereof to be posted at each jobsite.[183]

In the 1977 test claim statute, section 1773.2 was amended *solely* to remove the requirement that the awarding body publish prevailing wage rate determinations in the newspaper each year

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[182] See also Government Code section 17517.5, which states:

> "Cost savings authorized by the state" means any decreased costs that a local agency or school district realizes as a result of any statute enacted or any executive order adopted that permits or requires the discontinuance of or a reduction in the level of service of an existing program that was mandated before January 1, 1975.

[183] Statutes 1974, chapter 876.

when the awarding body chooses the option of referring to a copy of the prevailing wage rates on file at its principal office.[184]

A reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided. Here, that has not occurred. Instead, the burden on school districts has been lessened by removing the requirement to annually publish their prevailing wage rates in the newspaper under specified circumstances. This result constitutes not a higher level of service but a lower level of service.[185] Therefore, staff finds Labor Code section 1773.2 does not impose a new program or higher level of service on school districts.

Certified Payroll Records (Lab. Code, § 1776, subdivisions (b), (e), (g) & (h), Cal. Code Regs., tit. 8, §§ 16400 & 16403)

The statute and regulations require the awarding body to perform the following activities:

- Upon a request made to the awarding body by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records;
  - obtain certified payroll records from the contractor, including specified information in the request;
  - mark or obliterate the records to prevent disclosure of an individual's private information;
  - provide copies of the records to the requestor; and
  - retain copies of the records for at least 6 months.
- Withhold penalties from contractor progress payments for noncompliance with Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement.
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776.

Prior to 1975, Labor Code section 1776 stated:

> Every contractor and subcontractor shall keep an accurate record showing the name, occupation, and the actual per diem wages paid to each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the body awarding the contract and to the Division of Labor Law Enforcement.[186]

The test claim statutes modified Labor Code section 1776 as follows:

1. *Statutes 1976, Chapter 599* – The contractor's and subcontractor's payroll records were required to be available for inspection at all reasonable hours, and a copy had to

[184] Statutes 1977, chapter 423.

[185] See also Government Code section 17517.5.

[186] Statutes 1949, chapter 127.

be made available to the employee or his authorized representative, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards. After a complaint was filed with the awarding body or the Division of Labor Standards Enforcement alleging that a contractor or subcontractor paid less than the prevailing wage on a public works project, the contractor or subcontractor was required upon written notice from either the awarding body or the Division of Labor Standards Enforcement within 10 days to file with the awarding body a certified copy of the payroll records. The awarding body could charge a reasonable fee for copying such records, and the awarding body was required to retain such records for 90 days after completion of the contract.

2. *Statutes 1978, Chapter 1249* – The requirement on the awarding body to retain copies of payroll records for 90 days after completion of the contract was removed. The payroll records were required to be certified.[187] Upon request, the contractor was required to furnish certified copies of payroll records to, among other entities, the awarding body.[188] A certified copy of the payroll records was required to be made available to the public, provided the request was made through either the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement; the public could not be given access to such records by the contractor.[189] Any copy of certified payroll records made available to the public or any public agency by the awarding body, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement was required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number.[190] In the event of non-compliance with these requirements, the contractor had 10 days in which to comply after written notice specifying in what respects the contractor had to comply; when non-compliance was evident after the 10-day period, the contractor was required to pay an administrative penalty to the state or political subdivision on whose behalf the contract was made of $25 for each calendar day, or portion thereof, for each worker, until strict compliance was effectuated, and upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, the penalties were required to be withheld from progress payments then due.[191] The awarding body was required to have inserted in the contract stipulations to effectuate these provisions.[192] The Director of the Department of Industrial Relations was required to adopt rules consistent with the California Public Records Act and the Information Practices Act of 1977 governing release of such records including the

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[187] Labor Code section 1776, subdivision (b).

[188] Labor Code section 1776, subdivision (b)(2).

[189] Labor Code section 1776, subdivision (b)(3).

[190] Labor Code section 1776, subdivision (d).

[191] Labor Code section 1776, subdivision (f).

[192] Labor Code section 1776, subdivision (g).

establishment of reasonable fees to be charged for reproducing copies of such records.[193]

3. *Statutes 1983, Chapter 681* – Subdivision (b)(3) was amended to require that when requested certified payroll records were not provided, the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made.
4. *Statutes 2001, Chapter 804* – Subdivision (e) was amended to require that any copies of payroll records made available for inspection by or furnished to a joint labor-management committee shall be obliterated to prevent disclosure of an individual's name and social security number until January 1, 2003; thereafter any such records provided to a joint labor-management committee shall be obliterated only to prevent disclosure of an individual's social security number.[194]

Title 8, California Code of Regulations, sections 16400 through 16403 of the regulations were added to:

1. require the awarding body to acknowledge a request for payroll records to the requestor, and provide the costs the requestor must pay for the awarding body and contractor to prepare the records;
2. specify the information required in a request to the contractor for the records;
3. establish fees to be charged for preparing and reproducing the records; and
4. require the awarding body to keep unredacted copies of requested payroll records for at least 6 months following completion and acceptance of the project. These requirements are new in comparison to the preexisting law.

The Department of Industrial Relations states that the test claim statutes modifying Labor Code section 1776 did not significantly change any awarding body requirement:

> Prior to 1975, there was no provision for local agencies to obtain or copy [Certified Payroll Records]. Since local agencies did their own enforcement, however, they routinely obtained them. ... Before 1975, the Public Records Act made such information disclosable on demand from the public. See Government Code §§ 6252 ["Local agency" includes school district], 6252 (d) [definition of public record]. The post 1975 amendments to § 1776 did not change local agencies' pre-existing requirements to provide copies of public records (including payroll records) to the public. ...

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[193] Labor Code section 1776, subdivision (h).

[194] However, legislation enacted in 2003, effective January 1, 2004 (Stats. 2003, ch. 62), modified this provision to require that records provided to a joint labor-management committee be marked or obliterated to prevent disclosure of an individual's name and social security number. That statute was not pled in the test claim and thus staff makes no finding with regard to it.

> Labor Code § 1776 did not change any local agency requirement in any meaningful way. Test Claimant claims that there is a new mandate because local agencies now have to make copies of the [Certified Payroll Records] on request by members of the public and obliterate certain personal information. First, the requirement to obliterate personal information is not necessarily with the local agency. Labor Code § 1776(e) merely requires that the copy provided to the public by DLSE or the local agency "be obliterated," which can be done by the private contractor. ... [195]

Staff disagrees with the Department. The pre-existing statute did not provide for the awarding body to *obtain a copy* of the payroll records, merely the ability to inspect them. The California Public Records Act[196] provides public access only to writings that are in the *possession* of state or local agencies.[197] Consequently, there was no pre-existing duty on the district to provide public access to the records. The fact that such copies were routinely obtained by the awarding body in the course of enforcing the CPWL does not change the duties imposed by the previous statute, which plainly did not require the awarding body to obtain the records on behalf of the public or make the specified redactions. Moreover, Government Code section 17565 provides that if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate. Additionally, although it is true that personal information could be "obliterated" by the contractor, the test claim statutes require the awarding body to provide the record to the public, in a form that prevents disclosure of individual information. Therefore, staff finds it is the awarding body's responsibility to mark or obliterate the record to prevent disclosure of individual information.

The DIR also states that the requirement to withhold contract payments for violations of Labor Code section 1776 pursuant to subdivision (g) of that section is not new because the obligation already was subsumed in Labor Code section 1727, which at that time required "the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to ... the terms of this chapter," and Labor Code section 1776, subdivision (g), is part of the same chapter as section 1727.[198] However, the provisions of subdivision (g) require withholding of contractor progress payments for *administrative penalties assessed for violations of section 1776* – i.e., failure to provide certified payroll records – upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. There was no pre-existing provision in law to assess and withhold administrative penalties for payroll record violations. Therefore, the requirements are new in comparison to the pre-existing general references to the chapter.

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[195] Department of Industrial Relations comments, submitted January 15, 2003, pages 14-15.

[196] Government Code section 6250 et seq.

[197] Government Code section 6252, subdivision (e); "public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

[198] Department of Industrial Relations comments, submitted April 14, 2008, pages 3-4.

Thus, there are new requirements of school districts as awarding bodies that were not required under pre-existing law:

- Perform the following activities upon a request by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
  - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
  - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e) (as amended by Stats. 1978, ch. 1249 and Stats. 2001, ch. 804); Cal. Code Regs., tit. 8, § 16403, subd. (b))
  - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3) (as amended by Stats. 1978, ch. 1249)); and
  - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249)).
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776 (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249)).

These new requirements do provide a higher level of service to the public since the public now has access to certified payroll records through the awarding body, and the individual employee's rights to privacy are protected by the awarding body obliterating certain information. Withholding penalties from progress payments helps enforce the law to ultimately ensure contractors' cooperation. Moreover, placing stipulations in the contract provides notice to the contractor of his or her requirements before the contract is signed. And finally, the amendments adding these new requirements in 1978 and 2001 were not associated with other shifts of responsibility from awarding bodies to the state for making prevailing wage rate determinations under Labor Code sections 1770 and 1773 (Stats. 1976, ch. 281) and enforcing the CPWL under Labor Code sections 1726, 1727, and 1741 (Stats. 2000, ch. 954). Thus, in every sense the requirements impose an increased level of service.

DIR asserts that retaining copies of certified payroll records for at least 6 months and inserting a clause in public works contract pursuant to Labor Code section 1776, subdivision (h), at most result in negligible increases in levels of service, and should be considered de minimis under the analysis in *Kern High School District*. While staff does not disagree that the increased levels of service may be small, there is nothing in *Kern* or other mandates case law to support denial of the claim based on a finding that the newly mandated activities result in only a de minimis increase in the level of service.

Although the Supreme Court in *Kern* found that newly mandated notice and agenda costs were modest, the determination that such costs were not reimbursable was based on the fact that the underlying program was completely funded by the state and there was nothing in the record to

show that such administrative costs could not be paid for from state funds already provided, rather than the fact that there was only a de minimis increase in the level of service. [199]

In *San Diego Unified School District*, the Supreme Court addressed another narrowly drawn situation where there was a de minimis increase in the level of service. There, school districts were seeking reimbursement for activities that exceeded federal due process requirements in relation to discretionary school expulsions.[200] The court denied the claim based on another case, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, which had found that procedural requirements enacted to comply with a general federal mandate, which were reasonably articulated to make the underlying federal right enforceable and to set forth necessary procedural details, and which did not significantly increase the cost of compliance with the federal mandate, were not reimbursable. The *San Diego Unified* court likewise held that:

> [F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate. [201]

Here, the prevailing wage requirements are not intended to implement a federal law and cannot be likened to the *San Diego Unified* circumstances. Thus, neither *San Diego Unified* nor *County of Los Angeles* is applicable.

DIR also asserts that "[s]egregating the minimal costs to retain records for the purpose of subvention creates a further dilemma" since the awarding body must separate the costs of retaining payroll records from countless other documents it retains.[202] DIR further asserts that [i]f *de minimis* has any meaning, it has to include some balance of the relative costs of subvention versus the administrative cost to the local agencies to track the alleged mandate's costs."[203] However, beyond requiring the claimant to assert a minimum amount for test claims and for actual reimbursement claims,[204] the mandates process does not provide for such a balancing test.

Staff therefore finds that the new requirements imposed on school districts as awarding bodies for handling certified payroll records and modifying contract language constitute a new program or higher level of service within the meaning of article XIII B, section 6.

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[199] *Kern High School District, supra,* 30 Cal.4th 727, 727.

[200] *San Diego Unified School District v. Commission on State Mandates, supra,* 33 Cal.4th 859, 888.

[201] *Id.* at 890.

[202] Letter from Anthony Mischel, Attorney At Law, Department of Industrial Relations, April 14, 2008, page 3.

[203] *Ibid.*

[204] Government Code section 17564 sets the minimum for test claims and reimbursement claims at $1,000.

Apprenticeship Requirements (Lab. Code, §§ 1773.3 & 1777.5, subd. (n))

The statutes require the awarding body to provide a copy of the contract award to the Division of Apprenticeship Standards when apprentices will be used in the contract, and include language in the contract regarding apprenticeship requirements.

Prior to 1975, Labor Code section 3098 stated:

> An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. ... Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.[205]

Section 3098 was renumbered to section 1773.3 in Statutes 1978, chapter 1249, with substantially the same language. Therefore, the requirements existed prior to 1975 and no new program or higher level of service is imposed.

Prior to 1975, Labor Code section 1777.5 stated in relevant part:

> The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.[206]

This exact language was ultimately renumbered to subdivision (n) in Statutes 1999, chapter 903. Therefore, the requirements existed prior to 1975 and no new program or higher level of service is imposed.

Take Cognizance of and Report Suspected Violations (Lab. Code, § 1726), Withhold Funds for Civil Wage and Penalty Assessments (Lab. Code, § 1727), and Transmit Funds to Labor Commissioner (Lab. Code, § 1742, subd. (f))

These statutes require the awarding body to: 1) take cognizance of violations of the prevailing wage laws in the course of the execution of the contract, and report any suspected violations to the Labor Commissioner; 2) withhold any amounts necessary to satisfy a Civil Wage and Penalty Assessment issued by the Labor Commissioner and receive from the contractor any money withheld for such purpose by the contractor from the subcontractor; and 3) transmit funds withheld in response to a civil wage and penalty assessment to the Labor Commissioner upon receipt of a certified copy of a final order that is no longer subject to judicial review.

With regard to the awarding body's role in reporting CPWL violations, prior to 1975, Labor Code section 1726 stated:

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[205] Statutes 1974, chapter 1095.

[206] Statutes 1974, chapter 965.

> The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract.[207]

The test claim statute, Statutes 2000, chapter 954, modified section 1726 to state in relevant part:

> The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of execution of the contract, and *shall promptly report* any suspected violations to the Labor Commissioner. (Emphasis added.)

Thus, there was a pre-existing requirement for awarding bodies to "take cognizance" of violations, and this requirement does not impose a new program or higher level of service. There is, however, a new requirement to "report" suspected violations to the Labor Commissioner.

With regard to withholding funds from contractor payments for CPWL violations, prior to 1975, Labor Code section 1727 stated:

> Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body.[208]

The test claim statute, Statutes 2000, chapter 954, modified section 1727, which states:

> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom any amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.
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> (b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

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[207] Statutes 1937, chapter 90.

[208] Statutes 1945, chapter 1431.

Thus, the only change in the awarding body's responsibility is to now withhold amounts required to satisfy a civil wage and penalty assessment made by the Labor Commissioner, rather than the previous requirement to withhold amounts forfeited pursuant to a stipulation in the contract or for other violations of the CPWL, once a full investigation was conducted by the Division of Labor Law Enforcement or by the awarding body.

In the same test claim statute, Statutes 2000, chapter 954, Labor Code section 1742 was added to provide a hearing procedure for contractors or subcontractors to appeal a civil wage and penalty assessment. Subdivision (f) of that section requires an awarding body that has withheld funds in response to a civil wage and penalty assessment to transmit the withheld funds to the Labor Commissioner, upon receipt of a certified copy of a final order that is no longer subject to judicial review.

The Department of Industrial Relations argues that these are not new requirements, explaining the historical and current processes as follows:

> Prior to 1975, local agencies were required both to "take cognizance" of violations and to withhold funds owed to contractors for prevailing wage violations. Labor Code §§ 1726, 1727. If there were insufficient funds available for withholding, then local agencies notified the Labor Commissioner of the violation. The local agency, with the Labor Commissioner's assistance filed civil lawsuits against the offending contractors. *Id.*
>
> This obligation to report violations to the Labor Commissioner has not changed. Enforcement of prevailing wage violations was removed from local agencies as of 2001, Stats. 2000, ch. 954. In exchange for this reduction in work for local agencies, the [L]egislature added a reporting responsibility. ...
>
> Prior to 1975, local agencies withheld funds owed contractors for prevailing wage violations. Labor Code § 1727. This obligation did not change after 1975. In 2000, as part of the overall change in enforcement, private contractors had to withhold funds from offending subcontractors if the local agency had not withheld sufficient funds. The local agency had no role in this process. [Citations.]
>
> ... [T]he Labor Commissioner did not issue citations against contractors prior to 1975. Local agencies did the bulk of the enforcement.
>
> Currently, the Labor Commissioner does all the enforcement work, and local agencies do no more than withhold funds when the Labor Commissioner informs them of violations. This is identical to local agencies' historic responsibility to "take cognizance" of violations and withhold payments.[209]

Under the previous process, the awarding body would take cognizance of CPWL violations pursuant to Labor Code section 1726, do its own investigations and enforcement, and withhold any penalties from contractor payments pursuant to Labor Code section 1727, seeking

[209] Department of Industrial Relations comments, submitted January 15, 2003, pages 16-17.

assistance from the Labor Commissioner as needed. Currently, according to the Department of Industrial Relations, the Labor Commissioner does all the enforcement work, unless the awarding body enforces the CPWL violations by voluntarily establishing a Labor Compliance Program. Thus, the test claim statutes have shifted primary enforcement of the CPWL from local agencies to the state, leaving awarding bodies the option to implement a Labor Compliance Program. In addition, there is no substantive change in the requirement that awarding bodies withhold funds from contractors for CPWL violations; the triggering mechanism is now a civil wage and penalty assessment issued by the Labor Commissioner rather than the completion of an investigation by the Division of Labor Law Enforcement or by the awarding body.

The Supreme Court has stated that a reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided.[210] Here that has not occurred. Rather, the test claim statute accomplishes a shift of responsibility *from* school districts *to* the state with regard to enforcement of the CPWL. And, although the district is left with some minor responsibility for reporting suspected violations of the CPWL to the Labor Commissioner and transmitting withheld funds at the appropriate time, this result constitutes not a higher level of service but a lower level of service.[211] With regard to withholding funds from contractors for CPWL violations, there is no change in that level of service.

Based on the foregoing, staff finds that Labor Code sections 1726, 1727 and 1742, subdivision (f), do not impose a new program or higher level of service on school districts.

Summary

Therefore, staff finds the activities listed below that are required of K-12 school districts or community college districts when acting as an awarding body, constitute a new program or higher level of service within the meaning of article XIII B, section 6, but only when triggered by repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

[210] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[211] See also Government Code section 17517.5.

b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.

3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Activities constituting a new program or higher level of service under the foregoing circumstances:

- Perform the following tasks upon a request made to the awarding body by the public for certified payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
  - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
  - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e) (as amended by Stats. 1978, ch. 1249 and Stats. 2001, ch. 804), Cal. Code Regs., tit. 8, § 16403, subd. (b))
  - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3) as amended by Stats. 1978, ch. 1249)); and
  - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249).)

Issue 3: Do the test claim statutes or regulations impose costs mandated by the state within the meaning of Government Code section 17514 and article XIII B, section 6 of the California Constitution?

For these statutes to impose a reimbursable, state-mandated program, two additional elements must be satisfied. First, the statutes must impose "costs mandated by the state" pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant alleged in the original test claim "it is estimated that the district has incurred, or will incur, in excess of $200 in staffing and other costs in excess of revenues annually, for the period from July 1, 2000 through June 2002, to implement the new duties mandated by the state, for which the district has not been reimbursed by any federal, state, or

local government agency, and for which it cannot otherwise obtain reimbursement." On page 7 of Exhibit 6, "Second Declaration of William McGuire," of the test claim amendment filed July 31, 2003, claimant states:

> To the extent that Clovis Unified School District commences a public works project subject to Labor Code Section 1771.7, it is estimated that Clovis Unified School District will incur in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The Department of Industrial Relations (DIR) commented that while the original test claim contained a general, non-specific declaration of the increased cost, a new declaration, limited to whatever mandates the Commission believes might exist, should be required to justify the test claim.[212] However, there is no provision in the Government Code or the Commission's regulations to authorize the Commission to impose such a requirement on the test claimant. Government Code section 17564 does provide the following:

> (a) No claim shall be made pursuant to Sections 17551, 17561, or 17573, nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, or pursuant to a legislative determination under Section 17573, unless these claims exceed one thousand dollars ($1,000). However, a county superintendent of schools ... may submit a combined claim on behalf of school districts ... if the combined claim exceeds one thousand dollars ($1,000) even if the individual school district's ... claims do not each exceed on thousand dollars ($1,000). The county superintendent of schools ... shall determine if the submission of the combined claim is economically feasible and shall be responsible for disbursing the funds to each school ...

Staff therefore finds there is evidence in the record, signed under penalty of perjury, that the claimant will or has incurred "costs mandated by the state" for purposes of the existence of a reimbursable state-mandated program.

Government Code section 17556, subdivision (d), states in relevant part that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds:

> the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The increased level of service at issue is the preparation and copying of certified payroll records under Labor Code section 1776, subdivisions (b) and (e). Subdivision (e) states "the requesting party shall, prior to being provided the records, reimburse the costs of *preparation* by ... the entity through which the request was made." Subdivision (i) of that section provides that the Director of the Department of Industrial Relations "shall adopt rules consistent with the California Public Records Act ... and the Information Practices Act of 1977, ... governing the release of these records, including the establishment of reasonable fees to be charged for

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[212] Department of Industrial Relations comments, submitted April 14, 2008, pages 4-5.

reproducing copies of records required by this section." Section 16402 of those regulations states:

> The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

Thus, the Department has established "reasonable fees to be charged" of the requesting party to cover the costs of preparation of the records. Construction of a statute by the administrative officials charged with its enforcement or interpretation may not be controlling but is entitled to great weight and will be followed unless it is clearly erroneous or unauthorized.[213] There is no evidence in the record to show that the costs allowed by the Department's regulation are not sufficient to cover the actual costs of preparation of these payroll records.

In the ordinary sense, "preparation" is defined as "the act or process of preparing."[214] "Prepare" is defined as "to make ready in advance for a particular purpose, event or occasion."[215] Based on these definitions, and absent any other information in the record, staff finds that all activities leading up to getting the records ready to be released, including reproduction and actually providing the records, are included in the fees that can be recovered from the requesting party. Thus includes the following activities:

- obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (c));
- send an acknowledgment to the requestor including notification of the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (d));
- make the specified redactions (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b)) ; and
- provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)).

Therefore, staff finds that a school district has authority to charge fees sufficient to pay for this portion of the increased level of service, and Government Code section 17556, subdivision (d), is applicable to deny reimbursement for these activities.

With regard to the remaining activities, Government Code section 17556, subdivision (e), states in relevant part that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds:

> The statute, executive order, or an appropriation in the Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no

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[213] *State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (1995) 37 Cal.App.4th 675, 683.

[214] Webster's II, New Collegiate Dictionary, 1999, page 873, column 1.

[215] *Ibid.*

net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The state provides matching funds in the form of grants for deferred maintenance for K-12 school districts and community college districts.[216] In most cases, the funding is only available from the state when the district demonstrates its own funding is available.[217] Additional assistance for extreme hardship is also available for K-12 districts that meet certain criteria.[218] Funding is also available for new construction and modernization grants.[219] It is possible that grant funding for modernization might be available for repair or maintenance projects, but it is not likely that funding for new construction could be used for such projects.

The DIR commented that any mandate that exists is so negligible as to not require subvention since partial state funding already exists for maintenance and repair projects in school districts and community colleges pursuant to Education Code sections 17582-17588 and 84660, the Deferred Maintenance Program. The Department of Finance also pointed out the availability of this funding, and recommended the Commission consider the funding as offsetting revenues for any reimbursable mandate finding.

Although state funding is provided which might be used for the new activities, there is no evidence in the record that such funding results in no net costs to the district or was "specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." Therefore, staff finds that Government Code section 17556, subdivision (e), is inapplicable to deny reimbursement for the remaining activities. Nevertheless, any grant funds available to awarding bodies under the deferred maintenance program, or any other eligible funding, when used for the newly mandated activities in this test claim shall be identified as possible offsetting revenues.[220]

Staff finds the following remaining activities do impose costs mandated by the state, but only when such activities are triggered by repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or

---

[216] Education Code sections 17582-17588, and 84660.

[217] *Ibid.*

[218] Education Code section 17587.

[219] Education Code sections 17072.10 and 17074.10.

[220] Eligible grant funding for such projects will be clarified further at the parameters and guidelines stage.

b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.

2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and

   a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

   b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.

3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Activities Reimbursable Under Circumstances Cited Above:

- Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249).)

Conclusion

Staff concludes that Labor Code section 1776, subdivisions (g) and (h), and section 16403, subdivision (a), of the Department of Industrial Relations' regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, but only when those activities are triggered by projects for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113, and

   a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or

   b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000. (Pub. Contract Code, § 20114.)

2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654, and

    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000. (Pub. Contract Code, § 20655.)

3. For any K-12 school district or community college district that is subject to the Uniform Public Contract Cost Accounting Act (UPCCAA), when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.[221] (Pub. Contract Code, § 22032.)

Only the following activities for the foregoing projects are reimbursable:

- Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Department of Industrial Relations' Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249).)

Any grant funds available to awarding bodies under the deferred maintenance program, or any other eligible grant program, when used for the newly mandated activities in this test claim, shall be identified in the parameters and guidelines as possible offsetting revenues.

None of the other test claim statutes, regulations or alleged executive orders that were pled mandate a new program or higher level of service subject to article XIII B, section 6.

Recommendation

Staff recommends the Commission adopt this analysis to partially approve the test claim.

[221] Prior to January 1, 2007, the dollar limit for public projects that could be performed by the district with its own forces was $25,000.

STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER

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Exhibit D **D**

July 23, 2008

Michael Johnston, Assistant Superintendent
Clovis Unified School District
1450 Herndon Avenue
Clovis, CA 93611-0599

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: **Notice of Withdrawal of Test Claim and Removal from Agenda**
Prevailing Wage Rate, 01-TC-28
Clovis Unified School District
Labor Code Sections 1720,1720.2,1720.3,1726,1727,1733,1735,1741,1742, 1742.1,1743,1750,1770,1771,1771.5,1771.6,1772,1773,1773.1,1773.2,1773.3, 1773.5,1773.6,1775,1776,1777.1,1777.5,1777.6,1777.7,1812,1813,1861;
Public Contract Code, Section 22002;
Statutes 1976, Ch. 281; Statutes 1976, Ch. 538; Statutes 1976, Ch. 599; Statutes 1976, Ch. 861; Statutes 1976, Ch. 1174; Statutes 1976, Ch. 1179; Statutes 1977, Ch. 423; Statutes 1978, Ch. 1249; Statutes 1979, Ch. 373; Statutes 1980, Ch 962; Statutes 1980, Ch. 992; Statutes 1981, Ch 449; Statutes 1983, Ch. 681; Statutes 1983, Ch. 1054; Statutes 1988, Ch. 160; Statutes 1989, Ch. 278; Statutes 1989, Ch. 1224; Statutes 1992, Ch. 913; Statutes 1992, Ch. 1342; Statutes 1993, Ch.589; Statutes 1997, Ch. 17; Statutes 1997, Ch. 757; Statutes 1998, Ch. 443; Statutes 1998, Ch. 485; Statutes 1999, Ch. 30; Statutes 1999, Ch. 83; Statutes 1999, Ch. 220; Statutes 1999, Ch. 903; Statutes 2000, Ch. 135; Statutes 2000, Ch. 875; Statutes 2000, Ch. 881; Statutes 2000, Ch. 920; Statutes 2000, Ch. 954; Statutes 2001, Ch. 804; Statutes 2001, Ch. 938;
Title 8, CCR, Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802,17201-17212, 17220-17229, 17230-17237,17240-17253, 17260-17264

Dear Mr. Johnston:

This is to notify you that your July 23, 2008, application to withdraw the *Prevailing Wage Rate* test claim has been accepted. In light of the withdrawal, Items 5 and 6 have been removed from the Commission's August 1, 2008 hearing calendar.

Pursuant to section 1183.08 of the Commission's regulations, the test claim will be dismissed if no other school district takes over the claim by substitution of the parties on or before **September 22, 2008**. If no party takes over the test claim, dismissal of the claim will tentatively be set for hearing on **September 26, 2008**, at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California.

Please contact Nancy Patton at (916) 323-8217 with any questions regarding the above.

Sincerely,

Paula Higashi
Executive Director

Commission on State Mandates

Original List Date: 7/8/2002
Last Updated: 4/26/2007
List Print Date: 07/23/2008
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Mr. Arthur Palkowitz San Diego Unified School District Office of Resource Development 4100 Normal Street, Room 3209 San Diego, CA 92103-8363	Tel: (619) 725-7785 Fax: (619) 725-7564
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STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
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EXHIBIT EE

September 2, 2008

Mr. Keith B. Petersen
SixTen and Associates
3841 North Freeway Boulevard, Suite 170
Sacramento, CA 95834

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

Re: **Substitution of Claimant**
Prevailing Wage Rate, 01-TC-28
Labor Code Sections 1720,1720.2,1720.3,1726,1727,1733,1735,1741,1742, 1742.1,1743,1750,1770,1771,1771.5,1771.6,1772,1773,1773.1,1773.2,1773.3, 1773.5,1773.6,1775,1776,1777.1,1777.5,1777.6,1777.7,1812,1813,1861; Public Contract Code, Section 22002; Statutes 1976, Ch. 281; Statutes 1976, Ch. 538; Statutes 1976, Ch. 599; Statutes 1976, Ch. 861; Statutes 1976, Ch. 1174; Statutes 1976, Ch. 1179; Statutes 1977, Ch. 423; Statutes 1978, Ch. 1249; Statutes 1979, Ch. 373; Statutes 1980, Ch 962; Statutes 1980, Ch. 992; Statutes 1981, Ch 449; Statutes 1983, Ch. 681; Statutes 1983, Ch. 1054; Statutes 1988, Ch. 160; Statutes 1989, Ch. 278; Statutes 1989, Ch. 1224; Statutes 1992, Ch. 913; Statutes 1992, Ch. 1342; Statutes 1993, Ch.589; Statutes 1997, Ch. 17; Statutes 1997, Ch. 757; Statutes 1998, Ch. 443; Statutes 1998, Ch. 485; Statutes 1999, Ch. 30; Statutes 1999, Ch. 83; Statutes 1999, Ch. 220; Statutes 1999, Ch. 903; Statutes 2000, Ch. 135; Statutes 2000, Ch. 875; Statutes 2000, Ch. 881; Statutes 2000, Ch. 920; Statutes 2000, Ch. 954; Statutes 2001, Ch. 804; Statutes 2001, Ch. 938;
Title 8, CCR, Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802,17201-17212, 17220-17229, 17230-17237,17240-17253, 17260-17264
Grossmont Union High School District, Claimant

Dear Mr. Petersen:

On July 23, 2008, the Commission accepted the withdrawal of Clovis Unified School District as the claimant on the above-named test claim. This is to notify parties that effective August 21, 2008, Grossmont Union High School District is substituting as claimant for the test claim. Grossmont Union High School District appointed Mr. Keith Petersen, SixTen and Associates to act as the district's sole representative for this matter.

Enclosed is Grossmont Union High School District's notice of substitution of claimant and an updated mailing list.

Please contact me at (916) 323-8217 if you have questions.

Sincerely,

NANCY PATTON
Assistant Executive Director

Enclosures

J:mandates/2001/tc/01tc28/corres/subofclaimant

Grossmont Union
High School District
COMMITTED TO EXCELLENCE
SINCE 1920

August 19, 2008

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: CSM 01-TC -28 (As amended); Prevailing Wage Rate

Dear Ms. Higashi:

On July 23, 2008, the Clovis Unified School District requested to withdraw as the claimant for the above referenced test claim. Your response dated the same date accepted the withdrawal and indicated that another school district could take over the claim. This letter is a request to substitute Grossmont Union High School District as the new test claimant.

The District contact person will be:

Scott Patterson, Deputy Superintendent
Grossmont Union High School District
1100 Murray Drive, El Cajon, CA 92020-5664
Phone: 619.644.8010; Fax: 619.465.6251
E-mail: _spatterson@guhsd.net_ (mailto:spatterson@guhsd.net)

The District appoints Keith Petersen, President, SixTen and Associates, as its representative on this test claim. All communication regarding this test claim should be directed to Mr. Petersen with a copy to me.

I am informed that the District will have to provide a declaration of eligible costs. Mr. Petersen is preparing this document now and we will submit it upon notification that we are the new test claimant.

Thank you for you consideration of this request.

Sincerely,

Scott Patterson, Deputy Superintendent

c: Patrick Day, Chair, Education Mandated Cost Network
Robert Miyashiro, Consultant, Education Mandated Cost Network

Commission on State Mandates

Original List Date: 7/8/2002
Last Updated: 4/26/2007
List Print Date: 09/02/2008
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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SixTen and Associates
Mandate Reimbursement Services

EXHIBIT FF

KEITH B. PETERSEN, MPA, JD, President
E-Mail: Kbpsixten@aol.com

San Diego
5252 Balboa Avenue, Suite 900
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Sacramento
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834
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September 2, 2008

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: CSM 01-TC-28 (As Amended)
Prevailing Wage Rates
Test Claim of Grossmont Union High School District

Dear Ms. Higashi:

Enclosed is the original and seven copies of the declaration of Scott H. Patterson, on behalf of Grossmont Union High School District, for the above referenced test claim.

Sincerely,

Keith B. Petersen

DECLARATION OF SCOTT H. PATTERSON
Grossmont Union High School District

COSM No. 01-TC-28 Prevailing Wage Rates

Original Test Claim Filed June 28, 2002 Chapter 938, Statutes of 2001, et al

Amended Test Claim Filed July 29, 2003 Chapter 868, Statutes of 2002

Statutes

Chapter 868, Statutes of 2002
Chapter 938, Statutes of 2001
Chapter 804, Statutes of 2001
Chapter 954, Statutes of 2000
Chapter 920, Statutes of 2000
Chapter 881, Statutes of 2000
Chapter 875, Statutes of 2000
Chapter 135, Statutes of 2000
Chapter 903, Statutes of 1999
Chapter 220, Statutes of 1999
Chapter 83, Statutes of 1999
Chapter 30, Statutes of 1999
Chapter 485, Statutes of 1998
Chapter 443, Statutes of 1998
Chapter 757, Statutes of 1997
Chapter 17, Statutes of 1997
Chapter 589, Statutes of 1993
Chapter 1342, Statutes of 1992
Chapter 913, Statutes of 1992
Chapter 1224, Statutes of 1989
Chapter 278, Statutes of 1989
Chapter 160, Statutes of 1988
Chapter 1054, Statutes of 1983
Chapter 681, Statutes of 1983
Chapter 449, Statutes of 1981
Chapter 992, Statutes of 1980
Chapter 962, Statutes of 1980
Chapter 373, Statutes of 1979
Chapter 1249, Statutes of 1978
Chapter 423, Statutes of 1977
Chapter 1179, Statutes of 1976
Chapter 1174, Statutes of 1976
Chapter 861, Statutes of 1976
Chapter 599, Statutes of 1976
Chapter 538, Statutes of 1976
Chapter 281, Statutes of 1976

Code Sections

Labor Code Sections:

1720 1720.2 1720.3 1726 1727 1733 1735 1741 1742 1742.1 1743 1750 1770
1771 1771.5 1771.6 1771.7 1772 1773 1773.1 1773.2 1773.3 1773.5 1773.6 1775 1776
1777.1 1777.5 1777.6 1777.7 1812 1813 1861

Public Contract Code Section 22002

California Code of Regulations

Title 8: 16000 16001 through 16003 16100 through 16102
16200 through 16206 16300 through 16304 16400 through 16403
16410 through 16414 16425 16426 through 16428
16429 through 16432 16433 16434 through 16439 16500
16800 through 16802 17201 through 17212 17220 through 17229
17230 through 17237 17240 through 17253 17260 through 17264

Executive Orders

School Facility Program Substantial Progress and Expenditure Audit Guide May 2003
Prepared by the Office of Public School Construction

AB 1506 Labor Compliance Program Guidebook - February 2003
Prepared by the Division of Labor Standards Enforcement

Antioch Unified School District
Labor Compliance Program - January 17, 2003

I, Scott H. Patterson, Deputy Superintendent, Business Services, Grossmont Union High School District, make the following declaration and statement. In my capacity as Deputy Superintendent, Business Services, I am responsible for the award and implementation of public works contracts for the District. I am familiar with the provisions and requirements of the Labor and Public Contract Code Sections and the Title 8 California Code of Regulations enumerated above.

These code sections and regulations, prior to 2002, require the Grossmont Union High School District to:

1) Pursuant to Labor Code Section 1773 and Title 8, California Code of Regulations, Section 16202, obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for public works.

2) Pursuant to Title 8, California Code of Regulations, Section 16204, ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations.

3) Pursuant to Title 8, California Code of Regulations Section 16001, request from the Director of Industrial Relations a coverage determination regarding a

specific project or type of work to be performed.

4) Pursuant to Title 8, California Code of Regulations, Section 16302, file a petition for review of a determination of the Director of Industrial Relations of any rate or rates.

5) Pursuant to Labor Code Section 1773.4 and Title 8, California Code of Regulations Section 16002.5, appeal an incorrect determination made by the Director of Industrial Relations.

6) Pursuant to Labor Code Section 1773.2, include a statement of prevailing rate of per diem wages in all calls and advertisements for bids, in the public works contract itself, and to post the statement at all job sites. In lieu of those requirements, the district may include a statement in the call for bids and contract a statement to the effect that copies of the prevailing rate of wages are on file in its principal office.

7) Pursuant to Labor Code Section 1777.1 and Title 8, California Code of Regulations, Section 16800 through 16802, maintain records of ineligible contractors and subcontractors and to refuse to grant them public works projects of the district.

8) Pursuant to Labor Code Section 1777.3, send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies.

9) Pursuant to Labor Code Section 1776, when necessary or requested by the Director of Industrial Relations, inspect and audit payroll records of contractors

and subcontractors working on district public works projects.

10) Pursuant to Labor Code Section 1776 and Title 8, California Code of Regulations, Section 16402, when requested by appropriate parties, obtain and provide copies of the payroll records of the contractors and subcontractors working on district public works projects. The records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number.

11) Pursuant to Labor Code Section 1771.5 and Title 8, California Code of Regulations, Sections 16425 through 16439, comply with all of the requirements of a Labor Compliance Program, when initiated and enforced by the district. These requirements include:

(a) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of the prevailing wage laws.

(b) A pre-job conference shall be conducted with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract.

(c) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(d) The district shall review and, if appropriate, audit payroll records to verify compliance with prevailing wage laws.

(e) The district shall withhold contract payments when payroll records are

delinquent or inadequate.

(f) The district shall withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred.

12) Pursuant to Labor Code Section 1771.6 and Title 8, California Code of Regulations, Section 17220, provide contractors and subcontractors, and bonding companies and sureties, with Notices of Withholding of Contract Payments when minimum wage law violations are discovered by the district. The notice shall be in writing and include the following information:

(a) A description of the nature of the violation and basis for the notice.

(b) The amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1.

(c) The name and address of the office to whom a Request for Review may be sent.

(d) Information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments.

(e) Notice of Opportunity to request a settlement meeting under Section 17221.

(f) A statement appearing in bold or another type of face, that makes it stand out from other text, to the effect that failure to submit a timely request for review will

writs of mandates filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including the retention of counsel to file timely responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment.

19) Pursuant to Labor Code Section 1742.1 and Title 8, California Code of Regulations, Section 16413, grant and participate in settlement meetings requested by contractors or subcontractor in an attempt to settle any disputed issue before formal hearing procedures.

20) Pursuant to Labor Code Section 1771.2, a joint labor-management committee may bring an action against an employer who fails to pay prevailing wages. As a necessary party, the school district would be required to appear and participate in these legal proceedings.

21) Pursuant to Labor Code Section 1776, furnish copies of payroll records of a contractor or subcontractor to a joint labor management committee obliterated only to prevent disclosure of social security numbers.

As amended by Chapter 868, Statutes of 2002, these statutes, code sections and executive orders require the Grossmont Union High School District to:

22) Pursuant to Labor Code Sections 1771.5 and 1771.7, pay the reasonable fees of a third party when contracting with that third party to initiate and enforce a Labor Compliance Program.

23) Oversee compliance with all of the requirements of Labor Code Sections 1771.5 and 1771.7 (for works commencing or after April 1, 2003), Title 8,

California Code of Regulations, Section 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook" when contracting with a third party to initiate and enforce a Labor Compliance Program. This may include, but is not necessarily limited to, the withholding of contract payments and collecting and disbursing penalties and wages at the direction of the third party LCP.

24) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (a), when seeking approval of an LCP, submit evidence of the district's ability to operate an LCP.

25) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (b), complete a request for approval deemed by the Director to be deficient, or make other corrections as required, and resubmit the request for approval of a Labor Compliance Program.

26) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (c), submit a request for an extension of an LCP at least 30 days prior to the anniversary date of the initial approval.

27) Pursuant to Labor Code Section 1771.7, subdivision (d)(1), make a written finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5.

28) Pursuant to Labor Code Section 1771.7, subdivision (d)(2)(A), transmit to the State Allocation Board, in the manner determined by that board, a copy of the finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in

subdivision (b) of Section 1771.5.

29) Pursuant to Labor Code Section 1771.7 (for works commencing on or after April 1, 2003), Title 8, California Code of Regulations, Section 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook", comply with all of the requirements of a Labor Compliance Program, when initiated and enforced by the district.

30) Pursuant to the "Program Guidebook", Chapter 4 Parts (A) and (B), review and, if appropriate, audit payroll records to verify compliance with prevailing wage laws by monitoring certified payroll records (CPRs), investigating complaints from workers, and monitoring agencies and contractors. Upon the conclusion of the audit, prepare audits and findings and obtain the approval of recommended forfeitures from the labor commissioner.

31) Pursuant to the "Program Guidebook", Chapter 3, withhold contract payments when payroll records are delinquent or inadequate; and withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred.

32) Pursuant to Chapter 4 of the "Program Guidebook", serve on the contractor, any affected subcontractor, and any bonding company issuing a bond securing the payment of wages, a Notice of Withholding of Contract Payments (NWCR) using the form attached in the Guidebook as Appendix 2.

33) Pursuant to Chapter 4 of the "Program Guidebook", when mailing an NWCR, also mail a notice to the DIR on a form entitled Notice of Transmittal, as found in the Guidebook as Appendix 3.

34) Pursuant to Chapter 4 of the "Program Guidebook", when a party requests a review after receiving an NWCR, mail a form entitled "Notice of Opportunity to Review Evidence" as found in the Guidebook as Appendix 4.

35) Pursuant to Chapter 4, paragraph iv (D) of the "Program Guidebook", defend Notices to Withhold Contract Payments in administrative review proceedings and in court.

36) Pursuant to Chapter 6 of the "Program Guidebook", investigate worker complaints of underpayment of prevailing wage rates.

37) Pursuant to Chapter 6 of the "Program Guidebook", conduct investigations on an as-needed basis.

38) Pursuant to Chapter 9 of the "Program Guidebook", conduct audits on a random or as-needed basis.

39) Pursuant to Chapter 9 of the "Program Guidebook", prepare cases and document files.

40) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, submit a copy of the Department of Industrial Relations approved Labor Compliance Program to which the project(s) conformed or, if applicable, a copy of the third party provider contract.

41) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, upon request, submit all bid invitations and contracts that must contain language alluding to Labor Code Sections 1770 through 1780 compliance and verification; evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set forth in

Labor Code Sections 1770 through 1780; and evidence of weekly submittals of certified copies of payrolls for all contractors and subcontractors.

42) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, when a district uses its own employees for an LCP, provide the name of the district employee(s) performing the Labor Compliance Program duties; the salary and benefits of the employee, including transportation costs, and a specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

Grossmont Union High School District is required to comply with these laws relating to prevailing wage rate laws in all public works projects, as defined when:

(a) Pursuant to Labor Code Section 1720.2, the construction work is performed according to plans, specifications or criteria furnished by the district and where the district enters into a lease, as lessee, of the completed project during or upon completion of the construction;

(b) Pursuant to Labor Code Section 1720.3, hauling refuse from a public works site to an outside location;

(c) Pursuant to Labor Code Section 1720, the work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work;

(d) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for maintenance, including landscape maintenance;

(e) Pursuant to Labor Code Section 1720, the work is for installation works;

(f) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for field surveying work traditionally covered by collective bargaining agreements

when the work is integral to the specific public works project; and

(g) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for residential and commercial projects when the public work is for student or faculty housing.

It is estimated that Grossmont Union High School District has incurred in excess of $1,000 in staffing and other costs in each of the Fiscal Years July 1, 2001 through June 30, 2002, and July 1, 2002 through June 30, 2003, to implement these new duties mandated by the state for which the District has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this declaration is true and correct to the best of my own knowledge or information or belief.

EXECUTED on this 25th day of August, 2008, at El Cajon, California.

Scott H. Patterson
Deputy Superintendent, Business Services
Grossmont Union High School District

APPOINTMENT OF REPRESENTATIVE

Grossmont Union High School District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.

Scott H. Patterson
Deputy Superintendent, Business Services
Grossmont Union High School District

8/25/08
Date

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
(916) 445-0278
E-mail: csminfo@csm.ca.gov

Exhibit G G

November 12, 2008

Mr. Keith Peterson
SixTen & Associates
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: **Revised Draft Staff Analysis and Hearing Date (January 30, 2009)**
Prevailing Wage Rate, 01-TC-28
Grossmont Union High School District
Labor Code Sections 1720,1720.2,1720.3,1726,1727,1733,1735,1741,1742, 1742.1,1743,1750,1770,1771,1771.5,1771.6,1772,1773,1773.1,1773.2,1773.3, 1773.5,1773.6,1775,1776,1777.1,1777.5,1777.6,1777.7,1812,1813,1861;
Public Contract Code, Section 22002;
Statutes 1976, Ch. 281; Statutes 1976, Ch. 538; Statutes 1976, Ch. 599; Statutes 1976, Ch. 861; Statutes 1976, Ch. 1174; Statutes 1976, Ch. 1179; Statutes 1977, Ch. 423; Statutes 1978, Ch. 1249; Statutes 1979, Ch. 373; Statutes 1980, Ch 962; Statutes 1980, Ch. 992; Statutes 1981, Ch 449; Statutes 1983, Ch. 681; Statutes 1983, Ch. 1054; Statutes 1988, Ch. 160; Statutes 1989, Ch. 278; Statutes 1989, Ch. 1224; Statutes 1992, Ch. 913; Statutes 1992, Ch. 1342; Statutes 1993, Ch.589; Statutes 1997, Ch. 17; Statutes 1997, Ch. 757; Statutes 1998, Ch. 443; Statutes 1998, Ch. 485; Statutes 1999, Ch. 30; Statutes 1999, Ch. 83; Statutes 1999, Ch. 220; Statutes 1999, Ch. 903; Statutes 2000, Ch. 135; Statutes 2000, Ch. 875; Statutes 2000, Ch. 881; Statutes 2000, Ch. 920; Statutes 2000, Ch. 954; Statutes 2001, Ch. 804; Statutes 2001, Ch. 938;
Title 8, CCR, Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802,17201-17212, 17220-17229, 17230-17237,17240-17253, 17260-17264

Dear Mr. Peterson:

On August 21, 2008, Grossmont Union High School District filed a substitution of parties and took over this test claim. The analysis that was previously issued for the August 1, 2008 hearing has been revised in the Claimant and Chronology sections to reflect the substitution of parties. The revised draft staff analysis for this test claim, and the declaration of Scott H. Patterson, on behalf of Grossmont Union High School District, are enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the revised draft staff analysis by **December 3, 2008**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on **Friday, January 30, 2009** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about January 16, 2009. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Camille Shelton at (916) 323-8215 with any questions regarding the above.

Sincerely,

Paula Higashi
Executive Director

Enclosure

J:mandates/2001/01tc28/correspondence.reviseddsatrans(Nov 08)

ITEM __

TEST CLAIM
REVISED DRAFT STAFF ANALYSIS

Labor Code Sections 1720, 1720.2, 1720.3, 1726, 1727, 1733, 1735, 1741, 1742, 1742.1, 1743, 1750, 1770, 1771, 1771.5, 1771.6, 1771.7, 1772, 1773, 1773.1, 1773.2, 1773.3, 1773.5, 1773.6, 1775, 1776, 1777.1, 1777.5, 1777.6, 1777.7, 1812, 1813, 1861

Public Contract Code Section 22002

Statutes 2002, Chapter 868 (AB 1506); Statutes 2001, Chapter 938 (SB 975); Statutes 2001, Chapter 804 (SB 588); Statutes 2000, Chapter 954 (AB 1646); Statutes 2000, Chapter 920 (AB 1883); Statutes 2000, Chapter 881 (SB 1999); Statutes 2000, Chapter 875 (AB 2481); Statutes 2000, Chapter 135 (AB 2539); Statutes 1999, Chapter 903 (AB 921); Statutes 1999, Chapter 220 (AB 302); Statutes 1999, Chapter 83 (SB 966); Statutes 1999, Chapter 30 (SB 16); Statutes 1998, Chapter 485 (AB 2803); Statutes 1998, Chapter 443 (AB 1569); Statutes 1997, Chapter 757 (SB 1328); Statutes 1997, Chapter 17 (SB 947); Statutes 1993, Chapter 589 (AB 2211); Statutes 1992, Chapter 1342 (SB 222); Statutes 1992, Chapter 913 (AB 1077); Statutes 1989, Chapter 1224 (AB 114); Statutes 1989, Chapter 278 (AB 2483); Statutes 1988, Chapter 160 (SB 2637); Statutes 1983, Chapter 1054 (AB 1666); Statutes 1983, Chapter 681 (AB 2037); Statutes 1981, Chapter 449 (AB 1242); Statutes 1980, Chapter 992 (AB 3165); Statutes 1980, Chapter 962 (AB 2557); Statutes 1979, Chapter 373 (SB 925); Statutes 1978, Chapter 1249 (AB 3174); Statutes 1977, Chapter 423 (SB 406); Statutes 1976, Chapter 1179 (AB 3676); Statutes 1976, Chapter 1174 (AB 3365); Statutes 1976, Chapter 861 (SB 1953); Statutes 1976, Chapter 599 (AB 1125); Statutes 1976, Chapter 538 (AB 2466); Statutes 1976, Chapter 281 (AB 2363)

Title 8, California Code of Regulations Sections 16000, 16001-16003, 16100-16102, 16200-16206, 16300-16304, 16400-16403, 16410-16414, 16425, 16426-16428, 16429-16432, 16433, 16436-16439, 16500, 16800-16802, 17201-17212, 17220-17229, 17230-17237, 17240-17253, 17260-17264
(Reg. 1956, No. 08; Reg. 1972, No. 13; Reg. 1972, No. 23; Reg. 1977, No.02; Reg. 1977, No. 49; Reg. 1978, No. 06; Reg. 1979, No. 19; Reg. 1980, No. 06; Reg. 1981, No. 09; Reg. 1982, No. 51; Reg. 1986, No. 07; Reg.1988, No. 35; Reg. 1990, No. 14; Reg. 1990, No. 42; Reg. 1991, No. 12; Reg. 1992, No. 13; Reg. 1996, No. 52; Reg. 1999, No. 08; Reg. 1999, No. 25; Reg. 1999, No. 41; Reg. 2000, No. 03; Reg. 2000, No. 18; and Reg. 2002, No. 03)

School Facility Program Substantial Progress and Expenditure Audit Guide – May 2003
(Prepared by the Office of Public School Construction)

AB 1506 Labor Compliance Program Guidebook – February 2003
(Prepared by the Division of Labor Standards Enforcement)

Antioch Unified School District Labor Compliance Program
January 17, 2003

Prevailing Wage Rate

01-TC-28

Grossmont Union High School District, Claimant

EXECUTIVE SUMMARY

This test claim was originally set for hearing on August 1, 2008. On July 23, 2008, after the final staff analysis was issued, the original claimant, Clovis Unified School District, filed an application to withdraw the claim pursuant to section 1183.08 of the Commission's regulations. Section 1183.08 of the Commission's regulations allows another local agency or school district to take over a test claim by substitution of parties within 60 days of the application to withdraw. On August 21, 2008, Grossmont Union High School District filed a substitution of parties and took over the claim.

This revised draft staff analysis updates the Claimant and Chronology sections to reflect the withdrawal and substitution of parties. No other substantive changes have been made to the analysis.

Background

This test claim addresses changes to the California Prevailing Wage Law (CPWL), which is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds." Contractors for public works projects that exceed $1,000 are required to pay local prevailing wages to construction workers on those projects. The requirement to pay prevailing wages is only applicable to work performed under contract, and is not applicable to work carried out by a public agency with its own forces; the requirement is applicable to contracts let for maintenance work. Local prevailing wage rates are set by the Director of the Department of Industrial Relations.

The Test Claim Statutes, Regulations and Alleged Executive Orders Impose a Partially Reimbursable State-Mandated Program on K-12 School Districts or Community College Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution

The provisions of the CPWL are only applicable when a district contracts with a private entity to carry out a public works project. The cases have consistently held that when a district makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed. The underlying decision to undertake a public works project is mandated by the state only when the public works project is for the purpose of repair or maintenance of school buildings or property. The underlying decision to contract for such a project is mandated by the state under the Public Contract Code, only when the project is not an emergency as defined and under other specified conditions related to the size of the student body and cost of the project.

The test claim statutes and regulations mandate certain activities when the CPWL provisions are triggered under the above circumstances, and some of those activities impose a new program or higher level of service on districts within the meaning of article XIII B, section 6 of the California Constitution. For some of those activities, however, the test claim statutes and

regulations allow the districts to levy fees sufficient to pay for the costs of the newly-mandated activities, and Government Code section 17556, subdivision (d), is applicable to deny reimbursement for them. The remaining three activities do impose costs mandated by the state, thus imposing a partially reimbursable state-mandated program on K-12 school districts and community college districts.

Conclusion

Staff concludes that Labor Code section 1776, subdivisions (g) and (h), and section 16403, subdivision (a), of the Department of Industrial Relations' regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, but only when those activities are triggered by projects for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113, and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000. (Pub. Contract Code, § 20114.)
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654, and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000. (Pub. Contract Code, § 20655.)
3. For any K-12 school district or community college district that is subject to the Uniform Public Contract Cost Accounting Act (UPCCAA), when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.[1] (Pub. Contract Code, § 22032.)

Only the following activities for the foregoing projects are reimbursable:

- Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Department of Industrial Relations' Division of Apprenticeship Standards

[1] Prior to January 1, 2007, the dollar limit for public projects that could be performed by the district with its own forces was $25,000.

or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)

- Insert in the contract stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249).)

Any grant funds available to awarding bodies under the deferred maintenance program, or any other eligible grant program, when used for the newly mandated activities in this test claim, shall be identified in the parameters and guidelines as possible offsetting revenues.

None of the other test claim statutes, regulations or alleged executive orders that were pled mandate a new program or higher level of service subject to article XIII B, section 6.

Recommendation

Staff recommends the Commission adopt this analysis to partially approve the test claim.

STAFF ANALYSIS

Claimant

Grossmont Union High School District

Chronology

06/28/02	Clovis Unified School District ("Claimant") filed test claim with the Commission on State Mandates ("Commission")
07/08/02	Commission staff deemed the test claim complete
08/14/02	The Department of Industrial Relations requested an extension of time, for an additional 90 days, to file comments on the test claim
08/15/02	Commission staff approved extension of time, to November 13, 2002, to file comments on the test claim
08/19/02	Claimant filed missing pages of the test claim with the Commission
11/05/02	The Department of Finance requested an extension of time, for an additional 60 days, to file comments on the test claim
11/06/02	Commission staff approved extension of time, to January 15, 2003, to file comments on the test claim
01/13/03	The Department of Finance requested an extension of time to file comments on the test claim
01/15/03	Commission staff approved extension of time, to January 31, 2003, to file comments on the test claim
01/15/03	The Department of Industrial Relations filed comments on the test claim
01/15/03	The State Building and Construction Trades Council of California, AFL-CIO, filed comments on the test claim
01/29/03	The Department of Finance requested an extension of time to file comments on the test claim
01/30/03	Commission staff approved extension of time, to February 18, 2003, to file comments on the test claim
02/18/03	Claimant filed rebuttal comments on the test claim
02/18/03	The Department of Finance filed comments on the test claim
03/20/03	Claimant filed comments on the test claim
04/02/03	The Department of Industrial Relations filed comments on the test claim
07/31/03	Claimant filed amendment to the test claim
08/14/03	Commission staff deemed the amendment to the test claim complete
08/18/03	The Department of Industrial Relations filed comments on the test claim
09/05/03	The Department of Finance requested a 30-day extension to file comments on the test claim

09/12/03	The Department of Industrial Relations requested an extension of time, for an additional 21 days, to file comments on the test claim
09/15/03	The Department of General Services, Office of Public School Construction, filed comments on the test claim
09/16/03	Commission staff approved extension of time, to October 6, 2003, for the Department of Industrial relations to file comments on the test claim
09/18/03	Claimant filed rebuttal comments on the test claim
10/07/03	The Department of Industrial Relations filed comments on the test claim
10/09/03	The Department of Industrial Relations filed a verification for its August 18, 2003 comments on the test claim
10/14/03	The Department of Finance requested an extension of time, for an additional 30 days, to file comments on the test claim
10/15/03	Commission staff approved extension of time, to November 5, 2003, to file comments on the test claim
10/20/03	Claimant filed rebuttal comments on the test claim
11/06/03	Claimant filed rebuttal comments on the test claim
11/05/03	The Department of Finance filed comments on the test claim
12/08/03	Claimant filed rebuttal comments on the test claim
01/28/04	The Department of Industrial Relations requested an extension of time, for an additional 30 days, to file comments on the test claim
01/30/04	Commission staff approved extension of time, to March 3, 2004, to file comments on the test claim
07/11/07	Commission staff requested claimant to provide specific versions of regulations claimed
07/23/07	The Department of Industrial Relations requested postponement of the December 6, 2007 hearing on the test claim
07/26/07	Commission staff denied the request to postpone hearing the test claim
07/25/07	Claimant requested an extension of time, for an additional four weeks, to file regulations information requested by Commission staff
08/01/07	Commission staff approved extension of time, to August 29, 2007, to file the information requested
08/30/07	Claimant submitted additional regulations information requested by Commission staff
03/11/08	Commission staff issued draft staff analysis
03/28/08	The Department of Industrial Relations requested an extension of time to file comments on the draft staff analysis.

03/28/08	Commission staff approved the request for an extension of time, for an additional two weeks, to file comments on the draft staff analysis
04/01/08	The Department of General Services, Office of Public School Construction, filed comments on the draft staff analysis
04/14/08	The Department of Industrial Relations filed comments on the draft staff analysis
04/15/08	The Department of Finance filed comments on the draft staff analysis
05/27/08	The Department of Industrial Relations requested that the hearing be postponed to August 1, 2008
05/28/08	Commission staff approved the request to postpone the hearing to August 1, 2008
07/18/08	Commission staff issued the final staff analysis for August 1, 2008 hearing
07/23/08	Clovis Unified School District files application to withdraw test claim pursuant to section 1183.08 of the Commission's regulations
07/23/08	Commission staff issues letter to Clovis Unified School District and interested parties and affected state agencies accepting the withdrawal, and providing notice that the test claim will be dismissed, pursuant to section 1183.08 of the Commission's regulations, if no other school district takes over the claim by substitution of the parties on or before September 22, 2008
08/21/08	Grossmont Union High School District files notice of substitution of parties and takes over test claim
09/02/08	Commission staff issues letter to parties providing notice of substitution of parties
09/03/08	Grossmont Union High School District files declaration of Scott H. Patterson in support of test claim.
11/12/08	Revised draft staff analysis issued for comment; item set for hearing on January 30, 2009

Background

This test claim addresses 36 statutory changes to the California Prevailing Wage Law (CPWL),[2] involving 33 Labor Code sections and more than 90 regulatory provisions, which have taken place since 1975. The CPWL is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds."[3] Contractors for public works projects that exceed $1,000 are required to pay

[2] Labor Code sections 1720 et seq.

[3] *Road Sprinkler Fitters, Local Union 669 v. G & G Fire Sprinkler, Inc.* (2002) 102 Cal.App.4th 765, 776.

local prevailing wages to construction workers on those projects.[4] The requirement to pay prevailing wages is only applicable to work performed under contract, and is not applicable to work carried out by a public agency with its own forces; the requirement is applicable to contracts let for maintenance work.[5] Local prevailing wage rates are set by the Director of the Department of Industrial Relations.[6]

In addition to state agencies, the CPWL applies to "political subdivisions," which include any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.[7] Thus, the CPWL applies to both school districts and community college districts. The agency or authority awarding the contract for public work is known as the "awarding body."[8]

The overall purpose of the CPWL is to benefit and protect employees on public works projects.[9] Its specific goals are to: 1) protect employees from substandard wages that might be paid if contractors could recruit from cheap-labor areas; 2) permit union contractors to compete with nonunion contractors; 3) benefit the public through the superior efficiency of well-paid employees; and 4) compensate nonpublic employees with higher wages for the absence of job security and benefits enjoyed by public employees.[10]

The CPWL does not generally cover federal projects. Those projects are addressed in the federal Davis-Bacon Act (40 USC § 276a(a)), which was enacted for a similar purpose, i.e., to protect local wage standards by preventing federal contractors from basing their bids on wages lower than those prevailing in the area.[11] However, the application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies.[12]

Public Works Defined

The Labor Code generally defines "public works" as construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds,[13] and includes: 1) design and preconstruction work;[14] 2) work done for irrigation,

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[4] Labor Code section 1771.

[5] *Ibid.*

[6] Labor Code section 1770.

[7] Labor Code section 1721.

[8] Labor Code section 1720.

[9] *Lusardi Construction Co. v. Aubry* (1992) 1 Cal 4th 976, 987.

[10] *Ibid.*

[11] *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883.

[12] Title 8, California Code of Regulations, section 16001, subdivision (b).

[13] Labor Code section 1720, subdivision (a)(1).

[14] *Ibid.*

utility, reclamation and improvement districts;[15] 3) street, sewer, or other improvement work for public agencies;[16] 4) laying of carpet;[17] 5) certain public transportation demonstration projects;[18] and 6) hauling of refuse from a public works site to an outside disposal location.[19] Public works projects also include maintenance,[20] as defined.[21]

The Labor Code also defines "paid for in whole or in part out of public funds" as payment of funds directly to or on behalf of a public works contractor, subcontractor or developer,[22] including various other types of payments,[23] and provides several types of projects that are excluded from that definition.[24]

Prevailing Wage Rates

Prevailing wage rates are set by the Director of the Department of Industrial Relations (DIR),[25] generally by reviewing local wage rates established by collective bargaining agreements and rates that may have been predetermined for federal public works.[26] The awarding body for any contract for public works is required to specify in the call for bids, the bid specifications and the contract itself, what the prevailing wage rate is for each craft, classification or type of worker needed to execute the contract.[27] In lieu of specifying the wage rates in the call for bids, bid specifications and the contract itself, the awarding body may include a statement in

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[15] Labor Code section 1720, subdivision (a)(2).

[16] Labor Code section 1720, subdivision (a)(3).

[17] Labor Code section 1720, subdivisions (a)(4) and (a)(5).

[18] Labor Code section 1720, subdivision (a)(6).

[19] Labor Code section 1720.3.

[20] Labor Code section 1771; Title 8, California Code of Regulations, section 16001, subdivision (f).

[21] "Maintenance" is defined as: (1) routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system, or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired; and (2) carpentry, electrical, plumbing, glazing, touchup painting, and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures. Janitorial services of a routine, recurring or usual nature are excluded. (tit. 8, Cal. Code Regs., § 16000.)

[22] Labor Code section 1720, subdivision (b)(1).

[23] Labor Code section 1720, subdivisions (b)(2) through (b)(6).

[24] Labor Code section 1720, subdivision (c).

[25] Labor Code section 1770.

[26] Labor Code section 1773.

[27] Labor Code section 1773.2.

those documents that copies of the prevailing wage rates are on file at its principal office, which shall be made available to any interested party on request.[28] The awarding body is required to post at each job site a copy of the determination by the DIR Director of the prevailing wage rates.[29]

Prospective bidders, representatives of any craft classification or type of worker involved, or the awarding body may challenge the declared prevailing wage rates with DIR within 20 days after commencement of advertising of the bids.[30] The Director of DIR begins an investigation and within 20 days, or longer if agreed upon by all the parties, makes a determination and transmits it in writing to the awarding body and the interested parties, which delays the closing date for submitting bids or starting of work until five days after the determination.[31] The Director's determination is final, and shall be considered the determination of the awarding body.[32]

Payroll Records

Contractors and subcontractors subject to the CPWL are required to keep accurate payroll records showing name, address, social security number, work classification, straight time and overtime hours worked each day and week and actual wages paid to each worker in connection with the public work,[33] and provide certified copies or make such records available for inspection, upon request of the employee, the awarding body, Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards.[34] Requests by the public are required to be made through the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement,[35] and shall be redacted to prevent disclosure of an individual's name, address and social security number.[36] The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the entity through which the request was made.[37] The awarding body is required to insert stipulations in the contract to effectuate these provisions.[38]

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[28] *Ibid.*

[29] *Ibid.*

[30] Labor Code section 1773.4.

[31] *Ibid.*

[32] *Ibid.*

[33] Labor Code section 1776, subdivision (a).

[34] Labor Code section 1776, subdivision (b).

[35] Labor Code section 1776, subdivision (b)(3).

[36] Labor Code section 1776, subdivision (e).

[37] Labor Code section 1776, subdivision (b)(3).

[38] Labor Code section 1776, subdivision (h).

Discrimination on Public Works Employment Prohibited

Labor Code section 1735 prohibits contractors from discriminating on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for a violation of the CPWL.

Enforcement of CPWL

The awarding body is required to "take cognizance" of violations of the CPWL committed in the course of the public works contract, and shall promptly report any suspected violations to the Labor Commissioner.[39]

The Labor Commissioner is charged with enforcing the CPWL.[40] If the Labor Commissioner determines after an investigation that there has been a violation of the CPWL, the Labor Commissioner issues a civil wage and penalty assessment to the contractor or subcontractor or both.[41] Prior to July 1, 2001, the only way to challenge such an assessment was in court. On and after July 1, 2001, contractors or subcontractors may obtain review of a civil wage and penalty assessment through an informal settlement meeting with the Labor Commissioner,[42] or via an administrative hearing.[43] Until January 1, 2009, hearings are conducted before the DIR Director with an impartial hearing officer; thereafter the hearing will be conducted by an administrative law judge.[44] An affected contractor or subcontractor may appeal the administrative decision within 45 days of service of the decision by filing a petition for writ of mandate under Code of Civil Procedure section 1094.5.[45] This process provides the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner.[46]

When the Labor Commissioner issues a civil wage and penalty assessment, the awarding body is required to withhold and retain such moneys from contractor payments sufficient to satisfy the assessment.[47] The amounts withheld cannot be disbursed until receipt of a final order that is no longer subject to judicial review.[48] The awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner.[49]

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[39] Labor Code section 1726.

[40] Labor Code section 1741.

[41] *Ibid.*

[42] Labor Code section 1742.1, subdivision (b).

[43] Labor Code section 1742, subdivisions (a) and (b).

[44] Labor Code section 1742, as amended by Statutes 2004, chapter 685.

[45] Labor Code section 1742, subdivision (c).

[46] Labor Code section 1742, subdivision (g).

[47] Labor Code section 1727, subdivision (a).

[48] Labor Code section 1727, subdivision (b).

[49] Labor Code section 1742, subdivision (f).

Labor Compliance Program

The awarding body can avoid paying prevailing wages for public works projects of $25,000 or less when the project is for construction, and $15,000 or less when the project is for alteration, demolition, repair or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program (LCP) for all of its public works projects.[50] As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.[51]

If the awarding body enforces the CPWL as an LCP, the awarding body is entitled to keep any penalties assessed. Before taking any action, the awarding body is required to provide notice of the withholding of any contract payments to the contractor and any subcontractor.[52] The same process for review of a civil wage and penalty assessment made by the Labor Commissioner, as set forth in Labor Code sections 1742 and 1742.1, is invoked.[53] Any amount recovered from the contractor shall first satisfy the wage claim, before being applied to penalties, and if insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.[54] Wages for workers who cannot be located are placed in the Industrial Relations Unpaid Wage Fund and held in trust.[55] Penalties of not more than $50 per day for each worker paid less than the prevailing wage rates[56] are paid into the general fund of the awarding body that enforced the CPWL.[57]

Awarding bodies that choose to use funds derived from the Kindergarten-University Public Education Facilities Bond Acts of 2002[58] or 2004[59] for public works projects are required to adopt and enforce an LCP or contract with a third party to adopt and enforce an LCP.[60] These funds are allocated through the School Facility Program established by Chapter 12.5 of the

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[50] Labor Code section 1771.5, subdivision (a).

[51] Labor Code section 1771.5, subdivision (b).

[52] Labor Code section 1771.6, subdivision (a).

[53] Labor Code section 1771.6, subdivisions (b) and (c).

[54] Labor Code section 1771.6, subdivision (d).

[55] Labor Code section 1771.6, subdivision (e).

[56] Labor Code section 1775.

[57] Labor Code section 1771.6, subdivision (e).

[58] Proposition 47, approved by the voters at the November 5, 2002 statewide general election.

[59] Proposition 55, approved by the voters at the March 2004 statewide direct primary election.

[60] Labor Code section 1771.7, subdivision (a).

Education Code. The State Allocation Board was required to increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the LCP.[61] Awarding bodies that choose to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of 2006,[62] however, are not subject to this requirement.

Employment of Apprentices on Public Works Projects

Properly registered apprentices are allowed to work on public works projects and must be paid prevailing wages for apprentices in the trade.[63] Apprenticeship standards are established by the DIR Division of Apprenticeship Standards,[64] and ratios of apprentices to journey level workers in a particular craft or trade on the public work are established by the particular apprenticeship program.[65] Contractors must meet various requirements with regard to employing apprentices, and the awarding body is required to include stipulations to that effect in the contract.[66]

School Facility Construction, Repairs and Funding

Beginning in 1947, the Legislature authorized the State Allocation Board to allocate funds for building and repairing schools. Legislation enacted in the late 1940s and early 1950s established a loan-grant program "to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the public school system..."[67] The State Department of General Services[68] administers and the State Allocation Board (SAB) allocates and apportions the funds made available to the districts with priority given to districts where the children will benefit most from additional facilities.[69]

The School Facilities Act[70] establishes a state program to provide state per pupil funding for new construction and modernization of existing school facilities[71] to be administered by the SAB.[72]

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[61] Labor Code section 1771.7, subdivision (e).

[62] Proposition 1D, approved by the voters at the November 7, 2006 statewide general election.

[63] Labor Code section 1777.5, subdivisions (a) and (b).

[64] Labor Code section 1777.5, subdivision (c).

[65] Labor Code section 1777.5, subdivision (g).

[66] Labor Code section 1777.5, subdivision (n).

[67] Education Code sections 15700, et seq.

[68] Education Code section 15702.

[69] Education Code section 15704.

[70] Education Code sections 17070.10 et seq.

[71] Title 2, California Code of Regulations, section 1859.

[72] Education Code section 17070.35.

The Education Code sets out requirements that potential school building sites must meet.[73] Prior to commencing acquisition of real property for a new schoolsite or addition to an existing schoolsite, the governing board of a school district is required to evaluate property at a public hearing using the site selection standards established by the Department of Education.[74] Moreover, in the exercise of its police power, the state may through legislative action control the protection of public health, safety, and comfort in the erection of school buildings.[75] The Department of General Services is generally required to supervise the design and construction of any school building or the reconstruction or alteration of or addition to any school building.[76] Nevertheless, *whether* a school district decides to engage in a project to construct a school building is within the discretion of its governing board.[77]

Education Code section 17366 states the Legislature's intent to provide safe educational facilities for California schoolchildren as follows:

> [T]he Legislature intends that the governing board of each school district adopt a plan for the orderly repair, reconstruction, or replacement of school buildings not repaired, reconstructed, or replaced in accordance with this article.

Whenever the structural condition of any school building has been examined by designated entities or under the authorization of law and a report of the examination has been made to the governing board showing the building is unsafe for use, the governing board is required to immediately prepare an estimate of the cost necessary to make such repairs to the building(s) as are necessary, or, if necessary, to reconstruct or replace the building so that the building when repaired or reconstructed, or any building erected to replace it, shall meet such standards of structural safety as are established in accordance with law.[78] Using the information from the examination and report, the governing board is required to establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings.[79] If the governing board of the school district complies with these provisions, no member of that governing board may be held personally liable for injury to persons or damage to property resulting from the fact that a school building was not constructed under the requirements of Education Code sections 17280 et seq.[80]

Education Code section 17593 requires K-12 school districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing

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[73] Education Code sections 17210, et seq.

[74] Education Code sections 17211 and 17251.

[75] *Hall v. City of Taft* (1956) 47 Cal.2d 177, 184.

[76] Education Code section 17280.

[77] *People v. Oken* (1958) 159 Cal.App.2d 456, 460.

[78] Education Code section 17367.

[79] *Ibid.*

[80] Education Code section 17371.

> board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Education Code section 17002 defines "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction. The instrument shall not require capital enhancements beyond the standards for which the facility was designed and constructed.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. ...

Thus, both K-12 school districts and community college districts are required by statute to repair the school property of their districts.

The Education Code provides for deferred maintenance funding from the state, on a dollar-for-dollar matching basis, to K-12 school districts and community college districts.[81] Typical deferred maintenance projects include roofing, plumbing, heating, air conditioning, electrical and floor systems. For K-12 school districts, an annual Basic Grant is provided to districts for major repair or replacement listed on the district's Five Year Plan, and an Extreme Hardship Grant is provided in addition to the Basic Grant where a critical project must be completed within one year for health and safety or structural reasons.[82] Community college projects are also subject to a five-year maintenance plan submitted to the Chancellor, and the Chancellor allocates requested funding based on three criteria: 1) projects necessary to meet safety requirements and to correct hazardous conditions; 2) scheduled maintenance necessary to prevent substantially increased maintenance or replacement costs in the future; and 3) projects necessary to prevent disruption of instructional programs.[83]

The Education Code authorizes the County Superintendent of Schools to provide for the maintenance and repair of the property of school districts under his or her jurisdiction that elect to take advantage of this service by paying into the school maintenance and repair fund established for this purpose.[84] The superintendent is authorized to hire labor for such maintenance and repair:

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[81] Education Code sections 17582-17588 and 84660.

[82] Deferred Maintenance Program Handbook, prepared on behalf of the State Allocation Board by the Office of Public School Construction, June 2007, page 1.

[83] California Code of Regulations, title 5, sections 57200 et seq.

[84] Education Code section 1266.

> The superintendent of schools of the county may employ such extra help as is necessary to perform the labor for the maintenance and repair work, as well as to provide for the supervision and transportation of the labor together with the equipment and materials for the work. The cost price of the maintenance and repair services to any school district is the original cost thereof and in addition a sum sufficient to reimburse the county superintendent of schools for all supervision, transportation, equipment, and other expenses, but the sum added shall not in any case exceed 10 percent of the cost of labor and supplies.[85]

Contracting for Public Works Projects

The Public Contract Code establishes contracting requirements for school districts and community college districts.[86] Depending on the purpose of the project and estimated dollar amount, the district may be required to contract out to the lowest responsible bidder to accomplish the project. The major requirements are outlined below.

The governing board of any school district or any community college district shall let any contracts involving an expenditure of more than $50,000[87] to the lowest responsible bidder,[88] for any of the following: 1) the purchase of equipment, materials, or supplies to be furnished, sold or leased to the district; 2) services, except construction services; or 3) repairs, including maintenance,[89] that are not a public project as defined in section 22002, subdivision (c).[90, 91]

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[85] Education Code section 1269.

[86] Public Contract Code sections 20110 et seq. and 20650 et seq.

[87] Adjusted annually for inflation pursuant to Public Contract Code sections 20111, subdivision (d), and 20651, subdivision (d).

[88] The lowest responsible bidder shall provide security as the board requires, or all bids shall be rejected. (Pub. Contract Code, § 20111 and 20651.)

[89] Public Contract Code sections 21115 and 20656 define "maintenance" as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." It includes but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." It does not include, among other types of work: "janitorial or custodial services and protection of the sort provided by guards or other security forces." It further does not include painting, repainting, or decorating other than touchup, but instead it is the intent of the Legislature that such activities be controlled directly by the provisions of section 20114 or 20655.

[90] Public Contract Code sections 20111, subdivision (a), and 20651, subdivision (a).

[91] Section 22002, subdivision (c) defines "public project" as:
(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition,

Any contract for a public project, as defined, involving an expenditure of $15,000 or more shall be let to the lowest responsible bidder who shall give security as required by the board or the board shall reject all bids.[92]

Notwithstanding the preceding requirements, in the case of an emergency when any repairs, alterations, work, or improvement is necessary to any facility of the college or public schools to permit the continuance of existing classes, or to avoid danger to life or property, the governing board of a school district or community college district may, by unanimous vote, with the approval of the county superintendent of schools, either: 1) make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing materials or supplies without advertising for or inviting bids; or 2) without regard to the number of hours needed for the job, authorize the use of day labor or force account to carry out the project.[93]

Moreover, the governing board of a school district or community college district may make repairs, alteration, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance by day labor or by force account[94] whenever the total number of hours on the job does not exceed 350 hours; for any school district having an average daily attendance of 35,000 or more, or for any community college district whose number of full-time equivalent students is 15,000 or greater, the governing board may perform the above activities by day labor or force account whenever the total number of hours on the job does not exceed 750 hours or when the cost of material for the job does not exceed $21,000.[95]

The Uniform Public Construction Cost Accounting Act (UPCCAA)[96]

The Uniform Public Construction Cost Accounting Act was enacted to "promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state."[97] The Act provides for developing such cost accounting standards by the California Uniform Construction Cost Accounting Commission, and an alternative method for the bidding of public works projects by public entities.[98] A

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and repair work involving any publicly owned, leased, or operated facility.
(2) Painting or repainting of any publicly owned, lease, or operated facility.
(3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

[92] Public Contract Code sections 20111, subdivision (b), and 20651, subdivision (b).

[93] Public Contract Code sections 20113 and 20654.

[94] In the context of the CPWL, work done by "force account" means work done by the local agency's own employees as distinguished from work performed pursuant to contract with a commercial firm for similar services. (70 Ops.Cal.Atty.Gen. 92, 97 (1987).)

[95] Public Contract Code sections 20114 and 20655.

[96] Public Contract Code sections 22000 et seq.

[97] Public Contract Code section 22001.

[98] *Ibid.*

public agency whose governing board has by resolution elected to become subject to this Act may use its own employees to perform projects of $30,000 or less.[99]

Test Claim Statutes, Regulations and Alleged Executive Orders

Statutes

The test claim statutes encompass changes to the CPWL in the Labor Code beginning in 1976. The relevant provisions are summarized below.

Labor Code Sections 1720, 1720.2 and 1720.3: New types of public works projects were added with these sections:

- Section 1720 was modified to add public transportation demonstration projects, design and preconstruction, including land surveying,[100] and installation projects.
- Section 1720.2 was amended to include projects done under private contract where the property subject to the contract is privately owned but upon completion of the construction work more than 50 percent of the property is leased to the state or a political subdivision for its use, and the construction work is performed according to plans or specifications furnished by the state or a political subdivision with a lease agreement that is entered into between a lessor and the state or political subdivision as lessee, during or upon completion of the project.
- Section 1720.3 was amended to include the removal of refuse from the public works construction site.

Labor Code Section 1726: A requirement was added for the awarding body, which was already required to "take cognizance" of violations, to promptly *report* suspected violations to the Labor Commissioner. The section was further amended to state that if the awarding body determines as a result of its own investigation (under a Labor Compliance Program) that there

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[99] Public Contract Code section 22032; prior to January 1, 2007, the dollar limit for public projects that could be performed by the district was $25,000.

[100] Design and preconstruction was added by Statutes 2000, Chapter 881. The Senate Rules Committee Analysis stated that the bill codified current DIR practice and regulation by including construction inspectors and land surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project. (Senate Rules Committee, Office of Senate Floor Analyses, SB 1999, August 29, 2000, page 2.) On June 9, 2000, the DIR issued a decision (Public Works Case No. 99-046) finding that construction inspectors hired to do inspection for compliance with applicable building codes and other standards for a public works project were deemed to be employed upon public works and therefore entitled to prevailing wage. This DIR decision was the subject of a lawsuit, *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, which held that even though the DIR had interpreted preexisting statute to include the pre-construction activities as public works and argued that the new statute merely clarified existing law, the Supreme Court found the change in the statute operated prospectively only.

has been a violation and withholds contract payments, the Labor Compliance Program procedures in section 1771.6 shall be followed.

Labor Code Section 1727: This section was amended to state that if the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a *subcontractor's* violations, the *contractor* is required to withhold money upon request of the Labor Commissioner and transfer that money to the awarding body. In either case, the awarding body is limited to disbursing such withheld assessments until after receipt of a final order that is no longer subject to judicial review.

Labor Code Section 1735: This section, as added and amended, prohibits discrimination on public works employment for specified categories of persons, and every contractor violating the section is subject to all the penalties imposed for violations of the chapter.

Labor Code Sections 1733, 1741, 1742, 1742.1 and 1743: These sections provide for an administrative process to challenge wage and penalty assessments as set forth:

- Section 1733, relating to court challenges to wage and penalty assessments, was repealed since a new administrative procedure was established.
- Section 1741 established that the Labor Commissioner, after an investigation, shall issue a civil wage and penalty assessment on contractors and/or subcontractors that violate the CPWL, and sets the procedures for issuing the assessment.
- Section 1742 provided that contractors or subcontractors may obtain review of a civil wage and penalty assessment by the Labor Commissioner, and established procedures and additional appeal provisions. The hearing is conducted before the DIR Director with an impartial hearing officer until January 1, 2009; thereafter the hearing is conducted by an administrative law judge. Subdivision (f) provides that the awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner. Subdivision (g) provides that the section is the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner or the awarding body when it acts under a Labor Compliance Program pursuant to section 1771.5.
- Section 1742.1 established procedures to allow for the contractor or subcontractor to meet with the Labor Commissioner to settle a dispute over the civil wage and penalty assessment without the need for formal proceedings. Additional procedures were established to require the awarding body, when enforcing under a Labor Compliance Program, to afford the contractor or subcontractor, upon request of such contractor or subcontractor, the opportunity to meet with the awarding body to attempt to settle any dispute without the need for formal proceedings.
- Section 1743 provided that the contractor and subcontractor shall be joint and severally liable for all amounts due pursuant to a final order, but the Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

Labor Code Section 1750: This section allows the second lowest bidder a right of action against a successful bidder, when the successful bidder has violated the Unemployment Insurance Code. It does not require any activities of awarding bodies.

Labor Code Sections 1770, 1773, 1773.1, 1773.2, 1773.5 and 1773.6: These sections were amended to require the Director of the Department of Industrial Relations to determine the general prevailing rate of per diem wages, using specified criteria, rather than the pre-1975 requirement of having this responsibility rest with the awarding body. Section 1773.2 was thus amended to remove the requirement that the awarding body annually publish prevailing wage rate determinations in the newspaper. Section 1773.5, which previously gave the Director of DIR authority to establish rules and regulations, was amended to add "including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

Labor Code Section 1771: This section was amended to establish the threshold dollar amount for contracts subject to prevailing wages at $1,000.

Labor Code Sections 1771.5, 1771.6 and 1771.7: These new sections established the ability of an awarding body to elect to initiate and enforce a Labor Compliance Program (LCP). In exchange, payment of prevailing wages is not required for any public works project of $25,000 or less when the project is for construction, or for any public works project of $15,000 or less when the project is for alteration, demolition, repair or maintenance work. An awarding body that establishes an LCP is also allowed to keep any fines or penalties assessed when it takes enforcement action. As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred. A contractor may appeal an enforcement action by a political subdivision to the Director of DIR.

Section 1771.6 was repealed and added to establish notice and withholding procedures for an awarding body that elects to enforce the CPWL under an LCP.

Section 1771.7 was repealed and later added to require that an awarding body that chooses to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or 2004 for a public works project shall initiate and enforce, or contract with a third party to initiate and enforce, an LCP with respect to that public works project. The provision applies to public works that commence on or after April 1, 2003.

Any awarding body choosing to use such bond funds is required to make a written finding that the awarding body has initiated and enforced, or has contracted with a third party to initiate and enforce, the Labor Compliance Program. If the awarding body is a school district, the governing body of that district shall transmit to the State Allocation Board a copy of the finding. If the awarding body is a community college district, that awarding body shall transmit a copy of the written finding to the Director of the Department of Industrial Relations.

Labor Code Section 1772: This section, which existed prior to 1975, establishes that workers employed by contractors or subcontractors in the execution of any public works project are deemed to be employed on the public work.

Labor Code Section 1775: This section was amended to increase penalty amounts assessed by the Labor Commissioner to be paid by contractors and/or subcontractors for violations of the

requirement to pay prevailing wages, and to delete a requirement that the awarding body provide notice to a worker making a wage claim that there is insufficient money available from the contractor to pay such claim. Additionally, the section was changed to extend to subcontractors the liability for insufficient wage payments, and to require contractors to withhold monies due a subcontractor for such insufficient payments that are the subject of a claim filed with the Division of Labor Standards Enforcement.

Labor Code Section 1776: This section was amended to expand the requirements for contractors and subcontractors to keep certified payroll records for public works projects and furnish copies of those records to the awarding body, the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards. The amendments also require that copies of such payroll records be made available to the public through the awarding body, the Division of Labor Standards Enforcement or the Division of Apprenticeship Standards (but not by the contractor or subcontractor); if the records have not already been made available to those entities, then the requesting party is required to reimburse the costs of preparation by the contractor, subcontractors and the entity through which the request was made. Any records made available to the public must be marked or obliterated to prevent disclosure of an individual's name, address or social security number. Any records made available to a joint labor-management committee must be marked or obliterated to prevent disclosure of an individual's social security number. The body awarding the contract is required to place stipulations to effectuate these provisions in the contract. In addition, the Director of the Department of Industrial Relations was required to adopt regulations consistent with the California Public Records Act and the Information Practices Act of 1977 governing release of the records including establishment of reasonable fees to be charged for reproducing copies of the records.

Labor Code Section 1777.1: This section was added and amended to deny a contractor or subcontractor the ability to bid on or be awarded a contract for a public works project, or perform work as a subcontractor on a public works project, when the contractor or subcontractor is found by the Labor Commissioner to be in violation of prevailing wage requirements with intent to defraud or in willful violation of the requirements. The section was also modified to require the Labor Commissioner to semi-annually publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project.

Labor Code Sections 1773.3, 1777.5, 1777.6 and 1777.7: These sections generally address apprenticeship requirements that must be met by contractors, and penalties that may be assessed for violation of those requirements. Section 1773.3, a renumbered version of pre-1975 Labor Code section 3098, requires an awarding body whose public works contract will employ apprentices to send a copy of the award to the Division of Apprenticeship Standards within five days of the award.

Labor Code Sections 1812 and 1813: These provisions, which existed prior to 1975, deal with contractor violations of the 8-hour work day limit and 40-hour work week limit. Section 1813 requires the awarding body to cause stipulations regarding these requirements to be placed in the contract, to take cognizance of violations and to report such violations to the Division of Labor Standards Enforcement.

Labor Code Section 1861: This section, which existed prior to 1975, requires contractors to sign and file with the awarding body a certification that the contractor will provide workers' compensation or equivalent insurance.

Public Contract Code Section 22002 (previously section 21002): For purposes of contracting by public agencies and school districts, this section added a definition of "public project:"

> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, lease, or operated facility.
> (2) Painting or repainting of any publicly owned, leased, or operated facility.
> (3) Construction, erection, improvement or repair of dams, reservoirs, powerplants and electrical transmission lines of 230,000 volts or higher that are publicly owned utility systems.

"Public project" does not include maintenance work; for purposes of the section, "maintenance work" includes:

> (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
> (2) Minor repainting.
> (3) Resurfacing of streets and highways at less than one inch.
> (4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

For purposes of the chapter, "facility" is defined as any plant, building, structure, ground facility, publicly owned utility system as limited above, real property, streets and highways, or other public work improvement.

Regulations

California Code of Regulations, Title 8, sections 16000 through 17264, as pled in the test claim, implement and make specific the statutory provisions cited above.

Alleged Executive Orders

School Facility Program Substantial Progress and Expenditure Audit Guide (May 2003): This document, prepared by the Department of General Services' Office of Public School Construction (OPSC), was developed to assist school districts in meeting program reporting requirements for the School Facilities Program (SFP).

Section 3.9 of the document states that for SFP projects that require the district to implement a Labor Compliance Program, the district must submit a copy of the Department of Industrial Relations approved Labor Compliance Program to which the project conformed and, if applicable, a copy of the third party provider contract. The district must also be prepared to submit, upon request: 1) all bid invitation and contracts that must contain language alluding to Labor Code section 1770 through 1780 compliance and verification; 2) evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set in Labor Code section 1770 through 1780; and 3) evidence of weekly submittals of certified copies of payroll for all contractors and subcontractors. If the district

uses its own employees to implement and administer the Labor Compliance Program, the district must account for the name of the district employee performing the Labor Compliance Program duties, the salary and benefits of that employee including transportation costs, and a specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

AB 1506 Labor Compliance Program Guidebook (February 2003): The guidebook was issued by the DIR to address newly enacted Labor Code section 1771.7. Page 3 of the document states:

> This guidebook was prepared by the [Division of Labor Standards Enforcement] and knowledgeable individuals in the private and public sector with a wide range of experience in school district issues, construction projects, public works and labor compliance. This guidebook was intended to facilitate requests to the DIR director from awarding bodies seeking approval of their own LCPs to conform to the requirements of Labor Code section 1771.7.
>
> This guidebook is not intended to be used as a substitute for the full text of statutes and regulations which comprise the prevailing wage system, or the continually developing body of law which prevailing wage enforcement has generated over the past six decades and will continue to generate in the future. Rather, this information should be viewed as a framework for implementation of an effective LCP designed to enforce prevailing wage requirements consistent with the practice of DLSE.

The guidebook summarizes the relevant provisions of the Labor Code and Title 8, California Code of Regulations, provides instructional materials and practical advice for implementing an LCP, identifies contact and resource information, includes appendices with recommended forms, commonly used terms and a checklist of labor law requirements.

Antioch Unified School District Labor Compliance Program (January 17, 2003): This document was provided as an example of a recently approved LCP, and the DIR stated in its transmittal of the document that Antioch's LCP manual "could be a model for other districts because it contains the most up-to-date information about compliance with labor standards on public works projects."

Prior Test Claim

On December 6, 2007, the Commission heard and denied the *Prevailing Wages (03-TC-13)* test claim, filed by the City of Newport Beach. This test claim alleged various changes to the CPWL, but was applicable only to local agencies and did not show that the underlying decisions to undertake public works projects subject to the CPWL are mandated by the state. The Statement of Decision found the following:

> The provisions of the CPWL are only applicable when a local agency contracts with a private entity to carry out a public works project. The test claim statutes and regulations modified several provisions of the CPWL, and local agencies that contract out for their public works projects are affected by these changes. However, the cases have consistently held that

when a local agency makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed.

Public works projects can arise in a myriad of ways, but there is no evidence in the record or in law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. In fact, like the exercise of eminent domain in *City of Merced*, the local agency has discretion to undertake public works projects. The courts have underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision that requires the costs to be incurred. Therefore, the Commission finds that the test claim statutes and regulations do not mandate a new program or higher level of service, and thus do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6.

Claimant's Position

Claimant asserts that the test claim statutes and regulations result in school districts and community college districts incurring costs mandated by the state by creating new state-mandated duties related to the uniquely governmental function of providing for public works. When contracting with third parties for public works as an awarding body, school districts, county offices of education and community colleges are required to do the following:

1. Obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for public works, pursuant to Labor Code section 1773 and Title 8, California Code of Regulations, section 16202.
2. Ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations, pursuant to Title 8, California Code of Regulations, section 16204.
3. Request from the Director of Industrial Relations a coverage determination regarding a specific project or type of work to be performed, pursuant to Title 8, California Code of Regulations, section 16001.
4. File a petition for review of a determination of the Director of Industrial Relations of any rate or rates, pursuant to Title 8, California Code of Regulations, section 16302.
5. Appeal an incorrect determination made by the Director of Industrial Relations, pursuant to Labor Code section 1773.4 and Title 8, California Code of Regulations, section 16002.5.
6. Pursuant to Labor Code section 1773.2, include a statement of prevailing rates of per diem wages in the call and advertisements for bids, the bid specifications and in the public works contract itself, or, in lieu of those requirements, the district may include in the call for bids, bid specifications and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in its principal office, and in that case the district must post the statement of prevailing wages at all job sites.

7. Maintain records of ineligible contractors and subcontractors and refuse to grant them public works projects of the district, pursuant to Labor Code section 1777.1 and Title 8, California Code of Regulations, sections 16800 through 16802.

8. Send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies, pursuant to Labor Code section 1777.3.

9. Inspect and audit payroll records of contractors and subcontractors working on district public works projects, when necessary or requested by the Director of Industrial Relations, pursuant to Labor Code section 1776.

10. Obtain and provide copies of the payroll records of the contractors and subcontractors working on district public works projects, when requested by appropriate parties; the records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number, pursuant to Labor Code section 1776 and Title 8, California Code of Regulations, section 16402.

11. Pay the reasonable fees of a third party when contracting with that third party to initiate and enforce a Labor Compliance Program (LCP), pursuant to Labor Code sections 1771.5 and 1771.7.

12. For works commencing on or after April 1, 2003, oversee compliance with all the requirements of Labor Code sections 1771.5 and 1771.7, Title 8, California Code of Regulations, sections 16425 through16439, and Chapters 2, 3 and 5 of the AB 1506 Labor Compliance Program Guidebook ("Program Guidebook") when contracting with a third party to initiate and enforce an LCP, including but not necessarily limited to the withholding of contract payments and collecting and disbursing penalties and wages at the direction of the third party LCP.

13. Pursuant to Title 8, California Code of Regulations, section 16426, subdivision (a), when seeking approval of an LCP, submit evidence of the district's ability to operate its LCP and offering evidence on the following factors:

    a. Experience and training of the awarding body's personnel on public works labor compliance issues.

    b. The average number of public works contracts the awarding body annually administers.

    c. Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved.

    d. The awarding body's record of taking cognizance of Labor Code violations and withholding in the preceding five years.

    e. The availability of legal support for the LCP.

    f. The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body.

g. The method by which the awarding body will transmit notices to the Labor Commissioner of willful violations as defined in Labor Code section 1777.1, subdivision (d).

14. Complete a request for approval deemed by the Director of DIR to be deficient, or make other corrections as required, and resubmitting the request for approval of a LCP, pursuant to Title 8, California Code of Regulations, section 16426, subdivision (b).

15. Submit a request for an extension of an LCP at least 30 days prior to the anniversary date of the initial approval, pursuant to Title 8, California Code of Regulations, section 16426, subdivision (c).

16. Make a written finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, an LCP as described in Labor Code section 1771.5, subdivision (b), pursuant to Labor Code section 1771.7, subdivision (d)(1). Transmit a copy of such written finding for school districts to the State Allocation Board, in the manner determined by that board, pursuant to Labor Code section 1771.7, subdivision (d)(2)(A). Transmit a copy of such written finding for community college districts to the Director of DIR, in the manner determined by DIR, pursuant to Labor Code section 1771.7, subdivision (d)(3).

17. Comply with all the requirements of an LCP, when initiated and enforced by the district, pursuant to Labor Code sections 1771.5 or 1771.7 (for works commencing on or after April 1, 2003), Title 8, California Code of Regulations, sections 16425 through 16439, and Chapters 2, 3, and 5 of the Program Guidebook. These requirements include:

    a. Place in all bid invitations and public works contracts appropriate language concerning the requirements of the prevailing wage laws comprising Labor Code sections 1720 through 1861.

    b. Conduct a pre-job conference with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract.

    c. Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

    d. Review and, if appropriate, audit payroll records to verify compliance with prevailing wage laws. These investigations shall be conducted by monitoring certified payroll records, investigating complaints from workers, and monitoring agencies and contractors, pursuant to the Program Guidebook, Chapter 4, Parts (A) and (B). Upon conclusion of the audit, prepare audits and findings and obtain the approval of recommended forfeitures from the Labor Commissioner.

    e. Withhold contract payments when payroll records are delinquent or inadequate.

    f. Withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred. Withhold contract payments when payroll records are delinquent or inadequate, pursuant to Chapter 3 of the Program Guidebook.

g. Serve on the contractor, any affected subcontractor, and any bonding company issuing a bond securing the payment of wages, a Notice of Withholding of Contract Payments using the form attached in Appendix 2 of the Program Guidebook.

h. Mail a notice to DIR on a form titled Notice of Transmittal, found in Appendix 3 of the Program Guidebook, pursuant to Chapter 4 of the Program Guidebook.

i. When a party requests review, mail a form titled Notice of Opportunity to Review Evidence, found in Appendix 4 of the Program Guidebook, pursuant to Chapter 4 of the Program Guidebook.

18. Provide contractors and subcontractors, bonding companies and sureties with Notice of Withholding of Contract Payments, using the form found in Appendix 2 of the Program Guidebook, when minimum wage law violations are discovered by the district, pursuant to Labor Code section 1771.6 and Title 8, California Code of Regulations, section 17220. The notice shall be in writing and include the following information:

a. a description of the nature of the violation and basis for the notice;

b. the amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1, using the form found in Appendix 4 of the Program Guidebook;

c. the name and address of the office to whom a Request for Review may be sent;

d. information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments;

e. notice of Opportunity to request a settlement meeting under Title 8, California Code of Regulations, section 17221; and

f. a statement appearing in bold, or another type face that makes it stand out from other text, to the effect that failure to submit a timely request for review will result in a final order that is binding on the contractor and subcontractor, and on the bonding company.

19. Complete and mail a Notice of Transmittal, as found in Appendix 3 of the Program Guidebook, to the DIR to begin the administrative review process.

20. Defend Notices to Withhold Contract Payments in administrative review proceedings and in court, pursuant to Chapter 4, paragraph iv(d) of the Program Guidebook.

21. Pursuant to Chapter 6 of the Program Guidebook, when investigating worker complaints of underpayment of prevailing wage rates: a) gather supporting documents from all available sources and analyze them for authenticity; and b) conduct a complete certified payroll record and/or project audit. This includes

reviewing certified payroll records for errors, inconsistencies, discrepancies, falsification, misclassification, under-reporting, and any other omissions that render the records inaccurate where needed by comparing the inspector of records' daily log with all available records.

22. Pursuant to Chapter 6 of the Program Guidebook, conduct investigations on an as-needed basis by:
    a. Calculating back wages and penalties.
    b. Reviewing findings with the contractor and any subcontractor.
    c. Writing a complete summary of the investigation with a statement of findings and recommended action for submission to DIR's Division f Labor Standards Enforcement for approval of withholdings.
    d. Conducting settlement negotiations.
    e. Testifying on behalf of the school district in appeal hearings and litigation.
    f. Attending pre-bid and job-start meetings and monitoring active construction projects.
    g. Interviewing workers to validate complaints.
23. Pursuant to Chapter 9 of the Program Guidebook, conduct audits on a random or as-needed basis, to include comparing certified payroll records to source documents such as front and back copies of canceled checks, time cards, copies of pay check stubs, payroll registers, personnel sign in sheets, daily logs and any other document which authenticates or corroborates that which has been reported.
24. Pursuant to Chapter 9 of the Program Guidebook, prepare cases and documentation to include:
    a. Copies of workers' complaints.
    b. Copies of all correspondence to the contractor.
    c. Certified payroll records.
    d. Inspector's daily log.
    e. Correct prevailing wage determination and applicable increases.
    f. Scope of work for trade classifications used.
    g. Tabulation of bids.
    h. Notice to proceed.
    i. Notice of Completion (if applicable).
    j. Surety company information.
    k. Contractor's previous record of violations (if applicable).
    l. The Notice of Withholding of Contract Payments (if applicable).
    m. Release of Notice of Withholding of Contract Payments (if applicable).

n. Memo(s) to file.

25. Pursuant to Section 3.9 of the School Facility Program Substantial Progress and Expenditure Audit Guide ("Audit Guide"), in the event of any postaward audit of a school district by the State Allocation Board, pursuant to Labor Code section 1771.7, subdivision (d)(2)(C), submit a copy of the DIR approved LCP to which the project conformed and a copy of any third party provider contract.

26. Pursuant to Section 3.9 of the Audit Guide, at the time of an OSPC audit, be prepared to submit, upon request, the following:

    a. All bid invitations and contracts that must contain language alluding to Labor Code sections 1770 through 1780 compliance and verification.

    b. Evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set forth in Labor Code sections 1770 through 1780.

    c. Evidence of weekly submittals of certified copies of payrolls for all contractors and subcontractors.

27. Pursuant to Section 3.9 of the Audit Guide, if a district elects to use its own employees for its LCP, provide the following additional information:

    a. The name of the district employee performing the LCP duties.

    b. The salary and benefits of the employee including transportation costs.

    c. A specific breakdown of hours spent by project subject to the LCP requirements.

28. Report any suspected violations of the prevailing wage laws to the Labor Commissioner, pursuant to Labor Code section 1726.

29. Withhold contract payments for underpaid wages and for penalties when, through the district's own investigation, the district determines a violation of prevailing wage laws has occurred, pursuant to Labor Code section 1726.

30. Withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner, pursuant to Labor Code section 1727.

31. Retain amounts withheld to satisfy a Civil Wage and Penalty Assessment until receiving a final order no longer subject to judicial review, pursuant to Labor Code section 1727.

32. After July 1, 2001, comply with all due process requirements for the benefit of contractors and subcontractors when amounts are withheld pursuant to a Civil Wage and Penalty Assessment or a Notice of Withholding of Contract Payments, including the providing of proper and timely notices, allowing review of evidence relied upon, appearance and participation at hearings and the appeals therefrom, pursuant to Labor Code section 1742 and Title 8, California Code of Regulations, section 17220.

33. After July 1, 2001, respond to petitions for writs of mandate filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including

the retention of counsel to file timely responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment, pursuant to Labor Code section 1742.

34. Grant and participate in settlement meetings requested by contractors or subcontractors in an attempt to settle any disputed issue before formal hearing procedures, pursuant to Labor Code section 1742.1 and Title 8, California Code of Regulations, section 16413.

35. As a necessary party, appear and participate in legal proceedings resulting from any action against contractor or subcontractor filed by a joint labor-management committee for failure to pay prevailing wages, pursuant to Labor Code section 1771.2.

36. Furnish copies of payroll records of a contractor or subcontractor to a joint labor-management committee, when requested, obliterated only to prevent disclosure of social security numbers, pursuant to Labor Code section 1776.

The original claimant on this claim, Clovis Unified School District, estimated that the district has incurred, or will incur, in excess of $200 in staffing and other costs in excess of revenues annually, for the period from July 1, 2000 through June 2002, to implement the new duties mandated by the state, for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement. In an amendment filed on July 31, 2003, page 7 of the Second Declaration of William McGuire states:

> To the extent that Clovis Unified School District commences a public works project subject to Labor Code Section 1771.7, it is estimated that Clovis Unified School District will incur in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

In that amendment, an additional declaration was provided by Thomas J. Donner from the Santa Monica Community College District alleging costs mandated by the state.

On September 2, 2008, Grossmont Union High School District filed a declaration from Scott H. Patterson, Deputy Superintendent, Business Services, for the district estimating costs in excess of $1000 for fiscal years 2001-2002 and 2002-2003 to implement the duties described above.

The original claimant, Clovis Unified School District, filed rebuttal comments to the comments submitted by the Department of Finance, the Department of Industrial Relations, and the Department of General Services, Office of Public School Construction. These rebuttal comments are addressed, as necessary, in the following analysis.

Position of Department of Finance

The Department of Justice filed comments on behalf of the Department of Finance, generally stating that the test claim statutes do not impose a new program or higher level of service on school districts or community college districts since there is no reimbursable mandate for costs

of programs or services incurred as a result of the exercise of local discretion, citing *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783. The Department then provides a specific response to each claim; those responses are addressed, as necessary, in the following analysis.

With regard to the test claim amendment addressing Labor Code section 1771.7, the Department states the section does not create a state mandate because districts voluntarily participate in the underlying program, i.e., the construction of schools with state bond money, citing *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 740. Even assuming there was a mandate, the Department points out that the state has provided additional funds for the costs of LCPs, and LCPs also generate revenues and costs savings. The Department argues that the claimant has not shown that it has any costs above these additional funds, revenues and cost savings.

The Department concurred with the draft staff analysis and made the following additional comments:

> [W]e note that the State School Deferred Maintenance Program (Education Code section 17582, et seq.) and the Community Colleges Facility Deferred Maintenance and Special Repair Program (Education Code section 84660 et seq.) provide State-matching funds, on a dollar-for-dollar basis, to assist school and community college districts with expenditures for major repair or replacement of existing school building components. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have received funding to cover the State's share of any related costs resulting from the activities as recommended by the Commission to be a reimbursable state-mandated program on pages 70-71 of the draft staff analysis. We suggest the Commission consider the availability of funding provided from the State School Deferred Maintenance Program and the Community Colleges Facility Deferred Maintenance and Special Repair Program to school districts and community colleges as offsetting revenues, should the Commission adopt a decision finding a reimbursable mandate.

These comments are addressed, as necessary, in the following analysis.

Position of Department of Industrial Relations (DIR)

The DIR states that, since 1975, the state has taken on more of local agencies' historic responsibilities for determining and enforcing prevailing wages to make the prevailing wage duties clearer and less onerous, and leaving behind only minimal recordkeeping tasks. This type of shift from local agencies to the state does not trigger reimbursement under the requirements of article XIII B of the California Constitution. DIR points out that to the extent there has been any expansion in the scope of public works, the consequent obligation to pay prevailing wages directly affects private contractors and only indirectly affects local governments. DIR then provides specific responses to each claim, which are addressed, as necessary, in the following analysis.

In additional comments, DIR applies the principles of the *Department of Finance v. Commission on State Mandates (Kern High School District)* case to the test claim, concluding that claimant has not met its burden of showing districts are compelled to participate in the

underlying programs, i.e., either engage in construction of school facilities or engage in such projects via contract. DIR further notes that state funding for school construction is already provided through the State Allocation Board, which allocates money to districts based on formulas that pay between 40% to 80% of the cost of construction. DIR argues that the claimant has not made a credible case that such funding does not take care of whatever costs they have incurred.

With regard to the test claim amendment addressing Labor Code section 1771.7, the DIR states that no reimbursement is required because the newly created LCPs are voluntary programs for local school districts, and districts already receive state construction bond funding for their activities from the State Allocation Board. DIR further points out that district LCPs also are allowed to retain any penalties assessed and collected while enforcing the CPWL.

The DIR filed comments on the draft staff analysis stating that:

- Any mandate that exists is so negligible as to not require subvention pursuant to *Kern High School District*, since partial state funding already exists for maintenance and repair projects in school districts and community college districts, and such funding can be used for the newly mandated tasks.
- Retaining certified payroll records for six months at most results in a negligible increase in levels of service, which should be considered de minimis.
- Inserting a clause in public works contracts pursuant to Labor Code section 1776, subdivision (h), at most results in a negligible increase in levels of service.
- Retaining contract payments for certified payroll record violations pursuant to Labor Code section 1776, subdivision (g), is not a mandate since it does not require any activity of the awarding body. Additionally, this requirement does not result in a new program or higher level of service because the obligation already was subsumed in Labor Code section 1727 which required "the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to … the terms of this chapter," and Labor Code section 1776, subdivision (g), is part of the same chapter as section 1727.
- Regarding the requirement that districts put certain projects out for bid, Public Contract Code section 22030 allows a school district or community college district to decide whether to subject itself to the thresholds set forth in the Uniform Public Construction Cost Accounting Act (UPCCAA) or the other work limits thresholds set forth in sections 20114 or 20655 of the Public Contract Code. Therefore, any project that does not create a mandate to contract with private parties under both sets of thresholds should not be considered a mandate for subvention purposes.
- The Commission should require a new declaration from the claimant to justify the test claim, since in the limited circumstances in which a mandate might exist to contract with private parties for a public project, the three alleged mandates cause virtually no increased costs.

These comments are addressed, as necessary, in the following analysis.

Position of Department of General Services, Office of Public School Construction

The Office of Public School Construction (OSPC), in commenting on the test claim amendment addressing Labor Code section 1771.7, states that participation by a school district in the School Facility Program (SFP), established by Chapter 12.5 of the Education Code, is voluntary:

> The Education Code does not compel a district to obtain funding from the State through the SFP as a condition of building schools. School districts may choose to build facilities through the use of district raised funds. Program elements are only required if a district chooses to participate in the program. Additionally, Labor Code ... Section 1771.7 states "an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of 2002 ... for a public works project, shall initiate and enforce ... a labor compliance program".[101]

The OSPC further states that the State Allocation Board (SAB) has authority to increase the per pupil grant amount to accommodate the State's share for the additional costs due to the initiation and enforcement of an LCP; the increases were approved by the SAB on July 2, 2003, and are currently being provided.

OSPC filed an amendment to its September 15, 2003 comments addressing new bond money for public school construction that subsequently became available. The comments were amended to state:

> ... Additionally, Labor Code ... Section 1771.7 states "an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of *either* 2002 *or 2004* ... for a public works project, shall initiate and enforce ... a labor compliance program."
>
> The OSPC further states that the State Allocation Board (SAB) has authority to increase the per pupil grant amount to accommodate the State's share for the additional costs due to the initiation and enforcement of a LCP *for school projects funded from Proposition 47 or Proposition 55. Proposition 1D does not require school districts to enforce a LCP; therefore, projects that include LCPs are not eligible for funding increases under this bond.*

These comments are addressed as necessary in the following analysis.

Interested Person -- State Building and Construction Trades Council of California (AFL-CIO)

The State Building and Construction Trades Council (SBCTC) filed comments on the test claim as an interested person, pursuant to Title 2, California Code of Regulations, section 1181.1, subdivision (*l*). The SBCTC states that the test claim should be denied for the following reasons:

1. Any "mandate" imposed by the CPWL is on private contractors, not the local agency. It is possible that if private contractors have higher labor costs, such costs might be passed on to their customers; however, the contractor's cost of paying higher wages to workers

[101] Comments from Department of General Services, Office of Public School Construction, Luisa M. Park, Executive Officer, September 15, 2003, page 1.

on a project may well be offset by the increased skill and productivity of those workers. Several recent studies conclude that the prevailing wage law does not actually increase total school construction costs, and the claimant has presented no evidence to the contrary. SBCTC provided a copy of one study: "A Comparison of Public School Construction Costs" by Peter Philips, Ph.D., Professor of Economics, University of Utah, February, 2001.[102]

2. Although the CPWL does impose minor direct costs on school districts to administer and enforce the law, what has occurred since 1975 is the opposite of an unfunded state mandate since the state has taken upon itself responsibilities that were formerly borne by local agencies — i.e., determining prevailing wage rates and enforcing the CPWL.

3. It is correct to state that there has been some expansion in the definition of "public work" since 1975; however, many of the changes to that definition were actually clarifications of the pre-1975 statutory language and claimant has not presented any evidence that these minor changes have had any practical effect on school district construction projects.

The SBCTC did not file comments on the draft staff analysis.

[102] The claimant is not seeking reimbursement for the cost of increased salaries, which would not be reimbursable in any case pursuant to *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[103] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[104] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[105]

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[106] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[107]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[108] To determine if the program is new or imposes a higher level of service, the test claim requirements must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes.[109] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[110]

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[103] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[104] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[105] *County of San Diego v. State of California (County of San Diego)* (1997) 15 Cal.4th 68, 81.

[106] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[107] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[108] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[109] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[110] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[111]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[112] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[113]

The analysis addresses the following issues:

- Do the test claim statutes, regulations or alleged executive orders impose a state-mandated program on K-12 school districts or community college districts within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes or regulations impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes or regulations impose costs mandated by the state within the meaning of Government Code section 17514 and article XIII B, section 6 of the California Constitution?

Issue 1: Do the test claim statutes, regulations or alleged executive orders impose a state-mandated program on K-12 school districts or community college districts within the meaning of article XIII B, section 6 of the California Constitution?

For the test claim statutes, regulations or alleged executive orders to impose a state-mandated program, the language must order or command a school district or community college district to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the district has made an underlying discretionary decision causing the requirements to apply, or where participation in the underlying program is voluntary, courts have held that resulting new requirements do not constitute a reimbursable state mandate.[114] Stated another way, a reimbursable state mandate is created when the test claim statutes or regulations establish conditions under which the state, rather than a local entity, has made the decision requiring the district to incur the costs of the new program.[115]

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[111] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[112] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[113] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817 (*City of San Jose*).

[114] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[115] *San Diego Unified School Dist., supra* (2004) 33 Cal.4th 859, 880.

The claimant asserts the test claim statutes, regulations and alleged executive orders require districts to perform new activities to comply with state prevailing wage requirements, the costs of which are reimbursable under article XIII B, section 6. Since the provisions of the CPWL are only applicable to public works projects performed under contract, and not to work carried out by a public agency with its own forces,[116] the analysis must first address whether the state is requiring a school district or community college district to engage in any public works projects or to contract out for such projects. Then, the alleged new activities must be analyzed to determine whether they are required or mandated by the plain language of the test claim statutes, regulations, or alleged executive orders.

Do Districts Have Discretion to Undertake Public Works Projects?

Types of Public Works Projects Subject to CPWL

The Labor Code sets forth the types of projects that are considered "public works," subject to the CPWL. Prior to 1975, public works projects subject to prevailing wages generally included: 1) construction; 2) alteration; 3) demolition; 4) repair work; 5) work done for irrigation, utility, reclamation and improvement districts; 6) street, sewer or other improvement work; 7) laying of carpet; and 8) maintenance work.[117] Since 1975, the test claim statutes added new types of public works projects:

- Labor Code section 1720 was modified to add:
  - public transportation demonstration projects (effective August 7, 1989);
  - design and preconstruction, including land surveying (effective January 1, 2001); and
  - installation projects (effective January 1, 2002).
- Effective January 1, 1981, Labor Code section 1720.2 was amended to include projects done under private contract where the property subject to the contract is privately owned but upon completion of the construction work more than 50 percent of the property is leased to the state or a political subdivision for its use *and* the construction work is performed according to plans or specifications furnished by the state or a political subdivision with a lease agreement that is entered into between a lessor and the state or political subdivision as lessee during or upon completion of the project.
- Effective January 1, 2000, Labor Code section 1720.3 was amended to state that contracts for the removal of refuse from a public works construction site entered into by "any political subdivision" – which includes K-12 school districts and community college districts – are public works projects.

Each of these new types of public works projects is now subject to the CPWL.[118] The timing for CPWL coverage is significant here for purposes of the mandates analysis. The pre-existing

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[116] Labor Code section 1771.

[117] Labor Code sections 1720 and 1771 in effect as of January 1, 1975.

[118] Labor Code section 1771: "... not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed ... shall be paid to all workers employed on public works."

public works projects were already subject to the pre-existing CPWL administrative requirements, while the new public works projects only became subject to and therefore triggered the pre-existing requirements at the time they were enacted.[119] Thus, for pre-existing public works projects, only the *newly-imposed* CPWL administrative requirements that are claimed could be subject to reimbursement. For *newly-covered* public works projects, however, all CPWL administrative requirements *that are claimed*, both pre-existing and new, could be subject to reimbursement.

Discretion to Undertake Public Works Projects

The foregoing provisions show that the CPWL covers a broad range of public works projects. The decision to undertake such projects could arise in a myriad of ways, from a district-level decision to an initiative enacted by the voters.

With regard to K-12 school districts, Education Code section 17593 requires those districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Moreover, Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Education Code section 17002 defines "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction. The instrument shall not require capital enhancements beyond the standards for which the facility was designed and constructed.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. ...

Thus, both K-12 school districts and community college districts are required by statute to repair the school property of their districts. Since "property" includes "any external thing over which the rights of possession, use, and enjoyment are exercised,"[120] the requirement to repair includes real property as well as facilities owned by the district. Moreover, because the term

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[119] See footnote 97 regarding effective date for CPWL coverage of design and pre-construction, including land surveying.

[120] Black's Law Dictionary, Seventh Edition, 1999, page 1232, column 2.

"repair" is defined as "to restore to sound condition after damage or injury" and "to renew or refresh,"[121] staff finds that "repair" includes "maintenance" for purposes of these provisions.

These statutes, therefore, require K-12 school districts and community college districts to repair and maintain their facilities and property.

Aside from the above statutory requirements, however, there is no evidence in the test claim statutes, regulations, alleged executive orders, or in the record that the state has required districts to undertake other public works projects that *do not* involve repair or maintenance, including the newly-covered public works projects. In fact, with regard to new construction of school buildings, the Second District Court of Appeal has stated: "Where, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[122]

Absent such legal compulsion, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[123]

In the case of *San Diego Unified School Dist.*, the test claim statutes required school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[124] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[125] Regarding expulsion recommendations that were discretionary on the part of the district, the court stated that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[126] Ultimately, however, the Supreme Court decided the discretionary expulsion issue on an alternative basis.[127]

There is no evidence in the record to indicate that failure to undertake public works projects that are not otherwise required by statute would result in certain and severe penalties such as double taxation or other draconian consequences as set out in the *Kern* case. Nor does the

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[121] Webster's II, New Collegiate Dictionary, 1999, page 939, column 2.

[122] *People v. Oken, supra,* 159 Cal.App.2d 456, 460.

[123] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

[124] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[125] *Id.* at pages 881-882.

[126] *Id.* at page 887, footnote 22.

[127] *Id.* at page 888.

record show that the circumstances here are similar to those faced by the *San Diego* court regarding school safety. Although school safety was mentioned in the context of the statutory repair and maintenance requirements, nothing in the record indicates that failure to undertake *other* public works projects that are not required in statute would result in unsafe schools.

Instead, staff finds that public works projects that are entered into for purposes other than repair and maintenance are discretionary, analogous to the situation in *City of Merced*. There, the issue before the court was whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill, when a local agency exercised the power of eminent domain.[128] The court stated:

> Whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[129]

The Supreme Court in *Kern High School District* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[130]

The Code of Civil Procedure provision that was cited in *City of Merced* states:

> Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.[131]

The Law Revision Commission's comment on this provision stated:

> Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent

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[128] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

[129] *Id.* at 783.

[130] *Kern High School District, supra,* 30 Cal.4th 727, 743.

[131] Code of Civil Procedure section 1230.030.

> domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. ...[132]

The holding in *City of Merced* applies in this instance. A K-12 school district's or community college district's decision to undertake a public works project, other than for repair or maintenance of school buildings and property, is analogous to the discretionary decision to acquire property via eminent domain, and there is no evidence in the law or in the record that districts are practically compelled to engage in such public works projects.

Therefore, staff finds that the state has required K-12 school districts and community college districts to undertake public works projects to repair or maintain facilities and property of K-12 school districts and community college districts, pursuant to Education Code sections 17002, 17565, 17593 and 81601. The state has *not* required these districts to undertake any other public works projects. Consequently, any prevailing wage requirements, *when triggered by a public works project that does not address repair or maintenance*, are not mandated by the state and are not subject to article XIII B, section 6.

Moreover, since repair and maintenance types of public works projects were covered by the CPWL prior to 1975, only those CPWL administrative requirements claimed that were imposed *on or after January 1, 1975*, could be subject to reimbursement.

Do Districts Have Discretion to Contract for Repair or Maintenance Public Works Projects?

Since the requirement to pay prevailing wages is limited to work performed under contract, the next question is whether the state requires K-12 school districts or community college districts to contract for public works projects for repair or maintenance of school facilities or property, or whether the district can use its own forces for the project. As more fully described below, the state sometimes requires districts to contract for repair and maintenance of school facilities and property, depending upon project variables and the laws under which the district operates.

The Public Contract Code governs when districts are required to contract with private entities, and generally requires school districts and community college districts to contract with the lowest responsible bidder for construction, repairs and maintenance.[133] There are exceptions, however. For instance, when emergency repairs are needed for any facility to permit the continuance of existing classes or to avoid danger to life or property, the governing board of a school district or community college district is allowed to use its own forces to make such repairs.[134] In addition, the governing board of a school district or community college district is allowed to use its own forces to make repairs and other improvements under certain labor hour or material cost limits. For K-12 school districts, Public Contract Code section 20114 provides the following labor hour or material cost limits:

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[132] California Law Revision Commission comment, 19 West's Annotated Code of Civil Procedure (1982 ed.) following section 1230.030, p. 414.

[133] Public Contract Code sections 20111 and 20651.

[134] Public Contract Code sections 20113 and 20654.

(a) In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20115[135, 136] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20115, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of material does not exceed twenty-one thousand dollars ($21,000).
(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

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[135] Public Contract Code section 20115 defines "maintenance" in this instance as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purpose in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." This includes, but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." These provisions express the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20114.

[136] For purposes of the Labor Code, "maintenance" is similarly defined:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
(2) Carpentry, electrical, plumbing, glazing, touchup painting, and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continually usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.
EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.
EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.
(3) Landscape maintenance. See Public Contract Code Section 21002 [subsequently renumbered to section 22002].
EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded. (Title 8, Cal. Code Regs., tit. 8, § 16000.)

For community college districts, Public Contract Code section 20655 provides the following labor hour or material cost limits:

> (a) In each community college district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20656[137] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any district whose number of full-time equivalent students is 15,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20656, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of materials does not exceed twenty-one thousand dollars ($21,000).
> (b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

Notwithstanding the above provisions, a flat dollar threshold for public projects, as defined in Public Contract Code section 22002,[138] is established when a K-12 school district or

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[137] Public Contract Code section 20656 defines "maintenance" for this purpose in the same manner as Public Contract Code section 20115. Section 20656 expresses the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20655.

[138] Subdivision (c) defines "public project" as:

> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and *repair* work involving any publicly owned, leased, or operated facility.[138]
> (2) Painting or repainting of any publicly owned, lease, or operated facility.
> (3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher. (Emphasis added.)

Subdivision (d) states that "public project" does not include "maintenance work" which includes all of the following:

> (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
> (2) Minor repainting.
> (3) Resurfacing of streets and highways at less than one inch.
> (4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.
> (5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams,

community college district operates under the Uniform Public Construction Cost Accounting Act (UPCCAA).[139] Public Contract Code section 22001 sets forth the following findings and declarations regarding the UPCCAA:

> The Legislature finds and declares that there is a statewide need to promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state. This chapter provides for the development of cost accounting standards and an alternative method for the bidding of public works projects by public entities.

Section 22030 provides that the UPCCAA is only applicable to a district whose governing board has by resolution elected to become subject to its procedures and has notified the State Controller of the election. Once the district has elected to become subject to the UPCCAA, in the event of a conflict with any other provision of law relative to bidding procedures, the alternative bidding procedures and cost threshold under the UPCCAA for public projects, as defined, shall apply.[140]

The UPCCAA provides that public projects, which exclude maintenance, of $30,000 or less may be performed by a school district or community college district by its own forces.[141] In cases of emergency when repair or replacements are necessary, the work may be done by a district with its own forces.[142] Thus, for those districts subject to the UPCCAA, when the public project is not an emergency, contracting is required for a public project, as defined, when the cost of such project will exceed $30,000. When the project is for maintenance or other work that does not fall within the definition of public project, districts subject to the UPCCAA *may* use the bidding procedures set forth under the UPCCAA and in that situation would likewise be required to contract when the cost of the project will exceed $30,000.[143] Here, repair or maintenance projects – those that are legally required by Education Code sections 17002, 17565, 17593 and 81601 as noted above – could fall under the UPCCAA definition for public project, or may not. But in either case, for districts subject to the UPCCAA, when the project is not an emergency, contracting is required only when the cost of the project will exceed $30,000.

The Department of Industrial Relations (DIR) states that section 22030 of the Public Contract Code allows a school district to decide whether to subject itself to the UPCCAA thresholds or the K-12 and community college thresholds and thus being subject to one or the other is a

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> reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

[139] Public Contract Code sections 22000 et seq.

[140] Public Contract Code section 22030.

[141] Public Contract Code section 22032; prior to January 1, 2007, the dollar limit for public projects that could be performed by the district was $25,000.

[142] Public Contract Code section 22035.

[143] Public Contract Code section 22003.

choice.[144] DIR concludes that "any project that does not create a mandate to contract with private parties under both sets of thresholds should not be considered a mandate for subvention purposes."[145]

Staff agrees that there is a choice on the part of the school district to become subject to the UPCCAA. However, staff disagrees with DIR's conclusion that unless the project is required to be contracted under both sets of thresholds it should not be considered a mandate for subvention purposes.

A district choosing the UPCCAA is subject to an entirely different set of bidding and accounting procedures for public projects, as defined, and is required to adopt an informal bidding ordinance for public projects of $125,000 or less.[146] And, where there is a conflict with any other provision of law relative to bidding procedures on public projects, the alternative bidding procedures set forth in the UPCCAA, including the $30,000 threshold, are controlling.[147] Thus, once the election is made, both the state and local UPCCAA rules are in place.

DIR appears to be reading a requirement into the law that is not there. A basic rule of statutory construction requires that a statute be given its plain meaning, and express requirements that the Legislature has not placed in the statute may not by implication be brought into a statute's interpretation.[148] The Legislature has given districts a choice to be subject to the UPCCAA, and a public works project is *either* subject to the labor hour/material cost thresholds, which vary significantly depending on the size of the district and the type of project, *or* the UPCCAA $30,000 project threshold, but not both. In either case, the CPWL program requirements will be triggered at the applicable threshold, and variables from the project itself will determine whether the threshold is reached. A district's decision to fall within the UPCCAA – a decision that may not have anything to do with a particular public project – does not operate as a trigger or a limit to what may be reimbursable. To require the district to apply both sets of thresholds each time it undertakes a project for purposes of determining the point at which subvention is allowed is not consistent with mandates case law or the purpose of article XIII B, section 6. Consequently, staff concludes that the threshold at which a project must be let to contract depends upon the applicable Public Contract Code bidding procedures under which the district operates.

Accordingly, staff finds that the state has required K-12 school districts and community college districts to undertake public works projects to repair or maintain their facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, via contract under the following circumstances:

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[144] Letter from Anthony Mischel, Attorney At Law, Department of Industrial Relations, April 14, 2008, page 4.

[145] *Ibid.*

[146] Public Contract Code section 22034.

[147] Public Contract Code section 22030.

[148] *In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and

    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or

    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.

2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and

    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.

3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Thus, repair or maintenance public works projects, but only when contracted for under the circumstances set forth above, are not discretionary. Moreover, since repair and maintenance public works projects were covered by the CPWL prior to 1975, only those CPWL administrative requirements claimed, that were imposed *on or after January 1, 1975*, could be subject to reimbursement.

Do the Test Claim Statutes, Regulations and Alleged Executive Orders Mandate Any Activities When a District is Required to Contract for Repairs or Maintenance of School Buildings or Property?

The next question is whether the plain language of the test claim statutes, regulations or alleged executive orders, on or after January 1, 1975, mandates any activities on K-12 school districts or community college districts when a district is required by law to contract for repair or maintenance public works projects.

A. Determining Prevailing Wage Coverage and Rates

1. Obtain Correct Prevailing Wage Rates – Labor Code Section 1773 and Title 8, California Code of Regulations, Sections 16202 and 16204

Labor Code section 1773 states in relevant part:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director of Industrial Relations.

Section 16202 of the regulations states in relevant part:

(a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

Section 16204 of the regulations, dealing with effective dates of rate determinations and rates, states in relevant part:

(a)(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

The plain language of this regulation requires the awarding body to "ensure" that the correct determination is used. This provision does not impose the activity of ensuring that the Director of Industrial Relations made a correct determination, as claimant asserts; rather it imposes the activity of ensuring that the appropriate wage rates, as determined by Director of Industrial Relations and as obtained by the awarding body, are properly used in the contract.

Thus, the plain language of the statute and regulations cited require the awarding body to obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract.

2. Coverage Determinations – Title 8, California Code of Regulations, Section 16001

Section 16001 of the regulations states in relevant part:

(a)(1) Any interested party … *may* file with the Director of Industrial Relations … a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as a public works under the Labor Code. …

(2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director … any documents, arguments, or authorities it *wishes* to have considered in the coverage determination process. (Emphasis added.)

Thus, the plain language of this provision shows that an awarding body may, but is not required to, request a coverage determination from the Director of Industrial Relations. The awarding body must provide documentation to the Director by a date certain if it *wishes* to have that documentation considered. Thus, no activities are required of the awarding body by this regulation.

3. Review of Prevailing Wage Rate Determination – Title 8, California Code of Regulations, Section 16302

Section 16302 of the regulations provides that an interested party, including an awarding body, "*may* file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director …" (Emphasis added.) Thus, the awarding body is not required to file such a petition, and no activities are required.

4. Appeal of Public Work Coverage Determination – Labor Code Section 1773.4 and Title 8, California Code of Regulations, Section 16002.5

Section 16002.5 of the regulations, as it interprets Labor Code section 1773.4, provides that an interested party, including an awarding body, "*may* appeal to the Director of Industrial Relations ... a determination of coverage under the public works laws ... regarding either a specific project or type of work ..." (Emphasis added.) Thus, the awarding body is not required to make such appeal, and no activities are required.

B. Notices and Reports

1. Statement of Prevailing Wage Rates – Labor Code Section 1773.2

Labor Code section 1773.2 states:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.
>
> In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

Labor Code section 1773.2 does impose on the awarding body the activity of providing notice, in either of the fashions set forth.

2. Ineligible Contractors and Subcontractors – Labor Code Section 1777.1 and Title 8, California Code of Regulations, Sections 16800 through 16802.

Labor Code section 1777.1, subdivision (d), requires the Labor Commissioner, not less than semi-annually, to "publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project ..." Sections 16800 through 16802 set forth procedures for the Division of Labor Standards Enforcement to investigate and conduct hearings for debarment of contractors and subcontractors.

The plain language of the test claim statute and regulations does not impose any activities on the awarding body.

3. Notice Regarding Apprenticeship Standards – Labor Code Sections 1773.3 and 1777.5, Subdivision (n)

Labor Code section 1773.3 states:

> An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. ... Within five days of a finding of any discrepancy regarding the ratio of apprentices

to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

Section 1777.5 sets apprenticeship standards. Subdivision (n) states:

> The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

The plain language of the test claim statute requires the awarding body, when apprentices will be used in the contract, to include language in the contract regarding apprenticeship requirements and provide a copy of the contract award to the Division of Apprenticeship Standards.

4. Take Cognizance of and Report Suspected Violations – Labor Code Section 1726

Labor Code section 1726 states in relevant part:

> The body awarding the contract for public work shall take cognizance of violations of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

Thus, the plain language of this test claim statute requires the awarding body to take cognizance of and report any suspected violations to the Labor Commissioner.

D. Payroll Records – Labor Code Section 1776 and Title 8, California Code of Regulations, Sections 16400 - 16403

Labor Code section 1776 states in relevant part:

> (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury ...
>
> (b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:
>
> (1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.
>
> (2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) *shall* be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

...

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement *shall* be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal labor Management Cooperation Act of 1978 ... *shall* be marked or obliterated only to prevent disclosure of an individual's social security number. ...

...

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties *shall* be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract *shall* cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act ... and the Information Practices Act of 1977 ... governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section. (Emphasis added.)

Section 16400 of the regulations states in relevant part:

> (c) Acknowledgment of Request. The public entity receiving a request for payroll records *shall* acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.
>
> (d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:
>
> (1) Specify the records to be provided and the form upon which the information is to be provided;
>
> (2) Conspicuous notice of the following:
>
> (A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and
>
> (B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty-five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;
>
> (3) Cost of preparation as provided in Section 16402; and
>
> (4) Provide for inspection.
>
> (e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice. (Emphasis added.)

Section 16401 provides that the format for reporting payroll records by the contractor shall be on a form provided by the public entity and that copies of such forms are available at any office of the Division of Labor Standards Enforcement throughout the state. The section also provides specified words for the required certification, but allows the public entity to require a more strict or extensive form of certification.

Section 16402 of the regulations states:

> The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of

cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

Section 16403 of the regulations states:

> (a) Records received from the employing contractor *shall* be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;
>
> (b) copies provided to the public upon written request *shall* be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;
>
> (c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information. (Emphasis added.)

In summary, requests by the public for certified payroll records can only be made through the awarding body, the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards, and any copies provided to the public shall be redacted to prevent disclosure of an individual's name, address, social security number and other private information. Once the awarding body receives a request for the records from the public, the awarding body is required to send an acknowledgment to the requesting party and indicate to the requestor the costs for preparing the records. The awarding body's request to the contractor for the records must include specified information. The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the awarding body or other entity through which the request was made; the regulation establishes those costs, and requires that payment be made by the person seeking the record prior to release of the documents to cover the actual costs of preparation. The regulations further require that the awarding body keep unredacted copies of any such payroll records on file for at least 6 months following completion and acceptance of the project, or longer if the project is disputed. Upon request of the Division of Apprenticeship Standards or the Division of Labor Standards, the awarding body is required to withhold from contractor progress payments any penalties for the contractor's noncompliance. The body awarding the contract is also required to include in the contract stipulations regarding the contractor's requirements regarding payroll records.

With regard to providing certified payroll records to a joint labor-management committee under Labor Code section 1776, subdivision (e), it is unclear from the plain language of the statute whether such records must be provided by the awarding body or if such records may be provided by the contractor, since subdivision (b)(3) states: "The public shall not be given access to the records at the principal office of the contractor."

In interpreting statutes, the primary rule is to ascertain the intent of the Legislature so as to effectuate the purpose of the statute.[149] The first step is to examine the statutory language, giving the words their usual and ordinary meaning.[150] If there is ambiguity, extrinsic sources including legislative history may be used so that the general purpose of the statute is promoted rather than defeated.[151]

In this case, the Legislature enacted statutes to allow a joint labor-management committee the ability to independently enforce prevailing wage requirements under Labor Code section 1771.2.[152] As part of that enactment, section 1776 was modified to address certified payroll records released to a joint labor-management committee. The Senate Rules Committee bill analysis stated:

> This bill provides that a federally recognized joint labor-management committee may obtain a copy of a certified payroll from a *contractor* on a public works project, but with names and social security numbers deleted. If the committee discovers unpaid prevailing wages or fringe benefits due, and related penalties, it may file a civil action to collect them. ...[153] (Emphasis added.)

Thus it is clear from the legislative history that the provisions were intended to allow the joint labor-management committee to obtain certified payroll records directly from the contractor rather than the awarding body.

Therefore, the test claim statutes and regulations require awarding bodies to perform the following activities:

- Upon a request made to the awarding body by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
  - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
  - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b));
  - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
  - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).

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[149] *Estate of Griswold* (2001) 25 Cal 4th 904, 910.

[150] *Id.* at 911.

[151] *Ibid.*

[152] Statutes 2001, chapter 804.

[153] Senate Rules Committee, Office of Senate Floor Analyses, Senate Bill No. (SB) 588 Bill Analysis, September 12, 2001, page 2.

- Withhold penalties from contractor progress payments for noncompliance with section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).)

DIR asserts that withholding penalties from contractor progress payments for certified payroll record violations pursuant to Labor Code section 1776, subdivision (g), is not a mandate because it does not require any action by an awarding body. Instead, DIR argues, the same analysis of Labor Code section 1727 applies here, i.e., where the plain language of the test claim statute *prohibits* the awarding body from disbursing withheld money, no activities are required.

DIR misconstrues the mandate analysis of Labor Code section 1727 in E.2. below. There, the analysis found that the plain language of the statute *does* require the awarding body to engage in the activity of withholding money from contractor payments to satisfy a civil wage and penalty assessment issued by the Labor Commissioner. The plain language of that section also *prohibits* disbursement of such funds to any entity – either the Labor Commissioner or the contractor – until a final order that is no longer subject to judicial review is issued. Thus, the analyses of the two sections are consistent and Labor Code section 1776, subdivision (g), and does in fact mandate the awarding body to withhold penalties from contractor progress payments for noncompliance with section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement.

E. Withholdings

1. Withhold Contract Payments Based on District Determination – Labor Code Section 1726

Labor Code section 1726 states in relevant part that "if the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed." The plain language of this statute does not require the awarding body to engage in the activity of investigating a potential violation of the chapter.

2. Withhold and Retain Contract Payments to Satisfy Civil Wage and Penalty Assessments – Labor Code Section 1727

Labor Code section 1727 states:

> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.
>
> (b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor

under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed until receipt of a final order that is no longer subject to judicial review.

Thus, the plain language of the statute requires the awarding body to withhold from contractor payments the amount necessary to satisfy a civil wage and penalty assessment issued by the Labor Commissioner, or receive from the contractor any money withheld for such purpose by the contractor from the subcontractor. However, where the plain language of the test claim statute *prohibits* the awarding body from disbursing the withheld money until a final order that is no longer subject to judicial review, no activities are required of the awarding body.

3. Release Withheld Funds – Labor Code Section 1742, Subdivision (f)

Labor Code section 1742, subdivision (f), states in relevant part that "[a]n awarding body that has withheld funds in response to a civil wage and penalty assessment … shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds … to the Labor Commissioner."

The plain language of this statute requires the activity of releasing funds to the Labor Commissioner upon receipt of the final order.

F. Labor Compliance Program

Claimant pled several activities required of districts when they implement a Labor Compliance Program pursuant to Labor Code section 1771.5.[154] Ordinarily, the prevailing wage requirements are applicable for every public works project that exceeds $1,000.[155] Section 1771.5 states in pertinent part that if an awarding body *elects* to initiate and enforce a Labor Compliance Program, the awarding body can avoid prevailing wage requirements for public works projects of up to $25,000 for construction work or up to $15,000 for alteration, demolition, repair or maintenance work. Section 1771.7 further provides that an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004 *shall* initiate and enforce a Labor Compliance Program. Nothing in the plain language of section 1771.5 *requires* the awarding body to elect to initiate or enforce, and therefore undertake any activities related to, a Labor Compliance Program, nor does the plain language of sections 1771.5 or 1771.7 *require* the awarding body to use funds derived from the referenced bond measures. Staff therefore finds there is no "legal" compulsion for K-12 school districts or community colleges to initiate and enforce a Labor Compliance Program.

Absent such legal compulsion, the courts have ruled at times that "practical" compulsion might be found. As noted above, the Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court

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[154] With regard to initiating and enforcing a Labor Compliance Program, claimant pled Labor Code sections 1771.5, 1771.6 and 1771.7, Title 8, California Code of Regulations sections 16425 – 16439 and 17220 – 17221, "AB 1506 Labor Compliance Program Guidebook," "School Facility Program Substantial Progress and Expenditure Audit Guide," and "Antioch Unified School District Labor Compliance Program."

[155] Labor Code section 1771.

determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[156]

The Department of General Services, Office of Public School Construction, asserts that the law does not compel a district to obtain funding from the state as a condition of building schools, and school districts may choose to build facilities through the use of district raised funds. Claimant argues that the use of *district* raised funds is not realistic, citing several Education Code provisions which "strictly limit" the district's ability to issue local school bonds and manifest the Legislature's intent that the state should provide financing for school construction. Claimant summarized the argument as follows:

> In summary, the last 60 years of legislative history shows repeated and consistent recognition that school districts are unable to meet the school construction needs of their pupils. The history repeatedly reveals an admission that the education of school children is the primary responsibility of the state. The history of the inability of school districts and the obligation of the state to educate children results in the above recited litany of state money for school construction at low or no interest rates, repayment requirements of less than the amounts apportioned, and repayment terms unavailable anywhere else. Education of children is an obligation and function of the state. Classrooms are required to provide that education. Therefore, building classrooms is a state obligation.[157]

In the foregoing analysis regarding public works projects, however, staff found that the only public works projects mandated by the state are projects the districts undertake for repair and maintenance. Since no compulsion to undertake other types of public works projects was found, the only issue here is whether K-12 school districts and community college districts are compelled to use Kindergarten-University Public Education Facilities Bond Act of 2002 and 2004 funds for repair and maintenance projects, thereby triggering the requirement for the district to implement an LCP. For the reasons stated below, staff finds no such compulsion exists under the test claim statutes, regulations, or alleged executive orders, or under other law or in the record.

Claimant argues that requiring the district to use district-raised funds rather than state funds "results in non-legal compulsion in the form of double taxation which is prohibited by *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70-76."[158] That California Supreme Court case dealt with a claim seeking subvention of costs imposed as a result of a state statute which extended federally-mandated coverage of the state's unemployment insurance law to include state and local agencies.[159] The court noted that federal law provides powerful incentives to enactment of unemployment insurance protection by the individual states, i.e., "certified" state programs, and described the current situation as follows:

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[156] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

[157] Claimant comments, submitted October 20, 2003, page 10.

[158] *Ibid.*

[159] *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 51.

> In current form, the Federal Unemployment Tax Act (hereafter FUTA) ... assesses an annual tax upon the gross wages paid by covered private employers nationwide. The tax rate, which has varied over the years, stands at 6.2 percent for calendar year 1990. (Citations omitted.) However, employers in a state with a federally "certified" unemployment insurance program may credit their contributions to the state system against up to 90 percent of the federal tax. ... A "certified" state program also qualifies for federal administrative funds. (Citations omitted.)[160]

One of the questions before the court was whether the new state law, because of the federal incentives for enacting it, was in fact a "federal" mandate.[161] The court ruled that the state statute in question was actually a federal mandate; since the statute was not subject to the tax and spend limitations of articles XIII A and B, the local agency could tax and spend as necessary to meet expenses of the new legislation.[162] The court reasoned that "certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense,"[163] and provided the following explanation:

> If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty – full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.
>
> ...
>
> Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[164]

Claimant points out that in November of 2002 the voters approved Proposition 47, the Kindergarten-University Public Education Facilities Bond Act of 2002, which allocated more than $8 billion for new construction and more than $3 billion for the modernization of school facilities, which is a state general obligation bond measure to be repaid by taxation levied on all residents of the state, including school district constituents.[165] In response to the Office of

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[160] *Id.* at 58.

[161] *Id.* at 70.

[162] *Id.* at 76.

[163] *Id.* at 73-74.

[164] *Id.* at 74.

[165] Claimant comments, submitted October 20, 2003, page 14.

Public School Construction's suggestion that a school district has the discretion to build new facilities through the use of district raised funds, claimant argues that any district raised funds "would need to be repaid from taxes raised only from the constituents of that school district."[166] Claimant further argues that since any election to use district funds does not relieve the residents of that district from still paying taxes to reduce the state bonds, the citizens of the district would then be subject to "double taxation."[167] Claimant concludes that the "only reasonable alternative to school districts is to use available Proposition 47 state funds and to enforce a labor compliance program."[168]

Staff disagrees that using local general obligation bonds constitutes the "intolerable expense" of "double taxation" as described by the Supreme Court in *City of Sacramento*, or that school districts have no reasonable alternative to using funds available from Proposition 47 (2002 Kindergarten-University measure) or Proposition 55 (2004 Kindergarten-University measure). In fact, the ballot measure that enacted Proposition 47 states that, in addition to funding from state and local general obligation bonds, school districts also receive significant funds from developer fees and special local bonds known as "Mello-Roos" bonds.[169] The School Facility Program Handbook, which provides assistance to districts in applying for and obtaining these bond funds, notes that additional sources of funds for districts include, in addition to general obligation bonds, proceeds from the sale of surplus property and federal grants.[170] Under the Deferred Maintenance Program, K-12 school districts and community college districts can receive state matching funds, on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of existing school building components so that the educational process may safely continue.[171] None of these additional sources of funds triggers the requirement to initiate and establish an LCP.

Moreover, the purposes for the 2002 and 2004 bond measures, as stated in the ballot materials, were to provide funds for K-12 school districts to buy land, construct new buildings, reconstruct or modernize existing buildings, provide relief for critically overcrowded schools, and construct buildings for joint use; and for community college districts, the funds were intended to construct new buildings and related infrastructure, alter existing buildings, and purchase equipment for use in these buildings.[172]

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[166] *Ibid.*

[167] *Ibid.*

[168] *Ibid.*

[169] Official Voter Information Guide, General Election Tuesday, November 5, 2002, Proposition 47, Analysis by the Legislative Analyst, page 1.

[170] School Facility Program Handbook, A guide to assist with applying for and obtaining grant funds, prepared by the Office of Public School Construction, July 2007, page 12.

[171] Education Code sections 17582 – 17588 and 84660 et seq.; Deferred Maintenance Program Handbook, A guide to assist school districts in applying for and obtaining "grant" funds for the purposes of performing deferred maintenance work on school facilities, prepared by the Office of Public School Construction, June 2007, page 1.

[172] Official Voter Information Guide, General Election, Tuesday, November 5, 2002, Proposition 47, Analysis by the Legislative Analyst, page 2; Official Voter Information Guide,

Thus, although some of the 2002 and 2004 bond funds will likely be used for repairs, that was not their primary purpose. Furthermore, as noted above, K-12 school districts and community college districts have several funding alternatives to accomplish repair and maintenance. The Supreme Court in *Kern* stated that school districts, in the exercise of their discretion, will make the choices that are ultimately the most beneficial for the district:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[173]

Therefore, staff finds there is no evidence in the record or in law to demonstrate that districts are legally or practically compelled to use Kindergarten-University Public Education Facilities Bond Act of 2002 or 2004 funds to undertake repair or maintenance public works projects. Since none of the activities that flow from implementation of an LCP pursuant to the test claim statutes, regulations or alleged executive orders[174] have been triggered by a state-mandated requirement, none of those statutes, regulations or alleged executive orders are subject to article XIII B, section 6.

G. Hearings and Court Proceedings

Claimant pled several activities related to a new administrative hearing process pursuant to Labor Code sections 1742 and 1742.1 and Title 8, California Code of Regulations, sections 16413 and 17220, et seq. This new process was established for contractors and subcontractors to obtain review of civil wage and penalty assessments issued by the Labor Commissioner, or decisions of the awarding body to withhold contract payments when enforcing under a Labor Compliance Program pursuant to Labor Code section 1771.5, or under Labor Code section 1726.

Labor Code section 1742 states in relevant part:

> (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the

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California Primary Election, Tuesday, March 2, 2004, Proposition 55, Analysis by the Legislative Analyst, page 6.

[173] *Kern High School Dist., supra,* 30 Cal. 4th 727, 753.

[174] Labor Code sections 1771.5, 1771.6 and 1771.7, Title 8, California Code of Regulations sections 16425 – 16439 and 17220 – 17221, "AB 1506 Labor Compliance Program Guidebook," "School Facility Program Substantial Progress and Expenditure Audit Guide," and "Antioch Unified School District Labor Compliance Program."

assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b)(1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge ... The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be

given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

...

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

...

Section 16413 of the regulations further establishes procedures for a contractor or subcontractor to follow when requesting a hearing under Labor Code section 1742.

Labor Code section 1742.1 requires the Labor Commissioner to afford the affected contractor or subcontractor, upon his or her request, to meet with the Labor Commissioner to attempt to settle the dispute without the need for formal proceedings. The section further states in relevant part:

> The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6 [i.e., under a Labor Compliance Program], afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. ...

Sections 17220 et seq. of the regulations set forth procedures for an awarding body to follow when enforcing under a Labor Compliance Program pursuant to Labor Code section 1771.6.

The plain language of Labor Code sections 1742 and 1742.1, and the regulations cited, does not require awarding bodies to engage in any hearing activities, respond to writs of mandate, or participate in settlement meetings, unless the awarding body is voluntarily exercising enforcement authority under Labor Code section 1726 or 1771.5.[175] As noted above, Labor Code section 1726 *does not* require an awarding body to investigate potential violations of the chapter, nor does Labor Code section 1771.5 require an awarding body to initiate and enforce a Labor Compliance Program. Since both of these underlying activities are discretionary, Labor Code sections 1742 and 1742.1, and sections 16413 and 17220 et seq. of the regulations, do not mandate any activities on the awarding body.

Labor Code section 1771.2 allows a joint labor-management committee, established pursuant to federal law, to bring an action in court against an employer, i.e., a contractor or subcontractor, that fails to pay the prevailing wage to its employees as required. Nothing in that statute requires the awarding body to appear or participate in legal proceedings from such action by the joint labor-management committee. Thus, Labor Code section 1771.2 does not mandate any activities on the awarding body.

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[175] Labor Code section 1771.6, Title 8, California Code of Regulations, section 17202, subdivision (c).

Summary of Required Activities

Therefore, staff finds only the following activities are required by the plain language of the test claim statutes and regulations:

- Obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract. (Lab. Code, § 1773, tit. 8, Cal. Code Regs., §§ 16202 & 16204.)
- Include a statement of prevailing rates of per diem wages in the call and advertisement for bids, the bid specifications, and in the public works contract itself, or, in lieu of those requirements, the district may include in the call for bids, bid specifications, and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in the awarding body's principal office, and in that case the district must post the statement at all job sites. (Lab. Code, § 1773.2.)
- Provide a copy of the contract award to the Division of Apprenticeship Standards, when apprentices will be used in the contract, and include language in the contract regarding apprenticeship requirements. (Lab. Code, §§ 1773.3 & 1777.5, subd. (n).)
- Take cognizance of violations of the prevailing wage laws in the course of the execution of the contract, and report any suspected violations to the Labor Commissioner. (Lab. Code, § 1726.)
- Regarding certified payroll records, perform the following activities:
    - Upon a request made to the awarding body by the public for payroll records:
        - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
        - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
        - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b))
        - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
        - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
    - Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
    - Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h).).

- Withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner and receive from the contractor any money withheld for such purpose by the contractor from the subcontractor. (Lab. Code, § 1727.)
- Transmit funds withheld in response to a civil wage and penalty assessment to the Labor Commissioner upon receipt of a certified copy of a final order that is no longer subject to judicial review. (Lab. Code, § 1742, subd. (f))

Staff further finds that these activities are only mandated by the state for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.
3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Issue 2: Do the test claim statutes or regulations impose a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

A "new program or higher level of service" is imposed when the mandated activities: a) are new in comparison with the pre-existing scheme; *and* b) result in an increase in the actual level or quality of governmental services provided by the district.[176] To make this determination, the mandated activities must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes or regulations.

[176] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

Obtain Prevailing Wage Rate (Lab. Code, § 1773, Cal. Code Regs, tit. 8, §§ 16202 & 16204)

The statute and regulations require the awarding body to obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract.

Prior to 1975, Labor Code section 1773 stated in relevant part:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall *ascertain* the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract. ...
>
> In determining such rates, the *awarding body* shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the *awarding body* shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.
>
> If the *awarding body* determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the *awarding body* may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the *awarding body* determines that another rate should be adopted. (Emphasis added.)[177]

The Department of Industrial Relations explains how this pre-existing process worked:

> Labor Code section 1773 required the local agency to consider the "rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works." [Citations.] If these two mandatory sources of information were insufficient to determine the rate actually prevailing, local agencies had to "obtain and consider further data from the labor organizations and employers or employer associations concerned." *Id.* Local agencies had to obtain further information on what rates to pay each craft for overtime and holiday work, depending on which collective bargaining agreement, if any, applied.[178]

In this pre-existing law, the burden was on the awarding body to ascertain and determine the prevailing wage rates for public works projects.

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[177] Statutes 1971, chapter 785.

[178] Department of Industrial Relations comments, submitted January 15, 2003, page 9.

Labor Code section 1773 now requires the awarding body to "obtain" the general prevailing rate of per diem wages from the Director of Industrial Relations.[179] Section 16202 of the regulations requires the awarding body to request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination.

Thus, the test claim statute and regulation shifted this responsibility for ascertaining and determining prevailing wage rates *from* the awarding body *to* the Director of Industrial Relations. The Department of Industrial Relations explains the current process as follows:

> Currently, the Director performs this arduous task of determining what are prevailing wages. [Citations.] The definition of prevailing wages has not changed substantially since prior to 1975, including the requirement that the wages be set for each local geographic area. The Director, through the Division of Labor Statistics and Research ("DLSR") publishes general prevailing wage determinations twice each year for each craft or trade, by county. [Citations.] In addition, DLSR provides special determinations when requested. [Citations.] This work costs the Department approximately $2,071,082.39 per year, based on the prior two and a half fiscal years. [Citations.] This is work local agencies no longer do. Instead, local agencies are required simply to check the most recent determination before advertising a request for bids.

With regard to the obligation to "ensure" that the correct rate is used, the Department states:

> Prior to 1975, when local agencies determined local prevailing wages, the duty to obtain the correct prevailing wage was subsumed in the requirement that agencies ensure they were using the correct rate. However, any interested party could request review of the local agency's determination, and the local agency then had to justify its determination. [Citations.]
>
> In exchange for the Director's making rate determinations, local agencies now obtain the correct prevailing wages from the Director. [Citations.] This task no longer requires local agencies to do the actual investigations, surveys, and calculation ("determination") of the prevailing wage. That is, while the local agencies assume the burden of sending a letter, making a phone call, or checking the Department's website, this writing, sending or calling is substantially less expensive than was their prior obligation to investigate and calculate prevailing wages for each craft or trade on public works projects. ...[180]

The Supreme Court has stated that a reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided.[181] Here that has not occurred. Rather, the test claim statute accomplishes a shift of responsibility *from* school

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[179] Statutes 1976, chapter 281.

[180] *Id.* at page 10.

[181] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

districts *to* the state. And, although the district is left with the responsibility for obtaining the prevailing wage rates from the state and continuing to ensure that the proper rate is used in the contract, this result constitutes not a higher level of service but a lower level of service on the part of the district.[182]

Based on the foregoing, staff finds Labor Code section 1773 and sections 16202 and 16204, mandating the activity of obtaining the prevailing wage rates from the Department of Industrial Relations and ensuring the proper rate is used in the contract, do not impose a new program or higher level of service on school districts.

Statement of Prevailing Wages (Lab. Code, § 1773.2)

The statute requires the awarding body to include a statement of prevailing rates of per diem wages in the call and advertisement for bids, the bid specifications, and in the public works contract itself, or, in lieu of those requirements, the awarding body may include in the call for bids, bid specifications, and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in the awarding body's principal office, and in that case must post the statement at all job sites.

Prior to 1975, Labor Code section 1773.2 stated:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract.
>
> In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy of the prevailing rate of per diem wages on file at its principal office, in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year, and in such event, the awarding body shall cause a copy thereof to be posted at each jobsite.[183]

In the 1977 test claim statute, section 1773.2 was amended *solely* to remove the requirement that the awarding body publish prevailing wage rate determinations in the newspaper each year

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[182] See also Government Code section 17517.5, which states:

> "Cost savings authorized by the state" means any decreased costs that a local agency or school district realizes as a result of any statute enacted or any executive order adopted that permits or requires the discontinuance of or a reduction in the level of service of an existing program that was mandated before January 1, 1975.

[183] Statutes 1974, chapter 876.

when the awarding body chooses the option of referring to a copy of the prevailing wage rates on file at its principal office.[184]

A reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided. Here, that has not occurred. Instead, the burden on school districts has been lessened by removing the requirement to annually publish their prevailing wage rates in the newspaper under specified circumstances. This result constitutes not a higher level of service but a lower level of service.[185] Therefore, staff finds Labor Code section 1773.2 does not impose a new program or higher level of service on school districts.

Certified Payroll Records (Lab. Code, § 1776, subdivisions (b), (e), (g) & (h), Cal. Code Regs., tit. 8, §§ 16400 & 16403)

The statute and regulations require the awarding body to perform the following activities:

- Upon a request made to the awarding body by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records;
  - obtain certified payroll records from the contractor, including specified information in the request;
  - mark or obliterate the records to prevent disclosure of an individual's private information;
  - provide copies of the records to the requestor; and
  - retain copies of the records for at least 6 months.
- Withhold penalties from contractor progress payments for noncompliance with Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement.
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776.

Prior to 1975, Labor Code section 1776 stated:

> Every contractor and subcontractor shall keep an accurate record showing the name, occupation, and the actual per diem wages paid to each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the body awarding the contract and to the Division of Labor Law Enforcement.[186]

The test claim statutes modified Labor Code section 1776 as follows:

1. *Statutes 1976, Chapter 599* – The contractor's and subcontractor's payroll records were required to be available for inspection at all reasonable hours, and a copy had to

[184] Statutes 1977, chapter 423.

[185] See also Government Code section 17517.5.

[186] Statutes 1949, chapter 127.

be made available to the employee or his authorized representative, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards. After a complaint was filed with the awarding body or the Division of Labor Standards Enforcement alleging that a contractor or subcontractor paid less than the prevailing wage on a public works project, the contractor or subcontractor was required upon written notice from either the awarding body or the Division of Labor Standards Enforcement within 10 days to file with the awarding body a certified copy of the payroll records. The awarding body could charge a reasonable fee for copying such records, and the awarding body was required to retain such records for 90 days after completion of the contract.

2. *Statutes 1978, Chapter 1249* – The requirement on the awarding body to retain copies of payroll records for 90 days after completion of the contract was removed. The payroll records were required to be certified.[187] Upon request, the contractor was required to furnish certified copies of payroll records to, among other entities, the awarding body.[188] A certified copy of the payroll records was required to be made available to the public, provided the request was made through either the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement; the public could not be given access to such records by the contractor.[189] Any copy of certified payroll records made available to the public or any public agency by the awarding body, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement was required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number.[190] In the event of non-compliance with these requirements, the contractor had 10 days in which to comply after written notice specifying in what respects the contractor had to comply; when non-compliance was evident after the 10-day period, the contractor was required to pay an administrative penalty to the state or political subdivision on whose behalf the contract was made of $25 for each calendar day, or portion thereof, for each worker, until strict compliance was effectuated, and upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, the penalties were required to be withheld from progress payments then due.[191] The awarding body was required to have inserted in the contract stipulations to effectuate these provisions.[192] The Director of the Department of Industrial Relations was required to adopt rules consistent with the California Public Records Act and the Information Practices Act of 1977 governing release of such records including the

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[187] Labor Code section 1776, subdivision (b).

[188] Labor Code section 1776, subdivision (b)(2).

[189] Labor Code section 1776, subdivision (b)(3).

[190] Labor Code section 1776, subdivision (d).

[191] Labor Code section 1776, subdivision (f).

[192] Labor Code section 1776, subdivision (g).

establishment of reasonable fees to be charged for reproducing copies of such records.[193]

3. *Statutes 1983, Chapter 681* – Subdivision (b)(3) was amended to require that when requested certified payroll records were not provided, the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made.

4. *Statutes 2001, Chapter 804* – Subdivision (e) was amended to require that any copies of payroll records made available for inspection by or furnished to a joint labor-management committee shall be obliterated to prevent disclosure of an individual's name and social security number until January 1, 2003; thereafter any such records provided to a joint labor-management committee shall be obliterated only to prevent disclosure of an individual's social security number.[194]

Title 8, California Code of Regulations, sections 16400 through 16403 of the regulations were added to:

1. require the awarding body to acknowledge a request for payroll records to the requestor, and provide the costs the requestor must pay for the awarding body and contractor to prepare the records;
2. specify the information required in a request to the contractor for the records;
3. establish fees to be charged for preparing and reproducing the records; and
4. require the awarding body to keep unredacted copies of requested payroll records for at least 6 months following completion and acceptance of the project. These requirements are new in comparison to the preexisting law.

The Department of Industrial Relations states that the test claim statutes modifying Labor Code section 1776 did not significantly change any awarding body requirement:

> Prior to 1975, there was no provision for local agencies to obtain or copy [Certified Payroll Records]. Since local agencies did their own enforcement, however, they routinely obtained them. ... Before 1975, the Public Records Act made such information disclosable on demand from the public. See Government Code §§ 6252 ["Local agency" includes school district], 6252 (d) [definition of public record]. The post 1975 amendments to § 1776 did not change local agencies' pre-existing requirements to provide copies of public records (including payroll records) to the public. ...

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[193] Labor Code section 1776, subdivision (h).

[194] However, legislation enacted in 2003, effective January 1, 2004 (Stats. 2003, ch. 62), modified this provision to require that records provided to a joint labor-management committee be marked or obliterated to prevent disclosure of an individual's name and social security number. That statute was not pled in the test claim and thus staff makes no finding with regard to it.

> Labor Code § 1776 did not change any local agency requirement in any meaningful way. Test Claimant claims that there is a new mandate because local agencies now have to make copies of the [Certified Payroll Records] on request by members of the public and obliterate certain personal information. First, the requirement to obliterate personal information is not necessarily with the local agency. Labor Code § 1776(e) merely requires that the copy provided to the public by DLSE or the local agency "be obliterated," which can be done by the private contractor. ... [195]

Staff disagrees with the Department. The pre-existing statute did not provide for the awarding body to *obtain a copy* of the payroll records, merely the ability to inspect them. The California Public Records Act[196] provides public access only to writings that are in the *possession* of state or local agencies.[197] Consequently, there was no pre-existing duty on the district to provide public access to the records. The fact that such copies were routinely obtained by the awarding body in the course of enforcing the CPWL does not change the duties imposed by the previous statute, which plainly did not require the awarding body to obtain the records on behalf of the public or make the specified redactions. Moreover, Government Code section 17565 provides that if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate. Additionally, although it is true that personal information could be "obliterated" by the contractor, the test claim statutes require the awarding body to provide the record to the public, in a form that prevents disclosure of individual information. Therefore, staff finds it is the awarding body's responsibility to mark or obliterate the record to prevent disclosure of individual information.

The DIR also states that the requirement to withhold contract payments for violations of Labor Code section 1776 pursuant to subdivision (g) of that section is not new because the obligation already was subsumed in Labor Code section 1727, which at that time required "the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to ... the terms of this chapter," and Labor Code section 1776, subdivision (g), is part of the same chapter as section 1727.[198] However, the provisions of subdivision (g) require withholding of contractor progress payments for *administrative penalties assessed for violations of section 1776* – i.e., failure to provide certified payroll records – upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. There was no pre-existing provision in law to assess and withhold administrative penalties for payroll record violations. Therefore, the requirements are new in comparison to the pre-existing general references to the chapter.

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[195] Department of Industrial Relations comments, submitted January 15, 2003, pages 14-15.

[196] Government Code section 6250 et seq.

[197] Government Code section 6252, subdivision (e); "public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

[198] Department of Industrial Relations comments, submitted April 14, 2008, pages 3-4.

Thus, there are new requirements of school districts as awarding bodies that were not required under pre-existing law:

- Perform the following activities upon a request by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
  - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
  - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e) (as amended by Stats. 1978, ch. 1249 and Stats. 2001, ch. 804); Cal. Code Regs., tit. 8, § 16403, subd. (b))
  - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3) (as amended by Stats. 1978, ch. 1249)); and
  - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249)).
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776 (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249)).

These new requirements do provide a higher level of service to the public since the public now has access to certified payroll records through the awarding body, and the individual employee's rights to privacy are protected by the awarding body obliterating certain information. Withholding penalties from progress payments helps enforce the law to ultimately ensure contractors' cooperation. Moreover, placing stipulations in the contract provides notice to the contractor of his or her requirements before the contract is signed. And finally, the amendments adding these new requirements in 1978 and 2001 were not associated with other shifts of responsibility from awarding bodies to the state for making prevailing wage rate determinations under Labor Code sections 1770 and 1773 (Stats. 1976, ch. 281) and enforcing the CPWL under Labor Code sections 1726, 1727, and 1741 (Stats. 2000, ch. 954). Thus, in every sense the requirements impose an increased level of service.

DIR asserts that retaining copies of certified payroll records for at least 6 months and inserting a clause in public works contract pursuant to Labor Code section 1776, subdivision (h), at most result in negligible increases in levels of service, and should be considered de minimis under the analysis in *Kern High School District*. While staff does not disagree that the increased levels of service may be small, there is nothing in *Kern* or other mandates case law to support denial of the claim based on a finding that the newly mandated activities result in only a de minimis increase in the level of service.

Although the Supreme Court in *Kern* found that newly mandated notice and agenda costs were modest, the determination that such costs were not reimbursable was based on the fact that the underlying program was completely funded by the state and there was nothing in the record to

show that such administrative costs could not be paid for from state funds already provided, rather than the fact that there was only a de minimis increase in the level of service. [199]

In *San Diego Unified School District*, the Supreme Court addressed another narrowly drawn situation where there was a de minimis increase in the level of service. There, school districts were seeking reimbursement for activities that exceeded federal due process requirements in relation to discretionary school expulsions.[200] The court denied the claim based on another case, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, which had found that procedural requirements enacted to comply with a general federal mandate, which were reasonably articulated to make the underlying federal right enforceable and to set forth necessary procedural details, and which did not significantly increase the cost of compliance with the federal mandate, were not reimbursable. The *San Diego Unified* court likewise held that:

> [F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate. [201]

Here, the prevailing wage requirements are not intended to implement a federal law and cannot be likened to the *San Diego Unified* circumstances. Thus, neither *San Diego Unified* nor *County of Los Angeles* is applicable.

DIR also asserts that "[s]egregating the minimal costs to retain records for the purpose of subvention creates a further dilemma" since the awarding body must separate the costs of retaining payroll records from countless other documents it retains.[202] DIR further asserts that [i]f *de minimis* has any meaning, it has to include some balance of the relative costs of subvention versus the administrative cost to the local agencies to track the alleged mandate's costs."[203] However, beyond requiring the claimant to assert a minimum amount for test claims and for actual reimbursement claims,[204] the mandates process does not provide for such a balancing test.

Staff therefore finds that the new requirements imposed on school districts as awarding bodies for handling certified payroll records and modifying contract language constitute a new program or higher level of service within the meaning of article XIII B, section 6.

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[199] *Kern High School District, supra,* 30 Cal.4th 727, 727.

[200] *San Diego Unified School District v. Commission on State Mandates, supra,* 33 Cal.4th 859, 888.

[201] *Id.* at 890.

[202] Letter from Anthony Mischel, Attorney At Law, Department of Industrial Relations, April 14, 2008, page 3.

[203] *Ibid.*

[204] Government Code section 17564 sets the minimum for test claims and reimbursement claims at $1,000.

Apprenticeship Requirements (Lab. Code, §§ 1773.3 & 1777.5, subd. (n))

The statutes require the awarding body to provide a copy of the contract award to the Division of Apprenticeship Standards when apprentices will be used in the contract, and include language in the contract regarding apprenticeship requirements.

Prior to 1975, Labor Code section 3098 stated:

> An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. ... Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.[205]

Section 3098 was renumbered to section 1773.3 in Statutes 1978, chapter 1249, with substantially the same language. Therefore, the requirements existed prior to 1975 and no new program or higher level of service is imposed.

Prior to 1975, Labor Code section 1777.5 stated in relevant part:

> The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.[206]

This exact language was ultimately renumbered to subdivision (n) in Statutes 1999, chapter 903. Therefore, the requirements existed prior to 1975 and no new program or higher level of service is imposed.

Take Cognizance of and Report Suspected Violations (Lab. Code, § 1726), Withhold Funds for Civil Wage and Penalty Assessments (Lab. Code, § 1727), and Transmit Funds to Labor Commissioner (Lab. Code, § 1742, subd. (f))

These statutes require the awarding body to: 1) take cognizance of violations of the prevailing wage laws in the course of the execution of the contract, and report any suspected violations to the Labor Commissioner; 2) withhold any amounts necessary to satisfy a Civil Wage and Penalty Assessment issued by the Labor Commissioner and receive from the contractor any money withheld for such purpose by the contractor from the subcontractor; and 3) transmit funds withheld in response to a civil wage and penalty assessment to the Labor Commissioner upon receipt of a certified copy of a final order that is no longer subject to judicial review.

With regard to the awarding body's role in reporting CPWL violations, prior to 1975, Labor Code section 1726 stated:

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[205] Statutes 1974, chapter 1095.

[206] Statutes 1974, chapter 965.

> The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract.[207]

The test claim statute, Statutes 2000, chapter 954, modified section 1726 to state in relevant part:

> The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of execution of the contract, and *shall promptly report* any suspected violations to the Labor Commissioner. (Emphasis added.)

Thus, there was a pre-existing requirement for awarding bodies to "take cognizance" of violations, and this requirement does not impose a new program or higher level of service. There is, however, a new requirement to "report" suspected violations to the Labor Commissioner.

With regard to withholding funds from contractor payments for CPWL violations, prior to 1975, Labor Code section 1727 stated:

> Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body.[208]

The test claim statute, Statutes 2000, chapter 954, modified section 1727, which states:

> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom any amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.
>
> (b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

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[207] Statutes 1937, chapter 90.

[208] Statutes 1945, chapter 1431.

Thus, the only change in the awarding body's responsibility is to now withhold amounts required to satisfy a civil wage and penalty assessment made by the Labor Commissioner, rather than the previous requirement to withhold amounts forfeited pursuant to a stipulation in the contract or for other violations of the CPWL, once a full investigation was conducted by the Division of Labor Law Enforcement or by the awarding body.

In the same test claim statute, Statutes 2000, chapter 954, Labor Code section 1742 was added to provide a hearing procedure for contractors or subcontractors to appeal a civil wage and penalty assessment. Subdivision (f) of that section requires an awarding body that has withheld funds in response to a civil wage and penalty assessment to transmit the withheld funds to the Labor Commissioner, upon receipt of a certified copy of a final order that is no longer subject to judicial review.

The Department of Industrial Relations argues that these are not new requirements, explaining the historical and current processes as follows:

> Prior to 1975, local agencies were required both to "take cognizance" of violations and to withhold funds owed to contractors for prevailing wage violations. Labor Code §§ 1726, 1727. If there were insufficient funds available for withholding, then local agencies notified the Labor Commissioner of the violation. The local agency, with the Labor Commissioner's assistance filed civil lawsuits against the offending contractors. *Id.*
>
> This obligation to report violations to the Labor Commissioner has not changed. Enforcement of prevailing wage violations was removed from local agencies as of 2001, Stats. 2000, ch. 954. In exchange for this reduction in work for local agencies, the [L]egislature added a reporting responsibility. ...
>
> Prior to 1975, local agencies withheld funds owed contractors for prevailing wage violations. Labor Code § 1727. This obligation did not change after 1975. In 2000, as part of the overall change in enforcement, private contractors had to withhold funds from offending subcontractors if the local agency had not withheld sufficient funds. The local agency had no role in this process. [Citations.]
>
> ... [T]he Labor Commissioner did not issue citations against contractors prior to 1975. Local agencies did the bulk of the enforcement.
>
> Currently, the Labor Commissioner does all the enforcement work, and local agencies do no more than withhold funds when the Labor Commissioner informs them of violations. This is identical to local agencies' historic responsibility to "take cognizance" of violations and withhold payments.[209]

Under the previous process, the awarding body would take cognizance of CPWL violations pursuant to Labor Code section 1726, do its own investigations and enforcement, and withhold any penalties from contractor payments pursuant to Labor Code section 1727, seeking

[209] Department of Industrial Relations comments, submitted January 15, 2003, pages 16-17.

assistance from the Labor Commissioner as needed. Currently, according to the Department of Industrial Relations, the Labor Commissioner does all the enforcement work, unless the awarding body enforces the CPWL violations by voluntarily establishing a Labor Compliance Program. Thus, the test claim statutes have shifted primary enforcement of the CPWL from local agencies to the state, leaving awarding bodies the option to implement a Labor Compliance Program. In addition, there is no substantive change in the requirement that awarding bodies withhold funds from contractors for CPWL violations; the triggering mechanism is now a civil wage and penalty assessment issued by the Labor Commissioner rather than the completion of an investigation by the Division of Labor Law Enforcement or by the awarding body.

The Supreme Court has stated that a reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided.[210] Here that has not occurred. Rather, the test claim statute accomplishes a shift of responsibility *from* school districts *to* the state with regard to enforcement of the CPWL. And, although the district is left with some minor responsibility for reporting suspected violations of the CPWL to the Labor Commissioner and transmitting withheld funds at the appropriate time, this result constitutes not a higher level of service but a lower level of service.[211] With regard to withholding funds from contractors for CPWL violations, there is no change in that level of service.

Based on the foregoing, staff finds that Labor Code sections 1726, 1727 and 1742, subdivision (f), do not impose a new program or higher level of service on school districts.

Summary

Therefore, staff finds the activities listed below that are required of K-12 school districts or community college districts when acting as an awarding body, constitute a new program or higher level of service within the meaning of article XIII B, section 6, but only when triggered by repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

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[210] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[211] See also Government Code section 17517.5.

b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.

3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Activities constituting a new program or higher level of service under the foregoing circumstances:

- Perform the following tasks upon a request made to the awarding body by the public for certified payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
  - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
  - mark or obliterate the records to prevent disclosure of an individual's private information (Lab. Code, § 1776, subd. (e) (as amended by Stats. 1978, ch. 1249 and Stats. 2001, ch. 804), Cal. Code Regs., tit. 8, § 16403, subd. (b))
  - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3) as amended by Stats. 1978, ch. 1249)); and
  - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249).)

Issue 3: Do the test claim statutes or regulations impose costs mandated by the state within the meaning of Government Code section 17514 and article XIII B, section 6 of the California Constitution?

For these statutes to impose a reimbursable, state-mandated program, two additional elements must be satisfied. First, the statutes must impose "costs mandated by the state" pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant alleged in the original test claim "it is estimated that the district has incurred, or will incur, in excess of $200 in staffing and other costs in excess of revenues annually, for the period from July 1, 2000 through June 2002, to implement the new duties mandated by the state, for which the district has not been reimbursed by any federal, state, or

local government agency, and for which it cannot otherwise obtain reimbursement." On page 7 of Exhibit 6, "Second Declaration of William McGuire," of the test claim amendment filed July 31, 2003, claimant states:

> To the extent that Clovis Unified School District commences a public works project subject to Labor Code Section 1771.7, it is estimated that Clovis Unified School District will incur in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

Similarly, Grossmont Union High School District estimates the same costs in its filing of September 2, 2008.

The Department of Industrial Relations (DIR) commented that while the original test claim contained a general, non-specific declaration of the increased cost, a new declaration, limited to whatever mandates the Commission believes might exist, should be required to justify the test claim.[212] However, there is no provision in the Government Code or the Commission's regulations to authorize the Commission to impose such a requirement on the test claimant. Government Code section 17564 does provide the following:

> (a) No claim shall be made pursuant to Sections 17551, 17561, or 17573, nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, or pursuant to a legislative determination under Section 17573, unless these claims exceed one thousand dollars ($1,000). However, a county superintendent of schools ... may submit a combined claim on behalf of school districts ... if the combined claim exceeds one thousand dollars ($1,000) even if the individual school district's ... claims do not each exceed on thousand dollars ($1,000). The county superintendent of schools ... shall determine if the submission of the combined claim is economically feasible and shall be responsible for disbursing the funds to each school ...

Staff therefore finds there is evidence in the record, signed under penalty of perjury, that the claimant will or has incurred "costs mandated by the state" for purposes of the existence of a reimbursable state-mandated program.

Government Code section 17556, subdivision (d), states in relevant part that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds:

> the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The increased level of service at issue is the preparation and copying of certified payroll records under Labor Code section 1776, subdivisions (b) and (e). Subdivision (e) states "the requesting party shall, prior to being provided the records, reimburse the costs of *preparation* by ... the entity through which the request was made." Subdivision (i) of that section provides that the Director of the Department of Industrial Relations "shall adopt rules consistent with the California Public Records Act ... and the Information Practices Act of 1977, ... governing

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[212] Department of Industrial Relations comments, submitted April 14, 2008, pages 4-5.

the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section." Section 16402 of those regulations states:

> The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

Thus, the Department has established "reasonable fees to be charged" of the requesting party to cover the costs of preparation of the records. Construction of a statute by the administrative officials charged with its enforcement or interpretation may not be controlling but is entitled to great weight and will be followed unless it is clearly erroneous or unauthorized.[213] There is no evidence in the record to show that the costs allowed by the Department's regulation are not sufficient to cover the actual costs of preparation of these payroll records.

In the ordinary sense, "preparation" is defined as "the act or process of preparing."[214] "Prepare" is defined as "to make ready in advance for a particular purpose, event or occasion."[215] Based on these definitions, and absent any other information in the record, staff finds that all activities leading up to getting the records ready to be released, including reproduction and actually providing the records, are included in the fees that can be recovered from the requesting party. Thus includes the following activities:

- obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (c));
- send an acknowledgment to the requestor including notification of the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (d));
- make the specified redactions (Lab. Code, § 1776, subd. (e), Cal. Code Regs., tit. 8, § 16403, subd. (b)) ; and
- provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)).

Therefore, staff finds that a school district has authority to charge fees sufficient to pay for this portion of the increased level of service, and Government Code section 17556, subdivision (d), is applicable to deny reimbursement for these activities.

With regard to the remaining activities, Government Code section 17556, subdivision (e), states in relevant part that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds:

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[213] *State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (1995) 37 Cal.App.4th 675, 683.

[214] Webster's II, New Collegiate Dictionary, 1999, page 873, column 1.

[215] *Ibid.*

> The statute, executive order, or an appropriation in the Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The state provides matching funds in the form of grants for deferred maintenance for K-12 school districts and community college districts.[216] In most cases, the funding is only available from the state when the district demonstrates its own funding is available.[217] Additional assistance for extreme hardship is also available for K-12 districts that meet certain criteria.[218] Funding is also available for new construction and modernization grants.[219] It is possible that grant funding for modernization might be available for repair or maintenance projects, but it is not likely that funding for new construction could be used for such projects.

The DIR commented that any mandate that exists is so negligible as to not require subvention since partial state funding already exists for maintenance and repair projects in school districts and community colleges pursuant to Education Code sections 17582-17588 and 84660, the Deferred Maintenance Program. The Department of Finance also pointed out the availability of this funding, and recommended the Commission consider the funding as offsetting revenues for any reimbursable mandate finding.

Although state funding is provided which might be used for the new activities, there is no evidence in the record that such funding results in no net costs to the district or was "specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." Therefore, staff finds that Government Code section 17556, subdivision (e), is inapplicable to deny reimbursement for the remaining activities. Nevertheless, any grant funds available to awarding bodies under the deferred maintenance program, or any other eligible funding, when used for the newly mandated activities in this test claim shall be identified as possible offsetting revenues.[220]

Staff finds the following remaining activities do impose costs mandated by the state, but only when such activities are triggered by repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or

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[216] Education Code sections 17582-17588, and 84660.

[217] *Ibid.*

[218] Education Code section 17587.

[219] Education Code sections 17072.10 and 17074.10.

[220] Eligible grant funding for such projects will be clarified further at the parameters and guidelines stage.

b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.

2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and

   a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

   b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.

3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Activities Reimbursable Under Circumstances Cited Above:

- Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249).)

Conclusion

Staff concludes that Labor Code section 1776, subdivisions (g) and (h), and section 16403, subdivision (a), of the Department of Industrial Relations' regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, but only when those activities are triggered by projects for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113, and

   a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or

   b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000. (Pub. Contract Code, § 20114.)

2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654, and

    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000. (Pub. Contract Code, § 20655.)

3. For any K-12 school district or community college district that is subject to the Uniform Public Contract Cost Accounting Act (UPCCAA), when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.[221] (Pub. Contract Code, § 22032.)

Only the following activities for the foregoing projects are reimbursable:

- Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Department of Industrial Relations' Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert in the contract stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249).)

Any grant funds available to awarding bodies under the deferred maintenance program, or any other eligible grant program, when used for the newly mandated activities in this test claim, shall be identified in the parameters and guidelines as possible offsetting revenues.

None of the other test claim statutes, regulations or alleged executive orders that were pled mandate a new program or higher level of service subject to article XIII B, section 6.

Recommendation

Staff recommends the Commission adopt this analysis to partially approve the test claim.

[221] Prior to January 1, 2007, the dollar limit for public projects that could be performed by the district with its own forces was $25,000.

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September 2, 2008

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: CSM 01-TC-28 (As Amended)
Prevailing Wage Rates
Test Claim of Grossmont Union High School District

Dear Ms. Higashi:

Enclosed is the original and seven copies of the declaration of Scott H. Patterson, on behalf of Grossmont Union High School District, for the above referenced test claim.

Sincerely,

Keith B. Petersen

DECLARATION OF SCOTT H. PATTERSON
Grossmont Union High School District

COSM No. 01-TC-28 Prevailing Wage Rates

Original Test Claim Filed June 28, 2002 Chapter 938, Statutes of 2001, et al

Amended Test Claim Filed July 29, 2003 Chapter 868, Statutes of 2002

Statutes

Chapter 868, Statutes of 2002
Chapter 938, Statutes of 2001
Chapter 804, Statutes of 2001
Chapter 954, Statutes of 2000
Chapter 920, Statutes of 2000
Chapter 881, Statutes of 2000
Chapter 875, Statutes of 2000
Chapter 135, Statutes of 2000
Chapter 903, Statutes of 1999
Chapter 220, Statutes of 1999
Chapter 83, Statutes of 1999
Chapter 30, Statutes of 1999
Chapter 485, Statutes of 1998
Chapter 443, Statutes of 1998
Chapter 757, Statutes of 1997
Chapter 17, Statutes of 1997
Chapter 589, Statutes of 1993
Chapter 1342, Statutes of 1992
Chapter 913, Statutes of 1992
Chapter 1224, Statutes of 1989
Chapter 278, Statutes of 1989
Chapter 160, Statutes of 1988
Chapter 1054, Statutes of 1983
Chapter 681, Statutes of 1983
Chapter 449, Statutes of 1981
Chapter 992, Statutes of 1980
Chapter 962, Statutes of 1980
Chapter 373, Statutes of 1979
Chapter 1249, Statutes of 1978
Chapter 423, Statutes of 1977
Chapter 1179, Statutes of 1976
Chapter 1174, Statutes of 1976
Chapter 861, Statutes of 1976
Chapter 599, Statutes of 1976
Chapter 538, Statutes of 1976
Chapter 281, Statutes of 1976

Code Sections

Labor Code Sections:

1720 1720.2 1720.3 1726 1727 1733 1735 1741 1742 1742.1 1743 1750 1770
1771 1771.5 1771.6 1771.7 1772 1773 1773.1 1773.2 1773.3 1773.5 1773.6 1775 1776
1777.1 1777.5 1777.6 1777.7 1812 1813 1861

Public Contract Code Section 22002

California Code of Regulations

Title 8: 16000 16001 through 16003 16100 through 16102
16200 through 16206 16300 through 16304 16400 through 16403
16410 through 16414 16425 16426 through 16428
16429 through 16432 16433 16434 through 16439 16500
16800 through 16802 17201 through 17212 17220 through 17229
17230 through 17237 17240 through 17253 17260 through 17264

Executive Orders

School Facility Program Substantial Progress and Expenditure Audit Guide May 2003
Prepared by the Office of Public School Construction

AB 1506 Labor Compliance Program Guidebook - February 2003
Prepared by the Division of Labor Standards Enforcement

Antioch Unified School District
Labor Compliance Program - January 17, 2003

I, Scott H. Patterson, Deputy Superintendent, Business Services, Grossmont Union High School District, make the following declaration and statement. In my capacity as Deputy Superintendent, Business Services, I am responsible for the award and implementation of public works contracts for the District. I am familiar with the provisions and requirements of the Labor and Public Contract Code Sections and the Title 8 California Code of Regulations enumerated above.

These code sections and regulations, prior to 2002, require the Grossmont Union High School District to:

1) Pursuant to Labor Code Section 1773 and Title 8, California Code of Regulations, Section 16202, obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for public works.

2) Pursuant to Title 8, California Code of Regulations, Section 16204, ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations.

3) Pursuant to Title 8, California Code of Regulations Section 16001, request from the Director of Industrial Relations a coverage determination regarding a

specific project or type of work to be performed.

4) Pursuant to Title 8, California Code of Regulations, Section 16302, file a petition for review of a determination of the Director of Industrial Relations of any rate or rates.

5) Pursuant to Labor Code Section 1773.4 and Title 8, California Code of Regulations Section 16002.5, appeal an incorrect determination made by the Director of Industrial Relations.

6) Pursuant to Labor Code Section 1773.2, include a statement of prevailing rate of per diem wages in all calls and advertisements for bids, in the public works contract itself, and to post the statement at all job sites. In lieu of those requirements, the district may include a statement in the call for bids and contract a statement to the effect that copies of the prevailing rate of wages are on file in its principal office.

7) Pursuant to Labor Code Section 1777.1 and Title 8, California Code of Regulations, Section 16800 through 16802, maintain records of ineligible contractors and subcontractors and to refuse to grant them public works projects of the district.

8) Pursuant to Labor Code Section 1777.3, send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies.

9) Pursuant to Labor Code Section 1776, when necessary or requested by the Director of Industrial Relations, inspect and audit payroll records of contractors

and subcontractors working on district public works projects.

10) Pursuant to Labor Code Section 1776 and Title 8, California Code of Regulations, Section 16402, when requested by appropriate parties, obtain and provide copies of the payroll records of the contractors and subcontractors working on district public works projects. The records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number.

11) Pursuant to Labor Code Section 1771.5 and Title 8, California Code of Regulations, Sections 16425 through 16439, comply with all of the requirements of a Labor Compliance Program, when initiated and enforced by the district. These requirements include:

(a) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of the prevailing wage laws.

(b) A pre-job conference shall be conducted with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract.

(c) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(d) The district shall review and, if appropriate, audit payroll records to verify compliance with prevailing wage laws.

(e) The district shall withhold contract payments when payroll records are

delinquent or inadequate.

(f) The district shall withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred.

12) Pursuant to Labor Code Section 1771.6 and Title 8, California Code of Regulations, Section 17220, provide contractors and subcontractors, and bonding companies and sureties, with Notices of Withholding of Contract Payments when minimum wage law violations are discovered by the district. The notice shall be in writing and include the following information:

(a) A description of the nature of the violation and basis for the notice.

(b) The amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1.

(c) The name and address of the office to whom a Request for Review may be sent.

(d) Information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments.

(e) Notice of Opportunity to request a settlement meeting under Section 17221.

(f) A statement appearing in bold or another type of face, that makes it stand out from other text, to the effect that failure to submit a timely request for review will

result in a final order binding on the contractor and subcontractor, and on the bonding company.

13) Pursuant to Labor Code Section 1726, report any suspected violations of the prevailing wage laws to the Labor Commissioner.

14) Pursuant to Labor Code Section 1726, withhold contract payments for underpaid wages and for penalties when, through the district's own investigation, the district determines a violation of prevailing wages has occurred.

15) Pursuant to Labor Code Section 1727, withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner.

16) Pursuant to Labor Code Section 1727, retain amounts withheld to satisfy a Civil Wage and Penalty Assessment until receiving a final order no longer subject to judicial review.

17) Pursuant to Labor Code Section 1742, after July 1, 2001[1], and Title 8, California Code of Regulations, Section 17220, comply with all due process requirements for the benefit of contractors and subcontractors when amounts are withheld pursuant to a Civil Wage and Penalty Assessment or a Notice of Withholding of Contract Payments, including the providing of proper and timely notices, allowing them to review evidence relied upon, appearance and participation at hearings and the appeals therefrom.

18) Pursuant to Labor Code Section 1742, after July 1, 2001, respond to petitions for

[1] Prior to July 1, 2001, different procedures and legal remedies were available to contractors and subcontractors. See: former Labor Code Sections 1730, 1731, 1732 and 1733.

writs of mandates filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including the retention of counsel to file timely responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment.

19) Pursuant to Labor Code Section 1742.1 and Title 8, California Code of Regulations, Section 16413, grant and participate in settlement meetings requested by contractors or subcontractor in an attempt to settle any disputed issue before formal hearing procedures.

20) Pursuant to Labor Code Section 1771.2, a joint labor-management committee may bring an action against an employer who fails to pay prevailing wages. As a necessary party, the school district would be required to appear and participate in these legal proceedings.

21) Pursuant to Labor Code Section 1776, furnish copies of payroll records of a contractor or subcontractor to a joint labor management committee obliterated only to prevent disclosure of social security numbers.

As amended by Chapter 868, Statutes of 2002, these statutes, code sections and executive orders require the Grossmont Union High School District to:

22) Pursuant to Labor Code Sections 1771.5 and 1771.7, pay the reasonable fees of a third party when contracting with that third party to initiate and enforce a Labor Compliance Program.

23) Oversee compliance with all of the requirements of Labor Code Sections 1771.5 and 1771.7 (for works commencing or after April 1, 2003), Title 8,

California Code of Regulations, Section 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook" when contracting with a third party to initiate and enforce a Labor Compliance Program. This may include, but is not necessarily limited to, the withholding of contract payments and collecting and disbursing penalties and wages at the direction of the third party LCP.

24) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (a), when seeking approval of an LCP, submit evidence of the district's ability to operate an LCP.

25) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (b), complete a request for approval deemed by the Director to be deficient, or make other corrections as required, and resubmit the request for approval of a Labor Compliance Program.

26) Pursuant to Title 8, California Code of Regulations, Section 16426, subdivision (c), submit a request for an extension of an LCP at least 30 days prior to the anniversary date of the initial approval.

27) Pursuant to Labor Code Section 1771.7, subdivision (d)(1), make a written finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in subdivision (b) of Section 1771.5.

28) Pursuant to Labor Code Section 1771.7, subdivision (d)(2)(A), transmit to the State Allocation Board, in the manner determined by that board, a copy of the finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, a labor compliance program as described in

subdivision (b) of Section 1771.5.

29) Pursuant to Labor Code Section 1771.7 (for works commencing on or after April 1, 2003), Title 8, California Code of Regulations, Section 16425 through 16439 and Chapters 2, 3 and 5 of the "Program Guidebook", comply with all of the requirements of a Labor Compliance Program, when initiated and enforced by the district.

30) Pursuant to the "Program Guidebook", Chapter 4 Parts (A) and (B), review and, if appropriate, audit payroll records to verify compliance with prevailing wage laws by monitoring certified payroll records (CPRs), investigating complaints from workers, and monitoring agencies and contractors. Upon the conclusion of the audit, prepare audits and findings and obtain the approval of recommended forfeitures from the labor commissioner.

31) Pursuant to the "Program Guidebook", Chapter 3, withhold contract payments when payroll records are delinquent or inadequate; and withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred.

32) Pursuant to Chapter 4 of the "Program Guidebook", serve on the contractor, any affected subcontractor, and any bonding company issuing a bond securing the payment of wages, a Notice of Withholding of Contract Payments (NWCR) using the form attached in the Guidebook as Appendix 2.

33) Pursuant to Chapter 4 of the "Program Guidebook", when mailing an NWCR, also mail a notice to the DIR on a form entitled Notice of Transmittal, as found in the Guidebook as Appendix 3.

34) Pursuant to Chapter 4 of the "Program Guidebook", when a party requests a review after receiving an NWCR, mail a form entitled "Notice of Opportunity to Review Evidence" as found in the Guidebook as Appendix 4.

35) Pursuant to Chapter 4, paragraph iv (D) of the "Program Guidebook", defend Notices to Withhold Contract Payments in administrative review proceedings and in court.

36) Pursuant to Chapter 6 of the "Program Guidebook", investigate worker complaints of underpayment of prevailing wage rates.

37) Pursuant to Chapter 6 of the "Program Guidebook", conduct investigations on an as-needed basis.

38) Pursuant to Chapter 9 of the "Program Guidebook", conduct audits on a random or as-needed basis.

39) Pursuant to Chapter 9 of the "Program Guidebook", prepare cases and document files.

40) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, submit a copy of the Department of Industrial Relations approved Labor Compliance Program to which the project(s) conformed or, if applicable, a copy of the third party provider contract.

41) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, upon request, submit all bid invitations and contracts that must contain language alluding to Labor Code Sections 1770 through 1780 compliance and verification; evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set forth in

Labor Code Sections 1770 through 1780; and evidence of weekly submittals of certified copies of payrolls for all contractors and subcontractors.

42) Pursuant to Section 3.9 of the Audit Guide, in the event of an audit of the district, when a district uses its own employees for an LCP, provide the name of the district employee(s) performing the Labor Compliance Program duties; the salary and benefits of the employee, including transportation costs, and a specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

Grossmont Union High School District is required to comply with these laws relating to prevailing wage rate laws in all public works projects, as defined when:

(a) Pursuant to Labor Code Section 1720.2, the construction work is performed according to plans, specifications or criteria furnished by the district and where the district enters into a lease, as lessee, of the completed project during or upon completion of the construction;

(b) Pursuant to Labor Code Section 1720.3, hauling refuse from a public works site to an outside location;

(c) Pursuant to Labor Code Section 1720, the work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work;

(d) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for maintenance, including landscape maintenance;

(e) Pursuant to Labor Code Section 1720, the work is for installation works;

(f) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for field surveying work traditionally covered by collective bargaining agreements

when the work is integral to the specific public works project; and

(g) Pursuant to Title 8, California Code of Regulations, Section 16001, the work is for residential and commercial projects when the public work is for student or faculty housing.

It is estimated that Grossmont Union High School District has incurred in excess of $1,000 in staffing and other costs in each of the Fiscal Years July 1, 2001 through June 30, 2002, and July 1, 2002 through June 30, 2003, to implement these new duties mandated by the state for which the District has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this declaration is true and correct to the best of my own knowledge or information or belief.

EXECUTED on this 25th day of August, 2008, at El Cajon, California.

Scott H. Patterson
Deputy Superintendent, Business Services
Grossmont Union High School District

APPOINTMENT OF REPRESENTATIVE

Grossmont Union High School District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.

Scott H. Patterson
Deputy Superintendent, Business Services
Grossmont Union High School District

8/25/08
Date

Original List Date: 7/8/2002
Last Updated: 4/26/2007
List Print Date: 11/12/2008
Claim Number: 01-TC-28
Issue: Prevailing Wage Rate

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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December 2, 2008

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: 01-TC-28
Grossmont Union High School District
Prevailing Wage Rate

Dear Ms. Higashi:

I have received the Commission Revised Draft Staff Analysis (DSA) issued on November 12, 2008, to which I respond on behalf of the test claimant.

The threshold issue, and our assertion, is that school and community college districts are required (both statutorily and "practically compelled") to provide facilities (construct, remodel, and repair buildings) for the instruction of students. If so mandated, then the Public Contract Code mandates contracting with private construction companies, when costs are above insignificant threshold amounts, after a public bidding process. The Labor Code then mandates that the project must comply with the prevailing wage law, which includes a labor compliance program operated by the districts in certain circumstances. Reliance on state funding (and implementation of the rules that are a condition of participation) is required because local revenue raising power has proven insufficient, a finding of fact by the Legislature.[1]

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[1] Chapter 14 of Part 10, commencing with Education Code Section 17085 is entitled the "Emergency School Classroom Law of 1979" and is cited as the State Relocatable Classroom Law of 1979. Section 17086 states:

> . . .the Legislature recognizes that the ad valorem tax is no longer available as a source of revenue for the construction of necessary school facilities. The Legislature considers that the greatest need in school construction is for classrooms for the education of public school pupils. It is the intent of the Legislature to satisfy this primary need to the greatest extent possible before providing any additional educational facilities, regardless of how desirable such additional facilities may be.

The DSA (41) finds that there is statutory compulsion for ". . . K-12 school districts and community college districts to undertake public works projects to repair and maintain facilities and property . . ." However, the DSA determines that there is no similar legal compulsion for any public works projects that do not involve repair or maintenance.

Local Districts Are Required to Construct Facilities and Use State Funds

Article IX, Section 5, of the California Constitution requires the Legislature to " . . . provide for a system of common schools by which a free school shall be kept up and supported in each district . . ." The Constitution makes public education a matter of statewide rather than local concern. (*Levi v. O'Connell* (2006) 144 Cal.App.4th 700, 706 fn.3.) The Legislature's power over the public school system is plenary, subject only to constitutional restraints. (*Wilson v. State Bd. Of Educ.* (1999) 75 Cal.App.4th 1125, 1134.) "Where the Legislature delegates the local functioning of the school system to local boards, districts or municipalities, it does so, always, with its constitutional power and responsibility for ultimate control for the common welfare in reserve." (*Id.* at p.1135 quoting *Phelps v. Prussia* (1943) 60 Cal.App.2d 732, 738.)

The Legislature has stated repeatedly that it is an obligation and function of the state to provide adequate schools sites and buildings for the public school system and has delegated this duty to local districts.[2] Indeed, there is a tremendous unmet need for

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[2] Chapter 4 of Part 10 of Division 1 of Title 1 of the Education Code sets forth the State School Building Aid Law of 1949, commencing with Education Code Section 15700. Section 15700 provides:

> The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in providing necessary and adequate school sites and buildings for the pupils of the public school system, the system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.
>
> In adopting this act, the Legislature considers that the great need in school construction is for adequate classrooms for the education of the pupils of the public school system . . .To the end that school classrooms may be made available at once and to all school districts in need of such classrooms . . . (emphasis supplied)

Chapter 6 contains the State School Building Aid Law of 1952, commencing with Education Code Section 16000. Section 16001 provides:

> The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in providing necessary schoolsites and buildings for the pupils of the public school system, this system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.
>
> In adopting this chapter, the Legislature considers that the great need in school construction is for classrooms for the education of the pupils of the public school

new construction and modernization. The California Department of Education estimated as of September 2007 that 16 new classrooms and 21 modernized classrooms *per day* are needed. See "School Facilities Fingertip Facts," attached. Also see attached "An overview of the State School Facility Programs (September 2007)" for a brief summary of the funding programs available to enable local school districts to

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> system . . .To the end that school classrooms may be made available at once and to all school districts in need of such classrooms . . . (emphasis supplied)

Article 9 of Chapter 6, commencing with Education Code Section 16310, is entitled School Housing Aid For Rehabilitation and Replacement of Structurally Inadequate School Facilities. Section 16312 states:

> The Legislature hereby declares that it is in the interest of the state and the people thereof to provide assistance to school districts in rehabilitating or replacing structurally unsafe school facilities inasmuch as the education of children is an obligation of the state, and the obligation carries with it a corresponding responsibility for the physical safety of children while attending school. (emphasis supplied)

Chapter 8 of Part 10 contains the Urban School Construction Aid Law of 1968, commencing with Education Code Section 16700. Section 16701 provides:

> The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid urban school districts of the state in reconstructing, modernizing, or replacing schoolsites and buildings for pupils of the public school system who are now housed in substandard schools . . .

Chapter 12 of Part 10 establishes the "Leroy F. Greene State School Building Lease-Purchase Law of 1976", commencing with Section 17000. Section 17001 states:

> (a) The Legislature hereby declares that it is in the interest of the state and the people thereof for the state to reconstruct, remodel, or replace existing school buildings that are educationally inadequate or that do not meet present-day structural safety requirements, and to acquire new schoolsites and buildings for the purpose of making them available to local school districts for the pupils of the public school system, that system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.(emphasis supplied)

Chapter 15 of Part 10, commencing with Section 17100, established the School District Revenue Bond Act. This Act is based on the finding of the legislature that:

> The Legislature hereby finds and declares that the State School Building Lease-Purchase Fund, pursuant to Section 17008, and the proceeds from the sale or lease of surplus school property are the two sources available to school districts to finance the construction of school facilities to relieve overcrowding. However, these sources are still insufficient to meet the construction needs statewide of school districts. (emphasis supplied)

build facilities. Once the local districts are funded, hundreds of state statutes and regulations govern all aspects of planning and building new school facilities. Numerous helpful publications have been issued by the California Department of Education and the Office of Public School Construction. Regardless, the actual construction of the facilities is the responsibility of the local school districts to be accomplished pursuant to these state rules when utilizing state funds.

School districts are determined by geographic boundaries, and must accommodate students within their boundaries as required by the free school guarantee. Children are required to attend school by Education Code Sections 48200 et al, which set the parameters of compulsory education. Therefore, children are compelled to attend school, and school districts are compelled to enroll them and provide facilities for their instruction. Community college districts have a similar legal compulsion to accommodate students pursuant to Section 76000.

There are also specific statutory requirements for providing school facilities. Governing boards are legally required to build new school facilities when there is a vote by the district directing them to do so, as required by Education Code Section 17340. Section 17573 requires the governing board to provide a "warm, healthful place" for children to eat their lunches. Section 17576 requires that sufficient restrooms are provided. If a school facility is found to be unsafe, Education Code Sections 17367 and 81162 (pertaining to K-12 school districts and community college districts respectively) require that the governing board adopt a plan to either repair, reconstruct, *or replace* the unsafe school building.

The DSA (39) relied on a statement in *People v. Oken* for the proposition that school district governing boards have wide discretion in constructing school facilities. However, this statement must be viewed in context of the facts of that case. It concerned a private citizen attempting to require a school district to build a school building on a specific piece of property. Therefore, despite the broad language used, the holding of the court was only that a private individual could not maintain an action to dictate where or when a school must be built. The court did not even consider whether school districts were required to supply sufficient school facilities. ". . . [A] decision is not authority for what is said in the opinion but only for the points actually involved and actually decided." (*Childers v. Childers* (1946) 74 Cal.App.2d 56, 61) Thus, this case cannot be used for the proposition that there is no legal compulsion on K-12 school districts to provide adequate school facilities.

Contrary to the conclusion of the DSA (41), school districts are also practically compelled to construct new school facilities when existing facilities become inadequate. The decision to build new school facilities is *not* analogous to the decision to exercise eminent domain in *City of Merced*. In that case, the court determined that the city's choice of eminent domain *as a method to obtain property* was discretionary. It did not consider the city's determination that it needed to obtain property in the first place, only the discretionary action of choosing eminent domain as the preferred method. In *Kern High School District*, the focus of the court was on the fact that the underlying programs

were voluntary and extracurricular. The district could simply stop participating and the only consequence would be the loss of related funding.

If the decision to build new school facilities is truly voluntary, then school districts would have multiple ways of responding to the need, as in *City of Merced*, or could simply choose not to respond, as in *Kern*. If this were true, K-12 and community college school districts would be able to turn away students within their geographic boundaries once existing facilities had met their capacity. Or accommodate additional students by setting up desks on the soccer fields. Neither of these is a tenable or legal option. Therefore, K-12 and community college districts are legally and practically compelled to undertake public works projects to construct new facilities, replace existing facilities when needed, and repair and maintain current facilities.

The Legislature has not provided local districts sufficient taxing authority.[3] This has

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[3] A District's Ability to Borrow is Strictly Limited

The authority to issue local school bonds is found in Chapter 1 of Part 10 in Division 1 of Title 1 of the Education Code, commencing at Section 15100. This authority is strictly limited. Education Code Section 15100 allows a district, when in its judgment it is advisable, and upon a petition of the majority of its qualified electors requires it, to order an election and submit to the electors of the district the question of whether the bonds of the district shall be issued and sold for the purpose of raising money for the purchase of school lots, the building or purchasing of school buildings, and the making of alterations or additions to school buildings. Section 15102 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district. Section 15106 provides that unified school districts or community college districts may not exceed 2.5 percent of the taxable property of the district.

Chapter 1.5 of Part 10 sets forth the Strict Accountability in Local School Construction Bonds Act of 2000, commencing with Section 15264. ("Proposition 39 bonds") Here again, bonded indebtedness is strictly limited. Section 15266 provides that the Act is an alternative to authorizing and issuing bonds pursuant to Chapter 1 or Chapter 2 (commencing with Section 15300) when the governing board of a school district or community college district decides, pursuant to a two-thirds vote, to pursue the authorization and issuance of bonds for school facilities. Section 15268 provides that such bonded indebtedness shall not exceed 1.25 percent of the taxable property of the district and may only be issued if the tax rate levied would not exceed thirty dollars ($30) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIII A of the California Constitution. Section 15270 provides that a unified school district may not authorize or issue bonds that exceed 2.5 percent of the taxable property of the district and may only be issued if the tax rate levied to meet the requirements of Section 18 of Article XVI of the California Constitution in the case of indebtedness incurred pursuant to this chapter at a single election, by a unified school district, would not exceed sixty dollars ($60) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIII A of the California Constitution.

Chapter 2 of Part 10 sets forth the Bonds of School Facilities Improvement Districts Act, commencing with Education Code Section 15300. Here again, bonded indebtedness is strictly

been further exacerbated by Proposition 13, which eliminated the ability of local school districts to levy additional special property taxes to pay off their facility indebtedness. Proposition 13 capped the ad valorem tax rate on real property at one percent of its value, thereby reducing the income from property taxes to such an extent that it virtually eliminated this source as a means of additional bonding capacity.

The test claimant requests that the Commissioners make findings that:

-The state has delegated the duty to local school and college districts to repair, construct, and maintain school facilities.
-Since the local districts are required to bid and contract such work as public works projects, the relevant Public Contract Code and Labor Code sections adopted after 1974 are costs mandated by the state upon the local districts for which no state subvention has been provided.
-Because the Legislature has not provided local districts the taxing power to adequately fund this construction, the local districts must rely upon state funds. Therefore the statutes, state regulations, and executive orders controlling the use of these funds are costs mandated by the state upon the local districts for which no state subvention has been provided.

Based on these findings, the Commissioners should direct staff to reevaluate the test claim and prepare a new proposed statement of decision consistent with these findings.

Specific Activities Mandated

Coverage Determinations - Title 8, California Code of Regulations, Section 16001

CCR Section 16001 provides the procedures to be followed when a coverage determination is requested from the Director of Industrial Relations. The DSA (47) concludes that " . . . no activities are required of the awarding body by this regulation." This determination is based on the requirement that the awarding body "shall forward" documents it "wishes to have considered" and the conclusion that the actions are therefore discretionary. However, subsection (a)(3) commands that "[a]ll parties to the coverage determination request shall have a continuing duty to provide the Director . . . with relevant documents in their possession or control, until a determination is made." The school district, as the awarding body, is necessarily a party to any coverage

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limited. Section 15300 provides that the chapter provides a method for the formation of school facilities improvement districts consisting of a portion of the territory within a school district or community college district and for the issuance of general obligation bonds by the school facilities improvement district. Section 15330 (repealed 2007) provides that the total amount of bonds issued shall not exceed 1.25 percent of the taxable property of the school facilities improvement district. Section 15334.5 further provides that no bonded indebtedness may be incurred pursuant to this chapter in an amount that would cause the bonded indebtedness of the territory of the school district or community college district of which the school facilities improvement district is a part, to exceed the limitation of indebtedness specified in Sections 15102 and 15106.

determination request. Therefore, the district is required by this regulation to provide all relevant documents to the Director of Industrial Relations, and the regulation does impose a mandated activity.

Ineligible Contractors and Subcontractors - Labor Code Section 1777.1 and Title 8, California Code of Regulations, Sections 16800 through 16802

The DSA (48) concludes that no activities are imposed on the awarding body by these sections because the sections outline duties of the Labor Commissioner and Division of Labor Standards Enforcement (DLSE). However, the sections also include duties imposed on awarding bodies. Title 8, CCR Section 16801(b) requires an awarding body to " . . . in accordance with Labor Code Section 1776(g), inform prime contractors of the requirements of Labor Code Section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code 1777.1."

Further, Title 8, CCR Section 16801(a)(2) grants a respondent to hearings conducted as a result of the DLSE investigation the power to call witnesses and issue subpoenas. If a school district, as the awarding body, receives a subpoena in connection with one of these hearings, then it must respond and any actions taken in response are mandated activities. Therefore, the requirement to inform prime contractors of the requirements of Labor Code Section 1776 and any response required by a subpoena authorized under this section are state-mandated activities under Ttile 8, CCR Section 16801.

Withhold and Retain Contract Payments to Satisfy Civil Wage and Penalty Assessments - Labor Code Section 1727

The DSA (55) states that Labor Code Section 1727 imposes a state-mandated activity where it requires awarding bodies to withhold payments or receive money withheld by the contractor from a subcontractor. However, it comes to the contrary conclusion that no activity is mandated by subsection (a) when it "*prohibits* the awarding body from disbursing the withheld money until a final order" (emphasis in original) is received. The last section of subsection (a) simply imposes a time limitation for the act of withholding the money. Therefore, Section 1727 imposes a state-mandated activity requiring awarding bodies to withhold payments or receive money withheld from a subcontractor until a final order is received.

Labor Compliance Program

The DSA (59) concludes that school districts are not mandated to implement a Labor Compliance Program (LCP) and therefore none of the activities that flow from implementation of an LCP are mandated activities. However, there are circumstances where school districts are legally compelled to initiate an LCP. One such instance occurs when school districts are participating in a design-build contract pursuant to Education Code Section 17250.10 et seq. Section 17250.30 (d) requires that "The school district shall establish and enforce a labor compliance program containing the requirements outlined in Section 1771.5 of the labor code . . ." if the district has not

entered into a collective bargaining agreement that covers all contractors working on the project. Education Code Section 81704 contains an identical provision governing community college districts.

Further, school districts are practically compelled to initiate an LCP by the need to provide adequate facilities, and the substantial funds available from the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004. Pursuant to Labor Code Section 1771.7, school districts using funds derived from these acts shall initiate and enforce an LCP. As previously discussed, school districts have a duty to provide adequate facilities for instruction. As noted in the DSA (57, 58), substantial funds are provided by these acts for the purposes of building new facilities and remodeling or modernizing existing facilities. Therefore, to the extent that a school district public works project qualifies for funding from the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004 it is practically compelled to accept these funds, and is required to initiate an LCP. Under certain circumstances, school districts are either legally or practically compelled to initiate an LCP, and therefore the related activities are mandated by the state.

Hearings and Court Proceedings

The DSA (61) concludes that awarding bodies are not required ". . . to engage in any hearing activities, respond to writs of mandate, or participate in settlement meetings, unless the awarding body is voluntarily exercising enforcement authority under Labor Code section 1726 or 1771.5." However, as discussed previously, there are situations where a school district is legally or practically compelled to initiate an LCP under Section 1771.5. In those instances, the district's participation in hearings and court proceedings is mandated. Further, when the proceedings stem from actions by the joint labor-management committee, the awarding body is a necessary party to the action. As such, the awarding body must cooperate with the court or hearing officer and respond to related orders. It cannot simply choose to ignore directives of the court or an administrative body. Thus, school district participation in settlement meetings, hearing activities, and court proceedings is a mandated activity.

New Program or Higher Level of Service

The DSA concludes in several instances that some of the program requirements do not impose a new program or higher level of service because they shift responsibility from the districts to the state and constitute "a lower level of service on the part of the district." This ignores the fact that the test is on the new or increased level of services provided by the local government agency to the public, not of the *number* of all or different services before and after the mandate legislation.[4] Any duty shifted to the

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[4] According to the court in *San Diego Unified School District v. Commission on State Mandates* (33 Cal.4th 859, 878):

The statutory requirements here at issue . . . reasonably are viewed as providing

districts previously required of the state agency would be a new program for the districts, even when those duites predate 1975, which is not a consistent finding in the DSA.

Obtain Prevailing Wage Rate

Labor Code Section 1773 and CCR Sections 16202 and 16204 require an awarding body to obtain the prevailing wage rates from the Director of Industrial Relations and ensure that the correct rates are used. The DSA (65) acknowledges that this scheme differs materially from the prior version of Section 1773, which required the awarding body to ascertain and determine prevailing wage rates. Thus, the provisions of these sections satisfy the first prong of the test for a new program or higher level of service within the meaning of Article XIII B, Section 6 of the California Constitution.

Take Cognizance of and Report Suspected Violations

The DSA (74, 76) acknowledges that Labor Code Section 1726 imposes a new requirement on awarding bodies to report suspected violations, but then concludes that the requirements do not impose a new program or higher level of service because they shift responsibility from the districts to the state and constitute "a lower level of service on the part of the district." This conclusion improperly places the emphasis on the number of activities required from a local agency, rather than the service provided to the public. By shifting the investigatory and enforcement responsibilities to the state, a higher level of service is provided to the public because there is greater visibility and oversight, and the state has greater resources then the awarding bodies to pursue the investigations. Therefore, as part of a scheme providing a higher level of service to the public, the district's responsibility to report suspected violations is a reimbursable activity

Mandated Costs

Certified Payroll Records

The DSA (79) concludes that there are no costs mandated by the state for responding to a request for certified payroll records under Labor Code Section 1776 because a fee of $1 for the first page and 25 cents for each subsequent page is authorized. This determination is based on the fact that there is no evidence in the record that these fees will not be sufficient to cover the associated costs. However, there is also no evidence in the record that the fees *are* sufficient. Further, there is no guarantee that the fees will be increased to accommodate inflation, or that they will be adjusted if experience demonstrates that they are not sufficient. Finally, the rates are dependent

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> a "higher level of service" to the public under the commonly understood sense of that term: (i) the requirements are new in comparison with the preexisting scheme . . . and (ii) the requirements were intended to provide an enhanced service to the public . . .

on the number of pages requested. The act of making the redactions is also dependent on the length of the document, but the process of sending an acknowledgment, requesting the records, and providing them to the requester is not in any way correlated with the number of pages. Thus, it is quite possible that the staff time and other costs will exceed the authorized fees. There should not be a denial of increased costs on this basis. Instead, claimants should be required to deduct any fees received as offsetting revenue.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

Attachments

C: Per Mailing List Attached

Test Claim 01-TC-28
Prevailing Wage Rate
Grossmont Union High School District

Table of Contents of Attachments to Claimant's Response of December 2, 2008

Cases

Levi v. O'Connell (2006) 144 Cal.App.4th 700
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California Education Codes

California Education Code Sections 15100-15111
California Education Code Sections 15264-15276
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California Education Code Section 15330
California Education Code Section 15334.5
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California Education Code Sections 17365-17374
California Education Code Sections 17565-17592.5
California Education Code Sections 48200-48208
California Education Code Sections 76000-76002
California Education Code Sections 81160-81179

Other Attachments

California Constitution Article 9 - Education
School Facilities Fingertip Facts
An overview of the State School Facility Programs (Sept. 2007) California

Cases

Levi v. O'Connell (2006) 144 Cal.App.4th 700

Wilson v. State Bd. of Education (1999) 75 Cal.App.4th 125

People v. Oken (1958) 159 Cal.App.2d 456

Childers v. Childers (1946) 74 Cal.App.2d 56

Levi v. O'Connell (2006)144 Cal.App.4th 700 , -- Cal.Rptr.3d --

[No. C051722. Third Dist. Nov. 7, 2006.]

LEILA J. LEVI et al., Plaintiffs and Appellants, v. JACK O'CONNELL, as Superintendent of Public Instruction, etc., et al., Defendants and Respondents.

(Superior Court of Sacramento County, No. 04AS00459, Raymond Cadei, Judge.)

(Opinion by Cantil-Sakauye, J., with Scotland, P.J., and Morrison, J., concurring.)

COUNSEL

The Pro-Family Law Center, Richard D. Ackerman for Plaintiffs and Appellants.

Allan J. Keown for Defendants and Respondents. **[144 Cal.App.4th 703]**

OPINION

CANTIL-SAKAUYE, J.-

In this case we consider whether the California Department of Education (CDE) fn. 1 is required to pay for the college education of an extremely gifted student under the age of 16. We conclude it is not. We shall affirm the judgment of dismissal of plaintiffs' action entered following the trial court's sustaining of CDE's demurrer without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

On February 9, 2004, Leila J. Levi (Levi) filed an original complaint against CDE on behalf of herself and as guardian ad litem for her 13-year-old son Levi M. Clancy (Clancy) (together plaintiffs). After the trial court sustained CDE's general demurrer with leave to amend, plaintiffs filed a first amended complaint. The first amended complaint alleges Clancy, born on October 12, 1990, is a highly gifted child required, as a minor under the age of 16, to attend school under the Compulsory Education Law. (Ed. Code, § 48200, et seq.) The first amended complaint alleges, "Clancy cannot attend a traditional K-12 school because the schools operated by CDE, and Clancy's local district, are ill-equipped and unsuitable for highly gifted children and will actually cause more harm to him than if he simply did not attend. Specifically, they cannot provide for his specific psycho-social and academic needs. Additionally, he has already completed a standard education within the **[144 Cal.App.4th 704]** K-12 academic system currently provided for by CDE." (Capitalization changed.)

According to the first amended complaint, Clancy started attending Santa Monica College when he was seven, passed the California High School Proficiency exam when he was nine, and began attending the University of California at Los Angeles (UCLA) when he was 13. Levi is a single mother and single income earner in her household who cannot afford to continue paying for Clancy's education at UCLA. The first amended complaint alleges CDE is constitutionally required to provide Clancy with an adequate and suitable free and equal education while he is a minor under the age of 16.

The complaint alleges three causes of action; the first for declaratory relief and/or a writ of mandate, the second for violation of the equal protection clause of California's Constitution, and the third for damages under the federal civil rights statute. (42 U.S.C.S. § 1983.) The complaint seeks a writ of mandate compelling CDE to provide Clancy with a fair, equal, and funded education suited to his personal needs, a declaratory judgment setting forth the rights and obligations of the parties to this case, general damages as well as special damages in the form of payment of the expenses associated with Clancy's education at Santa Monica College and UCLA, attorney fees, and costs of suit. The trial court sustained CDE's demurrer to all three causes of action without leave to amend and entered a judgment of dismissal.

On appeal plaintiffs challenge the trial court's sustaining of CDE's demurrer to their first cause of action for declaratory relief and/or a writ of mandate. They also claim public policy supports their position on appeal because they are asking for nothing more than what California already offers to students with special needs. They do not challenge the sustaining of CDE's demurrer to their second and third causes of action. fn. 2 In their brief on appeal, plaintiffs admit they are asking this court to establish an education voucher for Clancy's college education during his years of mandatory school attendance. We decline to do so. **[144 Cal.App.4th 705]**

DISCUSSIONI. *Standard of Review*

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967; see *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) On appeal we review the legal sufficiency of the complaint de novo, "i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.]" (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) The question before us is whether "the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" (*Aubry v. Tri-City Hospital Dist., supra*, at p. 967.)

II. *Plaintiffs' Cause of Action For Declaratory Relief*

While Clancy is under the age of 16 and subject to the compulsory full-time education requirements, plaintiffs claim CDE legally owes him an adequate, free and equal education providing for his specific individualized needs. If Clancy is not provided with the funding necessary to attend a university appropriate to his learning needs, plaintiffs claim they will be

forced to violate the compulsory education law. In their first cause of action, plaintiffs allege these circumstances give rise to a justiciable controversy over the parties' respective rights and duties entitling them to declaratory relief. Plaintiffs primarily rely on section 5 of article IX of the California Constitution (section 5). However, they also claim education guarantees under unspecified parts of the United States Constitution, the federal No Child Left Behind Act of 2001 (20 U.S.C. § 6301 et seq.), and the federal Individuals with Disability Education Act (IDEA). (20 U.S.C. § 1400 et seq.) Plaintiffs claim there exists a related controversy as to whether Clancy was excluded from the class of children protected by California's special education law. (Ed. Code, § 56000 et seq.)

On appeal, plaintiffs claim the trial court erred in concluding they had not stated a cause of action for declaratory relief because they are entitled to a judicial declaration of the educational rights of an extremely gifted child. **[144 Cal.App.4th 706]**

[1] "'The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79, quoting 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817, p. 273.) CDE contends plaintiffs have failed to allege facts sufficient to establish an actual controversy between themselves and CDE independent of the current lawsuit. (*City of Cotati v. Cashman, supra,* at p. 80; *California Assn. of Private Special Education Schools v. Department of Education* (2006) 141 Cal.App.4th 360, 377-378; *Brownfield v. Daniel Freeman Marina Hosp.* (1989) 208 Cal.App.3d 405, 410.) We disagree. The first amended complaint alleges sufficient specific facts regarding Clancy's present educational circumstances to establish an actual, current controversy concerning CDE's constitutional and statutory obligation to fund an appropriate education, in this case a college education, for Clancy.

CDE contends plaintiffs have not sufficiently pled a cause of action for declaratory relief because there is no right on the part of plaintiffs to or corresponding duty on the part of CDE to provide the relief plaintiffs seek.

[2] "'Strictly speaking, a general demurrer is not an appropriate means of testing the merits of the controversy in a declaratory relief action because plaintiff is entitled to a declaration of his rights even if it be adverse.' [Citations.] However, 'where the issue is purely one of law, if the reviewing court agreed with the trial court's resolution of the issue it would be an idle act to reverse the judgment of dismissal for a trial on the merits. In such cases the merits of the legal controversy may be considered on an appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend and the opinion of the reviewing court will constitute the declaration of the legal rights and duties of the parties concerning the matter in controversy.' [Citations.]" (*Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 24.) The issue here is purely a question of law, which we resolve adversely to plaintiffs.

[3] The California Legislature has been constitutionally required to provide for a system of common schools in California since the first state Constitution was adopted in 1849. fn. 3 (Cal. Const., art IX, § 3.) Since the Constitution of 1879 this constitutional requirement has included a free school guarantee. (Cal. Const., art. IX, § 5; *Hartzell v. Connell* (1984) 35 Cal.3d 899, 906 (*Hartzell*).) Specifically, section 5 provides, "The **[144 Cal.App.4th 707]** Legislature shall provide for *a system of common schools by which a free school shall be kept up and supported in each district* at least six months in every year, after the first year in which a school has been established." (Cal. Const., art. IX, § 5, italics added.)

[4] In section 5, the use of "the term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the Legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools within the state." (*Kennedy v. Miller, supra,* 97 Cal. at p. 432, italics omitted.) Under section 5, the "educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 596, superseded by statute as stated in *Crawford v. Huntington Beach Union High School Dist.* (2002) 98 Cal.App.4th 1275, 1286; see *Piper v. Big Pine School Dist.* (1924) 193 Cal. 664, 669, 673 (*Piper*).) California children have an enforceable right to attend such a school (*Piper, supra,* at p. 669) and to participate without paying fees in all of the educational activities - curricular or extracurricular - offered by such schools. (*Hartzell, supra,* 35 Cal.3d at p. 911.)

However, this still leaves the question - what are the "common schools" of the state that must be provided free under a single uniform statewide system? The early case of *Los Angeles County v. Kirk* (1905) 148 Cal. 385 (*Kirk*), provides the answer. In *Kirk* the California Supreme Court rejected a county's attempt to compel the Superintendent of Public Instruction to include the average daily attendance of kindergarten students in his apportionment of the State School Fund to the various counties. The high court held the fact that the Legislature declared a kindergarten adopted by a district to be part of the public primary schools did not operate to bring it within the uniform and mandatory system of common schools of the state. (*Id.* at pp. 390-391.) The court distinguished the public schools designated by section 6 of article IX of the California Constitution from the common schools of section 5, which it concluded were those schools of the state identified in section 6 of article IX as being exclusively supported by the State School Fund. (*Los Angeles County v. Kirk, supra,* at pp. 388-389.)

[5] Section 6 of article IX of the California Constitution has since been amended a number of times and now provides, in relevant part, "[t]he Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and state colleges, ..." However, the same section now provides: "The entire State School Fund shall be apportioned in each fiscal year in such manner as the Legislature may provide, through the school districts and other agencies maintaining such schools, for **[144 Cal.App.4th 708]** the support of, and aid to, *kindergarten schools, elementary schools, secondary schools, and technical schools* . . . ." (Cal. Const., art. IX, § 6, italics added.) [6] Applying the reasoning of *Kirk, supra,* 148 Cal. 385, the common schools of California under section 5 are the schools that provide what has become known as grades K through 12. Colleges and universities are not included. That is, section 5 constitutionally provides for a single standard and uniform system of free public K-12 education. The free school guarantee of section 5 does not provide for free college education.

[7] Nor does the free school guarantee mandate K-12 education individually tailored to each student's specific and particularized needs. Section 5 requires the state to maintain a regular, standard system of public K-12 education. (*Kennedy v. Miller, supra,* 97 Cal. at p. 432; *Serrano v. Priest, supra,* 5 Cal.3d at p. 596; *Piper, supra,* 193 Cal. at pp. 669, 673.) fn. 4

Naturally, such standard system should provide a high quality education for all the students of our state. State and federal law recognizes this. The federal No Child Left Behind Act of 2001 states: "The purpose of this title [20 USCS §§ 6301 et seq.] is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." (20 U.S.C. § 6301.) California has adopted programs to implement the requirements of the federal No Child Left Behind Act. (See, e.g., Ed. Code, §§ 52055.57, 52058.1, 52059.) California administers achievements tests (Ed. Code, §§ 60640) and a high school exit examination. (Ed. Code, § 60851.) California monitors its schools through a public school performance accountability program. (Ed. Code, § 52051 et seq.) However, plaintiffs have not cited us to, and we have not found, anything in the federal No Child Left Behind Act or the implementing California law that requires K-12 public education meet every student's particularized educational needs. fn. 5 **[144 Cal.App.4th 709]**

[8] The Legislature has declared its intent that "all *individuals with exceptional needs* have a right to participate in free appropriate public education and special educational instruction and services for these persons are needed in order to ensure the right to an appropriate educational opportunity to meet their unique needs." (Ed. Code, § 56000, italics added.) However,

the term "individuals with exceptional needs" as used in this statute is specifically defined as children who have been identified as having a disability within the meaning of "subparagraph (A) of paragraph (3) of Section 1401 of Title 20 of the United States Code [IDEA]." (Ed. Code, § 56026, subd. (a).) The term "child with a disability" is defined by the referenced section of the IDEA as a child who needs special education and related services by reason of mental retardation, hearing impairments, speech or language impairments, visual impairments, a serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities. (20 U.S.C. § 1401, subd. (3)(A).)

Plaintiffs' first amended complaint alleges Clancy is a highly gifted child who began attending college at seven, passed the high school exit exam at nine, and started attending UCLA when he was 13. It is alleged he has completed a standard education within the K-12 academic system. There are no allegations he needs special education and related services by reason of any of the disabilities or impairments listed in the IDEA. Therefore, he does not come within the provisions of the IDEA and he is not a child with exceptional needs as defined by California's special education law. (Ed. Code, § 56000 et seq.) We also note the "free appropriate public education" guaranteed by the IDEA is limited to appropriate preschool, elementary and secondary education. (20 U.S.C. § 1401, subd. (9)(C).) The IDEA does not guarantee appropriate free college education.

[9] Plaintiffs argue the mandate to provide an education suited to the specific needs and abilities of each child was recognized in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 (*Hayes*). *Hayes* is a subvention case and the issue on appeal in *Hayes* was whether certain special education programs for children with disabilities "constituted new programs or higher levels of service mandated by the state entitling the school districts to reimbursement under section 6 of article XIII B of the California Constitution and related statutes for the cost of implementing them or whether these programs were instead mandated by the federal government for which no reimbursement is due." (*Hayes, supra,* at p. 1570.) [144 Cal.App.4th 710] In considering this subvention issue, this court described the legal and historical context of the federal and state statutes governing education for the disabled and noted that principles of equal protection formed a basis for their enactment. (*Id.* at pp. 1582-1592.) The opinion of this court, however, did not consider or suggest that all children have a constitutional right to an education specifically tailored to their individual needs and abilities. Such issue was not presented and obviously, cases are not authorities for propositions not considered. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.)

[10] In summary, Clancy does not have a right to a free college education under the California constitutional free school guarantee of section 5. fn. 6 Nor are there any applicable state or federal statutes requiring that he be provided free college education as being the appropriate education individually tailored to his particular needs as a highly gifted child. fn. 7

We agree with the trial court that plaintiffs' allegations regarding the application of the truancy law to them (Ed. Code, § 48200 et seq.) are completely speculative and inadequate to plead a justiciable controversy. The truancy laws are not being applied to Clancy. And finally, the complaint affirmatively alleges Clancy is currently attending UCLA.

III. *Plaintiffs' Cause of Action For A Writ Of Mandate*

Plaintiffs' first amended complaint designates the first cause of action as being for "declaratory relief and/or writ of mandate [.]" (Capitalization omitted.) As part of the allegations of such cause of action, plaintiffs allege the [144 Cal.App.4th 711] defendants have "a ministerial duty to provide an adequate, fair and equal education" to Clancy. Plaintiffs' prayer for relief requested "a writ of mandate compelling defendants to provide [Clancy] with a fair, equal, and funded education suited to his personal needs[.]"

We have concluded CDE does not have a duty to provide Clancy with a free college education as we have explained. For the same reasons, we conclude plaintiffs have not stated a cause of action for mandate and the trial court correctly sustained CDE's demurrer to such cause of action.

IV. *Public Policy As Reflected In Education Code Section 56000*

Plaintiffs final argument on appeal contends public policy supports their position because they are "asking for nothing more than what California already deems to be appropriate for students with highly specialized needs." fn. 8 (Capitalization omitted.) Plaintiffs cite Education Code section 56000, which states that individuals with exceptional needs have the right to an appropriate educational opportunity to meet their unique needs. Plaintiffs claim Clancy has unique, exceptional and special needs and that section 56000 states a philosophical framework that demands all students of the age for compulsory education be provided with a tailored education.

As we have already stated, section 56000 (educational instruction and services to individuals with exceptional needs) is limited to children with disabilities and impairments. It does not reflect any statement of public policy applicable to all students or to highly gifted students. Under the free school guarantee of the California constitution and the current statutes children have a right to a standard, free public K-12 education. Plaintiffs allege Clancy has completed such an education. Plaintiffs have not sought to compel anything besides a free college education. Clancy is not entitled to such relief.

V. *Plaintiffs' Failure To Plead Prior Presentation Of A Government Tort Claim*

As we have rejected the merits of plaintiffs' claim that Clancy is entitled to have his college education funded by CDE, we need not address CDE's [144 Cal.App.4th 712] contention that any claim for money damages is precluded by plaintiffs' failure to plead prior presentation of a claim with the State Board of Control (Gov. Code, § 900.2, subd. (b) - now the Victim Compensation and Government Claims Board). (See Gov. Code, § 900 et seq.)

DISPOSITION

The judgment of dismissal is affirmed. Each party shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a)(4).)

Scotland, P.J., and Morrison, J., concurred.

FN 1. Plaintiffs' action named as defendants both Jack O'Connell as the California Superintendent of Public Instruction and the California Department of Education. For convenience, we shall hereafter simply refer to defendants as CDE.

FN 2. Plaintiffs' briefs on appeal do not contain any argument regarding the second and third causes of action of the first amended complaint under appropriate headings with meaningful discussion supported by authorities. (Cal. Rules of Court, rule 14(a)(1).) If plaintiffs are making any claim regarding those causes of action, the claim has not been properly made and is rejected on that basis. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1346.)

FN 3. Article IX of the California Constitution makes public education a matter of statewide rather than local concern. (*Kennedy v. Miller* (1893) 97 Cal. 429, 431; *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179, 181, superseded by statute on

other grounds as noted in *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal.App.4th 1005, 1013, fn. 5.)

FN 4. We emphasize we are considering in this case plaintiffs' allegations that CDE is *required* under current law to provide Clancy with a suitable or appropriate education, which in his case amounts to a college education. We are not addressing whether CDE should or should not (within the ordinary system of K-12 education), promote a policy of addressing students' individual needs to every extent possible. We are aware there is significant debate in the field of education regarding the educational needs of gifted and highly gifted children. (See, e.g., Davidson, Genius Denied: How to Stop Wasting Our Brightest Young Minds (2004); Colangelo, A Nation Deceived: How Schools Hold Back America's Brightest Students (2004).) We are not expressing an opinion on such issues, which are matters of public policy properly addressed to the Legislature or electorate, not the courts. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 19, 30.)

FN 5. Plaintiffs have cited us to Education Code section 66030, claiming it states a mandate that "'public education in California strive to provide [. . .] each California[n], . . . a reasonable opportunity to develop his or her potential.'" Plaintiffs misquote the section, which actually provides: "It is the intent of the Legislature that public *higher* education in California strive to provide . . . each Californian, . . . a reasonable opportunity to develop fully his or her potential." "Public higher education" refers to California Community Colleges, California State Universities, and each campus of the University of California. (Ed. Code, § 66010, subd. (a).) Section 66030 is irrelevant to whether the Legislature must tailor its K-12 education program to provide each student with individualized education.

FN 6. Plaintiffs include vague references to unspecified provisions of the United States Constitution in their cause of action for declaratory relief, but have provided no substantive discussion on appeal of their claim, except to point us to *Hayes, supra*, 11 Cal.App.4th 1564, which we have addressed. We do not need to respond further to plaintiffs' federal constitutional references. (*People v. Turner, supra*, 8 Cal.4th at p. 214, fn. 19; *Heavenly Valley v. El Dorado Bd. of Equalization, supra*, 84 Cal.App.4th at p. 1346.)

FN 7. California does have a gifted and talented pupil program. (Ed. Code, § 52200 et seq.) The governing boards of individual school districts may "elect" to provide programs pursuant to such state law. (Ed. Code, § 52206, subd. (a).) Plaintiffs' first amended complaint does not allege there was no such program available for Clancy or that the program available was inadequate. The first amended complaint alleges only that Clancy cannot attend a "traditional" K-12 school because the schools operated by CDE and Clancy's local district are "ill-equipped and unsuitable[,]" will "cause [him] harm" and "cannot provide for his specific psycho-social and academic needs." Plaintiffs' first amended complaint does not name as a defendant Clancy's local school district.

FN 8. Plaintiffs do not make a constitutional equal protection claim in this argument and have not challenged the trial court's ruling on their second and third causes of action. (See, *ante*, fn. 2.)

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Wilson v. State Bd. of Education (1999) 75 Cal.App.4th 1125 , 89 Cal.Rptr.2d 745

[No. A084485. First Dist., Div. Four. Oct 26, 1999.]

RICHARD D. WILSON et al., Plaintiffs and Appellants, v. STATE BOARD OF EDUCATION, Defendant and Respondent; CALIFORNIA NETWORK OF EDUCATIONAL CHARTERS, Intervener and Respondent.

(Superior Court of the City and County of San Francisco, No. 995602, Raymond D. Williamson, Jr., Judge.)

(Opinion by Reardon, J., with Hanlon, P. J., and Poché, J., concurring.)

COUNSEL

Lynn S. Carman for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Stephanie Wald and Douglas M. Press, Deputy Attorneys General, for Defendant and Respondent.

Remcho, Johansen & Purcell, Joseph Remcho, James C. Harrison; Nielsen, Merksamer, Parrinello, Mueller & Naylor, John E. Mueller and James R. Parrinello for Intervener and Respondent.

John H. Findley and Sharon L. Browne for Pacific Legal Foundation and Pacific Research Institute as Amici Curiae on behalf of Defendant and Respondent and Intervener and Respondent.

OPINION

REARDON, J.-

"Charter schools are grounded in private-sector concepts such as competition-driven improvement ..., employee empowerment and customer focus. But they remain very much a public-sector creature, with in-bred requirements of accountability and broad-based equity. Simple in theory, complex in practice, charter schools promise academic results in return for freedom from bureaucracy." (Com. on Cal. State Gov. Organization and Economy, rep., The Charter Movement: Education Reform School by School (Mar. 1996) p. 1 (Little Hoover Report).)

Charter schools are a phenomenon of the 1990's. With the Charter Schools Act of 1992, fn. 1 California became the second state to enact charter school legislation. (RPP Internat. & U. of Minn., A Study of Charter Schools, First-Year Rep., Of. of Ed. Research & Improvements, Dept. Ed. **[75 Cal.App.4th 1130]** (1997).) Last year, the Legislature fine-tuned the program. fn. 2 Since the close of briefing, new provisions have been added. fn. 3

Troubled by what they see as a multifaceted assault on the California Constitution, appellants fn. 4 aim to halt the march of the charter school movement in California through a facial challenge to the Charter Schools Act and Assembly Bill No. 544. They have petitioned for a writ of mandate commanding the Board to refrain from (1) granting any charters under Assembly Bill No. 544 or the original legislation, and (2) expending any public funds in implementing those laws. Their petition has

been denied. On appeal appellants roll out a slate of errors. None have merit.

I. Statutory Framework

A. *The Original Enactment*

Anyone closely allied with a public school-whether a parent or family member of a student, or a teacher, administrator or classified staff member-can attest to the perils resident in the complex tangle of rules sustaining our public school system. These include the potential to sap creativity and innovation, thwart accountability and undermine the effective education of our children.

The 1992 legislation sought to disrupt entrenchment of these traits within the educational bureaucracy by encouraging the establishment of charter schools. Specifically, it permitted the founding of 100 charter schools statewide and up to 10 in any district. These schools would be free from most state laws pertaining uniquely to school districts. Each would receive a five-year revocable charter upon successful petition to the school district governing board or county board of education, signed by a specified percent of teachers. (Former §§ 47602, subd. (a), 47605, 47607, as added by Stats. 1992, ch. 781, § 1, pp. 3756-3761; fn. 5 § 47610.)

The original enactment set out six goals: (1) improving pupil learning; (2) increasing learning opportunities, especially for low-achieving students; (3) encouraging use of different and innovative teaching methods; (4) creating **[75 Cal.App.4th 1131]** new professional opportunities for teachers, including being responsible for the school site learning program; (5) providing parents and students with more choices in the public school system; and (6) holding schools accountable for measurable pupil outcomes and providing a way to change from rule-based to performance-based accountability systems. fn. 6 (Former § 47601.)

Charter schools nonetheless were-and are-subject to important restraints: (1) they must be nonsectarian in their programs, admission policies, employment practices, and all other operations (former § 47605, subd. (d) [now § 47605, subd. (d)(1)]); (2) charter schools cannot charge tuition or discriminate against any student on the basis of ethnicity, national origin, gender or disability (*ibid.*); and (3) no private school can be converted to a charter school (former [and current] § 47602, subd. (b)).

The petition to establish a charter school was, and is, a comprehensive document which must, among other items, set forth (1) a description of the educational program; (2) student outcomes and how the school intends to measure progress in meeting those outcomes; (3) the school's governing structure; (4) qualifications of employees; (5) procedures to ensure the health and safety of students and staff; (6) means of achieving racial and ethnic balance among its students that reflects the general population within the territory of the school district; (7) admission requirements, if applicable; (8) annual audit procedures; (9) procedures for suspending and expelling students; and (10) attendance alternatives for students who choose not to attend charter schools. (Former § 47605, subd. (b) [now § 47605, subd. (b)(5)].)

Under the 1992 scheme, upon receiving a duly signed charter petition and convening a public hearing on its provisions, the school district had discretion to grant or deny the charter. (Former § 47605, subd. (b).) The granting of a charter exempted the school from laws governing school districts except, at the school's option, provisions concerning participation in the state teacher's retirement system. (Former §§ 47610, 47611.) Denial of a charter could trigger procedures for reconsideration, at petitioner's request. (Former § 47605, subd. (j)(1), (3).)

Charter schools were, and are, required to meet statewide performance standards and conduct certain pupil assessments. (Former § 47605, subd. (c) [now § 47605, subd. (c)(1)].) The chartering authority could, and can, revoke a charter for various deficiencies including charter or legal violations and failure to meet student outcomes. (Former [and current] § 47607, subd. (b).) **[75 Cal.App.4th 1132]**

B. *Assembly Bill No. 544*

Assembly Bill No. 544 substantially revamped the 1992 enactment. Gone is the cap of 100 charter schools, replaced with a 1998-1999 school year cap of 250, with 100 more authorized each successive school year. (§ 47602, subd. (a).)

Gone too is the exclusive reliance on teacher signatures to start the petition process. Now, a petition is valid if signed by the number of parents/guardians equal to at least half of the estimated students, or the number of teachers equal to at least half the teachers expected to be employed. (§ 47605, subd. (a)(1).) The petition must display a statement that the signator is "meaningfully interested" in sending his or her child to, or teaching at, the charter school, as the case may be. (*Id.*, subd. (a)(3).) Petitions for the conversion of an existing public school to a charter school must be signed by at least half of the permanent status teachers currently employed at the school. (*Id.*, subd. (a)(2).)

Gone also is the broad discretion in granting or denying a charter. Now, following review of the petition and the requisite public hearing, the governing board of the district "shall not deny a petition" unless it makes written findings of fact that: (1) The charter school presents an unsound educational program; (2) petitioners are "demonstrably unlikely" to succeed in implementing the program; or (3) the petition lacks the required signatures, affirmations or descriptions of program articulars. (§ 47605, subd. (b).) If the school district nonetheless denies a petition, the petitioner can submit to the county board of education or the Board. (*Id.*, subd. (j)(1).) Additionally, petitioner can submit directly to the county board of education for a charter school that would serve pupils otherwise directly served by the county office of education. (§ 47605.5.)

As well, the amendments permit a charter school to operate as a nonprofit benefit corporation, with the school district granting the charter entitled to one representative on the board of directors. (§ 47604, subds. (a), (b).)

Now, the Board itself, upon recommendation of the Superintendent of Public Instruction (Superintendent), can take "appropriate action," including revoking the charter of any school, if it finds "[g]ross financial mismanagement" (§ 47604.5, subd. (a)); "[i]llegal or substantially improper" use of funds (*id.*, subd. (b)); or that "[s]ubstantial and sustained departure" from successful practices jeopardizes the educational development of the students (*id.*, subd. (c)).

Other new provisions include the following: (1) No funds will be given for any pupil who also attends a private school that charges his or her family **[75 Cal.App.4th 1133]** for tuition (§ 47602, subd. (b)); (2) all charter schoolteachers must hold a Commission on Teaching Credentialing certificate or equivalent (§ 47605, subd. (*l*)); (3) petitioners must provide the chartering authority with financial statements that include a proposed first-year operational budget and three-year cash-flow and financial projections (*id.*, subd. (g)); (4) charter schools must use generally accepted accounting principles in conducting the required annual financial audits, and any exceptions or deficiencies identified during the audit must be resolved to the satisfaction of the chartering authority (*id.*, subd. (b)(5)(I)).

Concerning accountability, charter schools must "promptly respond to all reasonable inquiries" from either the chartering authority or the Superintendent. (§ 47604.3.) Additionally, the chartering authority can "inspect or observe any part of the charter school at any time" (§ 47607, subd. (a)) and charge the school for supervisorial oversight (§ 47613.7, subd. (a)).

C. *Senate Bill No. 434*

Senate Bill No. 434 (1999-2000 Reg. Sess.) further refines the Charter Schools Act. Starting January 1, 2000, charter schools must (1) at a minimum, offer the same number of instructional minutes per grade level as required of all school districts (§ 47612.5, subd. (a)(1) [added by Stats. 1999, ch. 162, § 1]); and (2) maintain written contemporaneous records documenting pupil attendance and make the same available for audit and inspection (*id.*, subd. (a)(2)). As well, as a condition of apportionment of state funding, charter schools must certify that its pupils have participated in the state testing program in the same manner as all other pupils attending public schools. (*Id.*, subd. (a)(3).) Further, charter schools which provide independent study must comply with statutory requirements and implementing regulations that relate to independent study. (*Id.*, subd. (b).) And finally, in keeping with this sentiment, charter schools will be held to the same prohibition as local education agencies when it comes to extending funds or value to pupils in independent study programs (or their parents or guardians): They cannot claim state funding if the funds or other value so extended could not legally be extended to similarly situated pupils of a school district (or their parents or guardians). (§ 51747.3, subd. (a), as amended by Senate Bill No. 434 [Stats. 1999, ch. 162, § 2].)

II. Standard of Review

Appellants have provoked a facial challenge to the Charter Schools Act and the Assembly Bill No. 544 amendments. This comes with a formidable burden commensurate with the outcome of a successful assault-namely, invalidation of a legislative act. **[75 Cal.App.4th 1134]**

[1] The California Constitution fn. 7 is a limitation on the powers of the Legislature, and we construe such limits strictly. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 [172 Cal.Rptr. 487, 624 P.2d 1215].) Thus, when scrutinizing the constitutionality of a statute, we start with the premise of *validity*, resolving all doubts in favor of the Legislature's action. (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 260 [5 Cal.Rptr.2d 545, 825 P.2d 438].) This presumption of constitutionality is particularly appropriate where, as here, the Legislature has enacted a statute with the pertinent constitutional prescriptions in mind. fn. 8 "In such a case, the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision." (*Pacific Legal Foundation v. Brown*, *supra*, 29 Cal.3d at p. 180.) Finally, to void a statute on its face, "petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute .... Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable

constitutional prohibitions." (*Id.* at pp. 180-181, italics omitted.)

III. Discussion

A. *The Legislature Has Plenary Power Over Public Schools*

[2a] As a preamble to addressing the amalgam of constitutional objections laid out in this appeal, we emphasize that the Legislature's power over our public school system is plenary, subject only to constitutional restraints. (*Hall v. City of Taft* (1956) 47 Cal.2d 177, 180-181 [302 P.2d 574]; *California Teachers Assn.* v. *Hayes* (1992) 5 Cal.App.4th 1513, 1524 [7 Cal.Rptr.2d 699].) Since 1879 our Constitution has declared the Legislature's preeminent role in encouraging education in this state, as well as its fundamental obligation to establish a system of public schools: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (Art. IX, § 1.) "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." (*Id.*, § 5.)

There can thus be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public schools (*Hall* **[75 Cal.App.4th 1135]** v. *City of Taft*, *supra*, "47 Cal.2d at p. 179), including broad discretion to determine the types of programs and services which further the purposes of education (*California Teachers Assn.* v. *Hayes*, *supra*, 5 Cal.App.4th at p. 1528).

[3a] Appellants first maintain that the 1998 Assembly Bill No. 544 amendments violate article IX, section 5 because they amount to abdication of *any* state control over essential educational functions, e.g., control over curriculum, textbooks, educational focus, teaching methods and operations of charter schools. This is so, they argue, because the parents and teachers who write the charters and the grantees who operate the schools now run the show with respect to all these functions.

Appellants confuse the delegation of certain educational functions with the delegation of the public education system itself. As explained in *California Teachers Assn.* v. *Board of Trustees* (1978) 82 Cal.App.3d 249, 253-254 [146 Cal.Rptr. 850], the public school system is the system of schools, which the Constitution requires the Legislature to provide-namely kindergarten, elementary, secondary and technical schools, as well as state colleges-and the administrative agencies which maintain them. (See art. IX, § 6 [delineating features of public school system].) However, the curriculum and courses of study are not constitutionally prescribed. Rather, they are *details* left to the Legislature's discretion. Indeed, they do not constitute part of the system but are merely a function of it. (*California Teachers Assn.* v. *Board of Trustees, supra*, 82 Cal.App.3d at p. 255.) The same could be said for such functions as educational focus, teaching methods, school operations, furnishing of textbooks and the like.

Moreover, appellants take too myopic a view of what it means for the state to retain control of our public schools, including charter schools. The Charter Schools Act represents a valid exercise of legislative discretion aimed at furthering the purposes of education. Indeed, it bears underscoring that charter schools are *strictly* creatures of statute. From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation-the Legislature has plotted all aspects of their existence. Having created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether. (See §§ 47602, subd. (a)(2), 47616.5.) In the meantime the Legislature retains ultimate responsibility for all aspects of education, including charter schools. [2b] " 'Where the Legislature delegates the local functioning of the school system to local boards, districts or municipalities, it does so, always, with its constitutional power and responsibility for ultimate control for the common welfare in reserve.' " (*Phelps* v. **[75 Cal.App.4th 1136]** *Prussia* (1943) 60 Cal.App.2d 732, 738 [141 P.2d 440], quoting trial court decision.)

B. *Charter Schools Are Part of California's Public School System*

[3b] Appellants further complain that Assembly Bill No. 544 has spun off a separate system of charter public schools that has administrative and operational independence from the existing school district structure, and whose courses of instruction and textbooks may vary from those of noncharter schools. Such splintering, appellants charge, violates the article IX, section 5 mandate to the Legislature to provide a "system of common schools."

Article IX, section 6 defines "Public School System" as including "all kindergarten schools, elementary schools, secondary schools, technical schools, and state colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them."

The key terms in these provisions are "common" and "system." The concept of a "common" school is linked directly to that of a "free school," which the Constitution mandates must be "kept up and supported" in each district for a prescribed annual duration. (Art. IX, § 5.) Historically, common schools were the "primary and grammar" schools, distinguished from other instrumentalities of the public school system by virtue of being the exclusive beneficiaries of the state school fund. (*Los Angeles County v. Kirk* (1905) 148 Cal. 385, 390-391 [83 P. 250]; *Stockton School District v. Wright* (1901) 134 Cal. 64, 67 [56 P. 34]; Jones, *Chapters on the School Law of California* (1914) 2 Cal.L.Rev. 459, 460-461.)

As to the concept of a system, we note that early on in California history "the contest was between a state system and a local system of common schools." (*Mitchell v. Winnek* (1897) 117 Cal. 520, 526 [49 P. 579].) The notion of a single state system, under state control, prevailed. (See *id.* at pp. 523-526.) *Piper v. Big Pine School Dist.* (1924) 193 Cal. 664, 666 [226 P. 926] presents a variation on this theme: At that time, the federal government had established "a school for the education and training of members of the Indian race" within the territorial boundaries of Big Pine School District. Alice Piper, "a female Indian child," sought admission to school in that district. (*Id.* at p. 665.) Our Supreme Court agreed that she was entitled to admission, holding that eligibility to attend the federal school did not satisfy the mandate of article IX, section 5 because the state had no control over that school. (*Piper v. Big Pine School Dist., supra*, 193 Cal. at pp. 672-673.) **[75 Cal.App.4th 1137]**

Thus the term "system" has come to import " 'unity of purpose as well as an entirety of operation, and the direction to the legislature to provide "a" system of common schools means *one* system which shall be applicable to all the common schools within the state.' " (*Serrano v. Priest* (1971) 5 Cal.3d 584, 595 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187], original italics.) This means that the educational system must "be uniform in terms of the prescribed course of study and educational progression from grade to grade." (*Id.* at p. 596.)

From this perspective it is apparent that charter schools are part of California's single, statewide public school system. First, the Legislature has explicitly found that charter schools are (1) part of the article IX "Public School System"; (2) under its jurisdiction; and (3) entitled to full funding. (§ 47615, subd. (a).) These findings are entitled to deference. (*Amwest Surety Ins. Co.* v. *Wilson* (1995) 11 Cal.4th 1243, 1252 [48 Cal.Rptr.2d 12, 906 P.2d 1112].) As well, the Legislature has directed that the Charter Schools Act "shall be liberally construed to effectuate [these] findings ...." (§ 47615, subd. (b).)

Second, the establishment of charter schools does not create a dual system of public schools, as, for example, would be the case if there were a competing local system. Rather, while loosening the apron springs of bureaucracy, the Act places charter schools within the common system of public schools, as the following provisions illustrate: Charter schools by law are free, nonsectarian and open to all students. (§ 47605, subd. (d)(1).) They cannot discriminate against students on the basis of ethnicity, national origin, gender or disability. (*Ibid.*) Further, charter schools must meet statewide standards and conduct pupil assessments applicable to pupils in noncharter public schools (*id.*, subd. (c)(1)); fn. 9 must hire credentialed teachers (*id.*, subd. (*l*)); and are subject to state and local supervision and inspection **[75 Cal.App.4th 1138]** (§§ 47605, subd. (k)(1), 47607, subd. (a)). Finally, beginning next year, charter schools must offer the minimum duration of instruction as required of all other public schools. (§ 47612.5, subd. (a)(1) [added by Stats. 1999, ch. 162, § 1].)

In sum it is clear that the Act brings charter schools within the system uniformity requirement because (1) their students will be taught by teachers meeting the same minimum requirements as all other public school teachers; (2) their education programs must be geared to meet the same state standards, including minimum duration of instruction, applicable to all public schools; and (3) student progress will be measured by the same assessments required of all public school students.

Moreover, the Act assures that charter schools will receive funding comparable to other public schools. (§§ 47612-47613.5.) In addition, it guards against the flow of funds to schools outside the system. For example, the Act prohibits the conversion of private schools to charter schools. It also bars charter schools from receiving any public funds for any pupil also attending a private school that charges the family for tuition. (§ 47602, subd. (b).)

C. *Charter Schools Are Under the Exclusive Control of Officers of the Public Schools and Fall Under the Jurisdiction of the Public School System*

[4] Next, appellants contend that charter schools offend constitutional provisions calling for public schools to be under the exclusive control of officers of the public school system, as well as under the jurisdiction of that system. We find no problem.

1. *Article IX, Section 8*

Article IX, section 8 provides in part: "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools ...."

This section endeavors to (1) prohibit the use of public funds to support private schools, whether sectarian or not; and (2) preserve strict separation **[75 Cal.App.4th 1139]** between religion and public education. Appellants attempt to build the argument that charter schools are private, not public schools. They are convinced that under Assembly Bill No. 544, officers of public schools have no real control over the educational product delivered by charter schools because these officers cannot deny a charter petition except upon finding that the educational program is unsound, the petitioners are "demonstrably unlikely" to succeed in implementing the program, or that the petition lacks certain mandatory items. (§ 47605, subd. (b).) According to appellants, this means the charter grantees are in control, and again according to appellants, they are not officers of the public schools.

First, the terms of Assembly Bill No. 544 belie these contentions. To begin with, charter schools *are* public schools because, as explained above, charter schools are part of the public school system. fn. 10 (§ 47615, subd. (a)(1).) Further, the Legislature has specifically declared that charter schools are under "the exclusive control of the officers of the public schools" (*id.*, subd. (a)(2)) and directs us to construe the law liberally to effectuate that finding (*id.*, subd. (b)).

Second, one court construing the "exclusive control" language harkened back to early constitutional history, observing that "[t]he language of article IX, section 8, has remained unchanged since its proposal in the constitutional convention of 1878-1879 and its adoption by the People on May 7, 1879. It was approved at the convention without significant debate .... (See 3 Debates and Proceedings of the Constitutional Convention of the State of Cal. (1881).) ... The delegates were seriously concerned with assuring that public funds should only be used for support of the public school system they were creating in article IX .... Thus, in another context a delegate expressed concern about any 'opposition system of schools against the common schools of the State ....' " (*Board of Trustees v. Cory* (1978) 79 Cal.App.3d 661, 665 [145 Cal.Rptr. 136].) Obviously charter schools are not in opposition to the public school system. On the contrary, they are a part of that system. Although they have operational independence, an overarching purpose of the charter school approach is to infuse the public school system with competition in order to stimulate continuous improvement in *all* its schools. (§ 47601, subd. (g).)

Third, we wonder what level of control could be more complete than where, as here, the very destiny of charter schools lies solely in the hands of public agencies and offices, from the local to the state level: school districts, **[75 Cal.App.4th 1140]** county boards of education, the Superintendent and the Board. The chartering authority controls the application approval process, with sole power to issue charters. (See §§ 47605, 47605.5.) Approval is not automatic, but can be denied on several grounds, including presentation of an unsound educational program. (§ 47605, subd. (b)(1).) Chartering authorities have continuing oversight and monitoring powers, with (1) the ability to demand response to inquiries concerning financial and other matters (§ 47604.3); fn. 11 (2) unlimited access to "inspect or observe any part of the charter school at any time" (§ 47607, subd. (a)(1)); and (3) the right to charge for actual costs of supervisorial oversight (§ 47613.7, subd. (a)). As well, chartering authorities can revoke a charter for, among other reasons, a material violation of the charter or violation of any law. (§ 47607, subd. (b)(1).) Short of revocation, they can demand that steps be taken to cure problems as they occur. (*Id.*, subd. (c).) The Board, upon recommendation from the Superintendent, can also revoke any charter or take other action in the face of certain grave breaches of financial, fiduciary or educational responsibilities. (§ 47604.5.) Additionally, the Board exercises continuous control over charter schools through its authority to promulgate implementing regulations. (§§ 47605, subd. (j)(4), 47613.5, subd. (b).) Finally, public funding of charter schools rests in the hands of the Superintendent. (See §§ 47612, 47613.)

Fourth, the sum of these features, which we conclude add up to the requisite constitutional control over charter schools, are in place whether a school elects to "operate as, or be operated by, a nonprofit public benefit corporation" (§ 47604, subd. (a)), or whether it remains strictly under the legal umbrella of the chartering authority. In other words, even a school operated by a nonprofit could never stray from under the wings of the chartering authority, the Board, and the Superintendent. We note too that situating the locus of control with the public school system rather than the nonprofit is not incompatible with the laws governing nonprofit public benefit corporations. Specifically, one of their enumerated powers is to "[p]articipate with others in any partnership, joint venture or other association, transaction or arrangement of any kind *whether or not such participation involves sharing or delegation of control with or to others*." (Corp. Code, § 5140, subd. (j), italics added.)

Fifth, speaking directly to appellants' repeated concern that charter grantees will be making decisions about curriculum and similar educational functions and thus the necessary control element has been abandoned, we reiterate that these functions are details left to legislative discretion. (*California Teachers Assn.* v. *Board of Trustees*, *supra*, 82 Cal.App.3d at p. 255.) With the Charter Schools Act, the Legislature has exercised its discretion to **[75 Cal.App.4th 1141]** sanction a certain degree of flexibility and operational independence, thereby giving the nod to healthy, innovative practices and experimentation. Central to its intent is the goal of stimulating continuous improvement in *all* public schools by fostering competition within the public school system itself. (See § 47601, subd. (g).) And in any event, through their powers to deny petitions and revoke charters, chartering authorities *do* exercise control over these educational functions.

Sixth, as to appellants' point that charter grantees are not officers of public schools, the law again belies this proposition. The Constitution gives the Legislature the "power, by general law, to provide for the incorporation and organization of school districts ... of every kind and class, and [to] classify such districts." (Art. IX, § 14.) Seizing this power, the Legislature has declared that "[a] charter school shall be deemed to be a 'school district' for purposes of Section 41302.5 and Sections 8 and 8.5 of Article XVI ...." fn. 12 (§ 47612, subd. (c).) Appellants argue that a charter school is not a school district "because its incorporation and organization [have] not been provided by an enactment of the Legislature ...." What is the Charter Schools Act if not an enactment of the Legislature providing for the organization of charter schools as districts for purposes of the enumerated provisions? Nothing in article IX, section 6 says that a district *classified* by the Legislature must also be *incorporated* pursuant to explicit legislative direction.

Thus, under this scheme, charter school officials are officers of public schools to the same extent as members of other boards of education of public school districts. So long as they administer charter schools according to the law and their charters, as they are presumed to do, they stand on the same constitutional footing as noncharter school board members. If they violate the law, the charter will be revoked.

2. *Article IX, Section 6*

Appellants advance similar arguments concerning the jurisdictional requirement of article IX, section 6. This section reads in part: "No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System *or placed under the* **[75 Cal.App.4th 1142]** jurisdiction of any authority other than one included within the Public School System." (Italics added.) Article IX, section 6 also provides that the public school system consists of the various levels and types of public schools and colleges as well as "the school districts and the other agencies authorized to maintain them."

School districts, county boards of education and respondent Board share several things in common: The formation of each entity is provided for in article IX (§ 7 [Board and county boards of education], §§ 14 & 16 [local school districts and their governing boards]). As such each entity is "authorized to maintain" the various schools in our public school system. (*Id.*, § 6.) Finally, each entity is a defined chartering and revoking authority under the Act (§§ 47605, subds. (b), (j), 47605.5, 47607), with supervisorial oversight over their charter schools (§§ 47604.3, 47607, 47613.7). The most direct answer to appellants' jurisdictional challenge is this: Charter schools are under the jurisdiction of chartering authorities; chartering authorities are authorities "within the Public School System," and hence no violation of article IX, section 6 can be stated.

To the extent appellants define the term "jurisdiction" more narrowly as "management and control" (citing *California Teachers Assn.* v. *Board of Trustees*, *supra*, 82 Cal.App.3d at p. 256), our analysis of article IX, section 8 fully applies. (See pt. C.1., *ante*.)

D. *The Charter Schools Act As Amended Does Not Run Afoul of Constitutional Prohibitions Against Public Appropriations in Aid of Sectarian Purposes or Institutions*

[5] Appellants' greatest misgiving is their assessment that the current scheme "requires the issuance of a school charter to every church or sect who otherwise qualifies to be a charter grantee ...." (Underscore omitted.) They reason as follows: A chartering authority cannot deny a charter, whether the proposed grantee is sectarian or not, unless it can render one of the negative findings set forth in section 47605, subdivision (b). This is so because the statute does not explicitly authorize chartering authorities to deny a petition on grounds that petitioner is a religious organization or an affiliate of a religious organization.

Moreover, appellants are dismayed that the Act does not specifically sanction charter revocation in the event a school is or becomes controlled by **[75 Cal.App.4th 1143]** a religious sect. fn. 13 Accordingly, they are adamant that churches and other sectarian groups will and must be permitted to operate and control charter schools, all in defiance of article XVI, section 5 fn. 14 and article IX, section 8 (quoted in pertinent part in pt. C.1., *ante*).

The antidote to these concerns is found in the Act itself. Charter petitioners must affirm that their school will be nonsectarian in its programs and operations. (§ 47605, subds. (b)(4), (d)(1).) A petition lacking such affirmation can be denied. (*Id.*, subd. (b)(4).) But what if the petition contained the requisite affirmation but petitioners nonetheless were controlled by a religious organization? In that event, the chartering authority could deny the petition because petitioners were "demonstrably unlikely to successfully implement the program set forth in the petition," most notably its nonsectarian premise. (*Id.*, subd. (b)(2).) Moreover, a petition for a charter school controlled by a sectarian organization would be denied under this same clause because the school would be *illegal* under article XVI, section 5. A school illegal from its inception has little chance of success. **[75 Cal.App.4th 1144]**

In addition, if a school's religious affiliation evolved *after* charter status was attained, or, if initially masked, became revealed at such later time, either situation would be immediate grounds for charter revocation. In the first instance, the school would come within the "[v]iolated any provision of law" provision of section 47607, subdivision (b)(4). In the latter instance, petitioners would have presented a facially acceptable but misleading petition, i.e., one affirming that the school would be nonsectarian in its programs and operations. (§ 47605, subds. (b)(4), (d)(1).) When that proved not to be the case, the charter would be subject to revocation because the school materially violated its charter. (§ 47607, subd. (b)(1).)

Appellants' various legal arguments are not persuasive. First, they dissect the holding of *California Teachers Assn.* v. *Riles* (1981) 29 Cal.3d 794 [176 Cal.Rptr. 300, 632 P.2d 953], a case that has no applicability to the one at hand. *Riles* involved a constitutional challenge to the statutory textbook loan program, which authorized the lending of public school textbooks to students attending private schools. There was no question that sectarian schools would benefit from the program. The only question was the *character* of the benefit provided, the state defendants arguing an indirect benefit under the "child benefit" doctrine. The high court rejected their arguments, holding that the benefit to sectarian schools themselves was neither indirect nor remote. By providing textbooks at public expense the loan program appropriated money to advance the educational function of sectarian schools, in violation of section 8 of article IX and section 5 of article XVI. (*California Teachers Assn.* v. *Riles, supra*, 29 Cal.3d at pp. 809-813.)

In contrast, charter schools must be nonsectarian. Not content with the nonsectarian provisions of the Charter Schools Act, appellants claim the law is flawed because it does not include an express nonaffiliation provision, as do the Minnesota and federal charter school laws. fn. 15 Their theory is untenable: that section 47605, subdivision (d), as worded, authorizes "public charter schools to be owned by, controlled by, affiliated with, fn. 16 or operated by, a church or religious group, provided, that it be nonsectarian in its programs, admission policies, employment practices, and all other operations." **[75 Cal.App.4th 1145]**

This construction disregards settled principles of statutory construction, such as: We presume that the Legislature operates within the borders of the Constitution when enacting legislation. (*In re Kay* (1970) 1 Cal.3d 930, 942 [83 Cal.Rptr. 686, 464 P.2d 142].) fn. 17 Unless a conflict with a provision of the Constitution is clear and unquestionable, we will uphold the statute, wherever possible interpreting it as consistent with applicable constitutional provisions, seeking to harmonize statute and Constitution. (*Arcadia Unified School Dist. v. State Dept. of Education*, *supra*, 2 Cal.4th at p. 260.) Finally, there is no requirement that the Legislature bar by statute what is already barred by Constitution. (See *Bowen v. Kendrick* (1988) 487 U.S. 589, 614 [108 S.Ct. 2562, 2577, 101 L.Ed.2d 520].) In this sense, a nonaffiliation provision would be redundant because nonaffiliation is already constitutionally proscribed.

E. *The Charter Schools Act Does Not Conflict With the Textbook Adoption Requirement of Article IX, Section 7.5*

[6] The broad exemption from most education laws governing school districts, which the Act extends to charter schools, embraces section 60200 concerning adoption of textbooks by the Board. Article IX, section 7.5 calls for such adoption: "The [Board] shall adopt textbooks for use in grades one through eight throughout the State, to be furnished without cost as provided by statute."

From this appellants posit infringement of article IX, section 7.5. But how? By its terms the provision imposes a requirement *on the Board*. It does not constitute a limitation on school districts, prohibit them from choosing other books, fn. 18 or hinder the Legislature from enacting laws delineating the scope of the Board's authority (see *Engelmann v. State Bd. of Education*, *supra*, 2 Cal.App.4th at p. 54). "[T]he Legislature may define, limit, or condition a constitutional power or right so long as it does not unduly burden **[75 Cal.App.4th 1146]** the exercise of that power or right." (*Ibid.*) This is just what section 47610 does: By exempting charter schools from the textbook adoption (and numerous other) laws, the Legislature has limited the scope of the Board's authority with respect to the textbook selection process. However, the price for limited experimentation and operational freedom afforded to charter schools does not unduly burden the Board's exercise of its textbook selection powers. Therefore, the Act does not run afoul of article IX, section 7.5.

F. *The Act Does Not Impermissibly Delegate Legislative Powers*

[7a] Appellants' final protest concerns the effect of the unamended Charter Schools Act, should we strike Assembly Bill No. 544. They insist that the underlying enactment amounts to an unconstitutional delegation of legislative powers to the Board and other chartering authorities. Specifically, they assert that the power to issue charters has been handed over without standards or guidance as to a whole quilt of concerns: decisions about curriculum, texts, educational focus, and teaching methods; minimum qualifications of charter grantees; whether, through apt terms in the charter, to retain control over publi educational functions of the charter schools; and whether to grant charters to grantees controlled by a church or religious sect. Appellants cast each of these issues as implicating "a fundamental policy decision which the Legislature [is] required to make ...."

To begin with, the Legislature has not left it up to charter authorities to decide whether to grant a charter to a grantee controlled by a religious sect. To reiterate: Article XVI, section 5 *is* the standard, and the standard is "don't do it under any circumstances."

Next, appellants misunderstand the legislative function. [8] "Essentials of the legislative function include the determination nd formulation of legislative policy. 'Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the "power to fill up the details" by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect ....' " (*State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 750 [16 Cal.Rptr.2d 727], quoting *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 549 [159 P.2d 921].)

[7b] Here, the Legislature made the fundamental policy decision to give parents, teachers and community members the opportunity to set up public schools with operational independence in order to improve student learning, **[75 Cal.App.4th 1147]** promote educational innovation and accomplish related public education goals. (§ 47601.) From there, the Legislature set limits on the number of charter schools that can exist at any particular time and their term (§§ 47602, subd. (a), 47606, subd. (a)); controlled against charter status by way of private school conversion (§ 47602, subd. (b)); and fixed standards for charter schools, as detailed in the numerous petition and operational requirements set forth in section 47605. Having set the policy and fixed standards and limits, the Legislature did its job: "In the educational setting, legislatures rarely control public school operations directly, but delegate authority which permits state, regional, and local education agencies to establish school policies and practices." (*State Bd. of Education v. Honig*, *supra*, 13 Cal.App.4th at p. 750.)

Reasonable grants of power to administrative agencies will not offend the nondelegation doctrine so long as adequate safeguards exist to protect against abuse of that power. (*State Bd. of Education v. Honig*, *supra*, 13 Cal.App.4th at p. 751.) Here, procedures are in place to safeguard the chartering authority decisionmaking process. These include procedures for review of denied petitions (§ 47605, subd. (j)) and, with the Assembly Bill No. 544 amendments, open meeting requirements (§ 47608).

Finally, while it is obvious that appellants wish for more-and more detailed-standards and guidelines, more could not be better in this situation where a primary purpose of the Act is to encourage educational innovation, experimentation and choice in order to improve learning and expand learning opportunities for all students. How can you write the score to a symphony yet to be created?

IV. Disposition

The Charter Schools Act rests on solid constitutional ground. We affirm the judgment.

Hanlon, P. J., and Poché, J., concurred.

A petition for a rehearing was denied November 24, 1999, and appellants' petition for review by the Supreme Court was denied January 25, 2000.

FN 1. The Charter Schools Act of 1992 was added by Statutes 1992, chapter 781, section 1, page 3756, and is found at part 26.8 of the Education Code, section 47600 et seq. (hereafter the Charter Schools Act or the Act).

Unless otherwise indicated, all statutory references are to the Education Code.

FN 2. Assembly Bill No. 544 (1997-1998) enacted as Statutes 1998, chapter 34, sections 1-19, amended and added new provisions to the Act.

FN 3. Senate Bill No. 434 (1998-2000 Reg. Sess.) enacted as Statutes 1999, chapter 162, sections 1, 2, effective January 1, 2000.

FN 4. Appellants are Richard D. Wilson and Fernando Ulloa, residents and taxpayers of San Francisco and Marin Counties, respectively. Respondent is the State Board of Education (Board); intervener is the California Network of Educational Charters.

FN 5. Hereafter, references to former section means those sections as added by Statutes 1992, chapter 781, section 1, pages 3756-3761.

FN 6. Assembly Bill No. 544 (1997-1998 Reg. Sess.) adds a seventh goal: "Provide vigorous competition within the public school system to stimulate continual improvements in all public schools." (§ 47601, subd. (g).)

FN 7. All references to constitutions and articles are to the California Constitution.

FN 8. Note, for example, that the Legislature has specifically found and declared that "Charter schools are part of the Public School System, as defined in Article IX" (§ 47615, subd. (a)(1)) and are "under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools" (*id.*, subd. (a)(2)) "for purposes of Section 8 of Article IX ...." (§ 47612, subd. (b).)

FN 9. Specifically, section 47605, subdivision (c)(1) states: "Charter schools shall meet all statewide standards and conduct the pupil assessments required pursuant to Section 60605 and any other statewide standards authorized in statute or pupil assessments applicable to pupils in noncharter public schools."

Section 60605, subdivision (a)(1)(A) directs the Board, according to various time frames, to "adopt statewide academically rigorous content standards ... in the core curriculum areas of reading, writing, and mathmematics to serve as the basis for assessing the academic achievement of individual pupils and of schools, school districts, and the California education system." By November 1, 1998, the Board was to adopt content standards for history/social science and science. The adoption of statewide performance standards and pupil assessments in these areas follow on a later time frame. (*Id.*, subd. (a)(1)(B).)

Section 60605, subdivision (c)(1) and (2) calls on the Board to adopt an assessment instrument and to require each district to administer the statewide assessment to all pupils in specified grades and in specified subject areas.

It is highly significant to appellants' dual system argument that these very same academic content and performance standards adopted by the Board pursuant to section 60605 are model standards, which means that school districts may use them as a guideline in developing district standards. (See § 60618.) Thus, school districts have discretion when it comes to standards, just as charter schools do. All schools, however, must participate in the mandatory statewide assessments, which ensures a constitutional level of cohesion within the curriculum and course of study at each grade level in all schools. Section 47612.5, subdivision (a)(3) (added by Stats. 1999, ch. 162, § 1) conditions state funding on certification that charter school pupils participated in the state testing program in the same manner as all other public school students.

FN 10. Because charter schools are public schools and serve to further public education goals, contrary to appellants' additional assertion, their funding does not offend the public purpose doctrine. (See *City of Los Angeles* v. *Lewis* (1917) 175 Cal. 777, 779-780 [167 P. 390].)

FN 11. The Superintendent can likewise prompt inquiry. (§ 47604.3.)

FN 12. Article XVI, section 8 gives priority funding status to support of the public school system and public institutions of higher education and also sets minimum amounts of funding. Section 8.5 of article XVI provides for allocation of property tax revenues to public schools. Section 41302.5 states that for purposes of these two constitutional sections, the term " 'school districts' shall include county boards of education, county superintendents of schools, and direct elementary and secondary level instructional services provided by the state ...."

FN 13. To demonstrate their concern, appellants refer us to the discussion in the Little Hoover Report about an independent study, home-based charter school where, "[a]t the request of parents, the school was purchasing textbooks published by organizations with religious affiliations." (Little Hoover Rep., *supra*, at p. 57.) Appellants are appalled that the school's charter was not revoked. This is not the whole story. According to the report, the school changed its policy after the county education office informally told school officials "that such purchases could be viewed as violating the anti-sectarian provisions of the charter law." (*Ibid.*)

On a related note, appellants also cite the existence of 40 home-based charter schools, assuming, without factual basis, that "[b]y definition, the home-based teacher is a good Christian, Jew, Muslim, Buddhist, or what have you, who inculcates the parents' religion to the pupil, in the course of the home-based teaching." This is a speculative attack on home-based independent study programs in general, which exist *apart* from the charter school movement. While the Little Hoover Report gives some credence to concerns about funnelling public funds to parents to subsidize religious training, it also notes: "Unfortunately, [this concern is] just as possible in independent study programs that are not run by charter schools, Department of Education officials acknowledge. [¶] The department points out that there is no special program with earmarked funding; independent study is a teaching 'modality' rather than a specific program. A district that chooses to have such a program receives per-pupil funding equal to that it receives for a student who it houses in a classroom under full-time

teacher supervision." (Little Hoover Rep., *supra*, at p. 58.) And in any event, starting next year charter schools will be explicitly barred from receiving state funds if they pay for religious materials or anything else in connection with a home or independent study program that could not legally be purchased for the education of noncharter public school students. (See § 51747.3, subd. (a).)

N 14. Article XVI, section 5 reads in relevant part: "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever ...."

FN 15. Section 124D.10, subdivision 8(c) of the Minnesota State Laws provides in part that the sponsor of a charter school "*may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or a religious institution.*" (Italics added.) The federal act similarly provides in part that a charter school is a public school which, among other traits, "*is not affiliated with a sectarian school or religious institution ....*" (20 U.S.C. § 8066(1)(E), italics added.)

FN 16. Appellants do not explain the concept of "affiliation" nor does that term or concept appear in the relevant constitutional provisions. The verb "affiliate" means "to bring or receive into close connection as a member or branch[;] to associate as a member." (Webster's New Collegiate Dict. (9th ed. 1984) p. 61, col. 2.) Common sense tells us that for purposes of article XVI, section 5, a school that associated itself as a member or branch of a religious sect would, in fact, be controlled by the operative "religious creed, church, or sectarian denomination."

FN 17. One strong indicator of validity is this: With Assembly Bill No. 544 the Legislature has permitted charter schools to elect to operate as, or be operated by, a nonprofit public benefit corporation. (§ 47604, subd. (a).) It is significant that the statute does not, for example, refer more broadly to corporations organized under the Nonprofit Corporation Law. (See Corp. Code, § 5000 et seq.) In addition to nonprofit public benefit corporations, such corporations would include nonprofit *religious* corporations. (See *id.*, § 5046.) Thus, the *only* private entity that can operate a charter school is a nonprofit public benefit corporation. A church or other religious corporation could never operate a charter school outright.

FN 18. Under the code itself a school district can select nonadopted textbooks, but only if it establishes to the Board's satisfaction "that the state-adopted instructional materials do not promote the maximum efficiency of pupil learning in the district ...." (§ 60200, subd. (g); *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 52 [3 Cal.Rptr.2d 264].)

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People v. Oken, 159 Cal.App.2d 456

[Civ. No. 22496. Second Dist., Div. Three. Apr. 17, 1958.]

THE PEOPLE, Plaintiff, v. HARRY OKEN et al., Defendants; TONY ALARCON, Appellant; EL MONTE SCHOOL DISTRICT et al., Respondents.

COUNSEL

Alexander Ruiz and Manuel Ruiz, Jr., for Appellant.

Harold W. Kennedy, County Counsel (Los Angeles), and Edwin P. Martin, Deputy County Counsel, for Respondents.

OPINION

'ATROSSO, J. pro tem. fn. *

This is an appeal by cross-complainant Tony Alarcon from an order striking his third amended cross-complaint as against the cross-defendants El Monte School District and county of Los Angeles. [1] While an order striking a pleading is not ordinarily appealable, the rule is otherwise where, as here, the cross-complaint is directed against cross-defendants not otherwise parties to the action. (Trask v. Moore (1944), 24 Cal.2d 365, 373 [149 P.2d 854].)

The action in which the cross-complaint was filed is one instituted on behalf of the People of the State of California by **[159 Cal.App.2d 458]** the district attorney of Los Angeles County against numerous defendants, including cross- defendant, alleged to be the owners or occupants of properties within an area comprising some 24 acres located in the county of Los Angeles and commonly known as "Hick's Camp," to abate a public nuisance alleged to exist upon the properties located therein by reason of the maintenance thereon of dilapidated buildings and unsanitary conditions therein more particularly described.

A demurrer having been sustained with leave to amend to the original cross-complaint, appellant filed a second amended cross-complaint containing four separate causes of action. Demurrers interposed by the respondents to the latter complaint were sustained without leave to amend as to the first, second and fourth cause of action thereof. Thereafter appellant filed a third amended cross-complaint which was stricken upon motion of the respondents as hereinbefore stated.

The third amended cross-complaint, as is likewise true of its predecessors, is in many respects a remarkable document. It purports to incorporate therein by reference, the first, second and fourth causes of action of the second amended cross-complaint to which, as previously stated, demurrers had been sustained without leave to amend. It then alleges that the action is brought by the appellant "on behalf of apprximately [sic] 35 persons similarly situated, named defendants, in the second amended complaint of nuisance on file herein, and also as agent for the State of California, and the person in charge of the public uses hereinafter set forth and requested." It then alleges that the El Monte School District and numerous ndividually named cross-defendants claim an interest in the property described in Exhibit "A," attached to the cross-complaint, which apparently comprises a portion of the property described in plaintiff's complaint, whereon are located the conditions which are sought to be abated as a public nuisance. It further alleges "that the public interest and necessity require that the said property be acquired by cross complainant as agent of the State of California, as provided in section 1001 of the

California Civil Code. That cross complainant, Tony Alarcon, is a person, competent and qualified to acquire the real property and improvements thereon, described herein, as agent of the State and/or person in charge of the uses hereinafter set forth. That cross complainant seeks to take and condemn private property, to wit: Real Estate and improvements, for the public uses hereinafter **[159 Cal.App.2d 459]** set forth. That the plaintiff and cross defendants, El Monte School District, ıest Roll, District Attorney for Los Angeles County and the County of Los Angeles, are public bodies within the purview ..ı subsection 21 of the section 1238 of the California Code of Civil Procedure, ... to wit: To demolish, clear, abate or remove buildings from the area known as 'Hicks Camp' and herein described in exhibit 'A,' for the reason that the same are detrimental to the health, safety and morals of the people, and because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings predominating in said area. That the public interest and necessity require the construction by the El Monte School District of a school building and also the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land hereinabove described. In conjunction therewith, said public interest and necessity require, that buildings, dwellings and structures within said tract of land be demolished, cleared, abated and/or removed, in the interest of the health, safety and morals of the people, because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings therein, in a manner that will be most compatible with the greatest public good and the least private injury. ... That there is grave danger of the creation of a public nuisance, unless the public uses herein referred to are provided for and the public interest and necessity stated above be adjuticated [sic]."

The cross-complaint closes with a prayer that the cross-defendants be required to set forth the nature, character, extent and value of their several estates or interest in the parcels of real property sought to be condemned and the severance damage, if any, accruing thereto; that the value of each separate interest or estate sought to be condemned and the severance damages, if any, be ascertained, and that upon payment to the defendants entitled to compensation of the several amounts so ascertained, the court make and enter a final order of condemnation, "conveying to cross complainant, as agent for the state, the properties for the public use above set forth."

We have ignored the allegations contained in the first, second and fourth causes of action, contained in the second amended cross-complaint, which were attempted to be incorporated **[159 Cal.App.2d 460]** by reference in the third amended cross-complaint in view of the fact that the demurrers interposed to these causes of action had, as noted, been sustained without leave to amend. [2] The attempted incorporation of these counts in the third amended cross-complaint without leave of the ırt is ineffective and they may not be treated as a part of the pleading in the case. (39 Cal.Jur.2d p. 339.) Moreover, .hout here undertaking to set forth in detail the voluminous allegations of said counts, we are completely satisfied that the trial court properly sustained the demurrers thereto without leave to amend. Each of these three causes of action seemingly undertakes to state a cause of action for monetary and injunctive relief against the respondents upon some undiscernible theory for damages which the cross-complainant and others similarly situated allegedly will sustain if the plaintiff prevails in its action to abate the nuisances alleged to exist upon the properties owned by them.

[3] From the allegations of appellant's pleadings which we have above summarized in some detail, it would appear that the relief which he seeks thereby as against the respondents is a judgment declaring that the public interest and necessity require the construction by the respondent El Monte School District of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" in the cross-complaint described. We know of no law, and none has been called to our attention, which authorizes a private citizen to maintain such an action. Where, when or how, if at all, a school district shall construct school buildings is a matter within the sole competency of its governing board to determine. (Montebello Unified School Dist. v. Keay (1942), 55 Cal.App.2d 839, 843-844 [131 P.2d 384].)

If, however, the third amended cross-complaint be construed as one whereby appellant as a private citizen seeks to acquire property for the purpose of constructing and operating a public school, it is likewise unauthorized by law. Section 1001 of the Civil Code, upon which appellant assertedly seeks to predicate his action, while authorizing any person, as "an agent of the State" or as "a person in charge of such use" to acquire private property under the power of eminent domain for any of the public uses provided in section 1238 of the Code of Civil Procedure is wholly without application. [4] A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the **[159 Cal.App.2d 461]** property sought to be acquired to one of the public uses provided in section 1238, but it must likewise be made to appear that he is authorized to devote the property to the public use in question, or otherwise stated, that he is a person authorized to administer or have "charge of such use." (Beveridge v. Lewis (1902), 137 Cal. 619, 621 [67 P. 1040, 70 P. 1083, 92 ^m.St.Rep, 188, 58 L.R.A. 581].) [5] While appellant alleges by way of conclusion that he "is a person, competent and alified to acquire the real property" described in his pleading "as agent of the State and/or person in charge of the uses" nerein set forth, the allegation must be disregarded, because we judicially know it is untrue. (Wilson v. Loew's Inc. (1956), 142 Cal.App.2d 183, 187-188 [298 P.2d 152].) [6] "The constitution declares that the legislature shall provide 'for a system of common schools,' or, as expressed elsewhere in the organic law, 'a public school system.' " (23 Cal.Jur. p. 18; Cal. Const.,

art. IX, §§ 5-6.) "By these two sections, the constitution makes the school system a matter of state care and supervision. The term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools. And this duty to provide for the education of the children of the state, so far as the state has, by the adoption of the constitution, undertaken it, cannot be delegated to any agency." (23 Cal.Jur. 21-22.) As said in Piper v. Big Pine School Dist., 193 Cal. 664, 669 [226 P. 926]:

"It is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state."

From the allegations of the cross-complaint, it affirmatively appears that "(i)n this case it is the school district, acting through its governing board, that is the agent of the State in charge of the use for which the land was sought." (Montebello Unified School Dist. v. Keay, supra.)

[7] The third amended cross-complaint wholly fails to state a cause of action and is patently frivolous and sham. **[159 Cal.App.2d 462]** It was therefore properly stricken by the trial court. [8] As said by this court in Neal v. Bank of America (1949), 93 Cal.App.2d 678, 682-683 [209 P.2d 825]:

"It may be conceded that there is no statutory provision for striking complaints from the files, as there is in respect to sham or frivolous answers. (Code Civ. Proc., § 453.) However, the courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes. (41 Am.Jur. §§ 346, 347, p. 527; anno., 13 Am.St.Rep. 640.) ... In Santa Barbara County v. Janssens, 44 Cal.App. 318 [186 P. 372], it was held that an order striking an amended cross-complaint from the files was within the jurisdiction of the trial court, and presumably correct in the absence of error disclosed by the record. The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration. ... It cannot be doubted that the court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham and the order clearly was not an abuse of discretion."

The order appealed from is affirmed.

Shinn, P. J., and Wood (Parker), J., concurred.

FN *. Assigned by Chairman of Judicial Council.

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Childers v. Childers, 74 Cal.App.2d 56

[Civ. No. 15214. Second Dist., Div. Two. Apr. 17, 1946.]

WILMA FLORA CHILDERS, Respondent, v. JOHN E. CHILDERS, Appellant.

COUNSEL

Courtney A. Teel for Appellant.

Harvey W. Guthrie for Respondent.

OPINION

WILSON, J.

At the conclusion of the trial of this action, which was had before the court without a jury, findings of fact and conclusions of law were waived by both parties, whereupon an interlocutory judgment of divorce was awarded to plaintiff. Defendant has appealed on the judgment roll and a transcript of the evidence introduced at the trial. The only point raised is that the evidence is insufficient to sustain the findings that must be implied in support of the judgment. **[74 Cal.App.2d 59]**

1. Assumptions and implications when findings are waived. [1] Since findings of fact and conclusions of law were waived every intendment is in favor of the judgment. It will be assumed that the trial court found every fact essential to the support of the judgment, and findings will be implied in favor of the successful litigant upon all of the issues raised by the pleadings. (Gray v. Gray, 185 Cal. 598, 599 [197 P. 945]; Miller v. Pacific Freight Lines, 40 Cal.App.2d 451, 453 [104 P.2d 1069]; Green v. Darling, 73 Cal.App. 700, 703 [239 P. 70]; Jensen v. Burton, 117 Cal.App. 66, 68 [3 P.2d 324].) [2] But since a transcript of the evidence is before this court the assumption goes no further, and we are not required to and we do not indulge in an assumption as to the sufficiency of the evidence to support the implied findings. The question will be determined from an examination of the evidence itself.

In two cases entitled Gordon v. Mount, 125 Cal.App. 701, 708 [13 P.2d 932], and Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 137 [130 P.2d 421], it is said that where findings of fact and conclusions of law are waived "it is presumed fn. * that every fact essential to the support of the judgment was proved and found by the court." It is the word "proved" that gives rise to this discussion. In each of said cases the entire evidence was before the reviewing court; it was discussed and held to be sufficient to sustain the judgments in the respective cases. Since the evidence was adequate, it was not necessary to assume that sufficient facts were proved to support the implied findings or to sustain the judgment. The opinion in the Gordon case cites Gray v. Gray, supra, and the Bekins case cites the Gray and Gordon cases and Miller v. Pacific Freight Lines, supra, as authorities for the statement above quoted. The Gray case, in stating that upon the waiver of findings the presumption arises that the trial court found all facts necessary to support the judgment, cites Antonelle v. New City Hall Commrs., 92 Cal. 228 [28 P. 270], and Bruce v. Bruce, 16 Cal.App. 353 [116 P. 994]. **[74 Cal.App.2d 60]** In the Antonelle case findings were waived and the appeal was on the pleadings and judgment. In the Bruce case findings were waived and the evidence was not furnished to the appellate court. The Miller case states the same presumption as that in the Gray case and cites three cases: Stewart v. Langer, 9 Cal.App.2d 60, 61 [48 P.2d 758]; High v. Bond, 107 Cal.App. 153, 154 [290 P. 145], and Benjamin Moore & Co. v. O'Grady, 9 Cal.App.2d 695, 698 [50 P.2d 847]. In each of said three cases the evidence was taken up on appeal and the only presumption stated was that the trial court made all findings necessary to support the

judgment. There was no reference to a presumption of evidence to sustain the implied findings. In both the Gray and Miller cases the only point raised was the sufficiency of the evidence to support the implied findings, and in each case the court discussed the evidence at length and held that it was sufficient. Neither the Gray nor the Miller case holds that any fact will be presumed to have been proved. Such a statement would have been uncalled for in view of the fact that the evidence in each case was found sufficient.

It thus appears that whatever was said in the Gordon and Bekins cases concerning a presumption of proof when the evidence was before the court was not only dictum but it has no foundation either in the decisions cited therein or in the cases which are referred to in the Gray and Miller opinions. None of the cases sustain the dictum.

[3] It is where findings are waived and a transcript of the evidence is not furnished to the appellate court that it will be assumed that the evidence supports such implied findings as are necessary to sustain the judgment. (Credit Bureau v. Horeth, 60 Cal.App.2d 47, 49 [139 P.2d 962]; Whitney v. Redfern, 41 Cal.App.2d 409, 413 [106 P.2d 919]; Cuthbert Burrel Co. v. Shirley, 64 Cal.App.2d 52, 54 [148 P.2d 85]; Harmon v. De Turk, 176 Cal. 758, 761 [169 P. 680].)

In 24 California Jurisprudence, page 956, section 194, and in other reference works, we find a repetition of the same presumption as that hereinbefore quoted from Gordon v. Mount and Bekins Van Lines, Inc. v. Johnson. No distinction is made between the cases there cited in which the evidence was before the appellate court and those in which it was not. An examination of the citations will demonstrate that they support the text only when the evidence is not brought up on appeal, but have no relevancy when the appellate court has **[74 Cal.App.2d 61]** the evidence before it. We have already pointed out that in Gray v. Gray the evidence was taken up on appeal and no assumption was indulged as to whether it supported the implied findings, and that in Harmon v. De Turk, Antonelle v. New City Hall Commrs., and Bruce v. Bruce, the appeals were on the judgment roll alone and both findings and evidence were assumed in support of the judgment. Likewise Green v. Darling, 73 Cal.App.700 [239 P. 70], was appealed on the judgment roll alone. There was no mention of the sufficiency of the evidence. In each of the cases of Ibbetson v. Ibbetson, 52 Cal.App. 699 [199 P. 872], and Jensen v. Burton, 117 Cal.App. 66 [3 P.2d 324], implied findings necessary to sustain the judgment were held to be supported by the evidence which is set out in the opinions. In Dee v. Dee, 34 Cal.App. 658 [168 P. 588], findings were waived, the evidence was conflicting, and it was assumed that the court found all of the facts necessary to sustain the judgment. In Kritzer v. Tracy Engineering Co., 16 Cal.App. 287 [116 P. 700], the appeal was upon the judgment roll but there were no findings. Whether there was an actual waiver of findings was disputed. The court said that since every intendment is in support of a judgment it would be presumed that findings were waived.

The confusion seems to have arisen through the inadvertent addition of the words "proved and" in the Gordon case, with the erroneous citation of the Gray case which is not authority therefor, and the repetition of the same words in the Bekins case, which cites the Gordon case as authority. No assumption as to the evidence was necessary in either of those cases, because, as hereinbefore stated, it was in the record.

[4] The doctrine of stare decisis does not require us to follow those cases to the extent of assuming what facts were proved when the evidence is before us. It is a fundamental rule of that doctrine that a decision is not authority for what is said in the opinion but only for the points actually involved and actually decided. (Norris v. Moody, 84 Cal. 143, 149 [24 P. 37]; Hart v. Burnett, 15 Cal. 530, 598.) [5] The rule of stare decisis is a rule of public policy. For the preservation of harmony and for the stabilization of the law the courts will ordinarily follow precedents when the same points arise in subsequent litigation, although they will not persist in an absurdity or perpetuate a manifest error. [6] There is no kinship between stare decisis and obiter dictum. Whatever **[74 Cal.App.2d 62]** may be said in an opinion that is not necessary to a determination of the question involved is to be regarded as mere dictum. (Cardenas v. Miller, 108 Cal. 250, 252 [39 P. 783, 41 P. 472, 49 Am.St.Rep. 84].) [7] The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of stare decisis to be followed (Brown v. Brown, 83 Cal.App. 74, 81 [256 P. 595]; Hills v. Superior Court, 207 Cal. 666, 670 [279 P. 805, 65 A.L.R. 266]; Laguna L. & W. Co. v. Greenwood, 92 Cal.App. 570, 574 [268 P. 699]; Harris v. Industrial Acc. Com., 204 Cal. 432, 438 [268 P. 902]), no matter how often repeated. (W. B. Samuels & Co. v. Nelson County, 204 Ky. 490 [264 S.W. 1098, 1099].) [8] Expression of dictum is not binding on a court inferior to that which rendered the decision. (City of Mountain View v. Farmers' Telephone Exch. Co., 294 Mo. 623 [243 S.W. 153, 157]; Travelers' Ins. Co. v. Lancaster, (Tex.Civ.App.) 71 S.W.2d 318, 320; Arthur C. Harvey Co. v. Malley, 61 F.2d 365, 366; affirmed 288 U.S. 415 [53 S.Ct. 426, 77 L.Ed. 866].)

[9] When it is claimed on appeal that the evidence does not sustain the findings or judgment, there are two methods of ascertaining the answer: (1) To examine the evidence if it is in the record, and (2) to assume its sufficiency if it is not. The court will apply one or the other of these methods but it will not resort to an assumption of evidence when the transcript is present. We may assume something to be true when there is no evidence one way or the other on the subject; but when there is positive evidence of the existence of a fact the judgment must be based on the evidence and there is no room for an

assumption. There can be no assumption or presumption that a fact does not exist in the face of uncontroverted evidence to the contrary. The only reason for the affirmance of the judgment in this action is the sufficiency of the evidence, not an assumption as to what took place at the trial and not shown by the transcript.

. Sufficiency of the evidence to sustain the implied findings. [10] In support of the judgment findings must be implied that ie charges of cruelty made by respondent were true, that she was entitled to permanent support in the amount awarded by the court, and that appellant had the ability to pay the same.

[11] The evidence as to cruelty is sufficient to sustain the implied finding thereon. Respondent testified that appellant attempted **[74 Cal.App.2d 63]** for a long period of time to keep their marriage secret; he introduced her under her maiden name; when they visited friends he asked her to remove her rings which were evidence that they were married; he never took her to places of amusement; he struck her several times and on two or three occasions grabbed her around the neck and choked her. Respondent's sister furnished corroboration for the latter acts of cruelty. Such evidence is sufficient to support the implied findings of appellant's cruelties. He offered nothing to the contrary, his testimony having been limited to their property and its value.

[12] The parties had been married less than a year when the complaint was filed. After the commencement of the action a child was born of the marriage who was eight months old at the time of the trial. In view of the age of the child and the necessity for its mother's constant attention to it, the implied finding of the necessity for the award of permanent support to respondent in the sum of $100 per month will not be disturbed.

[13] The implied finding of appellant's ability to pay the amount awarded is sustained by the evidence. He was permanently employed in the United States Post Office Department; his annual income was shown to be approximately $3,600 from salary and rentals; during the marriage he had given respondent about $100 per month; in the year preceding the trial he had sold property (title to which he had taken in the name of his cousin) for about the sum of $1,000 above the purchase price after paying expenses of sale. After deductions for taxes and for his own living expenses he was still able to pay the amount required by the judgment. The amount awarded was not unreasonable.

Judgment affirmed.

Moore, P. J., concurred.

McCOMB, J.

I concur in the judgment for the reason stated: that the evidence is sufficient to sustain the implied findings. But I do not subscribe to the conclusion reached in the main opinion under the heading (1) Assumptions and implications when findings are waived.

In spite of the language in certain earlier decisions to the contrary, it is my opinion that the Supreme Court has now established the law in California to be that where findings of **[74 Cal.App.2d 64]** fact and conclusions of law are waived by the parties, on an appeal from the judgment an appellate court will presume that every fact essential to the support of the judgment was (1) proved and (2) found by the trial court.

In Gordon v. Mount (1932), 125 Cal.App. 701 [13 P.2d 932], Mr. Justice Plummer speaking for the District Court of Appeal at page 708 says: "Where findings are waived it is presumed that every fact essential to the support of the judgment was proved and found by the court. (Gray v. Gray, 185 Cal. 598 [197 P. 945]; 24 Cal.Jur., p. 956, and the cases there cited.)

"In support of the judgment, there being no findings in this case, we must hold that the court, notwithstanding the record shows want of probable cause and lack of reliance upon advice of counsel that the testimony introduced in the cause did not justify the charge of malice, and the existence of malice being a question of fact, we are bound by the judgment of the trial court." (Italics added.)

In Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135 [130 P.2d 421], Gordon v. Mount, supra, is cited with approval, the Supreme Court saying at page 136 et seq.: "After the trial judge had ordered the judgment, findings of fact and conclusions of law were waived by written stipulation of counsel. On this state of the record every intendment is in favor of the judgment, and it is presumed that every fact essential to the support of the judgment was proved and found by the court. (Gray v. Gray, 185 Cal. 598 [197 P. 945]; Miller v. Pacific Freight Lines, 40 Cal.App.2d 451 [104 P.2d 1069]; Gordon v. Mount, 125 Cal.App. 701 [13 P.2d 932]; 24 Cal.Jur. p. 956, and cases there cited.) The applicable rule requires the assumption that the proof showed and that the court found and concluded that the services out of which the disputed tax

arose were so much a part of the business of the plaintiff, were so customarily rendered in that connection, and so directly contributed to the transportation which was the plaintiff's principal business, that money derived therefrom must be regarded as part of the 'gross receipts from operations of said operator' and taxable as such." (Italics added.)

In Ibbetson v. Ibbetson, 52 Cal.App. 699 at 702 [199 P. 872], the court says: "Findings having been waived, the presumption is that every fact essential to the support of the judgment was proved and found by the court and that accordingly the court found that there was no community property." (Italics added.) **[74 Cal.App.2d 65]** It is apparent that the legal profession had understood the rule to be as just stated, for in 24 California Jurisprudence, at page 956, appears this statement: "Where findings are waived, it is presumed that every fact essential to the support of the judgment was proved and found by the court." (Italics added.)

Again, in 2 Bancroft's Code Practice and Remedies the rule is stated as follows: "Even in those jurisdictions wherein the court is required to make findings although not requested, findings may be waived, and if waived it is presumed in support of the judgment that every material fact was proved and found." (Italics added.) See, also, Vogel v. Marsh, 120 Cal.App. 99 at 100 [7 P.2d 756]; Gordon v. Mount, supra, at 709, and Jensen v. Burton, 117 Cal.App. 66 at 68 et seq. [3 P.2d 324]. fn. *

Such a rule appears to be fair and in consonance with the simplified pleading in this state. Should a litigant desire to question the sufficiency of the evidence he should request findings so that the trial court and opposing counsel may know that on appeal the sufficiency of the evidence to sustain the findings may be attacked; and in the event sufficient evidence has not been introduced to support a material finding of fact opposing counsel may request, or the trial court may direct, that the case be reopened and the parties given an opportunity to produce evidence to support a material finding, if they are in a position to do so. In any event, the Supreme Court of the state has stated that where findings of fact are waived the presumption is that every fact was proved and found by the court. Hence this court is bound by the decision of the Supreme Court until such time as that court may disapprove or overrule its decision as set forth above. (Estate of Mickelson, 37 Cal.App.2d 450 at 453 [99 P.2d 687]; Sawyer v. Sterling Realty Co., 41 Cal.App.2d 715 at 724 [107 P.2d 449]; Chrisman v. Culinary Workers Local, 46 Cal.App.2d 129 at 132 [115 P.2d 553].) **[74 Cal.App.2d 66]**

The law is established in California that where two independent reasons are given for a decision neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and each is of equal validity. (California Employment Stab. Com. v. Municipal Court, 62 Cal.App.2d 781 at 787 [145 P.2d 361], and cases therein cited.) Under this rule the statement of the Supreme Court in Bekins Van Lines Inc. v. Johnson, supra, was an independent reason for the decision and hence not dictum.

The result, therefore, in my opinion is that this court is bound by the decision of the Supreme Court, and that since the parties waived findings of fact and conclusions of law defendant may not urge before this court the insufficiency of the evidence to support the judgment.

FN *. The terms "presume" and "presumption" are deemed to have been used in the cases cited herein synonymously with "assume" and "assumption" and do not import presumptions defined in the Code of Civil Procedure. In practical effect it would be more accurate to say that the absence of findings or of evidence, or of both, from the record on appeal is a waiver of the right of the appellant to question their sufficiency.

FN *. The use of the words "presumed" and "presumption" in the cited cases is unfortunate and has had a tendency to cause confusion in the decisions. The true legal concept may be expressed accurately thus: When findings of fact and conclusions of law are waived, on appeal appellant will be deemed to have waived the right to urge either that (1) the evidence is insufficient to support implied findings of fact or, (2) the implied findings do not sustain the judgment.

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EDUCATION CODE
SECTION 15100-15111

15100. Except as otherwise provided by law, the governing board of any school district or community college district may, when in its judgment it is advisable, and shall, upon a petition of the majority of the qualified electors residing in the school district or community college district, order an election and submit to the electors of the district the question whether the bonds of the district shall be issued and sold for the purpose of raising money for the following purposes:

(a) The purchasing of school lots.

(b) The building or purchasing of school buildings.

(c) The making of alterations or additions to the school building or buildings other than as may be necessary for current maintenance, operation, or repairs.

(d) The repairing, restoring, or rebuilding of any school building damaged, injured, or destroyed by fire or other public calamity.

(e) The supplying of school buildings and grounds with furniture, equipment, or necessary apparatus of a permanent nature.

(f) The permanent improvement of the school grounds.

(g) The refunding of any outstanding valid indebtedness of the district, evidenced by bonds, or of state school building aid loans.

(h) The carrying out of the projects or purposes authorized in Section 17577 or 81613.

(i) The purchase of schoolbuses the useful life of which is at least 20 years.

(j) The demolition or razing of any school building with the intent to replace it with another school building, whether in the same location or in any other location.

Any one or more of the purposes enumerated, except that of refunding any outstanding valid indebtedness of the district evidenced by bonds, may, by order of the governing board entered in its minutes, be united and voted upon as one single proposition.

15100.5. Except as otherwise provided by law, the governing board of the Peralta Community College District may, when in its judgment it is advisable, order the county superintendent of schools to call an election to be conducted pursuant to this chapter and submit to the electors of the district the question of whether the proceeds of previously authorized but unissued bonds of the district may be used for a purpose or purposes in addition to the purposes for which the previously approved bonds were authorized by the electors.

The governing board may, by order entered into its minutes, call for an election to expand the purposes of prior authorized but unissued bonds either as a single proposition on the ballot or combined with the question of issuing new bonds of the district for any purpose or purposes permitted by law.

If two-thirds of the votes cast on the question of expanding the purposes for which the proceeds of previously authorized but unissued bonds of the district may be used, or the combined question of expanding the purposes for which the proceeds of previously authorized but unissued bonds of the district and issuing newly authorized bonds of the district, are in favor of the proposition, the district may use the proceeds of the previously authorized but unissued bonds for the expanded purposes and may issue newly

authorized bonds, as the case may be.

101. Notwithstanding any other law, an election may not be held .rsuant to this chapter within 45 days before a statewide election or within 45 days after a statewide election unless conducted at the same time as the statewide election, subject to Part 3 (commencing with Section 10400) of Division 10 of the Elections Code, or on an established election date pursuant to Section 1000 or 1500 of the Elections Code.

15101.75. (a) This chapter shall apply to bond elections for and the issuance of bonds for school facilities improvement districts created pursuant to Chapter 2 (commencing with Section 15300) to the extent that this chapter does not conflict with Chapter 2. In the event of a conflict, the provisions of Chapter 2 shall supersede the provisions of this chapter, but only to the extent of the conflict.

(b) A bond adopted by the voters pursuant to this part prior to January 1, 2008, shall be governed by this part as it read on December 31, 2007.

15102. The total amount of bonds issued pursuant to this chapter and Chapter 1.5 (commencing with Section 15264) shall not exceed 1.25 percent of the taxable property of the school district or community college district, or the school facilities improvement district, if applicable, as shown by the last equalized assessment of the county or counties in which the district is located. For purposes of this ction, the taxable property of a district for any fiscal year shall e calculated to include, but not be limited to, the assessed value of all unitary and operating nonunitary property of the district, which shall be derived by dividing the gross assessed value of the unitary and operating nonunitary property within the district for the 1987-88 fiscal year by the gross assessed value of all unitary and operating nonunitary property within the county in which the district is located for the 1987-88 fiscal year, and multiplying that result by the gross assessed value of all unitary and operating nonunitary property of the county on the last equalized assessment roll.

15103. Notwithstanding any other provision of law, for the purpose of computing the limit on the amount of bonds which may be issued by a district pursuant to the provisions of this chapter, the taxable property of the district shall be determined upon the basis that the district's assessed value has not been reduced by the exemption of the assessed value of business inventories in the district or reduced by the homeowner's property tax exemption.

15105. For the purpose of the provisions of Sections 15102 and 15106 which require that the valuation as shown on the last equalized assessment roll be modified pursuant to Section 41201 or 84201, the "current year" as used in Section 41201 or 84201 shall be deemed to the latest fiscal year for which there exists a last equalized ounty assessment roll as ascertained in accordance with Chapter 3 (commencing with Section 2050) of Part 3 of Division 1 of the Revenue and Taxation Code, and the term "two immediately preceding years" shall be deemed to be the two fiscal years immediately preceding the

fiscal year for which the last equalized county assessment roll exists. Whenever in any year it becomes necessary to determine the modification under Sections 15102 and 15106, at a time between the date when the assessment roll for that year becomes the last equalized county assessment roll ascertained under Chapter 3 and the ate when the factor for the current year is certified and becomes available, the factor for the current year shall be deemed to be 1.00.

15106. A unified school district or community college district may issue bonds that, in aggregation with bonds issued pursuant to Section 15270, shall not exceed 2.5 percent of the taxable property of the school district or community college district, or the school facilities improvement district, if applicable, as shown by the last equalized assessment of the county or counties in which the district is located.

In computing the outstanding bonded indebtedness of a unified school district or community college district for all purposes of this section, any outstanding bonds shall be deemed to have been issued for elementary school purposes, high school purposes, and community college purposes, respectively, in the respective amounts that the proceeds of the sale of those outstanding bonds, excluding any premium and accrued interest received on that sale, were or have been allocated by the governing board of the unified school district or community college district to each of those purposes respectively.

(a) For the purposes of the State School Building Aid Law of 1952 (Chapter 6 (commencing with Section 16000)) with respect to applications for apportionments and apportionments filed or made prior to September 15, 1961, and to the repayment thereof, Chapter 4 commencing with Section 15700), inclusive, only, a unified school district shall be considered to have a bonding capacity in the amount permitted by law for an elementary school district and a bonding capacity in the amount permitted by law for a high school district.

(b) For purposes of this section, the taxable property of a district for a fiscal year shall be calculated to include, but not be limited to, the assessed value of all unitary and operating nonunitary property of the district, which shall be derived by dividing the gross assessed value of the unitary and operating nonunitary property within the district for the 1987-88 fiscal year by the gross assessed value of all unitary and operating nonunitary property within the county in which the district is located for the 1987-88 fiscal year, and multiplying the result by the gross assessed value of all unitary and operating nonunitary property of the county on the last equalized assessment roll. In the event of the unification of two or more school districts or community college districts subsequent to the 1987-88 fiscal year, the assessed value of all unitary and operating nonunitary property of the unified district or community college district shall be deemed to be the total of the assessed value of the taxable property of each of the unifying districts as that assessed value would be determined under Section 15102.

15107. In computing the limitation of indebtedness of a school district, community college district, or school facilities improvement district of any kind or class up to this time or in the uture formed or organized, hereinafter in this section referred to as the "bonding district," the outstanding indebtedness of any previously existing district all or any part of which forms a component part of the bonding district and the outstanding

indebtedness of any district for which any territory that has become a part of the bonding district is liable shall be excluded and shall not be deemed, for the purposes of computing the limitation of indebtedness under Section 15102 or 15106, to constitute outstanding indebtedness of the bonding district, except to the extent that the outstanding indebtedness has been expressly assumed by the bonding district by vote of not less than two-thirds of the electors of the bonding district voting at an election at which the proposition of assuming the indebtedness is voted upon. Nothing contained in this section shall operate to release any property from liability for taxes to pay the principal and interest of indebtedness incurred by any component district or for which any territory that has become a part of the bonding district is liable and in which the taxable property is located at the time of the incurring of the indebtedness. It is the intent of the Legislature to provide in this section a special method of computing the limitation of indebtedness of school districts or community college districts irrespective of liability of the area embraced within the school districts for the payment of any bonded indebtedness. This section does not authorize the issuance of bonds in excess of the limits expressed in Section 15334.5.

15108. For the purpose of determining the limitation of indebtedness of a school district, community college district, or school facilities improvement district of any kind or class under Section 15102 or 15106, that portion of the bonded indebtedness of the district for which another district or territory in another district is liable shall be excluded and shall not be deemed to constitute outstanding bonded indebtedness of the district.

15109. Where an elementary school district and a high school district with a combined average daily attendance of 300,000 or more are governed by the same governing board, and the pupils in grades seven and eight in the districts are in attendance at high schools maintained by the high school district, the governing board, by resolution filed with the county auditor, may provide that the bond issuance limitations determined under Section 15102 shall be adjusted by reducing the bond issuance limitation of the elementary school district by 1 percent of its total and by augmenting the bond issuance limitation for the high school district by the amount by which that of the elementary district was reduced.

15110. An action to determine the validity of bonds and of the ordering of the improvement or acquisition may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure. In such action, all findings, conclusions and determinations of the legislative body which conducted the proceedings shall be conclusive in the absence of actual fraud.

15111. The governing board of each school district or community college district shall, within 30 days after the end of each fiscal year, submit to the county superintendent of schools who has jurisdiction over the school district or community college district a report containing the following information, concerning any election held pursuant to Sections 4152, 15120, 15121, and 16058 for the approval of the issuance of bonds or the assumption of any bonded

indebtedness or other indebtedness:

(1) The total amount of the bond issue, bonded indebtedness or other indebtedness involved.

(2) The percentage of registered electors of the district who voted at the election.

(3) The results of the election, with the percentage of votes cast for and against the proposition involved.

EDUCATION CODE
SECTION 15264-15276

15264. It is the intent of the Legislature that all of the following are realized:

(a) Vigorous efforts are undertaken to ensure that the expenditure of bond measures, including those authorized pursuant to paragraph (3) of subdivision (b) of Section 1 of Article XIIIA of the California Constitution, are in strict conformity with the law.

(b) Taxpayers directly participate in the oversight of bond expenditures.

(c) The members of the oversight committees appointed pursuant to this chapter promptly alert the public to any waste or improper expenditure of school construction bond money.

(d) That unauthorized expenditures of school construction bond revenues are vigorously investigated, prosecuted, and that the courts act swiftly to restrain any improper expenditures.

15266. (a) As an alternative to authorizing and issuing bonds pursuant to Chapter 1 (commencing with Section 15100) or Chapter 2 (commencing with Section 15300), the governing board of a school district, community college district, or a school facilities improvement district may decide, pursuant to a two-thirds vote and subject to Section 15100 to pursue the authorization and issuance of bonds pursuant to paragraph (3) of subdivision (b) of Section 1 of Article XIIIA of the California Constitution and subdivision (b) of Section 18 of Article XVI of the California Constitution. An election may only be ordered on the question of whether bonds of a school district, community college district, or a school facilities improvement district shall be issued and sold pursuant to subdivision (b) of Section 18 of Article XVI of the California Constitution at a primary or general election, a regularly scheduled local election at which all of the electors of the school district, community college district, or school facilities improvement district, as appropriate, are entitled to vote, or a statewide special election.

(b) Upon adopting a resolution to incur bonded indebtedness pursuant to subdivision (b) of Section 18 of Article XVI of the California Constitution and after the question has been submitted to the voters, if approved at the election, the bonds shall be issued pursuant to paragraph (3) of subdivision (b) of Section 1 of Article XIIIA of the California Constitution and this chapter, and the governing board may not, regardless of the number of votes cast in favor of the bond, subsequently proceed exclusively under Chapter 1 (commencing with Section 15100) or under Chapter 2 (commencing with Section 15300), as appropriate. Where not inconsistent, the provisions of Chapter 1 (commencing with Section 15100) or Chapter 2 (commencing with Section 15300), as appropriate, shall apply to this chapter.

15268. The total amount of bonds issued, including bonds issued pursuant to Chapter 1 (commencing with Section 15100), shall not exceed 1.25 percent of the taxable property of the district as shown by the last equalized assessment of the county or counties in which the district is located. The bonds may only be issued if the tax rate levied to meet the requirements of Section 18 of Article XVI of

the California Constitution in the case of indebtedness incurred by a school district pursuant to this chapter, at a single election, would not exceed thirty dollars ($30) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with rticle XIIIA of the California Constitution. For purposes of this ection, the taxable property of a district for any fiscal year shall be calculated to include, but not be limited to, the assessed value of all unitary and operating nonunitary property of the district, which shall be derived by dividing the gross assessed value of the unitary and operating nonunitary property within the district for the 1987-88 fiscal year by the gross assessed value of all unitary and operating nonunitary property within the county in which the district is located for the 1987-88 fiscal year, and multiplying that result by the gross assessed value of all unitary and operating nonunitary property of the county on the last equalized assessment roll.

15270. (a) Notwithstanding Sections 15102 and 15268, any unified school district may issue bonds pursuant to this article that, in aggregation with bonds issued pursuant to Chapter 1 (commencing with Section 15100), may not exceed 2.5 percent of the taxable property of the district as shown by the last equalized assessment of the county or counties in which the district is located. The bonds may only be issued if the tax rate levied to meet the requirements of Section 18 of Article XVI of the California Constitution in the case of indebtedness incurred pursuant to this chapter at a single election, by a unified school district, would not exceed sixty dollars ($60) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIIIA of the California onstitution.

(b) Notwithstanding Sections 15102 and 15268, any community college district may issue bonds pursuant to this article that, in aggregation with bonds issued pursuant to Chapter 1 (commencing with Section 15100), may not exceed 2.5 percent of the taxable property of the district as shown by the last equalized assessment of the county or counties in which the district is located. The bonds may only be issued if the tax rate levied to meet the requirements of Section 18 of Article XVI of the California Constitution in the case of indebtedness incurred pursuant to this chapter at a single election, by a community college district, would not exceed twenty-five dollars ($25) per year per one hundred thousand dollars ($100,000) of taxable property when assessed valuation is projected by the district to increase in accordance with Article XIIIA of the California Constitution.

(c) In computing the outstanding bonded indebtedness of any unified school district or community college district for all purposes of this section, any outstanding bonds shall be deemed to have been issued for elementary school purposes, high school purposes, and community college purposes, respectively, in the respective amounts that the proceeds of the sale of those outstanding bonds, excluding any premium and accrued interest received on that sale, were or have been allocated by the governing board of the unified school district or community college district to each of those purposes respectively.

(d) For purposes of this section, the taxable property of a district for any fiscal year shall be calculated to include, but not e limited to, the assessed value of all unitary and operating nonunitary property of the district, which shall be derived by dividing the gross assessed value of the unitary and operating nonunitary property within the district for the 1987-88 fiscal year

by the gross assessed value of all unitary and operating nonunitary property within the county in which the district is located for the 1987-88 fiscal year, and multiplying the result by the gross assessed value of all unitary and operating nonunitary property of the county the last equalized assessment roll. In the event of the nification of two or more school districts subsequent to the 1987-88 fiscal year, the assessed value of all unitary and operating nonunitary property of the unified district shall be deemed to be the total of the assessed value of the taxable property of each of the unifying districts as that assessed value would be determined under Section 15268.

(e) For the purposes of this article, "general obligation bonds," as that term is used in Section 18 of Article XVI of the California Constitution, means bonds of a school district or community college district the repayment of which is provided for by this chapter and Chapter 1 (commencing with Section 15100) of Part 10, and includes bonds of a school facilities improvement district the repayment of which is provided for by this chapter and Chapter 2 (commencing with Section 15300).

15271. The governing board of a school district or community college district may proceed pursuant to this chapter on behalf of a school facilities improvement district that is created by and under the exclusive authority of the school district or community college district and act on behalf of the school facilities district as provided pursuant to Chapter 2 (commencing with Section 15300).

272. In addition to the ballot requirements of Section 15122 and he ballot provisions of this code applicable to governing board member elections, for bond measures pursuant to this chapter, the ballot shall also be printed with a statement that the board will appoint a citizens' oversight committee and conduct annual independent audits to assure that funds are spent only on school and classroom improvements and for no other purposes.

15274. If it appears from the certificate of election results that 55 percent of the votes cast on the proposition of issuing bonds pursuant to subdivision (b) of Section 18 of Article XVI of the California Constitution are in favor of issuing bonds, the governing board shall cause an entry of that fact to be made upon its minutes. The governing board shall then certify to the board of supervisors of the county whose superintendent of schools has jurisdiction over the district, all proceedings had in the premises. The county superintendent of schools shall send a copy of the certificate of election results to the board of supervisors of the county.

15276. Notwithstanding any other provision of law, a county board of education may not order an election to determine whether bonds may e issued under this article to raise funds for a county office of ducation.

EDUCATION CODE
SECTION 15300-15303

15300. This chapter provides a method for the formation of school facilities improvement districts consisting of a portion of the territory within a school district or community college district, for the conduct of a bond election within a school facilities improvement district, and for the issuance of general obligation bonds by a school district or community college district for a school facilities improvement district.

15301. (a) A school district or community college district that has a community facilities district formed pursuant to the Mello-Roos Community Facilities Act of 1982, as set forth in Chapter 2.5 (commencing with Section 53311) of Part 1 of Division 2 of Title 5 of the Government Code, that has as one of its purposes the construction of school facilities within a portion of the territory of the school district or community college district, may proceed under this chapter.

(b) The boundaries of a school facilities improvement district formed pursuant to this chapter shall include all of the portion of the territory within the boundaries of the school district or community college district that is not located within the boundaries of the community facilities district as described in subdivision (a).

(c) A school district or community college district may proceed nder this chapter without meeting the requirements of subdivisions (a) and (b) if the governing board of the school district or community college district determines that it is necessary and in the best interest of the school district or community college district, respectively, to form a school facilities improvement district pursuant to this chapter to finance school facilities and purposes authorized pursuant to Section 15100. As a part of that determination, the governing board of the school district or community college district shall make a finding that the overall cost of financing the bonds issued pursuant to this part would be less than the overall cost of other school facilities financing options available to the school district or community college district, including, but not limited to, issuing bonds pursuant to the Mello-Roos Communities Facilities Act of 1982 (Ch. 2.5 (commencing with Sec. 53311), Pt. 1, Div. 2, Title 5, Gov. C.). The governing board of the school district or community college district proceeding under this subdivision shall define the boundaries of the school facilities improvement district to include any portion of territory within the jurisdiction of the school district or community college district.

(d) The governing body of a school district or community college district that proceeds under this chapter shall comply with the filing requirements established by Section 54902 of the Government Code. A plat or map that is filed pursuant to this subdivision shall specifically identify property, located within the school district or community college district, that is not located within the improvement district established by the school district or community college district pursuant to this chapter.

15303. (a) This chapter shall not be operative in a county or counties until the board of supervisors of the county in which the county superintendent of schools having jurisdiction over the school district or community college district in which the school facilities improvement district is located, and the board of supervisors of any county in which the school facilities improvement district is located, by resolution adopted by a majority vote of each affected board of supervisors, makes this chapter applicable in the county or counties.

(b) A board of supervisors adopting a resolution pursuant to subdivision (a) shall file that resolution with the California Debt and Investment Advisory Commission established pursuant to Section 8855 of the Government Code.

Application

Resolution by board of supervisors required to make chapter applicable in county, see Education Code § 15303.

Historical and Statutory Notes

Construction of act, added by Stats.1997, c. 893 (S.B.161), as restatement of existing provisions, not resulting in new or additional costs to local agencies, see Historical and Statutory Notes under Education Code § 15100.5.

Former § 15327, added by Stats.1994, c. 1005 (A.B.3747), § 1, amended by Stats.1996, c. 1072 (S.B.1544), § 9; Stats.1997, c. 17 (S.B. 947), § 22, relating to the rights, powers, duties and responsibilities of the governing board was repealed by Stats.1997, c. 893 (S.B. 161) § 21. See this section.

Stats.1996, c. 277 (S.B.1562), provided for the repeal of § 15327 in old Part 10 and the addition of a similar section of this number, operative Jan. 1, 1998. Stats.1996, c. 1072 (S.B.1544), amended § 15327 in old Part 10. Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

Subordination of legislation by Stats.1996, c. 277 (S.B.1562), to other 1996 legislation, severability of provisions, and nonsubstantive nature of changes made by that Act, see Historical and Statutory Notes under Education Code § 15100.

Derivation: Former § 15327, added by Stats. 1994, c. 1005, § 1, amended by Stats.1996, c. 1072, § 9; Stats.1997, c. 17, § 22.

Cross References

Governing board, defined, see Education Code § 78.

Article 3

FINANCING THE BONDS

Section

Article 3 was added by Stats.1996, c. 277 (S.B.1562), § 2, operative Jan. 1, 1998.

Application

Resolution by board of supervisors required to make chapter applicable in county, see Education Code § 15303.

§ 15330. Amount of bonds; limitation; calculation of taxable property

The total amount of bonds issued shall not exceed 1.25 percent of the taxable property of the school facilities improvement district as shown by the last equalized assessment of the county or counties in which the school facilities improvement district is located. For purposes of this section, the taxable

property of a school facilities improvement district for any fiscal year shall be calculated to include, but not be limited to, the assessed value of all unitary and operating nonunitary property located within the school facilities improvement district, which shall be derived by dividing the gross assessed value of the unitary and operating nonunitary property located within the school facilities improvement district for the fiscal year by the gross assessed value of all unitary and operating nonunitary property located within the county in which the school facilities improvement district is located for the fiscal year, and multiplying that result by the gross assessed value of all unitary and operating nonunitary property of the county on the last equalized assessment roll.

(Added by Stats.1996, c. 277 (S.B.1562), § 2, operative Jan. 1, 1998.)

Application

Resolution by board of supervisors required to make chapter applicable in county, see Education Code § 15303.

Historical and Statutory Notes

Subordination of legislation by Stats.1996, c. 277 (S.B.1562), to other 1996 legislation, severability of provisions, and nonsubstantive nature of changes made by that Act, see Historical and Statutory Notes under Education Code § 15100.

Former § 15330, added by Stats.1994, c. 1005 (A.B.3747), § 1, relating to amount of bonds, was repealed by Stats.1996, c. 277 (S.B. 1562), § 1, operative Jan. 1, 1998. See this section.

Derivation: Former § 15330, added by Stats. 1994, c. 1005, § 1.

Library References

Schools ⇐97(3).
Westlaw Topic No. 345.

C.J.S. Schools and School Districts §§ 525 to 526.

§ 15331. Taxable property determination; assessed value not reduced

Notwithstanding any other law, for the purpose of computing the limit on the amount of bonds that may be issued by a school facilities improvement district pursuant to the provisions of this chapter, the taxable property of the school facilities improvement district shall be determined upon the basis that the school facilities improvement district's assessed value has not been reduced by the exemption of the assessed value of business inventories in the school facilities improvement district or reduced by the homeowner's property tax exemption.

(Added by Stats.1996, c. 277 (S.B.1562), § 2, operative Jan. 1, 1998.)

Application

Resolution by board of supervisors required to make chapter applicable in county, see Education Code § 15303.

Historical and Statutory Notes

Subordination of legislation by Stats.1996, c. 277 (S.B.1562), to other 1996 legislation, severability of provisions, and nonsubstantive nature of changes made by that Act, see Historical and Statutory Notes under Education Code § 15100.

Former § 15331, added by Stats.1994, c. 1005 (A.B.3747), § 1, relating to determination of taxable property of school facilities improvement district, was repealed by Stats.1996, c. 277

§ 15321. Notice of hearing

Notice of the hearing shall be given by publishing a copy of the resolution of intention in a newspaper of general circulation published in each affected county, pursuant to Section 6066 of the Government Code, the first publication shall be at least 14 days prior to the time fixed for the hearing. * * * No notice other than that required by this section need be given.

(Added by Stats.1996, c. 277 (S.B.1562), § 2, operative Jan. 1, 1998. Amended by Stats.2007, c. 670 (A.B.373), § 12.)

§ 15323. Adoption of resolution proposing modifications

At the hearing, the governing board of the school district or community college district may adopt a resolution proposing modifications, consistent with Section 15302, of the purpose stated in the resolution of intention. A resolution proposing modifications shall describe the proposed modifications, state the change, if any, in the estimated cost of carrying out the purpose, and shall fix a time and place for the hearing by the governing board.

(Added by Stats.1997, c. 893 (S.B.161), § 16. Amended by Stats.2007, c. 670 (A.B.373), § 13.)

§ 15326.5. Amendment of previously adopted resolution

The governing board may amend a previously adopted resolution ordering the formation of a school facilities improvement district to change or add to the purposes for which the school facilities improvement district is formed and the projects to be financed and to increase or decrease the amount of bonds that may be issued for those purposes. Bonds may be issued only for the purposes stated in, and in an amount not exceeding the amount stated in, a proposition submitted to and approved by the voters of the school facilities improvement district.

(Added by Stats.2007, c. 670 (A.B.373), § 14.)

Article 3

FINANCING THE BONDS

§ 15330. Repealed by Stats.2007, c. 670 (A.B.373), § 15

Historical and Statutory Notes

2007 Legislation

The repealed section, added by Stats.1996, c. 277 (S.B. 1562), § 2, operative Jan. 1, 1998, derived from former § 15330, added by Stats.1994, c. 1005, § 1, related to the amount of bonds, limitation, and calculation of taxable property.

§ 15331. Repealed by Stats.2007, c. 670 (A.B.373), § 16

Historical and Statutory Notes

2007 Legislation

The repealed section, added by Stats.1996, c. 277 (S.B. 1562), § 2, operative Jan. 1, 1998, derived from former § 15331, added by Stats.1994, c. 1005, § 1, related to taxable property determination, and assessed value not reduced.

§ 15332. Repealed by Stats.2007, c. 670 (A.B.373), § 17

Historical and Statutory Notes

2007 Legislation

The repealed section, added by Stats.1996, c. 277 (S.B. 1562), § 2, operative Jan. 1, 1998, derived from former § 15332, added by Stats.1994, c. 1005, § 1, related to location of a school facilities improvement district in a unified school district, amount of bonds, limitation, outstanding bonded indebtedness, and calculation of taxable property.

EDUCATION CODE
SECTION 15334.5

15334.5. Notwithstanding any other provision of law, no bonded indebtedness may be incurred pursuant to this part in an amount that would cause the bonded indebtedness of the territory of the school facilities improvement district or of the school district or community college district of which the school facilities improvement district is a part, to exceed the limitation of indebtedness specified in Sections 15102 and 15106. No bonded indebtedness may be incurred pursuant to this part in an amount that would cause the bonded indebtedness of the territory of the school facilities improvement district to exceed the limitation of indebtedness specified in Sections 15102 and 15106.

EDUCATION CODE
SECTION 15700-15754

15700. The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in providing necessary and adequate school sites and buildings for the pupils of the public school system, the system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.

In adopting this act, the Legislature considers that the great need in school construction is for adequate classrooms for the education of the pupils of the public school system. It is the intent of the Legislature to first satisfy this primary need to the greatest extent possible before providing additional educational facilities, regardless of how desirable such additional facilities may be. To the end that school classrooms may be made available at once and to all school districts in need of such classrooms, provisions for other needed school facilities is necessarily subordinated.

15701. As used in this chapter:

(a) "Board" means the State Allocation Board.

(b) "Director" means the Director of Education for kindergarten and grades 1 to 12, inclusive.

(c) "Project" means the purposes for which a school district has applied for an apportionment under this chapter.

(d) "Grade level maintained by a district" means either of the following:

(1) The kindergarten, if any, and grades 1 to 6, inclusive, or grades 1 to 8, inclusive, maintained by an elementary school district or a unified school district.

(2) Grades 7 to 12, inclusive, grades 9 to 12, inclusive, or grades 7 to 10, inclusive, maintained by a high school district or unified school district.

(e) "Apportionment" means an apportionment made under this chapter unless the context otherwise requires.

15702. The Director of General Services shall administer this chapter and shall provide any assistance to the board that it may require.

15703. The State Allocation Board is continued in existence for the purposes of this chapter. The members of the board and the Members of the Legislature meeting with the board in an advisory capacity shall receive no compensation for their services under this chapter but shall be reimbursed for their actual and necessary expenses incurred in connection with the performance of their duties hereunder, to be paid out of the Public School Building Loan Fund.

15704. The board by the adoption of rules shall give priority in allocating funds to districts to those districts where the children will benefit most from additional schoolhouse facilities. This

EDUCATION CODE
SECTION 16000-16105

16000. This chapter may be cited as the State School Building Aid Law of 1952.

16001. The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid school districts of the state in providing necessary schoolsites and buildings for the pupils of the public school system, this system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.

In adopting this chapter, the Legislature considers that the great need in school construction is for classrooms for the education of the pupils of the public school system. It is the intent of the Legislature to first satisfy this primary need to the greatest extent possible before providing additional educational facilities, regardless of how desirable such additional facilities may be. To the end that school classrooms may be made available at once and to all school districts in need of such classrooms, provisions for other needed school facilities is necessarily subordinated.

16002. As used in this chapter:

(a) "Board" means the State Allocation Board.

(b) "Director" means the Director of Education for kindergarten and grades 1 to 12, inclusive.

(c) Notwithstanding any other law, the term "project" shall be deemed to include any or all of the purposes for which a school district has applied for apportionments under this chapter, pursuant to any regulations that the State Allocation Board may adopt.

(d) "Grade level maintained by a district" means any of the following:

(1) The kindergarten, if any, and grades 1 to 6, inclusive, or grades 1 to 8, inclusive, maintained by an elementary school district or a unified school district.

(2) Grades 7 to 12, inclusive, grades 9 to 12, inclusive, or grades 7 to 10, inclusive, maintained by a high school district or unified school district.

However, not more than one grade level shall be claimed by any district under any one of the paragraphs of this subdivision.

(e) "Apportionment" means an apportionment made under this chapter unless the context otherwise requires. The term "apportionment" in Sections 16091, 16097, 16099, 16100, 16104, 16105, and any other section in this chapter where the context justifies, shall be deemed to include funds of a school district required by the board to be contributed toward the purposes thereof. It is hereby declared that this construction is not intended as a change in the present law but rather as a declaration of existing law.

16002.5. For the purposes of this chapter, the term "basic bond requirement," means 5 percent of the assessed valuation of taxable property of the district for each grade level maintained by a district, as shown by the last equalized assessment of the county or

EDUCATION CODE
SECTION 16310-16344

16310. Not to exceed forty million dollars ($40,000,000) of the proceeds of the sale of bonds authorized by the State School Building Aid Bond Law of 1966 may be expended pursuant to this article.

16311. Not to exceed two hundred fifty million dollars ($250,000,000) of the proceeds of the sale of bonds authorized by the School Building Aid and Earthquake Reconstruction and Replacement Bond Law of 1972 may be expended pursuant to this article.

16312. The Legislature hereby declares that it is in the interest of the state and the people thereof to provide assistance to school districts in rehabilitating or replacing structurally unsafe school facilities inasmuch as the education of children is an obligation of the state, and the obligation carries with it a corresponding responsibility for the physical safety of children while attending school.

16313. It is the intent of the Legislature in enacting this article to provide a means through repayable state loans for school districts not otherwise eligible for assistance under this chapter (consisting principally of school districts in the urban centers of the state), to house their pupils in facilities that are structurally safe.

16314. The following terms, as used in this article, shall have the following meanings, unless the State Allocation Board finds a different meaning is essential for properly carrying out the purposes of this article, or finds that a different meaning clearly appears from the context:

(a) "Board" means the State Allocation Board as defined in Article 1 (commencing with Section 16000) of this chapter.

(b) "Director" means the Director of Education.

(c) "District" means an elementary, high school, or unified school district.

(d) "Project" means the purposes for which a district has applied for assistance in the rehabilitation or replacement of unsafe school facilities at a given attendance center.

(e) "Apportionment" means an apportionment made under this article, and unless the context otherwise requires, it shall be deemed to include funds of a district required by the board to be contributed toward the cost of a project.

(f) "Attendance center" means a school maintained or to be maintained at a given location within a district.

16315. The State Allocation Board shall administer this article.

EDUCATION CODE
SECTION 16700-16734

16700. This chapter may be cited as the "Urban School Construction Aid Law of 1968."

16701. The Legislature hereby declares that it is in the interest of the state and of the people thereof for the state to aid urban school districts of the state in reconstructing, modernizing, or replacing schoolsites and buildings for pupils of the public school system who are now housed in substandard schools constructed prior to 1943.

16702. As used in this chapter:
(a) "Board" means the State Allocation Board.
(b) "Director" means the Director of Education.
(c) "Project" means the purpose or purposes for which a school district has applied for an apportionment or apportionments.
(d) "Apportionment" means an apportionment made under this chapter unless the context otherwise requires.
(e) "Urban district" means any school district, the boundaries of which are substantially identical to or which encompass the boundaries of a city having a population in 1960 of not less than 0,000 persons.

16703. The Director of General Services shall administer this chapter and shall provide any assistance to the board that it may require.

16704. The State Allocation Board is continued in existence for the purposes of this chapter. The members of the board and the Members of the Legislature meeting with the board shall receive no compensation for their services under this chapter but shall be reimbursed for their actual and necessary expenses incurred in connection with the performance of their duties hereunder, to be paid out of the Urban School Construction Aid Fund.

16705. The board by the adoption of rules shall give priority in allocating funds to urban districts to those districts where the children will benefit most from schoolhouse facilities. This priority shall be based upon the age of existing buildings and the acuteness of overcrowding at the school or schools where the construction or reconstruction will occur, the density of population in the attendance areas affected, or any other factors that will insure that the greatest need will be served.

16706. In addition to any other powers and duties that are granted the board by this chapter, the board shall:

EDUCATION CODE
SECTION 17000-17009.5

17000. This chapter may be cited as the "Leroy F. Greene State School Building Lease-Purchase Law of 1976."

17001. (a) The Legislature hereby declares that it is in the interest of the state and the people thereof for the state to reconstruct, remodel, or replace existing school buildings that are educationally inadequate or that do not meet present-day structural safety requirements, and to acquire new schoolsites and buildings for the purpose of making them available to local school districts for the pupils of the public school system, that system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state.

(b) In order to expedite the elimination of the use of nonconforming school buildings that are used or designed to be used for instructional purposes or intended to be entered by pupils, the State Allocation Board may establish criteria that considers special circumstances under which funds may be allocated for the reconstruction of nonconforming buildings. The funds allocated in accordance with this section shall not exceed 75 percent of the cost of facility replacement.

(c) It is the intent of the Legislature that all construction projects be designed and constructed to maximize the use of educational technology, as set forth in subdivision (b) of Section 17002.

17002. The following terms wherever used or referred to in this chapter, shall have the following meanings, respectively, unless a different meaning appears from the context:

(a) "Apportionment" means a reservation of funds necessary to finance the cost of any project approved by the board for lease to an applicant school district.

(b) "Board" means the State Allocation Board.

(c) "Cost of project" includes, but is not limited to, the cost of all real estate property rights, and easements acquired, and the cost of developing the site and streets and utilities immediately adjacent thereto, the cost of construction, reconstruction, or modernization of buildings and the furnishing and equipping, including the purchase of educational technology hardware, of those buildings, the supporting wiring and cabling, and the technological modernization of existing buildings to support that hardware, the cost of plans, specifications, surveys, and estimates of costs, and other expenses that are necessary or incidental to the financing of the project. For purposes of this section, "educational technology hardware" includes, but is not limited to, computers, telephones, televisions, and video cassette recorders.

(d) (1) "Good repair" means the facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to a school facility inspection and evaluation instrument developed by the Office of Public School Construction and approved by the board or a local evaluation instrument that meets the same criteria. Until the school facility inspection and evaluation instrument is approved by the board, "good repair" means the facility is maintained in a manner that assures that it is clean, safe, and

EDUCATION CODE
SECTION 17085-17096

17085. This chapter may be cited as the State Relocatable Classroom Law of 1979.

17086. In adopting this chapter, the Legislature recognizes that the ad valorem tax is no longer available as a source of revenue for the construction of necessary school facilities. The Legislature considers that the greatest need in school construction is for classrooms for the education of public school pupils. It is the intent of the Legislature to satisfy this primary need to the greatest extent possible before providing any additional educational facilities, regardless of how desirable such additional facilities may be.

17087. As used in this chapter:

(a) "Board" means the State Allocation Board.

(b) "Good repair" has the same meaning as specified in subdivision (d) of Section 17002.

(c) "Lessee" means a school district or county superintendent of schools to whom the board has leased a portable classroom pursuant to this chapter.

(d) "State School Building Aid Fund" means that fund established pursuant to Section 16096.

17088. In addition to any other powers and duties as are granted the board by this chapter, other statutes, or the State Constitution, the board has the power to do each of the following:

(a) Establish any qualifications not in conflict with other provisions of this chapter, as it deems will best serve the purposes of this chapter, for determining the eligibility of school districts and county superintendents of schools to lease portable classrooms under this chapter.

(b) Establish any procedures and policies in connection with the administration of this chapter as it deems necessary.

(c) Adopt any rules and regulations for the administration of this chapter requiring such procedure, forms, and information, as it may deem necessary.

(d) Have constructed, furnished, equipped, or otherwise require whatever work is necessary to place, portable classrooms on schoolsites where needed.

(e) Own, have maintained, and lease portable classrooms to qualifying school districts and county superintendents of schools.

(f) From any moneys in the State School Building Aid Fund available for purposes of this chapter, the board shall make available to the Director of General Services such amounts as it determines necessary to provide the assistance, pursuant to this chapter, required by Section 15504 of the Government Code.

(g) Notwithstanding any other provision of law, from any funds available to the board, the board may, no later than January 15 of any year, make available to the Director of General Services up to thirty-five million dollars ($35,000,000) for expenditure in the subsequent school year. It is the intent of the Legislature that

EDUCATION CODE
SECTION 17100

17100. The Legislature hereby finds and declares that the State School Building Lease-Purchase Fund, pursuant to Section 17008, and the proceeds from the sale or lease of surplus school property are the two sources available to school districts to finance the construction of school facilities to relieve overcrowding. However, these sources are still insufficient to meet the construction needs statewide of school districts.

EDUCATION CODE
SECTION 17340-17343

17340. The governing board of any school district may, and when directed by a vote of the district shall, build and maintain a schoolhouse.

17342. The governing board of any school district, whenever in its judgment it is desirable to do so, may establish additional schools in the district.

17343. The governing board of any school district may purchase property and construct and equip buildings in an area after the legal action has been taken that will result in annexation of the area to the school district, but before the annexation has become effective.

EDUCATION CODE
SECTION 17365-17374

17365. The Legislature finds and declares as follows:

(a) By an urgency act (Stats. 1933, Ch. 59), the Legislature at the 1933 General Session established reasonable minimum standards for the design and construction of new school buildings, as now defined in Section 17283. Although it was not required that then existing school buildings incorporate these standards, it was intended by the Legislature that in the intervening years continuous progress would be made in the repair, reconstruction or replacement of such school buildings.

(b) Progress toward this end has been outstanding since 1971 as a result of state funds being made available for rehabilitating or replacing structurally unsafe school facilities.

17366. It is the intent of the Legislature to reexamine the progress under this article from time to time. To enable it to do so, and to expedite the provision of safe educational facilities for California schoolchildren, the Legislature intends that the governing board of each school district adopt a plan for the orderly repair, reconstruction, or replacement of school buildings not repaired, reconstructed, or replaced in accordance with this article.

17367. The governing board of any school district which has in use for school purposes any school buildings which were not constructed under approved plans and the supervision and inspection requirements of Article 3 (commencing with Section 17280) of this chapter shall have such buildings examined pursuant to this section and shall have completed on or before January 1, 1970, the examination, reporting and estimate requirements of this section and Section 39223.

Whenever an examination of the structural condition of any school building of a school district has been made by the Department of General Services, or by any licensed structural engineer or licensed architect for the governing board of the school district, or under the authorization of law, and a report of the examination, including the findings and recommendations of the agency or person making the examination, has been made to the governing board of the district, and the report shows that the building is unsafe for use, the governing board of the district shall immediately have prepared an estimate of the cost necessary to make such repairs to the building or buildings as are necessary, or, if necessary, to reconstruct or replace the building so that the building when repaired or reconstructed, or any building erected to replace it, shall meet such standards of structural safety as are established in accordance with law. The estimate shall be based on current costs and may include other costs to reflect modern educational needs. Also an estimate of the cost of replacement based on the standards established by the State Allocation Board for area per pupil and cost per square foot, shall be made and reported.

The report required by this section shall include a statement that each of the buildings examined is safe or unsafe for school use. For the purpose of this statement the sole consideration shall be protection of life and the prevention of personal injury at a level

of safety equivalent to that established by Article 3 (commencing with Section 17280) of this chapter and the rules and regulations adopted thereunder, disregarding, insofar as possible, such building damage not jeopardizing life which would be expected from one disturbance of nature of the intensity used for design purposes in said rules and regulations.

The governing board, utilizing the information acquired from the examination and report developed pursuant to this section, shall establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings.

17368. "School building" as used in this article shall be limited to any physical structure capable of being occupied by pupils, but shall exclude, (a) any bleacher or grandstand with less than six rows of seats, (b) any building which is used exclusively for warehouse, storage, garage, or districtwide administrative office purposes, into which pupils are not required to enter, and buildings utilized by adult schools for off-campus, voluntary adult education courses or registered apprentice courses, (c) any swimming pool, or (d) any yard or lighting poles or flagpoles or playground equipment which does not exceed 35 feet in height.

"School building" as used in this article excludes any building owned or occupied by a unified school district, high school district, or a county superintendent of schools which is used exclusively for adult education purposes.

If any building so excluded was not constructed in accordance with Article 3 (commencing with Section 17280) of this chapter and was not repaired, reconstructed, or replaced in accordance with this article, there shall be posted in a conspicuous place on such building a public notice stating that such building does not meet the structural standards imposed by law for earthquake safety.

17369. "School building" as used in this article excludes any building operated by an official or board of a public entity for purposes other than educational, notwithstanding any educational use thereof incidental to the other primary purpose.

For purposes of this section, a public entity includes, but is not limited to, a city, city and county, county, or special district, but does not include a school district or county superintendent of schools.

17370. Except as provided in Section 17371, nothing in this article shall be construed as relieving any member of the governing board of a school district of any liability for injury to persons or damage to property imposed by law.

17371. No member of the governing board of a school district shall be held personally liable for injury to persons or damage to property resulting from the fact that a school building was not constructed under the requirements of Article 3 (commencing with Section 17280) of this chapter, if such governing board complies with the provisions of this article. Such limit on liability shall commence when such governing board initiates action to comply with the provisions of Section 17367.

A licensed structural engineer or licensed architect employed by a governing board to examine any school building under this article shall not be held personally liable for injury to persons or damage

EDUCATION CODE
SECTION 17565-17592.5

17565. The governing board of any school district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. The governing board may also insure the property against other perils. The insurance shall be written in any admitted insurer, or in any nonadmitted insurer to the extent and subject to the conditions prescribed in Section 1763 of the Insurance Code. Insurance on property of a district may be, in the discretion of the governing board, of the deductible type of coverage. By deductible type of coverage is meant a form of insurance under which the insurance becomes operative when the loss and damage exceeds an amount stipulated in the policy or policies.

The governing board, in their notice of bid for any school district construction, may indicate that it may elect to assume the cost of fire insurance by adding the coverage to the district's existing policy and in that event bids made on the construction shall be made in the alternative, with and without the fire insurance coverage included, and the governing board shall make its election as to who shall secure and pay for the insurance at the time of accepting the bid.

17566. (a) The governing board of any school district, by resolution, may establish a fund or funds for losses, and payments, including, but not limited to, health and welfare benefits for its employees as defined by Section 53200 of the Government Code, school district property, any liability, and workers' compensation, in the county treasury for the purpose of covering the deductible amount under deductible types of insurance policies, losses or payments arising from self-insurance programs, or losses or payments due to noninsured perils. In the fund or funds shall be placed those sums, to be provided in the budget of the school district, that will create an amount that, together with investments made from the fund or funds, will be sufficient in the judgment of the governing board to protect the school district from those losses or to provide for payments on the deductible amount under deductible types of insurance policies, losses or payments arising from self-insurance programs, or losses or payments due to noninsured perils. Nothing in this section shall be construed to prohibit the governing board from providing protection against those losses or liability for the payment of claims partly by means of the fund or funds and partly by means of insurance written by acceptable insurers as provided in Section 17565.

The fund or funds shall be considered as separate and apart from all other funds of the school district, and the balance therein shall not be considered to be part of the working cash of the school district in compiling annual budgets.

Warrants may be drawn on or transfers made from the fund or funds so created only to reimburse or indemnify the school district for losses as herein specified, and for the payment of claims, administrative costs, and related services, and to provide for deductible insurance amounts and purchase of excess insurance. The warrants or transfers shall be within the purpose of the fund or funds as established by resolution of the governing board.

The cash placed in the fund or funds may be invested and reinvested by the county treasurer, with the advice and consent of

the governing board of the school district, in securities that are legal investments for surplus county funds in this state. The income derived from the investments, together with interest earned on uninvested funds, shall be considered revenue of, and be deposited in, the fund. The cost of contracts or services authorized by this section are appropriate charges against the respective fund.

The governing board may contract for investigative, administrative, and claims adjustment services relating to claims. The contract may provide that the contracting firm may reject, settle, compromise, and approve claims against the district, or its officers or employees, within the limits and for amounts that the governing board may specify, and may provide that the contracting firm may execute and issue checks in payment of those claims, which checks shall be payable only from a trust account that may be established by the governing board. Funds in the trust account established by the board pursuant to this section shall not exceed a sum that is sufficient, as determined by the governing board to provide for the settlement of claims for a 30-day period. The rejection or settlement and approval of a claim by the contracting firm in accordance with the terms of the contract shall have the same effect as would the rejection or settlement and approval of the claim by the governing board.

The contract may also provide that the contracting firm may employ legal counsel, subject to terms and limitations that the board may prescribe, to advise the contracting firm concerning the legality and advisability of rejecting, settling, compromising, and paying claims referred to the contracting firm by the board for investigation and adjustment, or to represent the board in litigation concerning the claims. The compensation and expenses of the attorney for services rendered to the board shall be an appropriate charge against the appropriate fund.

The contract provided for in this section may contain other terms and conditions that the governing board may consider necessary or desirable to effectuate the board's self-insured programs.

In lieu of, or in addition to, contracting for the services described in this section, the governing board may authorize an employee or employees to perform any or all of the services and functions for which the board may contract under the provisions of this section.

(b) As used in this section:

(1) "Firm" includes a person, corporation, or other legal entity, including a county superintendent of schools.

(2) "Governing boards" includes governing boards of school districts and county superintendents of schools.

(3) "School district" includes a county superintendent of schools who may participate in or administer insurance or self-insurance programs for the county office of education or for one or more school districts.

(c) A county superintendent of schools may participate in or administer insurance for one or more school districts pursuant to this section or for one or more community college districts pursuant to Section 81602, for any combination of school districts and community college districts pursuant to this section and Section 81602.

(d) Prior to funding health and welfare benefits pursuant to this section, the school district shall secure the services of an actuary who is a member of the American Academy of Actuaries to provide actuarial evaluations of the future annual costs of those benefits. The future annual costs as determined by the actuary shall be made public at a public meeting at least two weeks prior to the commencement of funding health and welfare benefits pursuant to this section.

(e) Upon commencing the funding of health and welfare benefits

pursuant to this section, the school district shall secure the services of an actuary as described in subdivision (d) to complete, every three years, an actuarial evaluation of the annual costs of those benefits. A copy of the results of that evaluation shall be submitted by the district to the county superintendent of schools.

17567. Nothing in this code shall be construed to prohibit two or more school districts from exercising, through a joint powers agreement made pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 of Title 1 of the Government Code, the powers prescribed in Section 17566 in accordance with the terms and conditions set forth in that section and in Section 17565.

17568. In districts situated within or partly within cities having a population of over five hundred thousand (500,000) as determined by the 1920 federal census any board of education may establish a fund in the county treasury for the purpose of covering fire losses to school property in lieu of carrying fire insurance in admitted insurers as provided in Section 17565. In the fund shall be placed sums, to be provided in the budget of the district, as will create an amount which, together with investments made from the fund, will be sufficient in the judgment of the board of education upon the advice of competent actuaries to protect the board of education against losses by fire on all or any part of the school property within its jurisdiction. Nothing contained herein shall be construed as prohibiting the board of education from providing protection against fire losses partly by means of the fund and partly by means of fire insurance written by admitted insurers as provided in Section 17565.

The fund shall be considered as separate and apart from all other funds of the district and the balance therein shall not be considered as being part of the working cash of the district in compiling annual budgets or fixing annual tax rates.

Warrants shall be drawn on, or transfers made from, the fund so created only to reimburse or indemnify the school district for losses as herein specified, and for the payment of claims, administrative costs, related services, and to provide for deductible insurance amounts and the purchase of excess insurance. The warrants or transfers shall be within the purpose of the fund as established by resolution of the governing board.

The cash placed in the fund may be invested and reinvested by the county treasurer with the advice and consent of the board of education in securities which are legal investments for surplus county funds in this state. The income derived from such investments together with interest earned on uninvested funds shall be considered revenue of and be deposited in the fund.

The county treasurer shall make quarterly reports to the board of education as to the condition of the fund, using as a basis for the report the cost or market value, whichever may be the lower, of the securities held as investments plus the cash in the fund.

17569. The governing board of any school district may grade, pave, construct sewers, or otherwise improve streets and other public places in front of real property owned or controlled by it, and also may construct in immediate proximity to any school or site owned or controlled by the district, pedestrian tunnels, overpasses,

footbridges, sewers and water pipes when required for school or administrative purposes, may acquire property, easements and rights-of-way for such purpose, and may appropriate money to pay the cost and expense of the improvements, whether made by the board under contract executed by the board, or under contracts made in pursuance of any of the general laws of the state respecting street improvements, or under other contracts made in pursuance of the charter of any county or municipality.

17570. Any provision to the contrary notwithstanding, the governing board of any school district, other than a city school district with over 50,000 pupils in average daily attendance during the preceding fiscal year, may construct pedestrian walks, footbridges, and pedestrian tunnels when required for the safety of pupils attending the schools of the district, may acquire easements and rights-of-way for those purposes, and may appropriate money to acquire such easements and rights-of-way and to pay the cost and expense of the improvements, whether made by the board under contract executed by the board, or under contracts made in pursuance of any of the general laws of the state respecting street improvements, or under other contracts made in pursuance of the charter of any county or municipality. Pedestrian walks, footbridges, and pedestrian tunnels shall be constructed, and such easements or rights-of-way for those purposes shall be acquired, within one mile of the school for the pupils of which the walks, bridges, and tunnels are necessary.

17571. The governing board of any school district may install and maintain a lighting system in any underpass in the vicinity of a schoolhouse.

17572. The governing board of any school district may appropriate money to pay assessments, for the improvement of streets or other public places, levied against any real property owned by, or under the control of the board, when the property is included within an assessment district formed in pursuance of any general law of the state or under the charter of any municipality. The assessments may be paid out of any funds belonging to the school district, except funds derived from the sale of bonds or required by law to be used for teachers' salaries.

17573. The governing board of every school district shall provide a warm, healthful place in which children who bring their own lunches to school may eat the lunches.

17574. The governing board of a school district may construct a mobilehome site on the grounds of any district facility or facilities maintained by the district, including all necessary appurtenances and fixtures, and may pay the cost of utilities, insurance, and necessary services, for the purpose of enabling a responsible person or persons to install and occupy a mobilehome on such site. Such person or persons, who need not be classified as employees of the district, shall, in return for being permitted to install and occupy a mobilehome on the district facility site on terms and conditions acceptable to the governing board, agree to maintain any surveillance

over the facility grounds as the school district governing board requires, and to report to district authorities illegal or suspicious activities that are observed.

17575. The governing board of any school district, when leasing a building for housing of school district employees, may lease such building for any period they deem necessary.

17576. The governing board of every school district shall provide, as an integral part of each school building, or as part of at least one building of a group of separate buildings, sufficient patent flush water closets for the use of the pupils. In school districts where the water supply is inadequate, chemical water closets may be substituted for patent flush water closets by the board.

This section shall apply to all buildings existing on September 19, 1947, or constructed after such date.

17577. In addition to the other powers granted the governing board of each school district may provide sewers and drains adequate to treat and/or dispose of sewage and drainage on or away from each school property. For this purpose it may construct adequate systems or acquire adequate disposal rights in systems constructed or to be constructed by others for these purposes without regard to their proximity. The cost thereof may be paid from the building fund, including any bond moneys therein.

17578. The governing board of each district maintaining a high school shall provide for the annual cleaning, sterilizing, and necessary repair of football equipment of their respective schools pursuant to Sections 17579 and 17580.

17579. All football equipment actually worn by pupils shall be cleaned and sterilized at least once a year. Football equipment used in spring training shall be cleaned and sterilized before it is used in the succeeding fall term.

17580. Any contract with a dealer or craftsman for the repair of football equipment belonging to the district or the state college shall specifically state or describe the materials to be used by the dealer or craftsman in repairing such equipment.

17581. (a) The Legislature finds and declares that the quality of protective equipment worn by participants in high school interscholastic football is a significant factor in the occurrence of injuries to such participants and that it is therefore necessary to insure minimum standards of quality for the equipment in order to prevent unnecessary injuries to such participants.

(b) No football helmets shall be worn by participants in high school interscholastic football unless the equipment has been certified for use by the National Operating Committee on Standards

EDUCATION CODE
SECTION 48200-48208

48200. Each person between the ages of 6 and 18 years not exempted under the provisions of this chapter or Chapter 3 (commencing with Section 48400) is subject to compulsory full-time education. Each person subject to compulsory full-time education and each person subject to compulsory continuation education not exempted under the provisions of Chapter 3 (commencing with Section 48400) shall attend the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residency of either the parent or legal guardian is located and each parent, guardian, or other person having control or charge of the pupil shall send the pupil to the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residence of either the parent or legal guardian is located.

Unless otherwise provided for in this code, a pupil shall not be enrolled for less than the minimum schoolday established by law.

48200.5. Notwithstanding Section 48200, any resident of the City of Carson who is the parent or legal guardian of a person subject to compulsory education may enroll that person in either the school district in which the residency of the parent or guardian is located or in the Los Angeles Unified School District pursuant to the terms of an agreement permitting those transfers that is mutually adopted by the Compton Unified School District and the Los Angeles Unified School District.

48200.7. (a) The State Department of Education shall identify the three lowest performing elementary schools in the Compton Unified School District for purposes of extending the school year for pupils enrolled in kindergarten or grades 1 and 2 and for those pupils in any of grades 3 to 5, inclusive, who are performing in mathematics or English language arts two or more grade levels below the grade in which those pupils are enrolled as determined under subdivision (d).

(b) Beginning with the 1998-99 school year, the Compton Unified School District may identify schools of the district, in addition to those identified pursuant to subdivision (a), that are among the lowest performing schools in the district, and may provide extended school year instruction pursuant to Section 41601.1 to any pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, in a school identified pursuant to this subdivision who is performing in mathematics or English language arts at a grade level that is two or more grade levels below the grade in which that pupil is enrolled as determined pursuant to subdivision (d).

(c) Notwithstanding subdivision (b) of this section and Section 41601.1, the amount of funding claimed by the district for extended year instruction shall not in any year exceed twice the amount claimed pursuant to this section in the 1997-98 fiscal year as adjusted each year by the inflation adjustment determined pursuant to Section 42238.1.

(d) The determination that a pupil is performing two or more grade levels below the grade in which that pupil is enrolled shall be based on any combination of the following:

(1) The California Achievement Test-Form E.

(2) The Spanish assessment of basic education.

(3) Proficiency tests required for graduation.

(4) District criterion reference tests based on state curriculum guides.

(5) The STAR test.

(e) The Compton Unified School District shall test all pupils in kindergarten and grades 1 to 12, inclusive, in its lowest performing schools identified pursuant to subdivisions (a) and (b) prior to those pupils beginning an extended school year program under this section. At the end of the school year the school district shall again test the pupils in kindergarten and grades 1 to 12, inclusive, to determine the grade level at which those pupils are performing.

(f) The department shall approve each of the following areas in each elementary school identified as high-priority pursuant to subdivision (a):

(1) Curricula.

(2) Testing instruments.

(3) Schoolday length.

(4) Teacher selection, teacher mentoring, and staff development processes.

(g) The department shall review teacher compensation, including salary and benefits, in each elementary school identified as high-priority pursuant to subdivision (a).

(h) The department shall collect data as to each of the following items for each school in subdivisions (a) and (b):

(1) Instructional materials used by, and made available to, the school.

(2) Teacher capacity.

(3) Any other baseline data deemed necessary by the department.

(i) Instruction provided to pupils subject to this section during schooldays in excess of schooldays offered to other pupils shall be devoted to instruction in basic skills in mathematics and English language arts.

(j) In conjunction with the Legislative Analyst, the department shall contract for an independent evaluation to determine the effectiveness of the extended school year curriculum, instructional program, and materials provided pursuant to this section and funded pursuant to Section 41601.1 in improving pupil academic outcomes. Testing and data collection conducted pursuant to this section shall be administered under the oversight of the independent evaluator, who shall be provided with copies of all test results. Results of the evaluation shall be reported on or before January 1, 2002, to the Superintendent of Public Instruction, the Legislative Analyst, the Director of Finance, and the appropriate policy and fiscal committees of the Legislature. The Compton Unified School District shall be responsible for all costs incurred pursuant to this subdivision.

(k) A percentage of funding appropriated for purposes of this section, in an amount to be determined by the Superintendent of Public Instruction, shall be used for purposes of testing and data collecting pursuant to this section.

48200.8. Subsequent to the evaluation required pursuant to subdivision (j) of Section 48200.7, the State Department of Education, in consultation with the Legislative Analyst, shall contract, as necessary, for a second independent evaluation, or as determined by the department with concurrence by the Legislative Analyst may extend the original contract authorized in subdivision

(j) of Section 48200.7, to conclusively determine the effectiveness of the extended school year curriculum, instructional program, and materials in improving pupil academic outcomes provided pursuant to that section. The subsequent evaluation and data collection necessary to incorporate results of the program through the 2001-02 school year and subsequent summer period shall be funded through funds authorized pursuant to Section 41601.1, as determined by the Superintendent of Public Instruction, to ensure the Compton Unified School district shall be responsible for all costs incurred pursuant to this section. Testing and data collection conducted pursuant to this section shall be administered under the oversight of the independent evaluator, who shall be provided with copies of all test results. Results of the evaluation shall be reported on or before January 1, 2003, to the Superintendent of Public Instruction, the Legislative Analyst, the Director of Finance, and the appropriate policy and fiscal committees of the Legislature.

48201. (a) Except for pupils exempt from compulsory school attendance under Section 48231, any parent, guardian, or other person having control or charge of any minor between the ages of 6 and 16 years who removes the minor from any city, city and county, or school district before the completion of the current school term, shall enroll the minor in a public full-time day school of the city, city and county, or school district to which the minor is removed.

(b) (1) Upon a pupil's transfer from one school district to another, the school district into which the pupil is transferring shall request that the school district in which the pupil was last enrolled provide any records that the district maintains in its ordinary course of business or receives from a law enforcement agency regarding acts committed by the transferring pupil that resulted in the pupil's suspension from school or expulsion from the school district. Upon receipt of this information, the receiving school district shall inform any teacher of the pupil that the pupil was suspended from school or expelled from the school district and shall inform the teacher of the act that resulted in that action.

(2) A school district, or school district officer or employee, is not civilly or criminally liable for providing information under this subdivision unless it is proven that the information was false and that the district or district officer or employee knew or should have known that the information was false or the information was provided with a reckless disregard for its truth or falsity.

(3) Any information received by a teacher pursuant to this subdivision shall be received in confidence for the limited purpose for which it was provided and shall not be further disseminated by the teacher.

48202. The county board of education of each county may establish, by resolution, the following regulation requiring the reporting of various types of severance of attendance of or by any pupil subject to the compulsory education laws of California or of any one or more of the types of severance enumerated in subdivision (a) below and may require such reporting of any or all of the private and public schools of the county:

(a) The administration of each private school and public school district of the county shall, upon the severance of attendance by any pupil subject to the compulsory education laws of California, whether by expulsion, exclusion, exemption, transfer, suspension beyond 10 schooldays, or other reasons, report such severance to the county superintendent of schools in the jurisdiction. The report

shall include names, ages, last known address and the reason for each such severance.

(b) It shall be the duty of the county superintendent of such county to examine such reports and draw to the attention of the county board of education and local district board of education any cases in which the interests of the child or the welfare of the state may need further examination.

(c) After preliminary study of available information in cases so referred to it, the county board of education may, on its own action, hold hearings on such cases in the manner provided in Sections 48915 through 48920 and with the same powers of final decision as therein provided.

48203. (a) The superintendent of a school district and the principal of a private school in each county shall, upon the severance of attendance or the denial of admission of any child who is an individual with exceptional needs, as that term is defined in Section 56026, or who is a qualified handicapped person, as that term is defined in regulations promulgated by the United States Department of Education pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. Sec. 794), but who is otherwise subject to the compulsory education laws of California, report the severance, expulsion, exclusion, exemption, transfer, or suspension beyond 10 schooldays to the county superintendent of schools. The report shall include names, ages, last known address, and the reason for the severance, expulsion, exclusion, exemption, transfer, or suspension.

(b) It is the duty of the county superintendent to examine those reports and draw to the attention of the county board of education and governing board of a school district any cases in which the interests of the child or the welfare of the state may need further examination.

(c) After a preliminary study of available information in cases referred to it, the county board of education may, on its own action, hold hearings on those cases in the manner provided in Section 48914 and with the same powers of final decision as therein provided.

48204. (a) Notwithstanding Section 48200, a pupil complies with the residency requirements for school attendance in a school district, if he or she is any of the following:

(1) (A) A pupil placed within the boundaries of that school district in a regularly established licensed children's institution, or a licensed foster home, or a family home pursuant to a commitment or placement under Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.

(B) An agency placing a pupil in a home or institution described in subparagraph (A) shall provide evidence to the school that the placement or commitment is pursuant to law.

(2) A pupil for whom interdistrict attendance has been approved pursuant to Chapter 5 (commencing with Section 46600) of Part 26.

(3) A pupil whose residence is located within the boundaries of that school district and whose parent or legal guardian is relieved of responsibility, control, and authority through emancipation.

(4) A pupil who lives in the home of a caregiving adult that is located within the boundaries of that school district. Execution of an affidavit under penalty of perjury pursuant to Part 1.5 (commencing with Section 6550) of Division 11 of the Family Code by the caregiving adult is a sufficient basis for a determination that the pupil lives in the home of the caregiver, unless the school district determines from actual facts that the pupil is not living in

the home of the caregiver.

(5) A pupil residing in a state hospital located within the boundaries of that school district.

(b) A school district may deem a pupil to have complied with the residency requirements for school attendance in the district if at least one parent or the legal guardian of the pupil is physically employed within the boundaries of that district.

(1) This subdivision does not require the school district within which at least one parent or the legal guardian of a pupil is employed to admit the pupil to its schools. A school district shall not, however, refuse to admit a pupil under this subdivision on the basis, except as expressly provided in this subdivision, of race, ethnicity, sex, parental income, scholastic achievement, or any other arbitrary consideration.

(2) The school district in which the residency of either the parents or the legal guardian of the pupil is established, or the school district to which the pupil is to be transferred under this subdivision, may prohibit the transfer of the pupil under this subdivision if the governing board of the district determines that the transfer would negatively impact the court-ordered or voluntary desegregation plan of the district.

(3) The school district to which the pupil is to be transferred under this subdivision may prohibit the transfer of the pupil if the district determines that the additional cost of educating the pupil would exceed the amount of additional state aid received as a result of the transfer.

(4) The governing board of a school district that prohibits the transfer of a pupil pursuant to paragraph (1), (2), or (3) is encouraged to identify, and communicate in writing to the parents or the legal guardian of the pupil, the specific reasons for that determination and is encouraged to ensure that the determination, and the specific reasons therefor, are accurately recorded in the minutes of the board meeting in which the determination was made.

(5) The average daily attendance for pupils admitted pursuant to this subdivision is calculated pursuant to Section 46607.

(6) Unless approved by the sending school district, this subdivision does not authorize a net transfer of pupils out of a school district, calculated as the difference between the number of pupils exiting the district and the number of pupils entering the district, in a fiscal year in excess of the following amounts:

(A) For a school district with an average daily attendance for that fiscal year of less than 501, 5 percent of the average daily attendance of the district.

(B) For a school district with an average daily attendance for that fiscal year of 501 or more, but less than 2,501, 3 percent of the average daily attendance of the district or 25 pupils, whichever amount is greater.

(C) For a school district with an average daily attendance of 2,501 or more, 1 percent of the average daily attendance of the district or 75 pupils, whichever amount is greater.

(7) Once a pupil is deemed to have complied with the residency requirements for school attendance pursuant to this subdivision and is enrolled in a school in a school district the boundaries of which include the location where at least one parent or the legal guardian of a pupil is physically employed, the pupil does not have to reapply in the next school year to attend a school within that district and the district governing board shall allow the pupil to attend school through grade 12 in that district if the parent or legal guardian so chooses and if at least one parent or the legal guardian of the pupil continues to be physically employed by an employer situated within the attendance boundaries of the district, subject to paragraphs (1) to (6), inclusive.

(c) This section shall become inoperative on July 1, 2012, and as

of January 1, 2013, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2013, deletes or extends the dates on which it becomes inoperative and is repealed.

48204. Notwithstanding Section 48200, a pupil complies with the residency requirements for school attendance in a school district, if he or she is:

(a) (1) A pupil placed within the boundaries of that school district in a regularly established licensed children's institution, or a licensed foster home, or a family home pursuant to a commitment or placement under Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.

(2) An agency placing a pupil in the home or institution described in paragraph (1) shall provide evidence to the school that the placement or commitment is pursuant to law.

(b) A pupil for whom interdistrict attendance has been approved pursuant to Chapter 5 (commencing with Section 46600) of Part 26.

(c) A pupil whose residence is located within the boundaries of that school district and whose parent or legal guardian is relieved of responsibility, control, and authority through emancipation.

(d) A pupil who lives in the home of a caregiving adult that is located within the boundaries of that school district. Execution of an affidavit under penalty of perjury pursuant to Part 1.5 (commencing with Section 6550) of Division 11 of the Family Code by the caregiving adult is a sufficient basis for a determination that the pupil lives in the home of the caregiver, unless the school district determines from actual facts that the pupil is not living in the home of the caregiver.

(e) A pupil residing in a state hospital located within the boundaries of that school district.

(f) This section shall become operative on July 1, 2012.

48204.5. (a) The Legislature finds that school districts that are adjacent to the international border, because of their geographic position, face unique circumstances in conducting the verification of a pupil's residency.

(b) The Legislature declares that international border school districts may need to employ certain efforts to verify residency.

48204.6. (a) Any school district that is adjacent to an international border may accept a wide range of documents and representations from the parent or guardian of a pupil as reasonable evidence that the pupil meets the residency requirements for school attendance in the school district as set forth in Section 48204. Reasonable evidence of residency may be established by documentation, including, but not limited to, any of the following documentation:

(1) Property tax payment receipts.

(2) Rent payment receipts.

(3) Utility service payment receipts.

(4) Declaration of residency executed by the parent or guardian of the pupil.

(b) If any employee of a school district that is adjacent to an international border reasonably believes that the parent or guardian of a pupil has provided false or unreliable evidence of residency, the school district shall make reasonable efforts to determine that the pupil actually meets the residency requirements set forth in

48205. (a) Notwithstanding Section 48200, a pupil shall be excused from school when the absence is:

(1) Due to his or her illness.

(2) Due to quarantine under the direction of a county or city ealth officer.

(3) For the purpose of having medical, dental, optometrical, or chiropractic services rendered.

(4) For the purpose of attending the funeral services of a member of his or her immediate family, so long as the absence is not more than one day if the service is conducted in California and not more than three days if the service is conducted outside California.

(5) For the purpose of jury duty in the manner provided for by law.

(6) Due to the illness or medical appointment during school hours of a child of whom the pupil is the custodial parent.

(7) For justifiable personal reasons, including, but not limited to, an appearance in court, attendance at a funeral service, observance of a holiday or ceremony of his or her religion, attendance at religious retreats, attendance at an employment conference, or attendance at an educational conference on the legislative or judicial process offered by a nonprofit organization when the pupil's absence is requested in writing by the parent or guardian and approved by the principal or a designated representative pursuant to uniform standards established by the governing board.

(8) For the purpose of serving as a member of a precinct board for an election pursuant to Section 12302 of the Elections Code.

(b) A pupil absent from school under this section shall be allowed to complete all assignments and tests missed during the absence that can be reasonably provided and, upon satisfactory completion within a reasonable period of time, shall be given full credit therefor. The teacher of the class from which a pupil is absent shall determine which tests and assignments shall be reasonably equivalent to, but not necessarily identical to, the tests and assignments that the pupil missed during the absence.

(c) For purposes of this section, attendance at religious retreats shall not exceed four hours per semester.

(d) Absences pursuant to this section are deemed to be absences in computing average daily attendance and shall not generate state apportionment payments.

(e) "Immediate family," as used in this section, has the same meaning as that set forth in Section 45194, except that references therein to "employee" shall be deemed to be references to "pupil."

48206.3. (a) Except for those pupils receiving individual instruction provided pursuant to Section 48206.5, a pupil with a temporary disability which makes attendance in the regular day classes or alternative education program in which the pupil is enrolled impossible or inadvisable shall receive individual instruction provided by the district in which the pupil is deemed to reside.

(b) For purposes of this section and Sections 48206.5, 48207, and 48208, the following terms have the following meanings:

(1) "Individual instruction" means instruction provided to an individual pupil in the pupil's home, in a hospital or other residential health facility, excluding state hospitals, or under other circumstances prescribed by regulations adopted for that purpose by the State Board of Education.

(2) "Temporary disability" means a physical, mental, or emotional disability incurred while a pupil is enrolled in regular day classes or an alternative education program, and after which the pupil can reasonably be expected to return to regular day classes or the alternative education program without special intervention. A temporary disability shall not include a disability for which a pupil is identified as an individual with exceptional needs pursuant to Section 56026.

(c) (1) For purposes of computing average daily attendance pursuant to Section 42238.5, each clock hour of teaching time devoted to individual instruction shall count as one day of attendance.

(2) No pupil shall be credited with more than five days of attendance per calendar week, or more than the total number of calendar days that regular classes are maintained by the district in any fiscal year.

(d) Notice of the availability of individualized instruction shall be given pursuant to Section 48980.

48206.5. Any school district which, prior to January 1, 1986, maintained a program to provide individual instruction to pupils enrolled in regular day classes or an alternative education program offered by the district who have a temporary disability may continue the program as it existed prior to January 1, 1986.

48207. Notwithstanding Section 48200, a pupil with a temporary disability who is in a hospital or other residential health facility, excluding a state hospital, which is located outside of the school district in which the pupil's parent or guardian resides shall be deemed to have complied with the residency requirements for school attendance in the school district in which the hospital is located.

48208. (a) It shall be the primary responsibility of the parent or guardian of a pupil with a temporary disability to notify the school district in which the pupil is deemed to reside pursuant to Section 48207 of the pupil's presence in a qualifying hospital.

(b) Upon receipt of notification pursuant to subdivision (a), a school district shall do all of the following:

(1) Within five working days of receipt of the notification, determine whether the pupil will be able to receive individualized instruction, and, if the determination is positive, when the individualized instruction may commence. Individualized instruction shall commence no later than five working days after the positive determination has been rendered.

(2) Provide the pupil with individualized instruction pursuant to Section 48206.3. The school district may enter into an agreement with the school district in which the pupil previously attended regular day classes or an alternative education program, to have the school district the pupil previously attended provide the pupil with individualized instruction pursuant to Section 48206.3.

(3) Within five working days of the commencement of individualized instruction, provide the school district in which the pupil previously attended regular day classes or an alternative education program with written notice that the pupil shall not be counted by that district for purposes of computing average daily attendance pursuant to Section 42238.5, effective the date on which individualized instruction commenced.

EDUCATION CODE
SECTION 76000-76002

6000. The governing board of a community college district shall admit to the community college any California resident, and may admit any nonresident, possessing a high school diploma or the equivalent thereof.

The governing board may admit to the community college any apprentice, as defined in Section 3077 of the Labor Code, who, in the judgment of the governing board, is capable of profiting from the instruction offered.

The governing board may by rule determine whether there shall be admitted to the community college any other person who is over 18 years of age and who, in the judgment of the board, is capable of profiting from the instruction offered. If the governing board determines to admit other persons, those persons shall be admitted as provisional students and thereafter shall be required to comply with the rules and regulations prescribed by the board of governors pertaining to the scholastic achievement and other standards to be met by provisional or probationary students, as a condition to being readmitted in any succeeding semester. This paragraph shall not apply to persons in attendance in special classes and programs established for adults pursuant to Section 78401 or to any persons attending on a part-time basis only.

76001. (a) The governing board of a community college district may admit to any community college under its jurisdiction as a special part-time or full-time student in any session or term any student who s eligible to attend community college pursuant to Section 48800 or 48800.5.

(b) If the governing board denies a request for a special part-time or full-time enrollment at a community college for a pupil who is identified as highly gifted, the board shall record its findings and the reasons for denial of the request in writing within 60 days. The written recommendation and denial shall be issued at the next regularly scheduled board meeting that falls at least 30 days after the request has been submitted.

(c) The attendance of a pupil at a community college as a special part-time or full-time student pursuant to this section is authorized attendance, for which the community college shall be credited or reimbursed pursuant to Sections 48802 and 76002. Credit for courses completed shall be at the level determined to be appropriate by the school district and community college district governing boards.

(d) For purposes of this section, a special part-time student may enroll in up to, and including, 11 units per semester, or the equivalent thereof, at the community college.

(e) The governing board of a community college district shall assign a low enrollment priority to special part-time or full-time students described in subdivision (a) in order to ensure that these students do not displace regularly admitted students.

76002. (a) For the purposes of receiving state apportionments, a community college district may include high school pupils who attend a community college within the district pursuant to Sections 48800 and 76001 in the district's report of full-time equivalent students (FTES) only if those pupils are enrolled in community college classes

that meet all of the following criteria:

(1) The class is open to the general public.

(2) (A) The class is advertised as open to the general public in one or more of the following:

(i) The college catalog.

(ii) The regular schedule of classes.

(iii) An addenda to the college catalog or regular schedule of classes.

(B) If a decision to offer a class on a high school campus is made after the publication of the regular schedule of classes, and the class is solely advertised to the general public through electronic media, the class shall be so advertised for a minimum of 30 continuous days prior to the first meeting of the class.

(3) If the class is offered at a high school campus, the class may not be held during the time the campus is closed to the general public, as defined by the governing board of the school district during a regularly scheduled board meeting.

(4) If the class is a physical education class, no more than 10 percent of its enrollment may be comprised of special part-time or full-time students. A community college district may not receive state apportionments for special part-time and full-time students enrolled in physical education courses in excess of 5 percent of the district's total reported full-time equivalent enrollment of special part-time and full-time students.

(b) The governing board of a community college district may restrict the admission or enrollment of a special part-time or full-time student during any session based on any of the following criteria:

(1) Age.

(2) Completion of a specified grade level.

(3) Demonstrated eligibility for instruction using assessment methods and procedures established pursuant to Chapter 2 (commencing with Section 78210) of Part 48 and regulations adopted by the Board of Governors of the California Community Colleges.

(c) The Chancellor of the California Community Colleges shall prepare and submit to the Department of Finance and the Legislature, on or before March 1, 2004, and March 1 of each year thereafter, a report on the amount of FTES claimed by each community college district for special part-time and special full-time students for the preceding academic year in each of the following class categories:

(1) Noncredit.

(2) Nondegree-applicable.

(3) Degree-applicable, excluding physical education.

(4) Degree-applicable physical education.

(d) The Board of Governors of the California Community Colleges shall adopt rules and regulations to implement this section.

EDUCATION CODE
SECTION 81160-81179

81160. (a) The provisions of this article do not apply to an offsite building during the time the building is used wholly or in part for community college purposes if the building is neither owned by a community college district nor leased by a community college district under a lease containing an option to purchase the building.

For the purposes of this section, an "offsite building" is a building which is situated on land which is neither owned by a community college district nor leased by a community college district under a lease containing an option to purchase the land.

(b) "School building" as used in this article excludes any building which is used for community college district administrative buildings located on a site separate from the community college campuses of the district, and into which students are not required to enter.

(c) "School building" as used in this article shall be limited to any physical structure capable of being occupied by pupils, but shall exclude, (1) any bleacher or grandstand with less than six rows of seats, (2) any building which is used exclusively for warehouse, storage, garage, or districtwide administrative office purposes, into which pupils are not required to enter, and off-campus buildings utilized by adult schools or community colleges for voluntary adult education courses or registered apprentice courses, (3) any swimming pool, or (4) any yard or lighting poles or flagpoles or playground equipment which does not exceed 35 feet in height.

If any building so excluded was not constructed in accordance with Article 7 (commencing with Section 81130) of this chapter and was not repaired, reconstructed, or replaced in accordance with this article, there shall be posted in a conspicuous place on the building a public notice stating that the building does not meet the structural standards imposed by law for earthquake safety.

81161. It is the intent of the Legislature to re-examine the progress under this article from time to time. To enable it to do so, and to expedite the provision of safe educational facilities for California community college students, the Legislature intends that the governing board of each community college district adopt a plan for the orderly repair, reconstruction, or replacement of school buildings not repaired, reconstructed, or replaced in accordance with this article.

81162. Whenever an examination of the structural condition of any school building of a community college district has been made by the Department of General Services, by any licensed structural engineer or licensed architect for the governing board of the district, or under the authorization of law, and a report of the examination, including the findings and recommendations of the agency or person making the examination, has been made to the governing board of the district, and the report shows that the building is unsafe for use, the governing board of the district immediately shall have prepared an estimate of the cost necessary to make repairs to the building or buildings that are necessary, or, if necessary, to reconstruct or replace the building so that the building when repaired or

reconstructed, or any building erected to replace it, shall meet those standards of structural safety that are established in accordance with law. The estimate shall be based on current costs and may include other costs to reflect modern educational needs. Also, an estimate of the cost of replacement based on the standards established by the State Allocation Board for area per student and cost per square foot shall be made and reported.

The report required by this section shall include a statement that each of the buildings examined is safe or unsafe for school use. For the purpose of this statement, the sole consideration shall be protection of life and the prevention of personal injury at a level of safety equivalent to that established by Article 7 (commencing with Section 81130) of this chapter and the rules and regulations adopted thereunder, disregarding, insofar as possible, building damage not jeopardizing life that would be expected from one disturbance of nature of the intensity used for design purposes in those rules and regulations.

The governing board, utilizing the information acquired from the examination and report developed pursuant to this section, shall establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings.

81177. (a) No member of the governing board of a community college district shall be held personally liable for injury to persons or damage to property resulting from the fact that a school building was not constructed under the requirements of Article 7 (commencing with Section 81130), if the governing board complies with this article.

A licensed structural engineer or licensed architect, employed by a governing board to examine any school building under this article, shall not be held personally liable for injury to persons or damage to property as a result of the structural inadequacy and failure of a building, if he or she has exercised normal professional diligence in carrying out his or her functions under Article 7 (commencing with Section 81130) and this article.

(b) Except as provided in subdivision (a), nothing in this article shall be construed as relieving any member of the governing board of a community college district of any liability for injury to persons or damage to property imposed by law.

81179. Notwithstanding any other provision of this article or Chapter 4 (commencing with Section 81800), whenever a community college district does not have funds available to repair, reconstruct, or replace the school buildings referred to in this article or Section 16320, the community college district shall apply for the funds as may be necessary to accomplish the repair, reconstruction, or replacement pursuant to Chapter 4. The community college district shall also accept the funds as are disbursed to the district pursuant to Chapter 4, whether or not the funds constitute the maximum amount applied for, and shall repay the funds in accordance with Chapter 4.

Other Attachments

California Constitution Article 9 - Education

School Facilities Fingertip Facts

An overview of the State School Facility Programs (Sept. 2007) California

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SECTION 1. A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 2. A Superintendent of Public Instruction shall be elected by the qualified electors of the State at each gubernatorial election. The Superintendent of Public Instruction shall enter upon the duties of the office on the first Monday after the first day of January next succeeding each gubernatorial election. No Superintendent of Public Instruction may serve more than 2 terms.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 2.1. The State Board of Education, on nomination of the Superintendent of Public Instruction, shall appoint one Deputy Superintendent of Public Instruction and three Associate Superintendents of Public Instruction who shall be exempt from state civil service and whose terms of office shall be four years.

This section shall not be construed as prohibiting the appointment, in accordance with law, of additional Associate Superintendents of Public Instruction subject to state civil service.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 3. A Superintendent of Schools for each county may be elected by the qualified electors thereof at each gubernatorial election or may be appointed by the county board of education, and the manner of the selection shall be determined by a majority vote of the electors of the county voting on the question; provided, that two or more counties may, by an election conducted pursuant to Section 3.2 of this article, unite for the purpose of electing or appointing one joint superintendent for the counties so uniting.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 3.1. (a) Notwithstanding any provision of this Constitution to the contrary, the Legislature shall prescribe the qualifications required of county superintendents of schools, and for these purposes shall classify the several counties in the State.

(b) Notwithstanding any provision of this Constitution to the contrary, the county board of education or joint county board of education, as the case may be, shall fix the salary of the county superintendent of schools or the joint county superintendent of schools, respectively.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 3.2. Notwithstanding any provision of this Constitution to the contrary, any two or more chartered counties, or nonchartered counties, or any combination thereof, may, by a majority vote of the electors of each such county voting on the proposition at an election called for that purpose in each such county, establish one joint board of education and one joint county superintendent of schools for the counties so uniting. A joint county board of education and a joint county superintendent of schools shall be governed by the general statutes and shall not be governed by the provisions of any county charter.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 3.3. Except as provided in Section 3.2 of this article, it shall be competent to provide in any charter framed for a county under any provision of this Constitution, or by the amendment of any such charter, for the election of the members of the county board of education of such county and for their qualifications and terms of office.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 5. The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 6. Each person, other than a substitute employee, employed by a school district as a teacher or in any other position requiring certification qualifications shall be paid a salary which shall be at the rate of an annual salary of not less than twenty-four hundred dollars ($2,400) for a person serving full time, as defined by law.

The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and state colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them. No school or college or any other part of the Public School System

shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System.

The Legislature shall add to the State School Fund such other means from the revenues of the State as shall provide in said fund for apportionment in each fiscal year, an amount not less than one hundred eighty dollars ($180) per pupil in average daily attendance in the kindergarten schools, elementary schools, secondary schools, and technical schools in the Public School System during the next preceding fiscal year.

The entire State School Fund shall be apportioned in each fiscal year in such manner as the Legislature may provide, through the school districts and other agencies maintaining such schools, for the support of, and aid to, kindergarten schools, elementary schools, secondary schools, and technical schools except that there shall be apportioned to each school district in each fiscal year not less than one hundred twenty dollars ($120) per pupil in average daily attendance in the district during the next preceding fiscal year and except that the amount apportioned to each school district in each fiscal year shall be not less than twenty-four hundred dollars ($2,400).

Solely with respect to any retirement system provided for in the charter of any county or city and county pursuant to the provisions of which the contributions of, and benefits to, certificated employees of a school district who are members of such system are based upon the proportion of the salaries of such certificated employees contributed by said county or city and county, all amounts apportioned to said county or city and county, or to school districts therein, pursuant to the provisions of this section shall be considered as though derived from county or city and county school taxes for the support of county and city and county government and not money provided by the State within the meaning of this section.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 61/2. Nothing in this constitution contained shall forbid the formation of districts for school purposes situate in more than one county or the issuance of bonds by such districts under such general laws as have been or may hereafter be prescribed by the legislature; and the officers mentioned in such laws shall be authorized to levy and assess such taxes and perform all such other acts as may be prescribed therein for the purpose of paying such bonds and carrying out the other powers conferred upon such districts; provided, that all such bonds shall be issued subject to the limitations prescribed in section eighteen of article eleven hereof.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 7. The Legislature shall provide for the appointment or election of the State Board of Education and a board of education in each county or for the election of a joint county board of education for two or more counties.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 7.5. The State Board of Education shall adopt textbooks for use in grades one through eight throughout the State, to be furnished without cost as provided by statute.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 8. No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 9. (a) The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services. Said corporation shall be in form a board composed of seven ex officio members, which shall be: the Governor, the Lieutenant Governor, the Speaker of the Assembly, the Superintendent of Public Instruction, the president and the vice president of the alumni association of the university and the acting president of the university, and 18 appointive members appointed by the Governor and approved by the Senate, a majority of the membership concurring; provided, however that the present appointive members shall hold office until the expiration of their present terms.

(b) The terms of the members appointed prior to November 5, 1974, shall be 16 years; the terms of two appointive members to expire as heretofore on March 1st of every even-numbered calendar year, and two members shall be appointed for terms commencing on March 1, 1976, and on March 1 of each year thereafter; provided that no such appointments shall be made for terms to commence on March 1, 1979, or on March 1 of each fourth year thereafter, to the end that no appointment to the regents for a newly commencing term shall be made during the first year of any gubernatorial term of office. The terms of the members appointed for terms commencing on and after March 1, 1976, shall be 12 years. During the period of transition until the time when the appointive membership is comprised exclusively of persons serving for terms of 12 years, the total number of appointive members may exceed the numbers specified in the preceeding paragraph.

In case of any vacancy, the term of office of the appointee to fill such vacancy, who shall be appointed by the Governor and approved by the Senate, a majority of the membership concurring,

shall be for the balance of the term for which such vacancy exists.

(c) The members of the board may, in their discretion, following procedures established by them and after consultation with representatives of faculty and students of the university, including appropriate officers of the academic senate and student governments, appoint to the board either or both of the following persons as members with all rights of participation: a member of the faculty at a campus of the university or of another institution of higher education; a person enrolled as a student at a campus of the university for each regular academic term during his service as a member of the board. Any person so appointed shall serve for not less than one year commencing on July 1.

(d) Regents shall be able persons broadly reflective of the economic, cultural, and social diversity of the State, including ethnic minorities and women. However, it is not intended that formulas or specific ratios be applied in the selection of regents.

(e) In the selection of the Regents, the Governor shall consult an advisory committee composed as follows: The Speaker of the Assembly and two public members appointed by the Speaker, the President Pro Tempore of the Senate and two public members appointed by the Rules Committee of the Senate, two public members appointed by the Governor, the chairman of the regents of the university, an alumnus of the university chosen by the alumni association of the university, a student of the university chosen by the Council of Student Body Presidents, and a member of the faculty of the university chosen by the academic senate of the university. Public members shall serve for four years, except that one each of the initially appointed members selected by the Speaker of the Assembly, the President Pro Tempore of the Senate, and the Governor shall be appointed to serve for two years; student, alumni, and faculty members shall serve for one year and may not be regents of the university at the time of their service on the advisory committee.

(f) The Regents of the University of California shall be vested with the legal title and the management and disposition of the property of the university and of property held for its benefit and shall have the power to take and hold, either by purchase or by donation, or gift, testamentary or otherwise, or in any other manner, without restriction, all real and personal property for the benefit of the university or incidentally to its conduct; provided, however, that sales of university real property shall be subject to such competitive bidding procedures as may be provided by statute. Said corporation shall also have all the powers necessary or convenient for the effective administration of its trust, including the power to sue and to be sued, to use a seal, and to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise. The Regents shall receive all funds derived from the sale of lands pursuant to the act of Congress of July 2, 1862, and any subsequent acts amendatory thereof. The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs, and no person shall be debarred admission to any department of the university on account of race, religion, ethnic heritage, or sex.

(g) Meetings of the Regents of the University of California shall be public, with exceptions and notice requirements as may be provided by statute.

SEC. 14. The Legislature shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts, and community college districts, of every kind and class, and may classify such districts.

The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.

CALIFORNIA CONSTITUTION
ARTICLE 9 EDUCATION

SEC. 16. (a) It shall be competent, in all charters framed under the authority given by Section 5 of Article XI, to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards.

(b) Notwithstanding Section 3 of Article XI, when the boundaries of a school district or community college district extend beyond the limits of a city whose charter provides for any or all of the foregoing with respect to the members of its board of education, no charter amendment effecting a change in the manner in which, the times at which, or the terms for which the members of the board of education shall be elected or appointed, for their qualifications, compensation, or removal, or for the number which shall constitute such board, shall be adopted unless it is submitted to and approved by a majority of all the qualified electors of the school district or community college district voting on the question. Any such amendment, and any portion of a proposed charter or a revised charter which would establish or change any of the foregoing provisions respecting a board of education, shall be submitted to the electors of the school district or community college district as one or more separate questions. The failure of any such separate question to be approved shall have the result of continuing in effect the applicable existing law with respect to that board of education.

School Facilities Fingertip Facts

See also School Facility

I. **Public K-12 Projected Enrollment 2007-12 (5 years)** See also:
California Public K-12 Enrollment and High school Graduate Projection by County - 2007 Series
(XLS; Outside Source)
(Department of Finance Demographic Unit)
Based on Department of Finance October 2007 estimates of graded enrollment

Grade Level	2007-08	2012-13	Five Year Change	Change Per Year
K-6	3,269,393	3,356,656	87,263	17,453
7-8	976,081	919,320	-56,761	-11,352
9-12	1,997,542	1,902,995	-94,547	-18,909
TOTAL	6,243,016	6,178,971	-64,045	-12,808

II. **Statewide New Construction and Modernization Classroom Need**
Based on eligibility documents on file with the Office of Public School Construction (OPSC) as of September 26, 2007 and projects for which only a design apportionment has been made, the five-year need for new classrooms and the modernization of existing classrooms is:

New Construction Five-Year Need

Grade Level	Projected unhoused students	Classrooms needed 2007-2012*	Classrooms needed per year	Classrooms needed per day
K-6	308,024	12,321	2,464	7
7-8	87,705	3,248	650	2
9-12	268,402	13,645	2,729	7
TOTAL	664,131	29,214	5,843	16

Modernization Five-Year Need

Grade Level	Students in classrooms over 25 years old	Classrooms to be modernized 2007-2012*	Classrooms to be modernized per year	Classrooms to be modernized per day
K-6	507,070	20,283	4,057	11
7-8	190,248	7,046	1,409	4
9-12	305,948	11,331	2,266	6
TOTAL	1,003,266	38,660	7,732	21

*Based on 25 students per K-6 classroom and 27 students per 7-12 classroom.

III. **Statewide New Construction and Modernization Funding Need**
The state share of funding, including district financial hardship costs, for approved but unfunded projects and for projects for which eligibility documents have been filed with the Office of Public School Construction as of September 26, 2007 is:

State Share	5 Year Need	Per Year
New Construction (50% state share)	$ 8.7 billion	$1.74 billion
Modernization (60% state share)	$ 3.5 billion	$0.7 billion
TOTAL (Rounded)	**$12.2 billion**	**$2.44 billion**

IV. **State K-12 General Obligation Bond History**

Year	Dollars
1982	$500 M
1984	$450 M

1986	$800 M
1988 (June)	$800 M
1988 (Nov.)	$800 M
1990 (June)	$800 M
1990 (Nov.)	$800 M
1992 (June)	$1.9 B
1992 (Nov.)	$900 M
1994 (June)	$1.9 B (failed by 0.4%)
1996 (March)	$2.03 B
1998 (Nov.)	$6.7 B (for 4 years)
2002 (Nov.)	$11.4 B
2004 (March)	$10.0 B
2006 (Nov.)	$7.33 B

Million (M); Billion (B)

V. **Public School Data 2006-07.** See also: Dataquest and Student Demographics.

Number of Districts 1,052

Number	Type of District
560	Elementary Districts
330	Unified Districts
87	High School Districts
75	County Offices, California Youth Authority, and State Special Schools

Number of Public Schools 9,674

Number	Type of School
5,714	Elementary Schools
1,289	Middle/Jr. High Schools
1,182	High School Schools
1,489	Continuation (Cont.), Alternative (Alt.), etc.

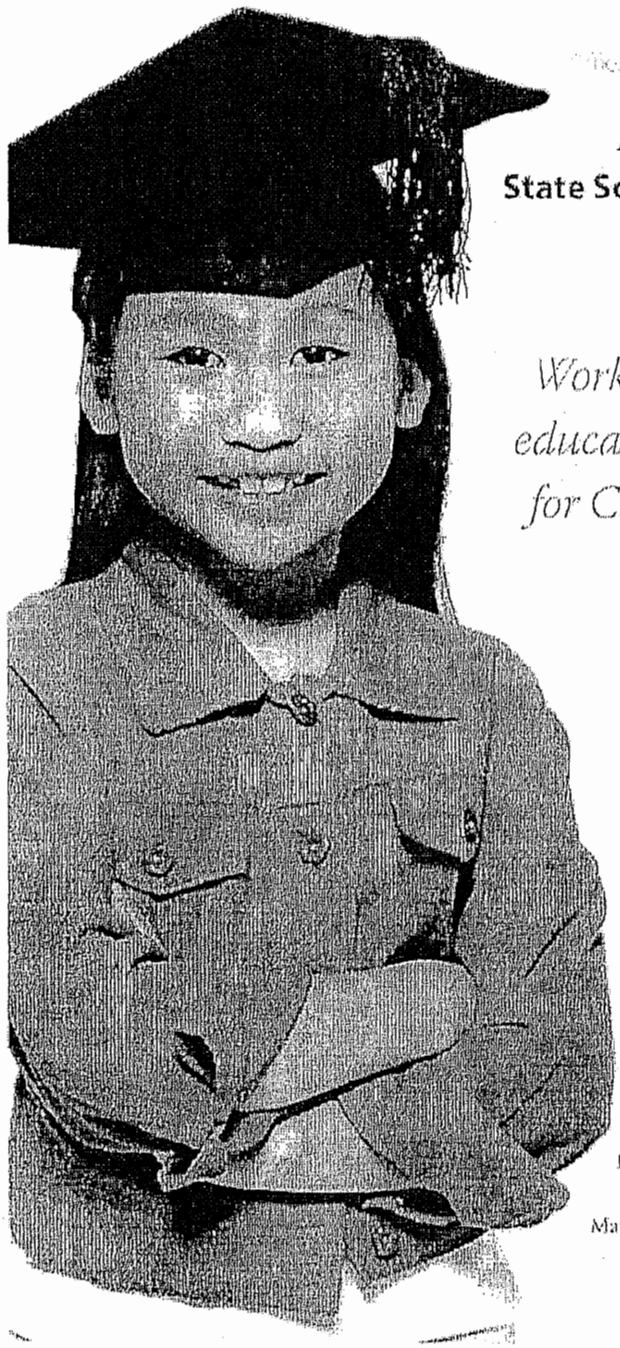
Number of Classrooms:	299,503	Classrooms over 25 years old:	215,642 (72%)
Number of Charter Schools:	584	Charter School Enrollment	222,266 (3.53% of K-12 enrollment)

VI. **Year-Round Education (YRE) 2006-07.** See also Multitrack Year-Round Education
140 districts use YRE. 64 districts use Multitrack (MTYRE) and 104 use Single Track (STYRE) (some districts use both calendars)

Calendar	Elementary MTYRE	Elementary STYRE	Middle MTYRE	Middle STYRE	High School MTYRE	High School STYRE	Cont. High, Alt., etc. MTYRE	Cont. High, Alt., etc. STYRE	Total MTYRE	Total STYRE
Schools	496	502	40	87	25	69	17	53	578	711
Enrollment	411,344	295,229	68,901	71,767	75,522	51,416	14,202	12,344	569,969	430,756

Two districts use the MTYRE Concept 6 calendar: Los Angeles Unified and Lodi Unified. Of the MTYRE data cited above, Concept 6 consists of:

	Elementary	Middle	High	Cont. High, Alt., etc.	TOTAL



An overview of the

State School Facility Programs

Working to improve the educational environment for California's children

Arnold Schwarzenegger, *Governor*

Rosario Marin, *Secretary*

Will Bush, *Director*

Will Semmes, *Chief Deputy Director*

Rob Cook, *Executive Officer*
SAB/OPSC

Lori Morgan, *Deputy Executive Officer*
SAB/OPSC

Mavonne Garrity, *Assistant Executive Officer*
SAB

An overview of the State School Facility Programs

State Allocation Board
Office of Public School Construction

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SACRAMENTO, CALIFORNIA 95814
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Prepared by the Office of Public School Construction

Contents

Charts and Tables

State Allocation Board

The State Allocation Board (SAB) is responsible for determining the allocation of State resources (proceeds from General Obligation Bond Issues and other designated State funds) used for the construction, modernization and maintenance of local public school facilities. The SAB is also charged with the responsibility for the administration of the State School Facility Program, the State Relocatable Classroom Program and the Deferred Maintenance Program. The SAB is the policy level body for the programs administered by the Office of Public School Construction (OPSC).

The SAB is comprised of the Director of Finance (the traditional chair), the Director of the Department of General Services, the Superintendent of Public Instruction, three members of the Senate, three members of the Assembly, and one appointee by the Governor

State Allocation Board Members

Michael Genest
Director, Department of Finance

Will Bush
Director,
Department of General Services

Jack O'Connell
State Superintendent of Public Instruction

Rosario Girard
Governor's Appointee

SENATE MEMBERS

Joe Simitian
Eleventh Senate District

Jack Scott
Twenty-Seventh Senate District

Bob Margett
Twenty-Ninth Senate District

ASSEMBLY MEMBERS

Gene Mullin
Nineteenth Assembly District

Jean Fuller
Thirty-Second Assembly District

Kevin de León
Forty-Fifth Assembly District

SAB EXECUTIVE OFFICERS

Rob Cook
Executive Officer

Lori Morgan
Deputy Executive Officer

Mavonne Garrity
Assistant Executive Officer

State Allocation Board Meetings

State Allocation Board

The SAB meets monthly to apportion funds to the school districts, act on appeals, and adopt policies and regulations as they pertain to the programs administered by the SAB. The SAB usually meets on Wednesdays at the State Capitol—at 4:00 p.m. when the State Legislature is in session and at 2:00 p.m. when the State Legislature is out on recess. Due to scheduling changes within the Legislature, some of the SAB meetings may be cancelled or changed with short notice. Meeting dates and locations, cancellation notices, and agenda topics are published on the OPSC Web site at HTTP://WWW.OPSC.DGS.CA.GOV. Please check there for latest meeting dates, times and locations.

SAB MEETING SCHEDULE

- Wednesday, January 24, 2007
- Wednesday, February 28, 2007
- Wednesday, March 28, 2007
- Wednesday, April 25, 2007
- Wednesday, May 23, 2007
- Wednesday, June 27, 2007
- Wednesday, July 25, 2007
- Wednesday, August 22, 2007
- Wednesday, September 26, 2007
- Wednesday, October 24, 2007
- November - No meeting
- December - To be determined

Implementation Committee

The Implementation Committee is an informal advisory body established by the OPSC to provide input as OPSC develops its recommendations for the Board for policy and legislation implementation. The committee membership is comprised of organizations representing the school facilities community.

Meetings are held at either the Legislative Office Building at 1020 N Street in Room 100 or at the East End Complex at 1500 Capitol Avenue in Rooms 72.149B and 72.151A. Both locations are in Sacramento. Meeting times are from 9:30 a.m. to 3:30 p.m. with a one-hour lunch break. Meeting dates, times and locations, meeting notices and agenda topics are published on the OPSC Web site. Please check the OPSC Web site for the latest dates, times and locations as they are subject to change.

IMPLEMENTATION COMMITTEE MEETING SCHEDULE

- Friday, January 5, 2007
- Friday, February 2, 2007
- Friday, March 2, 2007
- Thursday, April 5, 2007
- Friday, May 4, 2007
- Friday, June 1, 2007
- Friday, July 6, 2007
- Friday, August 3, 2007
- Friday, September 7, 2007
- Friday, October 5, 2007
- Friday, November 2, 2007
- Friday, December 7, 2007

Office of Public School Construction

The OPSC, as staff to the SAB implements and administers the School Facility Program (SFP) and other programs of the SAB. The OPSC is also charged with the responsibility of verifying that all applicant school districts meet specific criteria based on the type of funding which is being requested. The OPSC also prepares recommendations for the SAB's review and approval.

It is also incumbent on the OPSC staff to prepare regulations, policies and procedures which carry out the mandates of the SAB, and to work with school districts to assist them throughout the application process. The OPSC is responsible for ensuring that funds are disbursed properly and in accordance with the decisions made by the SAB.

The OPSC prepares the SAB meetings agendas. These agendas keep the Board members, school districts, staff, and other interested parties apprised of all actions taken by the SAB. The agenda serves as the underlying source document used by the State Controller's Office for the appropriate release of funds. The agenda further provides a "historical record" of all SAB decisions, and is used by school districts, facilities planners, architects, consultants and others wishing to track the progress of specific projects and/or availability of funds.

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Organization Chart

School Facility Program

Funds for the School Facility Program (SFP) may be from any funding source made available to the SAB. This includes proceeds from the sale of State General Obligation Bonds and the State General Fund. In addition, districts are required to provide a portion of the cost of a project from funds available to the school district. This may include, among other sources, local general obligation bonds, developer fees, general fund, etc.

The New Construction Grant

The New Construction Grant provides State funds on a 50/50 State and local sharing basis for public school capital facility projects in accordance with statute. Eligibility for State funding is based on a district's need to house pupils and is determined by criteria set in law.

Education Code, Section 17072.10 establishes the "new construction grant" per unhoused pupil for new construction projects. The annual adjustment to the grant, based on the change in the Class B Construction Cost Index, is approved by the SAB each January. The current adjusted grants are available on the OPSC Web site at HTTP://WWW.DOCUMENTS.DGS.CA.GOV/OPSC/RESOURCES/SFP_GRANT_ADJ.PDF.

This "new construction grant" amount is intended to provide the State's share for all necessary project costs, with the exception of site acquisition, utilities, off-site, service-site, and general-site development that may qualify for additional project funding. The necessary project costs include, but are not limited to, funding for design, the construction of the building, education technology, tests, inspections and furniture/equipment.

The Modernization Grant

The Modernization Grant provides State funds on a 60/40 basis for improvements to educationally enhance school facilities. Projects eligible under this program include such modifications as air conditioning, plumbing, lighting, and electrical systems. Site acquisition may not be included in modernization applications.

Education Code, Section 17074.10 establishes the "modernization grant" for each pupil to be housed in buildings to be modernized. The annual adjustment to the grant, based on the change in the Class B Construction Cost Index, is approved by the SAB each January. The current adjusted grants are available on the OPSC Web site at HTTP://WWW.DOCUMENTS.DGS.CA.GOV/OPSC/RESOURCES/SFP_GRANT_ADJ.PDF.

The "modernization grant" amount is intended to provide the State's share for all necessary project costs. The necessary project costs include, but are not limited to, funding for design, the modernization of the building, education technology, tests, inspections and furniture/equipment.

Charter School Facility Program

This program is intended to provide a charter school with funding to construct new facilities. To qualify for funding a charter must be deemed financially sound by the California School Finance Authority and meet the eligibility criteria outlined in law. A charter or school district filing on behalf of a charter under this program may receive a reservation of funding, by submitting a preliminary application, prior to receiving the necessary approvals from other State entities. Once those approvals are received the preliminary apportionment may be converted to a final apportionment and the funds previously set aside by the SAB may be released.

Most recently, new legislation made significant changes further expanding and providing flexibility for the Charter School Facility Program, and when Proposition 1D was approved by the voters in the November general election, provided an additional $500 million.

Critically Overcrowded School Facilities Program

The Critically Overcrowded School Facilities Program (COS) allows school districts with qualifying critically overcrowded school facilities to apply for a preliminary apportionment for new construction projects to relieve overcrowding. The preliminary apportionment serves as a reservation of funds and must be converted within a four-year period to a final apportionment that meets all the SFP New Construction program laws and regulations required for such an apportionment.

Education Facilities Bond Breakdowns

PROGRAM	BOND 2002 $13,050,000,000	BOND 2004 $12,300,000,000	BOND 2006 $10,416,000,000
New Construction	$ 3,350,000,000 [1]	$ 4,960,000,000	$ 1,900,000,000 [4,5]
Modernization	1,400,000,000 [2]	2,250,000,000	3,300,000,000 [4]
Charter Schools	100,000,000	300,000,000	500,000,000
Career Technical Education	—	—	500,000,000
Overcrowding Relief	—	—	1,000,000,000
High Performance Schools	—	—	100,000,000
New Construction Backlog	2,900,000,000	—	—
Modernization Backlog	1,900,000,000	—	—
Critically Overcrowded Schools	1,700,000,000	2,440,000,000	—
Joint Use	50,000,000	50,000,000	29,000,000
Total K–12	$11,400,000,000	$10,000,000,000	$ 7,329,000,000

[1] [illegible] million – energy efficiency.
[2] [illegible] million – energy efficiency.
[3] [illegible] million total – energy efficiency set aside for new construction and modernization.
[4] [illegible] of the sum of the appropriations for new construction and modernization shall be used to fund the small learning communities and small high schools.
[5] [illegible]

A school district must have both SFP new construction eligibility and one or more schools on the California Department of Education's (CDE) COS Source School List. In order to have a school qualify for inclusion on the CDE Source School List, the school site utilizing the 2001–2002 California Basic Enrollment Data System (CBEDS) enrollment must have a pupil density greater than 115 pupils per acre for K–6 and 90 pupils per acre for 7–12.

Applications for a COS preliminary apportionment were accepted through June 30, 2004.

If the requests for preliminary apportionments exceeds the funds available, projects will be ranked by the highest density levels relative to the CDE standard and funded from the highest to the lowest density.

School Facility Joint-Use Program

Under the SFP a method to fund certain types of joint-use projects has been implemented. There are two types of joint-use projects, both types include specific project eligibility.

- A Type I must be part of an SFP new construction project that will either increase the size, create extra costs, or both beyond that necessary for school use of the multi-purpose room, gymnasium, childcare facility, library, or teacher education.
- A Type II may be part of a modernization or may be a stand alone project located at a school that does not have the type of facility or the existing facility is inadequate. The project proposes to reconfigure existing school buildings, construct new school buildings, or both, to provide for a multi-purpose room, gymnasium, childcare facility, library, teacher education facility, or pupil academic achievement facility.

The state and local contribution to a joint-use project is 50/50. The joint-use partner must match a minimum 25 percent of the eligible project costs. If the district has passed a bond which specifies that the monies are to be used specifically for the purposes of the joint-use project, then the district can opt to pay up to the full 50 percent local share of eligible costs. Anything beyond the eligible project cost are the responsibility of the joint-use partner and/or the district.

Career Technical Education Facilities Program

Career Technical Education provides a program of study that involves a multiyear sequence of courses that integrates core academic knowledge with technical and occupational knowledge to provide students with a pathway to postsecondary education and careers. Proposition 1D provides $500 million for the purpose of constructing new facilities or reconfiguring existing facilities for career technical education purposes. This will enhance the educational opportunities for pupils in order to provide them with the skills and knowledge necessary for the high-demand technical careers of today and tomorrow.

Overcrowding Relief Grant

Proposition 1D establishes the Overcrowding Relief Grant (ORG) and provides up to $1 billion for this purpose. The ORG is intended to provide funding for the creation of additional open space via the reduction of portable classrooms on overcrowded sites by replacing those facilities with permanent classrooms at the existing site or the construction of new schools or classrooms at other sites.

High Performance Incentive Grant

This grant provides additional incentive grant funding to augment new construction and modernization projects for the use of designs and materials that promote the efficient use of energy and water, the maximum use of natural lighting and indoor air quality, the use of recycled materials and materials that emit a minimum of toxic substances, the use of acoustics conducive to teaching and learning, and other characteristics of high performance schools. Proposition 1D provides $100 million to encourage school districts to build educationally and environmentally superior schools.

The high performance incentive grant is based upon the High Performance Rating Criteria (HPRC) point system of the Collaborative for High Performance Schools (CHPS). efficient.

Small High School Program

Assembly Bill 1465, Chapter 894, Statutes of 2004 (Chan) created a pilot program within the SFP that provided districts access to $20 million for the purpose of constructing new small high schools and $5 million for the reconfiguration of existing high schools into two or more smaller high schools that would foster academic achievement and success in a small high school environment. The small high school program commenced on January 1, 2006 and remains in effect until January 1, 2008. Proposition 1D does not make any changes to the existing pilot program although it provides up to $200 million for new construction and modernization (reconfiguration) for these purposes.

Seismic Mitigation

Proposition 1D provides up to $199.5 million for seismic mitigation of the most vulnerable school facilities that meet certain criteria that pose an unacceptable risk of injury to its occupants in the event of a seismic occurrence. These funds will be used to repair, reconstruct, or replace qualifying school facilities.

Labor Compliance Program Grant

Significant labor code changes have occurred that impact the SFP. Assembly Bill 1506 added Section 1771.7 to the Labor Code that requires a district to make a certification that a labor compliance program (LCP), that has been approved by the Department of Industrial Relations (DIR), for the project apportioned under the SFP has been initiated and enforced if both of the following conditions exists:

- the district has a project which received an apportionment from the funding provided in Proposition 47 or Proposition 55, and
- the construction phase of the project commences on or after April 1, 2003, as identified by the date of the Notice to Proceed.

Additional information including a guidebook and model LCPs are available for viewing on the DIR Web site at HTTP://WWW.DIR.CA.GOV. Projects funded solely from Proposition 1D are not subject to these provisions.

Facility Hardship Grant

To be eligible for a facility hardship grant the district must demonstrate that one of two conditions exists: facilities must be replaced due to an imminent health and safety threat, or existing facilities have been lost to fire, flood, earthquake or other disaster.

To address these unusual situations, the SAB has developed a facility hardship grant. The purpose of the grant is to assist districts with funding where it has been determined that the district has a critical need for pupil housing because the condition of the facilities, or the lack of facilities, presents an imminent threat to the health and safety of the pupils.

Financial Hardship

Financial Hardship assistance is available for those districts that cannot provide all or part of their share of a school facility project. Education Code, Section 17075.10 and California Code of Regulations, Section 1859.81 require a district to have made all reasonable efforts to impose all levels of local debt capacity and development fees prior to requesting financial assistance.

School Facility Program Construction Process

The process of constructing or modernizing a school building originates with and is the responsibility of the individual school district. The school district determines the type and size of the school building utilizing criteria set forth from the CDE. The size is also determined by the number of students to be housed in the facility and consideration of health and safety issues designated by the appropriate state agencies. The school district should encourage and incorporate participation from the local community for input into the site location and design features. The school district usually utilizes community information workshops to generate community input and support. Dedication by the district and support from the community are as important as the site selection approval and acquisition process that may take one or more years.

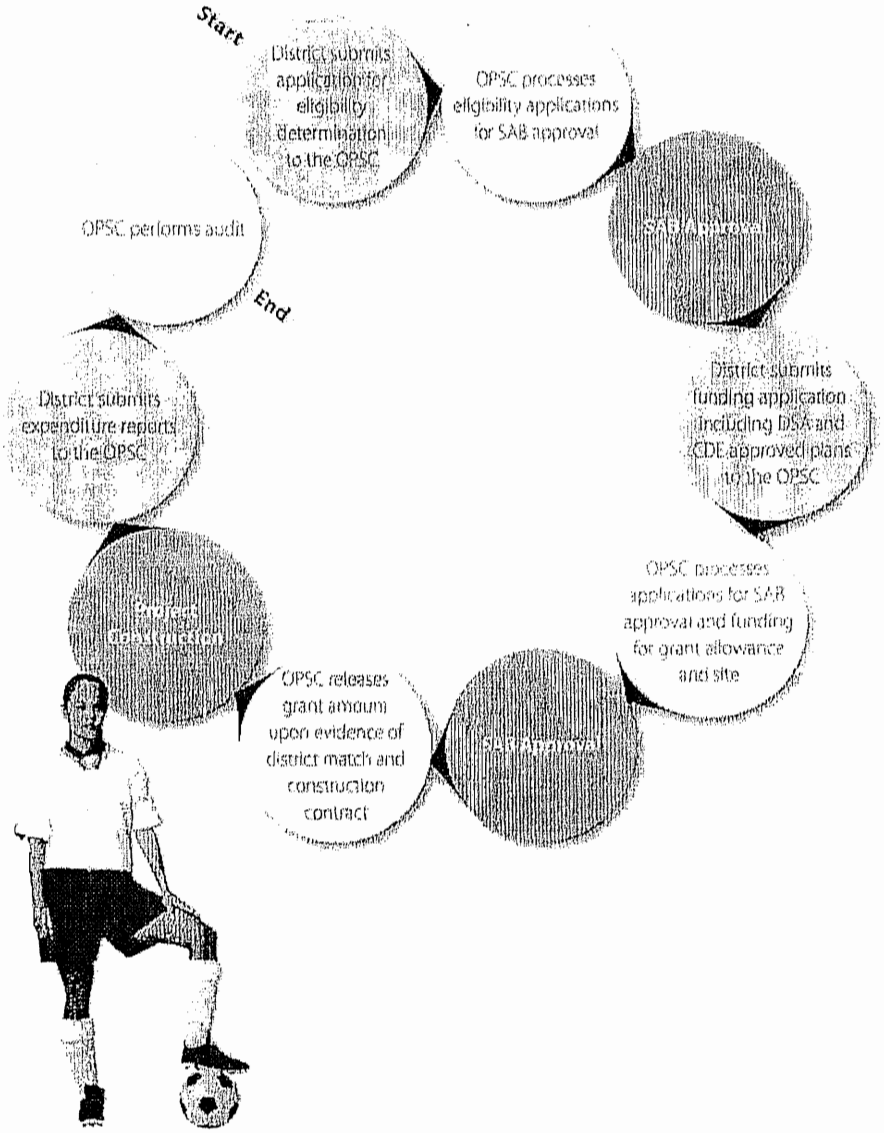
In the meantime, the school district should have passed a local bond or secured alternative funding for its share of the project. Without this funding, the school district cannot meet the 50 percent funding requirement for new construction project or the 40 percent funding requirement for modernization projects.

A district may submit an application to the OPSC for eligibility determination prior to commencing the project design. The OPSC will make every effort to process the eligibility application for SAB approval within 90 days. The district may proceed with the hiring of an architect for the development of plans and specifications for the school. Once the plans and specifications are completed by the architect, they are forwarded to the DSA for processing. In order for the district to request project funding, the district is required to verify that they have their 50/40 percent share of the project cost, stamped DSA plans, and approval of the site and plans by the CDE. In the event the district is unable to share in the cost of the project, the district can pursue financial assistance through the Financial Hardship provisions. Once the completed funding application is received, the OPSC will make every effort to process the application within 90–120 days and will present it to the SAB for an apportionment.

With all approvals and funding in place, the actual construction time on an average school of 2,000 students, takes approximately two years. Total design development and construction time from concept to occupancy is between 2 to 4 years. However, portable school construction projects can be completed within 9 to 15 months from concept to occupancy.

State School Building Funding Process

New Construction and Modernization



Other Programs Administered by the State Allocation Board

Emergency Repair Program

Senate Bill 6, Chapter 899, Statutes of 2004 (Alpert) established the Emergency Repair Program (ERP). The funding is available to schools identified by the CDE as ranked in deciles one, two, or three based on the Academic Performance Index (API).

This program provides funding to a Local Educational Agency (LEA) for the cost of repairing building systems or structural components that pose a health and safety threat to students and staff at eligible school sites. Grants can be requested in advance or after a project is under way or completed. The same schools that are eligible for School Facilities Needs Assessment Grant Program (SFNAGP) funding are eligible for ERP funding. Funds will be made available annually through the Budget Act and the program will operate until $800 million has been apportioned.

School Facilities Needs Assessment Grant Program

Senate Bill 6, Chapter 899, Statutes of 2004 (Alpert) established the SFNAGP. The funding was provided to schools identified by the CDE as ranked in deciles one, two, or three based on the 2003 API, and that were newly constructed prior to January 1, 2000. The program requires LEAs to perform a one-time comprehensive assessment of the facilities for each eligible school site and provides $10 per pupil, or a minimum of $7500 to accomplish this.

State Relocatable Classroom Program

The State Relocatable Classroom Program (SRCP) was designed to meet classroom needs for those districts impacted by excessive growth or unforeseen classroom emergencies. On October 26, 2005, the SAB adopted the Phase-Out Plan for the SRCP. The report was brought forth for the SAB's consideration due to the increasing size of the SRCP and the general condition of an aging fleet. The plan outlines a process for immediate disposal of all State Relocatable Classrooms and permits school districts and other entities to purchase the relocatables. Only those relocatables found to be in good repair can be used to house students. Effective December 1, 2005, the SAB will no longer accept applications to lease a relocatable.

For more information on the phase-out of the SRCP, visit the OPSC Web site.

» Note the SAB has a Disabled Veteran Business Enterprise policy which is applicable to the State Relocatable Classroom Program.

Deferred Maintenance Program

The State School Deferred Maintenance Program provides State matching funds, on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of existing school building components. Typically, this includes plumbing, heating, air conditioning, electrical systems, roofing, interior/exterior painting, floor systems, etc. Funds are also provided for critical hardship projects if the work must be completed within one year.

Funding for this program is generated from the amount of school district repayments under the State School Building Aid program that exceed the amount necessary to service the indebtedness on State General Obligation Bonds sold and loaned to the districts for that program and from certain State School Site Utilization Funds. Additional funds may be appropriated from the State General Fund.

Additional Information

For additional information regarding the State School Facility Programs, refer to the following program manuals which are available on the OPSC Web site.

- School Facility Program Handbook
- Deferred Maintenance Program Handbook
- State Relocatable Classroom Program Handbook
- Unused Sites Program Handbook

Also available on the OPSC website for additional reading and information:

- Architect's Submittal Guidelines
- Substantial Progress and Expenditure Audit Guide
- Cost Reduction Guidelines
- Cookbook for Energy Conservation Measures
- Disabled Veteran Business Enterprise Information and Forms Package
- Best Practices
- Program Forms

Summary of Bond Allocations

Amounts are in Millions of Dollars

	MAR 1996	NOV 1998	NOV 2002	MAR 2004	NOV 2006	TOTAL
New Construction	$ 1,127.8	$ 2,900.0	$ 6,250.0[1]	$ 4,960.0[3]	$ 1,900.0[4,5]	$17,137.8
Modernization	705.0	2,100.0	3,300.0[2]	2,250.0	3,300.0[4]	$11,655.0
Charter Schools	0.0	0.0	100.0	300.0	500.0	$ 900.0
Career Technical Education	0.0	0.0	0.0	0.0	500.0	$ 500.0
Overcrowding Relief	0.0	0.0	0.0	0.0	1,000.0	$ 1,000.0
High Performance Schools	0.0	0.0	0.0	0.0	100.0	$ 100.0
Hardship	0.0	1,000.0	0.0	0.0	0.0	$ 1,000.0
Class-Size Reduction	0.0	700.0	0.0	0.0	0.0	$ 700.0
Critically Overcrowded Schools	0.0	0.0	1,700.0	2,440.0	0.0	$ 4,140.0
Joint-Use	0.0	0.0	50.0	50.0	29.0	$ 129.0
Ed-Tech Counties	45.0	0.0	0.0	0.0	0.0	$ 45.0
Air-Conditioning	26.8	0.0	0.0	0.0	0.0	$ 26.8
State Relocatables	28.0	0.0	0.0	0.0	0.0	$ 28.0
Northridge Earthquake	13.4	0.0	0.0	0.0	0.0	$ 13.4
60/40	40.0	0.0	0.0	0.0	0.0	$ 40.0
Roofs	30.0	0.0	0.0	0.0	0.0	$ 30.0
Joint Use (EC Section 17052)	25.0	0.0	0.0	0.0	0.0	$ 25.0
Child Care	5.0	0.0	0.0	0.0	0.0	$ 5.0
Contingency Reserve	19.0	0.0	0.0	0.0	0.0	$ 19.0
Total Bond Funds	$ 2,065.0	$ 6,700.0	$11,400.0	$10,000.0	$ 7,329.0	$37,494.0

[1] $[illegible] million — energy efficiency

[2] $[illegible] million — energy efficiency

[3] $[illegible] million total — energy efficiency set aside for new construction and modernization

[4] No more than [illegible] percent of the sum of the appropriations for new construction and modernization shall be used to fund the smaller learning communities and small high schools.

[5] Up to [illegible] percent [illegible] shall be available for purposes of seismic repair, construction, or replacement, pursuant to section [illegible]

Summary of Deferred Maintenance Allocations

Amounts are in Millions of Dollars

	1999-00	2000-01	2001-02	2002-03	2003-04	TOTAL
Excess Repayments	$ 25.7	$ 20.7	$ 18.1	$ 15.6	$ 16.0	$ 96.1
Other Legislation	143.7	176.1	176.3	208.0	76.8	$ 780.9
Total	$ 169.4	$ 196.8	$ 194.4	$ 223.6	$ 92.8	$ 877.0

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H [FN*]CALIFORNIA TEACHERS ASSOCIATION et al., Plaintiffs and Respondents,

v.

THOMAS W. HAYES, as Director of the Department of Finance, etc., Defendant and Respondent, BILL HONIG, as Superintendent of Public Instruction, etc., Defendant and Appellant; CALIFORNIA CHILDREN'S LOBBY et al., Real Parties in Interest and Appellants.

No. C009444.

Court of Appeal, Third District, California.

Apr 30, 1992.

FN* Reporter's Note: This case was previously entitled "California Teachers Association v. Huff."

SUMMARY

A teacher's association and three of its officers filed a petition for a writ of mandate against the Superintendent of Public Instruction and other state officials to prohibit the inclusion of funding for the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the education funding guarantee of Prop. 98 (Classroom Instructional Improvement and Accountability Act). The trial court concluded that Prop. 98 was not intrinsically ambiguous, and that its plain meaning required that only appropriations allocated to, and administered by, school districts satisfied its minimum funding requirement. Accordingly, the trial court issued a writ of mandate prohibiting defendants from including any funds allocated to or administered by any entity or agency, other than a school district as defined in Ed. Code, § 41302.5, within the Prop. 98 education funding guaranties. The trial court also declared that Ed. Code, §§ 8203.5, subd. (c), 41202, subd. (f), which include funding for the Child Care and Development Services Act within the Prop. 98 guaranties, were unconstitutional. (Superior Court of Sacramento County, No. 363630, Michael T. Garcia, Judge.)

The Court of Appeal reversed. The court held that education and operation of the public schools are matters of statewide rather than local or municipal concern. Likewise, the court held that school moneys belong to the state, and the apportionment of funds to a school district does not give that district a proprietary right therein. Although the inclusion of funding for the act deprived school districts of absolute control over the funds the state is required to devote to education under Prop. 98, the court held that the measure did not expressly restrict the Legislature's plenary authority for education in the state, nor did it grant to school districts exclusive control over education funds. Accordingly, it held that the Legislature's inclusion of funding for the Child Care and Development Services Act within the Prop. 98 education funding guaranty was not facially unconstitutional. (Opinion by Sparks, Acting P. J., with Marler and Nicholson, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Universities and Colleges § 2--Organization and Affiliation--University of California.

The University of California is a public trust that finds its roots in the Constitution of 1849. The University of California has full powers of organization and government, subject only to limited legislative control. As such, it is not part of the public school system, and is subject to entirely different legal standards.

(2) Schools § 4--School Districts--Control and Operation--State Interest.

Although it is the legislative policy to strengthen and encourage local responsibility for control of public education through local school districts (Ed. Code, § 14000), education and operation of the public schools remain matters of statewide rather than local or municipal concern. Thus, local school districts are deemed agencies of the state for the administration of the school system, they are not a distinct and independent body politic, and they are not free and independent of legislative control.

(3) Schools § 4--School Districts--Control and Operation--Legislature's Powers.

The Legislature's power over the public school sys-

tem has been variously described as exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. Consequently, regulation of the education system by the Legislature is controlling over any inconsistent local attempts at regulation or administration of the schools. No one may obtain rights vested against state control by virtue of local provisions, ordinances or regulations. The Legislature has the power to create, abolish, divide, merge, or alter the boundaries of school districts. Indeed, the state is the beneficial owner of school property and local districts hold title as trustee for the state. School moneys belong to the state, and the apportionment of funds to a school district does not give that district a proprietary right therein. Thus, the Legislature can transfer property and apportion debts between school districts as it sees fit.

(4) Schools § 11--School Funds--Determination of Educational Purpose-- Legislative Discretion.
In including the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the funding guarantee of Prop. 98 (Classroom Instructional Improvement and Accountability Act), the Legislature was not arbitrary and unreasonable in its determination that the act advanced the purposes of public education. Although the Legislature is given broad authority over education, it cannot divert education funds for other purposes. However, education is a broad and comprehensive matter, and the state Constitution places a broad meaning upon education. Moreover, the Legislature is given broad discretion in determining the types of programs and services which further the purposes of education.

(5) Constitutional Law § 23--Constitutionality of Legislation--Raising Question of Constitutionality--Burden of Proof--Facial Challenge to Statute.
When a challenge is made to the facial validity of a statute, a reviewing court's task is to determine whether the statute can constitutionally be applied. To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.
[See 7 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 58.]

(6) Constitutional Law § 27--Constitutionality of Legislation--Rules of Interpretation--Purpose, Wisdom, and Motives of Legislature.
The authority to make policy is vested in the Legislature, and neither arguments as to the wisdom of an enactment, nor questions as to the motivation of the Legislature, can serve to invalidate particular legislation. Where a petitioner makes a facial challenge to an enactment, a reviewing court's role is limited to determining whether the Legislature's choice is constitutionally prohibited.

(7a, 7b) Schools § 11--School Funds--Proposition 98 Funding Guarantee-- Legislative Control.
The Legislature's inclusion of funding for the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the Prop. 98 (Classroom Instructional Improvement and Accountability Act) education funding guarantee was not facially unconstitutional. Although the inclusion of funding for the act deprived school districts of absolute control over the funds the state is required to devote to education under Prop. 98, the measure did not expressly restrict the Legislature's plenary authority for education in the state, nor did it grant to school districts exclusive control over education funds. The Constitution makes education and the operation of the public schools a matter of statewide rather than local or municipal concern. School districts do not have a proprietary interest in moneys which are apportioned to them. Accordingly, even though child care and development programs are not included within the definition of school districts, legislative programs which advance the educational mission of school districts and community college districts may constitutionally be included within the funding guaranty of Prop. 98.

(8) Constitutional Law § 39--Distribution of Governmental Powers--Between Branches of Government--Legislative Power.
Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Accordingly, the entire lawmaking authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. In addition, all intendments favor the exercise of the Legislature's plenary authority. If there is any doubt as to the Legisla-

ture's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations imposed by the Constitution are to be construed strictly, and are not to be extended to include matters not covered by the language used.

(9) Constitutional Law § 10--Construction of Constitutions--Initiative Amendments--Conformation of Parts.
In an action challenging the propriety of including the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the funding guarantee of Prop. 98 (Classroom Instructional Improvement and Accountability Act), construction of the constitutional provisions added by Prop. 98 had to be considered in light of all other relevant provisions of the Constitution. These provisions include those that contain, define, and limit the status of school districts and their relationship to the state. An initiative amendment to the Constitution must be interpreted in harmony with the other provisions of the organic law of this state of which it has become a part. To construe it otherwise would be to break down and destroy the barriers and limitations that the Constitution, read as a whole, has cast about legislation, both state and local.
[See **Cal.Jur.3d (Rev)**, Constitutional Law, § 28.]

COUNSEL
Joseph R. Symkowick, Roger D. Wolfertz and Allan H. Keown for Defendant and Appellant.
James R. Wheaton, Gray, Cary, Ames & Frye and Paul J. Dostart as Amici Curiae on behalf of Defendant and Appellant.
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Kronick, Moskovitz, Tiedemann & Girard and Rochelle B. Schermer as Amici Curiae on behalf of Plaintiffs and Respondents.
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SPARKS, Acting P. J.
At the November 1988 General Election, the electorate adopted Proposition 98, an initiative measure entitled "The Classroom Instructional Improvement and Accountability Act" [FN1] In general, Proposition 98 seeks to improve public education in California by establishing a minimum funding guarantee for public schools and by changing the way our state government treats its excess revenues. As the Legislative Analyst noted in her analysis of the initiative, Proposition 98 establishes a minimum level of funding for public schools and community colleges; requires the state to spend any excess revenues, up to a specified maximum, for public schools and community colleges; requires the Legislature to establish a state reserve fund; and requires the school districts to prepare and distribute "School ***1518** Accountability Report Cards" each year. (Ballot Pamp. analysis of Prop. 98 by Legislative Analyst as presented to the voters, Gen. Elec. (Nov. 8, 1988), p. 78, some capitalization and all paragraphing omitted.)

> FN1 Proposition 98 (Stats. 1988, p. A-264 et seq.) added two sections to the California Constitution, amended two other constitutional provisions and added six sections to the Education Code. It added section 5.5 to article XIII B of the California Constitution, amended section 2 of article XIII B, amended section 8 of article XVI, added section 8.5 to article XVI, and added sections 33126, 35256, 41300.1, 14020.1, 14022 and 41302.5 to the Education Code.
>
> The full text of Proposition 98 is set out in the appendix to this opinion.

To these ends, Proposition 98 sets a minimum funding level for "the monies to be applied by the state for the support of school districts and community college districts. ..." (Cal. Const., art. XVI, § 8, subd. (b).) It is around this phrase that the present controversy swirls. At issue in this case is the validity of the Legislature's decision to include funding for the Child Care and Development Services Act (Ed. Code, § 8200 et seq.) within the educational funding guarantees of Proposition 98. This decision was implemented by the enactment of Education Code section 41202, subdivision (f), which declares that " 'monies to be applied by the state for the support of school districts and community college districts,' as used in

Section 8 of Article XVI of the California Constitution, shall include funds appropriated for the Child Care and Development Services Act ...."

The California Teachers Association and three of its officers filed a petition for writ of mandate against the Director of Finance, the state Treasurer and the state Superintendent of Public Instruction to prohibit the inclusion of funding for the Child Care and Development Services Act within the Proposition 98 education funding guarantee. By stipulation, the California Children's Lobby, the Professional Association of Childhood Educators, the California Assocation for the Education of Young Children, and the Child Development Administrators Assocation, intervened in the action as real parties in interest. The trial court issued a writ of mandate prohibiting defendants from including any funds allocated to or administered by any entity or agency other than a school district as defined in Education Code section 41302.5, within the Proposition 98 educational funding guarantees, and declaring that Education Code sections 8203.5, subdivision (c), and 41202, subdivision (f), which include funding for the Child Care and Development Services Act within the Proposition 98 guarantees, are unconstitutional. Bill Honig, the State Superintendent of Public Instruction, and the real parties in interest appeal. We shall reverse.

I Procedural Background

Proposition 98 provides for the improvement of public education in two basic ways. The first, which is not implicated in this appeal, involves the allocation of state revenues in excess of the state appropriations limitation to elementary, high school and community college districts on a per-enrollment ***1519** basis for use solely for the purposes of instructional improvement and accountability. (Cal. Const., art. XIII B, § 2; art. XVI, § 8.5.) The second way, and the one involved here, establishes a minimum guaranteed state education funding level for "the moneys to be applied by the State for the support of school districts and community college districts ...." (Cal. Const., art. XVI, § 8, subd. (b).) [FN2]

> FN2 Under Proposition 98 the minimum funding level is set as the greater of (1) the same percentage of general fund revenues as was set aside for school districts and community colleges in the 1986-1987 school year, or (2) the amount necessary to ensure that total state and local allocations be equal to the prior year's allocations, adjusted for cost of living and enrollment changes. (Cal. Const., art. XVI, § 8, subd. (b).) A third test was added at the June 1990 Primary Election by the passage of Proposition III. That measure is not involved here.

After its passage, the Legislature acted to implement Proposition 98. (Ed. Code, § 41200 et seq. [unless otherwise specified, all further statutory references will be to the Education Code].) One aspect of the Legislature's implementation is at issue in this appeal. As we have noted, in section 41202, subdivision (f), the Legislature provided, among other things: " 'State General Fund revenues appropriated for school districts and community college districts, respectively' and 'monies to be applied by the state for the support of school districts and community college districts,' as used in Section 8 of Article XVI of the California Constitution, shall include funds appropriated for the Child Care and Development Services Act pursuant to Chapter 2 (commencing with Section 8200) of Part 6 ...."

In order to ensure that the Child Care and Development Services Act serves the purposes of public education, the Legislature enacted section 8203.5, which provides: "(a) The Superintendent of Public Instruction shall ensure that each contract entered into under this chapter to provide child care and development services, or to facilitate the provision of those services, provides support to the public school system of this state through the delivery of appropriate educational services to the children served pursuant to the contract. [¶] (b) The Superintendent of Public Instruction shall ensure that all contracts for child care and development programs include a requirement that each public or private provider maintain a developmental profile to appropriately identify the emotional, social, physical, and cognitive growth of each child served in order to promote the child's success in the public schools. To the extent possible, the State Department of Education shall provide a developmental profile to all public and private providers using existing profile instruments that are most cost efficient. The provider of any program operated pursuant to a contract under Section 8262 shall be responsible for maintaining developmental profiles upon entry through exit from a child developmental

program. [¶] Notwithstanding any other provision of law, 'moneys to be applied by the [s]tate,' as used in subdivision (b) of *1520 Section 8 of Article XVI of the California Constitution, includes funds appropriated for the Child Care and Development Services Act pursuant to Chapter 2 (commencing with Section 8200) of Part 6, whether or not those funds are allocated to school districts, as defined in Section 41302.5, or community college districts. [¶] (d) This section is not subject to Part 34 (commencing with Section 62000)." [FN3]*1521

FN3 In an uncodified provision the Legislature explained its purpose for including child care and development funds in the Proposition 98 funding guarantee: "The Legislature finds and declares as follows: [¶] (a) Since 1932, early childhood education and child development programs have been operated as part of the school programs that are conducted under the authority of the Superintendent of Public Instruction. In the 1988-89 fiscal year, 110,000 children in California were served in the state program of early childhood education and child development administered by the Superintendent of Public Instruction, as set forth in Chapter 2 (commencing with section 8200) of Part 6 of the Education Code. [¶] (b) Participation and enrollment in an early childhood education or child development program provides an opportunity for many children to hear their first English words (one in three speaks another language), to be introduced to the idea of numbers, to develop basic language concepts, to learn how to get along with other children and adults, and to begin to develop a positive self-image. [¶] (c) The Legislature has stated its intent that early childhood education and child development programs be a 'concomitant part of the educational system' by providing young children an equal opportunity for later school success. Those programs are considered by the general public to be an integral and essential part of the state's public education system. [¶] (d) Early childhood education programs for children of low-income families have been shown to increase high school graduation rates and college entry rates, to reduce the need for special education and grade level retention, and to reduce high school dropout rates. [¶] (e) In the state's early childhood education and development programs, each child is to receive an education program which is appropriate to his or her developmental, cultural, and linguistic needs. Each child is to receive a developmental profile, updated at regular intervals, which will be passed on to his or her elementary school. [¶] (f) In view of the unique function of early childhood education and child development programs, in supporting school districts by directly preparing children for participation in the public schools and by assisting those children in resolving special school-related problems, these programs constitute an essential and integral component of the overall system to carry out the mission of the public schools. Accordingly, in order to fully implement subdivision (b) of Section 8 of Article XVI of the California Constitution, which requires, in its introductory paragraph, a minimum level of funding 'for the support of' school districts, as defined, and community college districts, it is necessary to include, within the calculation of that funding, the funding provided by the Legislature for all early childhood education and development programs. Moreover, in accordance with the educational role of those programs, it is the responsibility of the Superintendent of Public Instruction to continue to ensure that all contracts for early childhood education and child develpment programs provide support to the public school system of this state through the delivery of appropriate educational services to the children served by the program. In addition, Section 8262.1 of the Education Code, as added by this act [in fact there is no section 8262.1], constitutes a necessary statutory implementation of that determination, which is consistent with the legislative history of the statutes that provide for the operation of early childhood education and child development programs. [¶] (g) For the period from the 1986-87 fiscal year to the present, the state's early childhood education and development programs have received funding adjustments for cost-of-living and enrollment increases that have been lower, overall, than the comparable adjustments for base revenue limits for school

districts. [¶] However, it is the intent of the Legislature that the inclusion of early childhood education and child development programs within the calculation of the state's education funding obligation pursuant to Proposition 98 is not to result in requiring in that calculation the use of the lower level of funding received by these programs in the 1986- 87 fiscal year." (Stats. 1989, ch. 1394, § 1.)

The Child Care and Development Services Act is contained in sections 8200 through 8498. It is a comprehensive statewide master plan for child care and development services for children to age 14 and their parents. (§ 8201, subd. (a).) Among other things it includes such items as resource and referral programs (§§ 8210-8215), campus child care and development programs (§ 8225), migrant child care and development programs (§§ 8230-8233), preschool programs (§ 8235), general child care and development programs (§§ 8240-8242), and programs for children with special needs (§§ 8250-8252). Services under this statutory scheme may be provided directly by school districts or local education agencies or by contracts through such agencies, or services may be provided by private parties contracting with the state Department of Education. (See rep., Child Development, Program Facts, prepared by the Dept. of Ed., Child Development Div., Field Services Branch (1989) pp. 12-13.) Programs under the Child Care and Development Services Act are under the general supervision of the Superintendent of Public Instruction. (§ 8203.) In some instances federal funding is available and the Legislature has declared that federal reimbursement shall be claimed where available and that the Department of Education is designated as "the single state agency" responsible for the programs under federal requirements. (§§ 8205-8207.)

Plaintiffs filed this action to prohibit the inclusion of funding for the Child Care and Development Services Act within the Proposition 98 education funding guarantee. [FN4]They maintain that funds which are not allocated directly to and administered by school districts cannot be included within the provisions of Proposition 98. [FN5]The trial court agreed with plaintiffs. It concluded that Proposition 98 is not intrinsically ambiguous and that its ***1522** plain meaning requires that only appropriations allocated to, and administered by, school districts satisfy its minimum funding requirement. As the trial court saw it, "[t]he phrase 'monies to be applied by the state for the support of school districts,' taken as a whole, clearly refers to financial allocations for the financial support of school districts, and not the financial support of private child care and development programs which incidentallly benefit school districts." Judgment was entered accordingly and this appeal followed.

FN4 Plaintiffs also contested the inclusion of funding for certain other types of programs within the Proposition 98 guarantee. In his answer defendant Bill Honig, as Superintendent of Public Instruction, conceded that plaintiffs are correct with respect to these other programs and no other party contests this concession. This appeal concerns only funding for the Child Care and Development Services Act.

FN5 The Director of the Department of Finance, filed an answer in which he agreed with plaintiffs and he is a respondent in this appeal. The former state Treasurer successfully demurred on the ground that his function in this regard is purely ministerial and the Treasurer is not a party on appeal. Defendant Honig contested the petition with respect to child care and development programs and he is an appellant herein. As we have noted, the parties stipulated that the Children's Lobby et alia be permitted to intervene as real parties in interest and they are also appellants in this appeal. Amici curiae briefs in support of appellants have been filed by the state Legislature, the California Congress of Parents, Teachers and Students, Inc., and certain child advocacy and care provider organizations.

II Historical Background

There can be no doubt that education has historically been accorded an ascendant position in this state. Indeed, at the very start, article IX of our 1849 Constitution created the office of Superintendent of Public Instruction; required the Legislature to encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement; required the Legislature to establish a system of common schools; and established a fund for the support

of the common schools. (See Stats. 1849, p. 32.) As this recitation will demonstrate, the preeminent position of education in California has been a constant in a world of governmental flux. Section 1 of article IX of the Constitution now provides, as it has since 1879: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Section 5 of article IX presently mandates, as it has since 1879: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." Since 1933, our Constitution has provided that from state revenues there shall first be set apart the moneys to be applied by the state for the support of the public school system and institutions of higher education. (Cal. Const., art. XVI, § 8, subd. (a); see former art. XIII, § 15, Stats. 1935, p. IXIX.)

Section 6 of article IX of our Constitution establishes a State School Fund. That section provides, in relevant part: "The Legislature shall add to the State School Fund such other means from the revenues of the State as shall provide in said fund for apportionment in each fiscal year, an amount not less than one hundred eighty dollars ($180) per pupil in average daily attendance in the kindergarten schools, elementary schools, secondary schools, and technical schools in the Public School System during the next ***1523** preceding fiscal year. [¶] The entire State School Fund shall be apportioned in each fiscal year in such manner as the Legislature may provide, through the school districts and other agencies maintaining such schools, for the support of, and aid to, kindergarten schools, elementary schools, secondary schools, and technical schools except that there shall be apportioned to each school district in each fiscal year not less than one hundred twenty dollars ($120) per pupil in average daily attendance in the district during the next preceding fiscal year and except that the amount apportioned to each school district in each fiscal year shall be not less than twenty-four hundred dollars ($2,400)."

Article IX, section 6, of the Constitution also provides in part: "The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and State colleges, established in accordance with law and, in addition, the school districts and other agencies authorized to maintain them. (1)**(See fn. 6.)** No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System." [FN6]

> FN6 The University of California is a public trust which finds its roots in the Constitution of 1849. (See Stats. 1849, p. 32; and see Cal. Const., art. IX, § 9.) The University of California has "full powers of organization and government" subject only to limited legislative control.(*Ibid.*) As such, it is not part of the Public School System and is subject to entirely different legal standards. The University of California is beyond the scope of the issues presented in this appeal.

For the administration of this public school system, the Constitution creates the office of Superintendent of Public Education and establishes a State Board of Education. (Cal. Const., art. IX, §§ 2, 2.1.)It provides for county boards of education and superintendents of schools. (Cal. Const., art. IX, §§ 3-3.3.)It permits city charters to provide for the election or appointment of boards of education. (Cal. Const., art. IX, § 16.)Section 14 of article IX provides: "The Legislature shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts, and community college districts, of every kind and class, and may classify such districts. [¶] The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established."

(2) It has been and continues to be the legislative policy of this state to strengthen and encourage local responsibility for control of public education ***1524** through local school districts. (§ 14000.) [FN7]Nevertheless, education and the operation of the public schools remain matters of statewide rather than local or municipal concern. (*Hall v. City of Taft* (1956) 47 Cal.2d 177, 179 [302 P.2d 574]; *Esberg v. Badaracco* (1927) 202 Cal. 110, 115-116 [

259 P. 730]; *Kennedy v. Miller* (1893) 97 Cal. 429, 431 [32 P. 558]; *Whisman v. San Francisco Unified Sch. Dist.* (1978) 86 Cal.App.3d 782, 789 [150 Cal.Rptr. 548].) Hence, local school districts are deemed to be agencies of the state for the administration of the school system and have been described as quasi-municipal corporations. (*Hall v. City of Taft, supra,* 47 Cal.2d at p. 181; *Pass School Dist. v. Hollywood Dist.* (1909) 156 Cal. 416, 418 [105 P. 122]; *Hughes v. Ewing* (1892) 93 Cal. 414, 417; *Town of Atherton v. Superior Court* (1958) 159 Cal.App.2d 417, 421 [324 P.2d 328].) Thus, a school district is not a distinct and independent body politic and is not free and independent of legislative control. (*Allen v. Board of Trustees* (1910) 157 Cal. 720, 725-726 [109 P. 486].)

FN7 Although state funding for education is designed to enhance local responsibility for education, the Legislature has found it undesirable to yield total monetary authority to school districts. In the Statutes of 1981, chapter 100, section 1, at page 653, it is said: "The Legislature finds and declares that as a matter of policy the setting aside of categorical support for school districts is necessary to ensure the adequate funding for programs such as the provision of textbooks, pupil transportation, teacher retirement, special education for individuals with exceptional needs, and for educationally disadvantaged youths. The Legislature supports this policy of appropriating separately funds for special purposes because it provides funds for the intended purposes of the programs and because the substantial variation from district to district in terms of financial need for the programs cannot be accommodated adequately in general school support formulas. Although this act does not appropriate funds for inflation for categorical programs, it is the intent of the Legislature that, because categorical programs provide essential educational services, these programs should receive general inflation funds as provided in the Budget Act for other state programs." Our Supreme Court has determined that under our Constitution education is uniquely important and cannot be left totally under local monetary control. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 614 [96 Cal.Rptr. 601, 487 P.2d 1241].)

(3) The Legislature's power over the public school system has been variously described as exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. (*Hall v. City of Taft, supra,* 47 Cal.2d at p. 181; *Pass School Dist. v. Hollywood Dist., supra,* 156 Cal. at p. 419; *San Carlos Sch. Dist. v. State Bd. of Education* (1968) 258 Cal.App.2d 317, 324 [65 Cal.Rptr. 711]; *Town of Atherton v. Superior Court, supra,* 159 Cal.App.2d 417, 421.) Indeed, it is said that the Legislature cannot delegate ultimate responsibility over education to other public or private entities. (*Hall v. City of Taft, supra,* 47 Cal.2d at p. 181; *Piper v. Big Pine School* Dist. (1924) 193 Cal. 664, 669 [226 P. 926].) Consequently, regulation of the education system by the Legislature will be held to be controlling over any inconsistent local attempts at regulation or administration of the schools. (*Hall v. City of Taft, supra,* 47 Cal.2d at p. 181; **1525***Esberg v. Badaracco, supra,* 202 Cal. at pp. 115- 116; *Whisman v. San Francisco Unified Sch. Dist., supra,* 86 Cal.App.3d at p. 789.) And no one may obtain rights vested against state control by virtue of local provisions, ordinances or regulations. (*Whisman v. San Francisco Unified Sch. Dist., supra,* 86 Cal.App.3d at p. 789.)

The Legislature, in the exercise of its sweeping authority over education and the school system, has the power to create, abolish, divide, merge, or alter the boundaries of school districts. (*Allen v. Board of Trustees, supra,* 157 Cal. at pp. 725-726; *Pass School Dist. v. Hollywood Dist., supra,* 156 Cal. at p. 418; *Hughes v. Ewing, supra,* 93 Cal. at p. 417.) Indeed, the state is the beneficial owner of school property and local districts hold title as trustee for the state. (*Hall v. City of Taft, supra,* 47 Cal.2d at pp. 181-182; *Chico Unified Sch. Dist. v. Board of Supervisors* (1970) 3 Cal.App.3d 852, 855 [84 Cal.Rptr. 198]; *Town of Atherton v. Superior Court, supra,* 159 Cal.App.2d at p. 421.) "School moneys belong to the state, and the apportionment of funds to a school district does not give that district a proprietary right therein." (*Butler v. Compton Junior College Dist.* (1947) 77 Cal.App.2d 719, 729 [176 P.2d 417]; see also *Gridley School District v. Stout* (1901) 134 Cal. 592, 593 [66 P. 785].) It follows that the Legislature can transfer property and apportion debts between school districts as it sees fit. (*Pass School Dist. v. Hollywood Dist., supra,* 156 Cal. at pp. 418-419; *Hughes v. Ewing, supra,* 93 Cal. at p. 417; *San*

Carlos Sch. Dist. v. State Bd. of Education, supra, 258 Cal.App.2d at p. 324.)

While few will deny the critical importance of education, the needs of the public education system often conflict with other desires of the electorate, especially that of minimizing the tax burden imposed upon the populace. Fewer still would deny that financing the public educational system in this state is Byzantine in its intricacy and complexity. Public education financing involves two basic, broad, and interrelated problems: public school resource production (how the funds are raised), and public school resource deployment (how the funds are spent). (See Andrews, *Serrano II: Equal Access to School Resources and Fiscal Neutrality-A View From Washington State* (1977) 4 Hast. Const.L.Q. 425, 429, fn. 18 [hereafter *Equal Access to School Resources*].) Public school financing is complicated by such matters as whether revenue should be raised through state or local taxation or some combination of both (see *Serrano v. Priest* (1976) 18 Cal.3d 728, 747 [135 Cal.Rptr. 345, 557 P.2d 929] [hereafter *Serrano II*]; and see *Equal Access to School Resources, supra,* 4 Hast. Const.L.Q. at pp. 445-446); disparate tax base to units of average daily attendance (ADA) ratios among various districts (see *Serrano v. Priest, supra,* 5 Cal.3d at p. 592 [hereafter *Serrano I*]); the willingness (or ability) of local voters to authorize increased taxes or expenditures for education (see *Serrano II, supra,* 18 Cal.3d at p. 769); the ***1526** availability of federal funding for educational programs and the sometimes inflexible qualification criteria for such funding (see Stats. 1981, ch. 100, § 1.3, pp. 653-654); the differing needs of schools and their students (see Stats. 1981, ch. 100, § 1, p. 653); and the difficulty of determining what types of services or programs should or should not be included within the educational budget (see *Equal Access to School Resources, supra,* 4 Hast. Const.L.Q. at pp. 441-442.)Although these matters are by no means exhaustive, they do illustrate the inherent complexity involved in developing an adequate formula for school support.

In the past 20 years state funding for education has been significantly influenced by several legal and political events. The changes began in 1971, a time when the major source of school revenue was derived from local real property taxes. (*Serrano I, supra,* 5 Cal.3d at p. 592.) The state then contributed aid to school districts in two forms: "basic state aid," which was a flat financial grant per pupil per year; and "equalization aid," which was based upon the assessed valuation of property per pupil within the district.(*Id.* at p. 593.)This educational status quo was challenged in *Serrano I,* a class action in which the plaintiffs maintained that the public school financing system created disparate educational opportunities based upon wealth. It was asserted that due to a substantial dependence upon local property taxes children from wealthy districts received greater educational opportunities than children from poorer districts. [FN8]In 1971, the California Supreme Court held that wealth is a suspect classification and that education constitutes a fundamental interest and thus the state plan should be subjected to strict scrutiny under equal protection principles. (*Id.* at pp. 614-615.)The high court concluded that an educational system which produces disparities of opportunity based upon district wealth would fail to meet constitutional requirements and the action was remanded for trial of the factual allegations of the complaint. (*Id.* at p. 619.)

> FN8 It has been pointed out that the wealth of a school district will not necessarily reflect the wealth of families it serves. For example, a district might have a high assessed valuation to ADA ratio because it includes areas which are heavily developed for commercial or industrial purposes, yet serve families who live near such areas because they cannot afford to move to more affluent areas. Conversely, a suburban or rural district may serve relatively affluent students yet lack a high assessed valuation to ADA ratio because it lacks any commercially developed areas within its boundaries. In *Serrano I* the Court disregarded this possibility because it was reviewing a demurrer to a complaint which alleged that there was a correlation between the wealth of a district and its residents and for the more basic reason that it did not believe that disparities in educational opportunities could be permitted simply because they reflected the wealth of the district rather than the individual.(*Id.* at pp. 600-601.)

After *Serrano I,* the Legislature modified the formula for state education aid in an effort to eliminate its objectionable features. The parties stipulated that the

modified formula should be considered at trial. (*1527*Serrano II, supra,* 18 Cal.3d at pp. 736-737.) Also during the pendency of the trial court proceedings, the United States Supreme Court rendered its opinion in *San Antonio School District v. Rodriguez* (1973) 411 U.S. 1 [36 L.Ed.2d 16, 93 S.Ct. 1278]. There, the Texas public school financing system, which was substantially similar to ours, was upheld by the federal high court. The court concluded that the Texas system did not result in a suspect classification based upon wealth and did not affect a fundamental interest and thus needed only to meet the "rational relationship" test under equal protection principles. (*Id.* at pp. 33-34, 48-55, 61-62 [36 L.Ed.2d at pp. 42-43, 51-56, 59-60].) Thereafter the *Serrano* trial court held that California's public education financing scheme violated independent state equal protection guarantees. In *Serrano II,* the California Supreme Court affirmed the judgment of the trial court which gave the state six years for bringing the public school financing system into constitutional compliance. (18 Cal.3d at pp. 749, 777.)

Meanwhile, at the June 1978 Primary Election the voters enacted Proposition 13, which added article XIII A to the California Constitution. That measure changed California's real property tax system from a current value system to an acquisition value system and limited the tax rates which could be imposed upon real property. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 220, 238 [149 Cal.Rptr. 239, 583 P.2d 1281].) In an effort to mitigate the effects of article XIII A upon local governments and schools, the Legislature enacted a bailout bill to distribute surplus state funds to local agencies. (See *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 297 [152 Cal.Rptr. 903, 591 P.2d 1].)Article XIII A also forced the state to assume a greater responsibility for financing the public school system. (§ 41060.)

In the November 1979 Special Statewide Election the voters enacted Proposition 4 to add article XIII B to the California Constitution. Article XIII B imposes limitations upon the power of all California governmental entities to appropriate funds for expenditures. (Cal. Const., art. XIII B, §§ 1, 8, subds. (a), (b).) Revenues received by any governmental entity in excess of its appropriations limit must be returned by a revision of tax rates or fee schedules within the next two fiscal years. (Cal. Const., art. XIII B, § 2.) The measure also provides that whenever the state mandates a new program or higher level of service upon local governments, it must provide a subvention of funds to reimburse local government for the added costs. (Cal. Const., art. XIII B, § 6.)

It can be seen that as a result of the events of the 1970's the already difficult task of financing public education was made even more formidable.***1528** As a result of article XIII A, the state was forced to assume a greater share of the responsibility for funding education. Any formula for funding education would be required to meet equal protection principles as set forth in the *Serrano* decisions. And as a result of article XIII B, there was certain to be greater competition for the state revenues within the appropriations limit. It was against this background that the voters enacted Proposition 98 at the November 1988 General Election.

III Matters Not in Issue

The question presented in this appeal can best be addressed when it is narrowed to its appropriate scope by elimination of what is not involved. We are not here concerned with whether the Child Care and Development Services Act in fact completely entails an educationally related program. (4) While the Legislature is given broad authority over education, it cannot divert education funds for other purposes. (*Crosby v. Lyon* (1869) 37 Cal. 242, 245.) But plaintiffs did not and cannot reasonably contend that the child care program under attack does not at least in part serve an educational purpose. Education is a broad and comprehensive matter. (*Board of Trustees v. County of Santa Clara* (1978) 86 Cal.App.3d 79, 84 [150 Cal.Rptr. 109].) It "[c]omprehends not merely the instruction received at school or college, but the whole course of training; moral, religious, vocational, intellectual, and physical. Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all. [It includes the] [a]cquisition of all knowledge tending to train and develop the individual." (Black's Law Dict. (5th ed. 1979) p. 461, col. 2.) Our Constitution places a similarly broad meaning upon education when it requires the Legislature to "encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (Cal. Const., art. IX, §

1.) [FN9] Moreover, under our Constitution the Legislature is given broad discretion in determining the types of programs and services which further the purposes of education. (*Veterans' Welfare Board v. Riley* (1922) 189 Cal. 159, 164-166 [208 P. 678, 22 A.L.R. 1531]; *University of So. California v. Robbins* (1934) 1 Cal.App.2d 523, 528 [37 P.2d 163].) It cannot be said that the Legislature has been arbitrary and unreasonable in its determination that the Child Care and Development Services Act furthers the purposes of public education.

> FN9 While "education" is sufficiently broad to include religious training, specific provisions of the state and federal Constitutions exclude religious training from governmental education programs. (U.S. Const., Amend. I; Cal. Const., art. I, § 4, art. IX, § 8.)

We are not here concerned with the question whether the Legislature's implementation of Proposition 98 is partially invalid or invalid as applied.***1529** Plaintiffs claim that the inclusion of funding for the Child Care and Development Services Act within the Proposition 98 funding requirement is invalid in toto and on its face. They argue that Proposition 98 funds must be transferred to school districts which then have total discretion to determine how those funds should be spent. They did not present evidence or argument to establish that portions of the Child Care and Development Act lack a sufficient nexus to education to be included in education funding or that the manner in which it is carried out by the Superintendent of Public Instruction does not support and further the purpose of education. (5) "Because this is a challenge to the facial validity of the [the statute], our task is to determine whether the statute can constitutionally be applied. 'To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute. ... Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.' " (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267 [5 Cal.Rptr.2d 545, 825 P.2d 438], italics in original.)

We are not here concerned with the advisability or wisdom of the Legislature's decision. [FN10](6) Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation. (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 913 [120 Cal.Rptr. 707, 534 P.2d 403]; *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 727 [119 Cal.Rptr. 631, 532 P.2d 495]; *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 869 [76 Cal.Rptr. 642, 452 P.2d 930]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 359 [55 Cal.Rptr. 23, 420 P.2d 735].) As a court of review our role is limited to determining whether the Legislature's choice is constitutionally prohibited. (*Ibid.*)

> FN10 For this reason we deny the request of amici curiae that we take judicial notice of certain legislative materials. The submitted documents tend to establish the value of, and the need for, funding for child care and development programs. Those are matters within the Legislature's prerogative and we may not superintend its determination.

Furthermore, we are not concerned here with statutory inconsistency. Instead, the issue relates solely to the construction of constitutional provisions. Proposition 98 added certain statutory provisions to the Education Code, Section 13 of Proposition 98 provides: "No provision of this Act may be changed except to further its purposes by a bill passed by a vote of two-thirds of the membership of both houses of the Legislature and signed ***1530** by the Governor." The legislation challenged by plaintiffs was enacted by the requisite two-thirds majorities and signed by the Governor. Accordingly, it is the constitutional provisions of Proposition 98 which are at issue in this case.

Finally, we are not here concerned with article XVI, section 8.5 of the Constitution, also added by Proposition 98. In that provision the voters determined that, within certain limits, state revenues in excess of the state appropriations limit should be used to improve education in the elementary and secondary schools and community colleges rather than be returned to the populace. The measure is self-executing; it requires no legislative action. Each year the Controller must transfer and allocate such excess revenues to the state school fund restricted for school districts and

community colleges, and then must allocate those funds to the districts and community colleges on a per-enrollment basis. (Cal. Const., art. XVI, § 8.5, subds. (a), (c).) Those sums may be expended solely for purposes of instructional improvement and accountability. (Cal. Const., art. XVI, § 8.5, subd. (d).)

Article XVI, section 8.5 is an entirely different matter than article XVI, section 8. Section 8.5 deals with revenues which are constitutionally beyond the Legislature's spending prerogatives under article XIII B.Section 8.5 does not extend the Legislature's spending power to excess revenues; rather it imposes a self-executing, ministerial duty upon the Controller to transfer such excess revenues to a restricted portion of the school fund and thence to allocate such revenues to school districts and community college districts on a per-enrollment basis. Section 8.5 specifically restricts the purposes for which those funds may be expended. The specific provisions of section 8.5 would prohibit the Legislature from retaining and utilizing those funds for purposes of the Child Care and Development Services Act.

IV Issue on Appeal

In this case we are concerned with whether funding for the Child Care and Development Services Act is on its face beyond the educational funding requirements of article XVI, section 8, of the Constitution as enacted by Proposition 98.

Defendant Honig contends that the Legislature has plenary power to define how California's public school system operates as well as what entities constitute that system. Given that absolute authority, which remains undiminished by the enactment of Proposition 98, the Legislature was empowered to include funds for early childhood education and child development within the minimum funding guarantee established by that initiative.*1531 He argues that the trial court, contrary to the settled and fundamental principles of constitutional adjudication, misconstrued the critical phrase "moneys to be applied by the State for the support of school districts" to be limited to funds directly allocated to school districts. In his view, "the definition of 'school districts' set forth in Proposition 98 is far from precise. Its uncertainty in fact made it necessary for the Legislature to refine and clarify which entities in the public school system were to be counted as falling within its minimum funding guarantee. This the Legislature did, three times. [¶] More importantly, nothing in Proposition 98 or any other provision of law either expressly or implicitly restricted the Legislature from including [the California Department of Education's] direct provision of child development services through contracts with private agencies within that guarantee. Since 1972, the Legislature has determined that private agencies, as well as public agencies, have been integral to the statewide provision of such services under the Child Development Act, and thereby to California's public school system. Accordingly, the Legislature's implementation of Proposition 98 in Sections 41202(f) and 8203.5(c) was not only possible and reasonable, it was consistent with its prior acts which made private agency child development services a recognized part of the public school system."

(7a) Plaintiffs counter that the plain language of Proposition 98 demonstrates that the funds must go directly to school districts and not to private entities contracting with the Department of Education. As they read the key phrase of the initiative, "monies to be applied by the State for the support of school districts" means funds "allocated to" or "appropriated for" school districts. Consequently, so their argument goes, the inclusion of non-school-district programs within the initiative's guarantee nullifies the central purpose of Proposition 98.

Real parties in interest argue alternatively that child development programs funded directly by the Department of Education are included within the phrase "school districts" but even if they are not, the Legislature has the power to amend the statutory definition of "school districts" contained in Proposition 98.

In analyzing these constitutional contentions we are bound by several fundamental principles of constitutional adjudication. (8) " 'Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire lawmaking authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers *which are not expressly, or by necessary implication *1532 denied to it by the Constitution.* ... [¶] Secondly, all intendments favor the exercise of the

Legislature's plenary authority: "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. *Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.*" ' (Italics added.)" (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 [172 Cal.Rptr. 487, 624 P.2d 1215], citing *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1, 488 P.2d 161], citations omitted.)

(9) Another principle of constitutional adjudication requires that the constitutional provisions added by Proposition 98 be considered in light of all other relevant provisions of the Constitution, including those that contain, define, and limit the status of school districts and their relationship to the state. "The initiative amendment to the [C]onstitution itself must be interpreted in harmony with the other provisions of the organic law of this state of which it has become a part. To construe it otherwise would be to break down and destroy the barriers and limitations which the [C]onstitution, read as a whole, has cast about legislation, both state and local." (*Galvin v. Board of Supervisors* (1925) 195 Cal. 686, 692 [235 P. 450]. See also *Edler v. Hollopeter* (1931) 214 Cal. 427, 430 [6 P.2d 245].) In *Galvin v. Board of Supervisors, supra,* 195 Cal. 686, the petitioners sought to compel a county board of supervisors to submit an initiative ordinance to the local voters. The Supreme Court held that the provisions of the Constitution which reserve the initiative power to local voters must be construed in light of other provisions which contain, define, and limit the scope of permissible local legislation.(*Id.* at p. 692.)This precluded local voters from accomplishing by initiative that which was beyond the powers of the local board of supervisors.(*Id.* at p. 693.See also *Giddings v. Board of Trustees* (1913) 165 Cal. 695, 698 [133 P. 479].) That principle of construction applies here.

(7b) When we consider Proposition 98 in light of other provisions of our Constitution, specifically article IX, which is devoted to education, and the long, unbroken line of authorities interpreting such provisions, we must reject an underlying premise of plaintiffs' argument. According to plaintiffs, the challenged legislation is invalid because it divests school districts of complete and total control over the funds the state is required to devote to education under Proposition 98. As plaintiffs put it: "Of course, if a school district decides to use part of its funding for child care and development programs, it is entitled to do so. It is also entitled to ignore child care and development altogether, and use its funding for other programs that it considers to be a higher priority." Nothing in Proposition 98 states or implies ***1533** that school districts are to have the autonomy claimed by plaintiffs. Article IX, section 5, of our Constitution still provides for one system of common schools, which implies a "unity of purpose as well as an entirety of operation, and the direction to the [L]egislature to provide 'a' system of common schools means *one* system which shall be applicable to all the common schools within the state." (*Kennedy v. Miller* (1893) 97 Cal. 429, 432 [32 P. 558], italics original; see also *Serrano I, supra,* 5 Cal.3d at p. 595.)

Since Proposition 98 did not alter the state's role in education, the Constitution continues to make education and the operation of the public schools a matter of statewide rather than local or municipal concern. (*Hall v. City of Taft, supra,* 47 Cal.2d at p. 179; *Esberg v. Badaracco, supra,* 202 Cal. at pp. 115-116; *Kennedy v. Miller, supra,* 97 Cal. at p. 431; *Whisman v. San Francisco Unified School Dist., supra,* 86 Cal.App.3d at p. 789.) Local school districts remain agencies of the state rather than independent, autonomous political bodies. (*Allen v. Board of Trustees, supra,* 157 Cal. at pp. 725-726.) The Legislature's control over the public education system is still plenary. (*Hall v. City of Taft, supra,* 47 Cal.2d at pp. 180-181; *Pass School Dist. v. Hollywood Dist., supra,* 156 Cal. at p. 419; *San Carlos Sch. Dist. v. State Bd. of Education, supra,* 258 Cal.App.2d at p. 324; *Town of Atherton v. Superior Court, supra,* 159 Cal.App.2d at p. 421.) The Legislature still has ultimate and nondelegable responsibility for education in this state. (*Hall v. City of Taft, supra,* 47 Cal.2d at p. 181; *Piper v. Big Pine School Dist., supra,* 193 Cal. at p. 669.) All school properties are still held in trust with the state as the beneficial owner. (*Hall v. City of Taft, supra,* 47 Cal.2d at p. 182; *Chico Unified Sch. Dist. v. Board of Supervisors, supra,* 3 Cal.App.3d at p. 855; *Town of Atherton v. Superior Court, supra,* 159 Cal.App.2d at p. 421.) And school districts still do not have a proprietary interest in moneys which are apportioned to them. (*Gridley School District v. Stout, supra,* 134 Cal. at p. 593; *Butler v. Compton Junior College Dist., supra,*

77 Cal.App.2d at p. 729.) Of course, if the electorate chose to alter our constitutional scheme for education it could do so. Education could be made a matter of local concern and school districts could be given greater autonomy. But we cannot conclude that such a major governmental restructuring was accomplished by implication in a measure dealing with public finance which spoke not at all on such matters.

In light of the Legislature's plenary authority over education and its legal relationship with school districts, we do not find Proposition 98 to be clear and unambiguous as asserted by plaintiffs. The measure establishes a minimum sum for "the monies to be applied by the state for the support of school districts and community college districts ...." Rather than expressly divesting the state of its traditional authority over education funds, ***1534** this provision would appear to retain state control since the moneys are to be "applied by the state." The measure does not expressly restrict the Legislature's plenary authority nor does it grant to school districts exclusive control over education funds. Had such a result been intended there are any number of linguistic formulations which could have so specified with adequate clarity. As a court, we cannot impose limitations or restrictions upon the Legislature's prerogatives in the absence of language reasonably calculated to require such a result when subjected to strict construction. (*Pacific Legal Foundation v. Brown, supra,* 29 Cal.3d at p. 180.)

Given plaintiffs' facial attack, it is enough to hold, as we do, that legislative programs which advance, and hence support, the educational mission of school districts and community college districts may constitutionally be included within the funding guarantee of Proposition 98. It cannot be said that the Child Care and Development Services Act totally and on its face fails to meet this test. [FN11]This is as far as we need go in this case. The plaintiffs asserted, and the judgment holds, that only funds allocated to and administered by school districts satisfy the requirements of Proposition 98. Such a conclusion improperly grants school districts a proprietary interest in school funds and gives them a degree of political autonomy in contravention to the Legislature's long-standing and well-established plenary authority over education in this state. Since we do not find such a fundamental governmental restructuring in Proposition 98, we must reject the reasoning of the trial court and reverse its judgment.

FN11 In reaching this conclusion we reject real parties' contention that the Legislature has impliedly defined programs under the Child Care and Development Services Act as being within the definition of "school districts." Section 41302.5 defines the agencies which are included within the phrase "school district" as used in Proposition 98. In implementing Proposition 98 the Legislature referred to that section but did not see fit to amend it to include child care and development programs. (§ 41202, subd. (f).) And in section 8203.5, subdivision (c), the Legislature included Child Care and Development Services Act funding within the Proposition 98 guarantee "whether or not those funds are allocated to school districts ...." By so providing the Legislature clearly chose not to include child care and development programs within the definition of school districts.

Summary and Conclusion

In this state, education is a matter of statewide rather than local or municipal concern. Local school districts are agencies of the state subject to the Legislature's plenary authority over education. Local school districts do not have political autonomy and have no proprietary interest in the properties or moneys they hold in trust for the state. Proposition 98 set forth minimum sums to be applied by the state for the support of school districts and community colleges. This measure does not deprive the Legislature of ***1535** its plenary authority over education and does not grant school districts political autonomy or a proprietary interest in the minimum funding to be applied by the state for support of school districts and community colleges. Accordingly, we reject the assertion that all funds within the minimum funding requirements of Proposition 98 must be allocated to, and administered by, school districts. Our opinion goes no further. While the Legislature's authority over education and education funding is broad, it is not unlimited. Our conclusion that Proposition 98 did not divest the Legislature of its traditional authority over education should not be construed to foreclose specific challenges to the Legislature's decisions based upon appropriate factual and legal showings. We hold only

that the decision to include funding for the Child Care and Development Services Act within the Proposition 98 minimum funding guarantees is not in toto and on its face beyond the Legislature's constitutional authority.

Disposition

The judgment is reversed. Appellant Honig shall recover his costs on appeal.

Marler, J., and Nicholson, J., concurred.
A petition for a rehearing was denied May 27, 1992, and the petition of plaintiffs and respondents for review by the Supreme Court was denied July 30, 1992. Mosk, J., was of the opinion that the petition should be granted. ***1536**

Appendix

Proposition 98 provides in full:

Section 1. This Act shall be known as "The Classroom Instructional and Accountability Act."

Section 2. Purpose and Intent. The People of the State of California find and declare that:

(a) California schools are the fastest growing in the nation. Our schools must make room for an additional 130,000 students every year.

(b) Classes in California's schools have become so seriously overcrowded that California now has the largest classes of any state in the nation.

(c) This act will enable Californians to once again have one of the best public school systems in the nation.

(d) This act will not raise taxes.

(e) It is the intent of the People of California to ensure that our schools spend money where it is most needed. Therefore, this Act will require every local school board to prepare a School Accountability Report Card to guarantee accountability for the dollars spent.

(f) This Act will require that excess state funds be used directly for classroom instructional improvement by providing for additional instructional materials and reducing class sizes.

(g) This Act will establish a prudent state reserve to enable California to set aside funds when the economy is strong and prevent cutbacks or tax increases in times of severe need or emergency.

Section 3. Section 5.5 is hereby added to Article XIIIB as follows:

Section 5.5 Prudent State Reserve. The Legislature shall establish a prudent state reserve fund in such amount as it shall deem reasonable and necessary. Contributions to, and withdrawals from, the fund shall be subject to the provisions of Section 5 of this Article.

Section 4. Section 2 of Article XIIIB is hereby amended to read as follows:

Section 2. Revenues in Excess of Limitation. ***1537**

(a) All revenues received by the state in excess of that amount which is appropriated by the state in compliance with this Article, and which would otherwise by required, pursuant to subdivision (b) of this Section, to be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years, shall be transferred and allocated pursuant to Section 8.5 of Article XVI up to the maximum amount permitted by that section.

(b) Except as provided in subdivision (a) of this Section, revenues received by any entity of government in excess of that amount which is appropriated by such entity in compliance with this Article during the fiscal year shall be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years.

Section 5. Section 8 of Article XVI is hereby amended to read as follows:

Section 8. School Funding Priority

(a) From all state revenues there shall first be set apart the monies to be applied by the state for support

of the public school system and public institutions of higher education.

(b) Commencing with the 1988-89 fiscal year, the monies to be applied by the state for the support of school districts and community college districts shall not be less than the greater of:

(1) The amount which, as a percentage of the State General Fund revenues which may be appropriated pursuant to Article XIIIB, equals the percentage of such State General Fund revenues appropriated for school districts and community college districts, respectively, in fiscal year 1986-87; or

(2) The amount required to ensure that the total allocations to school districts and community college districts from the State General Fund proceeds of taxes appropriated pursuant to Article XIIIB and allocated local proceeds of taxes shall not be less than the total amount from these sources in the prior year, adjusted for increases in enrollment, and adjusted for changes in the cost of living pursuant to the provisions of Article XIIIB.

(c) The provisions of subdivision (b) of this Section may be suspended for one year by the enactment of an urgency statute pursuant to Section 8 of Article IV, provided that no urgency statute enacted under this subdivision may be made part of or included within any bill enacted pursuant to Section 12 of Article IV. ***1538**

Section 6. Section 8.5 of Article XVI is hereby added as follows:

Section 8.5. Allocations to State School Fund

(a) In addition to the amount required to be applied for the support of school districts and community colleges pursuant to Section 8(b), the Controller shall during each fiscal year transfer and allocate all revenues available pursuant to subdivision (a) of Section 2 of Article XIIIB, up to a maximum of four percent (4%) of the total amount required pursuant to Section 8(b) of this Article, to that portion of the State School Fund restricted for elementary and high school purposes, and to that portion of the State School Fund restricted for community college purposes, respectively, in proportion to the enrollment in school districts and community college districts respectively.

(1) With respect to funds allocated to that portion of the State School Fund restricted for elementary and high school purposes, no transfer or allocation of funds pursuant to this section shall be required at any time that the Director of Finance and the Superintendent of Public Instruction mutually determine that current annual expenditures per student equal or exceed the average annual expenditure per student of the ten states with the highest annual expenditures per student for elementary and high schools, and that average clas [*sic*] size equals or is less than the average class size of the ten states with the lowest clas [*sic*] size for elementary and high schools.

(2) With respect to funds allocated to that portion of the State School Fund restricted for community college purposes, no transfer or allocation of funds pursuant to this section shall be required at any time that the Director of Finance and the Chancellor of Community Colleges mutually determine that current annual expenditures per student for community colleges in this state equal or exceed the average annual expenditure per student of the ten states with the highest annual expenditures per student for community colleges.

(b) Notwithstanding the provisions of Article XIIIB, funds allocated pursuant to this section shall not constitute appropriations subject to limitation, but appropriation limits established in Article XIIIB shall be annually increased for any such allocations made in the prior year.

(c) From any funds transferred to the State School Fund pursuant to paragraph (a) of this Section, the Controller shall each year allocate to each school district and community college district an equal amount per enrollment in school districts from the amount in that portion of the State ***1539** School Fund restricted for elementary and high school purposes and an equal amount per enrollment in community college districts from that portion of the State School Fund restricted for community college purposes.

(d) All revenues allocated pursuant to subdivision (a) of this section, together with an amount equal to the total amount of revenues allocated pursuant to subdivision (a) of this section in all prior years, as adjusted

if required by Section 8(b)(2) of Article XVI, shall be expended solely for the purposes of instructional improvement and accountability as required by law.

(e) Any school district maintaining an elementary or secondary school shall develop and cause to be prepared an annual audit accounting for such funds and shall adopt a School Accountability Report Card for each school.

Section 7. Section 33126 is hereby added to Article 2 of Chapter 2 of Part 20 of Division 2 of Title 2 of the Education Code to read as follows:

33126. School Accountability Report Card

In order to promote a model statewide standard of instructional accountability and conditions for teaching and learning, the Superintendent of Public Instruction shall by March 1, 1989, develop and present to the Board of Education for adoption a statewide model School Accountability Report Card.

(a) The model School Accountability Report Card shall include, but is not limited to, assessment of the following school conditions:

(1) Student achievement in and progress toward meeting reading, writing, arithmetic and other academic goals.

(2) Progress toward reducing drop-out rates.

(3) Estimated expenditures per student, and types of services funded.

(4) Progress toward reducing class sizes and teaching loads.

(5) Any assignment of teachers outside their subject areas of competence.

(6) Quality and currency of textbooks and other instructional materials.

(7) The availability of qualified personnel to provide counseling and other student support services. ***1540**

(8) Availability of qualified substitute teachers.

(9) Safety, cleanliness, and adequacy of school facilities.

(10) Adequacy of teacher evaluations and opportunities for professional improvement.

(11) Classroom discipline and climate for learning.

(12) Teacher and staff training, and curriculum improvement programs.

(13) Quality of school instruction and leadership.

(b) in developing the statewide model School Accountability Report, the Superintendent of Public Instruction shall consult with a Task Force on Instructional Improvement, to be appointed by the Superintendent, composed of practicing classroom teachers, school administrators, parents, school board members, classified employees, and educational research specialists, provided that the majority of the task force shall consist of practicing classroom teachers.

Section 8. Section 35256 is hereby added to Article 8 of Chapter 2 of Part 20 of Division 3 of Title 2 of the Education Code to read as follows:

35256. School Accountability Report Card

The governing board of each school district maintaining an elementary or secondary school shall by September 30, 1989, or the beginning of the school year develop and cause to be implemented for each school in the school district a School Accountability Report Card.

(a) The School Accountability Report Card shall include, but is not limited to, the conditions listed in Education Code Section 33126.

(b) Not less than triennially, the governing board of each school district shall compare the content of the school district's School Accountability Report Card to the model School Accountability Report Card adopted by the State Board of Education. Variances among school districts shall be permitted where necessary to account for local needs.

(c) The Governing Board of each school district shall annually issue a School Accountability Report Card for each school in the school district, publicize such reports, and notify parents or guardians of students that a copy will be provided upon request. ***1541**

Section 9. Section 41300.1 is hereby added to Article 1 of Chapter 3 of Part 24 of Division 3 of Title 2 of the Education Code to read as follows:

41300.1 Instructional Improvement and Accountability.

The amount transferred to Section A of the State School Fund pursuant to Section 8.5 of Article XVI of the State Constitution shall to the maximum extent feasible be expended or encumbered during the fiscal year received and solely for the purpose of instructional improvement and accountability.

(a) For the purpose of this section, "instructional improvement and accountability" shall mean expenditures for instructional activities for school sites which directly benefit the instruction of students, and shall be limited to expenditures for the following:

(1) Lower pupil-teacher ratios until a ratio is attained of not more than 20 students per teacher providing direct instruction in any class, and until a goal is attained of total teacher loads of less than 100 total students per teacher in all secondary school classes in academic subjects as defined by the Superintendent of Public Instruction.

(2) Instructional supplies, instructional equipment, instructional materials and support services necessary to improve school conditions.

(3) Direct student services needed to ensure that each student makes academic progress necessary to be promoted to the next appropriate grade level.

(4) Staff development which improves services to students or increases the quality and effectiveness of instructional staff, designed and implemented by classroom teachers and other participating school district personnel, including the school principal, with the aid of outside personnel as necessary. Classroom teachers shall comprise the majority of any group designated to design such staff development programs for instructional personnel.

(5) Compensation of teachers.

(b) Funds transferred to each school district, pursuant to this section shall be deposited in a separate account and shall be maintained and appropriated separately from funds from all other sources. Funds appropriated pursuant to this section shall supplement other resources of each school district and shall not supplant any other funds. ***1542**

Section 10. Section 14020.1 is hereby added to Article 1 Chapter 1 of Part 9 of Division 1 of Title 1 of the Education Code to read as follows:

14020.1. Instructional Improvement and Accountability.

The amount transferred to Section B of the State School Fund pursuant to Section 8.5 of Article XVI of the State Constitution shall to the maximum extent feasible be expended or encumbered during the year received solely for the purposes of instructional improvement and accountability.

(a) For the purposes of this section, "instructional improvement and accountability" shall mean expenditures for instructional activities for college sites which directly benefit the instruction of students and shall be limited to expenditures for the following:

(1) Programs which require individual assessment and counseling of students for the purpose of designing a curriculum for each student and establishing a period of time within which to achieve the goals of that curriculum and the support services needed to achieve these goals, provided that any such program shall first have been approved by the Board of Governors of Community Colleges.

(2) Instructional supplies, instructional equipment, and instructional materials and support services necessary to improve campus conditions.

(3) Faculty development which improves instruction and increases the quality and effectiveness of instructional staff, as mutually determined by faculty and the community college district governing board.

(4) Compensation of faculty.

(b) Funds transferred to each community college district pursuant to this section shall be deposited in a separate account and shall be maintained and appropriated separately from funds from all other sources. Funds appropriated pursuant to this section shall supplement other resources of each community college district and shall not supplant funds appropriated from any other source.

Section 11. Section 14022 is added to the Education Code to read as follows:

14022. (a) For the purposes of Section 8 and Section 8.5 of Article XVI of the California Constitution, "enrollment" shall mean: ***1543**

(1) In community college districts, full-time equivalent students receiving services, and

(2) In school districts, average daily attendance when students are counted as average daily attendance and average daily attendance equivalents for services not counted in average daily attendance.

(b) Determination of enrollment shall be based upon actual data from prior years and for the next succeeding year such enrollments shall be estimated enrollments adjusted for actual data as actual data becomes available.

Section 12. Section 41302.5 is added to the Education Code to read as follows:

41302.5. For the purposes of Section 8 and Section 8.5 of Article XVI of the California Constitution, "school districts" shall include county boards of education, county superintendents of schools and direct elementary and secondary level instructional services provided by the State of California.

Section 13. No provision of this Act may be changed except to further its purposes by a bill passed by a vote of two-thirds of the membership of both houses of the Legislature and signed by the Governor.

Section 14. Severability

If any provision of this Act, or the application of any provision of this Act to any person or circumstance, shall be held invalid, the remainder of this Act, to the extent that it can be given effect, shall not be affected thereby, and to this end the provisions of this Act are severable.

Cal.App.3.Dist.
California Teachers Assn. v. Hayes
5 Cal.App.4th 1513, 7 Cal.Rptr.2d 699, 74 Ed. Law Rep. 165

END OF DOCUMENT

Supreme Court of California, In Bank.
CANDID ENTERPRISES, INC., Plaintiff and Respondent,
v.
GROSSMONT UNION HIGH SCHOOL DISTRICT, et al., Defendants and Appellants.
L.A. 31877.

Sept. 26, 1985.

Developer of residential subdivision filed action for writ of mandamus to order school district's governing board to repay school impact fees assessed against developer. The Superior Court, San Diego County, Joseph A. Kilgariff, J., ordered refund of the fees, and school district appealed. The Supreme Court, Mosk, J., held that: (1) School Facilities Act does not preempt local governments from imposing school-impact fees on developers to finance permanent school facilities, and (2) school district's imposition of school-impact fees on developer to finance permanent school facility was related to legitimate purpose of requiring developers to mitigate overcrowding in schools caused or aggravated by development of residential subdivision, and thus, did not deny developer equal protection of law.

Reversed.

Opinion, 197 Cal.Rptr. 429, vacated.

West Headnotes

[1] Mandamus 250 ⚿154(4)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k154 Petition or Complaint, or Other Application
250k154(4) k. Right of Petitioner, and Authority, Duty, or Power of Respondent, in General. Most Cited Cases
School district's demurrer was not sustainable in action by developer of residential subdivision for writ of mandamus to order school district's governing board to repay school impact fees assessed against developer, even though writ of administrative mandate did not lie because school board was not required by law to grant developer hearing on request, where writ of ordinary mandate was available. West's Ann.Cal.C.C.P. §§ 1086, 1094.5(a); West's Ann.Cal.Gov.Code § 65913.5(e).

[2] Mandamus 250 ⚿3(2.1)

250 Mandamus
250I Nature and Grounds in General
250k3 Existence and Adequacy of Other Remedy in General
250k3(2) Remedy at Law
250k3(2.1) k. In General. Most Cited Cases
(Formerly 250k3(2))
Mandate requires that there be no plain, speedy, and adequate remedy, in the ordinary course of law. West's Ann.Cal.C.C.P. §§ 1086, 1094.5(a).

[3] Mandamus 250 ⚿87

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k87 k. Proceedings to Procure and Grant or Revoke Licenses, Certificates, and Permits. Most Cited Cases
Developer of residential subdivision who sought refund from school district's governing board of school impact fees assessed against developer was entitled to writ of ordinary mandate, where action on contract for refund of fees paid in the lease from payment of remainder was inadequate because there were no grounds on which to allege breach or to seek recision, no statutory action for refund than existed, and action for declaratory relief was inappropriate insofar as developer was attacking local legislation. West's Ann.Cal.C.C.P. §§ 1086, 1094.5(a).

[4] Mandamus 250 ⚿69

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Of-

ficers and Boards and Municipalities
250k69 k. Legislative Powers. Most Cited Cases
Writ of mandate may be used to challenge validity of legislative measure.

[5] **Counties 104 ⚷21.5**

104 Counties
104II Government
104II(A) Organization and Powers in General
104k21.5 k. Governmental Powers in General. Most Cited Cases
(Formerly 104k211/2)

Municipal Corporations 268 ⚷589

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k589 k. Nature and Scope of Power of Municipality. Most Cited Cases
Under police power granted by Constitution, counties and cities have plenary authority to govern, subject only to limitation that they exercise power within their territorial limits and subordinate to state law. West's Ann.Cal.Const. Art. 11, § 7.

[6] **Municipal Corporations 268 ⚷111(2)**

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k111 Validity in General
268k111(2) k. Conformity to Constitutional and Statutory Provisions in General. Most Cited Cases
Otherwise valid local legislation which conflicts with state law is preempted by state law and is void. West's Ann.Cal.Const. Art. 11, § 7.

[7] **Municipal Corporations 268 ⚷111(2)**

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k111 Validity in General
268k111(2) k. Conformity to Constitutional and Statutory Provisions in General. Most Cited Cases
Otherwise valid local legislation conflicts with state law where local legislation duplicates, contradicts, or enters area fully occupied by general law, either expressly or by legislative implication. West's Ann.Cal.Const. Art. 11, § 7.

[8] **Municipal Corporations 268 ⚷111(2)**

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k111 Validity in General
268k111(2) k. Conformity to Constitutional and Statutory Provisions in General. Most Cited Cases
In determining whether Legislature has preempted by implication to the exclusion of local regulation, Supreme Court must look to whole purpose and scope of legislative scheme, employing three tests: whether subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively matter of state concern; whether subject matter has been partially covered by general law couched in such terms as to indicate clearly that paramount state concern will not tolerate further or additional local action; or whether subject matter has been partially covered by general law, and subject is of such nature that adverse affect of local ordinance on transient citizens of state outweighs possible benefit to municipality.

[9] **Municipal Corporations 268 ⚷111(2)**

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k111 Validity in General
268k111(2) k. Conformity to Constitutional and Statutory Provisions in General. Most Cited Cases
Preemption by implication of legislative intent may not be found where Legislature has expressed its in-

tent to permit local regulations. West's Ann.Cal.Const. Art. 11, § 7.

[10] Zoning and Planning 414 ⚿14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases
School Facilities Act [West's Ann.Cal.Gov.Code § 65970 et seq.] which permits and recognizes local measures imposing school-impact fees on developers of new residential developments to finance new school facilities, does not impliedly preempt local regulations.

[11] Zoning and Planning 414 ⚿7.1

414 Zoning and Planning
414I In General
414k7 Constitutional and Statutory Provisions
414k7.1 k. In General. Most Cited Cases
(Formerly 414k7)
Purpose of School Facilities Act [West's Ann.Cal.Gov.Code § 65970 et seq.] is to encourage local school districts to identify, and local governments to deal with, effects of residential development on school facilities and to provide local government with new and improved methods to cope with effects of such development within reasonable period of time and on short-term basis. West's Ann.Cal.Gov.Code §§ 65970-65971.

[12] Zoning and Planning 414 ⚿382.4

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k382.1 Maps, Plats, or Plans, Conditions and Agreements
414k382.4 k. Fees, Bonds, and in Lieu Payments. Most Cited Cases
School Facilities Act provision [West's Ann.Cal.Gov.Code § 65974] restricting school-impact fees that may be imposed to no more than the amount necessary to pay five annual lease payments for interim facility, is attempt on part of Legislature to ensure that local governments do not indefinitely avoid problem of construction of permanent facilities by agreeing to long-term-use of temporary facilities, but is not limitation on authority of local government to impose school-impact fees to provide permanent facilities.

[13] Zoning and Planning 414 ⚿14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases

Zoning and Planning 414 ⚿382.4

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k382.1 Maps, Plats, or Plans, Conditions and Agreements
414k382.4 k. Fees, Bonds, and in Lieu Payments. Most Cited Cases
West's Ann.Cal.Gov.Code § 65980, which expressly limits scope of School Facilities Act [West's Ann.Cal.Gov.Code § 65970 et seq.] to temporary school facilities, indicates Legislature's intent that local governments use fees authorized by the Act as short-term solution, but does not indicate that local governments be prohibited from developing and implementing long-term solutions.

[14] Zoning and Planning 414 ⚿14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases
Fact that West's Ann.Cal.Gov.Code § 65979 prohibits exactions of school-impact fees from developers for purpose of building permanent school facilities where locality has received apportionment for permanent facilities pursuant to Green Act [West's Ann.Cal.Educ.Code, § 17700 et seq.] does not mean that Legislature intended School Facilities Act to preempt local governments from assessing developers for fees to build permanent school facilities under other circumstances.

[15] Constitutional Law 92 ⚿1012

92 Constitutional Law
92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1012 k. Taxation and Revenue Legislation. Most Cited Cases
(Formerly 92k48(4.1), 92k48(4))

Constitutional Law 92 ⚿3065

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3063 Particular Rights
92k3065 k. Economic or Social Regulation in General. Most Cited Cases
(Formerly 92k213.1(2))
"Basic and conventional standard," under which economic regulation imposing school-impact fees must be reviewed, invests legislation with presumption of constitutionality and requires merely that distinction drawn by challenged measure bears some rational relationship to conceivable legitimate state purpose.

[16] Constitutional Law 92 ⚿1040

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1040 k. Equal Protection. Most Cited Cases
(Formerly 92k48(4.1), 92k48(4))
Under conventional standard of review to determine whether legislation violates equal protection, burden of demonstrating invalidity of classification rests squarely upon the party who assails legislation. U.S.C.A. Const.Amend. 14.

[17] Constitutional Law 92 ⚿3614

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)8 Education
92k3611 Elementary and Secondary Education
92k3614 k. School Funding and Financing; Taxation. Most Cited Cases
(Formerly 92k242.2(2.1), 92k242.2(2))

Zoning and Planning 414 ⚿382.4

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k382.1 Maps, Plats, or Plans, Conditions and Agreements
414k382.4 k. Fees, Bonds, and in Lieu Payments. Most Cited Cases
(Formerly 92k242.2(2.1))
Assessment of school-impact fees to finance permanent school facility against developer of residential subdivision who entered into secured agreement to obtain school-availability letter did not deny developer equal protection of law, even though developments started after date school district stopped assessing such fees would be able to avoid fees altogether, where assessment was reasonable in that developers who were expected to cause or aggravate overcrowding in schools were required to mitigate overcrowding in schools, and others were not. U.S.C.A. Const.Amend. 14.

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curiae on behalf of plaintiff and respondent.

MOSK, Justice.

The major question we must decide in this case concerns what are commonly referred to as "school-impact fees"-i.e., fees that local *881 governments impose on real property development to cover the costs of **879 constructing and maintaining school facilities attributable to such development. The ***306 precise question is whether the School Facilities Act (sometimes hereafter the Act) (Gov.Code, § 65970 et seq.) [FN1]-which encourages local school boards to identify and local governments to deal with the problem of overcrowding, and to that end permits the imposition of school-impact fees to finance certain temporary facilities-preempts local governments from imposing such fees to finance both temporary and permanent facilities. We answer this question in the negative, and therefore reverse the judgment.

FN1. Unless otherwise noted, all statutory references are to the Government Code.

I

In California the financing of public school facilities has traditionally been the responsibility of local government. "Before the *Serrano v. Priest* decision in 1971, school districts supported their activities mainly by levying ad valorem taxes on real property within their districts." (Cal.Building Industry Assn., Financing School Facilities (Apr. 1983) p. 3 (hereafter Financing School Facilities).) Specifically, although school districts had received some state assistance since 1947, and especially since 1952 with the enactment of the State School Building Aid Law of 1952 (Ed.Code, § 16000 et seq.), they financed the construction and maintenance of school facilities mainly through the issuance of local bonds repaid from real property taxes.

After the *Serrano* decision (5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 124) and to the present day, local government has remained primarily responsible for school facility financing, but has often been thrust into circumstances in which it has been able to discharge its responsibility, if at all, only with the greatest difficulty. In these years, the burden on different localities has been different: extremely heavy on those that have experienced growth in enrollment, light on those that have experienced decline, and somewhere in between on those that have remained stable.

In the early 1970's, because of resistance to increasing real property taxes, localities throughout the state began to experience greater difficulty in obtaining voter approval of bond issues to finance school facility construction and maintenance. As a result, a number of communities chose to impose on developers school-impact fees-such as those at issue here-in order to make new development cover the costs of school facilities attributable to *882 it. (See, e.g., *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court* (1974) 13 Cal.3d 225, 118 Cal.Rptr. 158, 529 P.2d 582.)

With the passage of Proposition 13 in 1978 the burden of school financing became even heavier. "Proposition 13 prohibits ad valorem property taxes in excess of 1%, except to finance previously authorized indebtedness. Since most localities have reached this 1% limit, school districts cannot raise property taxes even if two-thirds of a district's voters wanted to finance school construction." (Financing School Facilities, supra, at p. 4; see Ed.Code, § 17786 ["the Legislature recognizes that the ad valorem tax is no longer available as a source of revenue for the construction of necessary school facilities"].) Moreover, although Proposition 13 authorizes the imposition of "special taxes" by a vote of two-thirds of the electorate, such special taxes have rarely been imposed, remain novel, and as consequence are evidently not perceived as a practical method of school facility financing-especially in view of the need for a two-thirds vote of the electorate to approve them. (Financing School Facilities, supra, at pp. 4, 14.)

In the face of such difficulties besetting local governments, the state has not taken over any substantial part of the responsibility of financing school facilities, less still full responsibility. To be sure, in order to implement the *Serrano* decision the Legislature has significantly increased assistance to education. But it has channeled by far the greater part of such assistance into educational programs and the lesser part **880 into school facilities; in fiscal year 1981-1982, for example, only 3.6 percent went ***307 for such facilities. (Financing School Facilities, supra, at pp. 3, 4, 6.) The Legislature has developed "no long-term, comprehensive solution to the acute and chronic facilities financing needs of local school dis-

tricts," but rather has enacted merely "a series of stop-gap, patchwork measures." (Id. at p. 6.) Moreover, because of, among other things, the state budget crisis in the early 1980's and other factors the Legislature has not adequately funded such measures as it has enacted-indeed, "[i]n the past several years, state-supported construction finance has waned...." (Id. at pp. 6, 16.) Thus, although the burden of financing school facilities appears too heavy for some localities to bear, they continue to bear it in large part alone.

II

In 1974 the Board of Supervisors of San Diego County adopted in the form relevant here a land-use policy, designated Policy I-43 (sometimes hereafter the Policy), to help assure orderly growth in the face of widespread and rapid development and a consequent general increase in population. In the Policy, the board of supervisors described the basic problem: ***883** "In many cases, ... the required public services have not ... been installed by the time the development shows a need. The result has been that residents in the newly developed areas have been inadequately served with schools." It then went on to frame a solution: "Before giving approval to development proposals involving a special use permit or a rezoning, ... the proponent of the development proposal ... [must] make certain provisions, in conjunction with appropriate governmental agencies, to insure: [¶] That the proponent of the development present evidence satisfactory to the Planning Commission, at the time of its consideration of the matter, and to the Board of Supervisors at the time of its consideration of the matter that public school services will in fact be provided concurrent with the need." As evidence that such services and facilities would be provided, the county accepted so-called "school-availability" letters from the local school districts.

In 1977 respondents Grossmont Union High School District (the District) and its governing board (the Board) recognized that developments being proposed at that time might cause overcrowding, and sent letters to that effect to the county. On the basis of such letters, the planning commission concluded that the District could not in fact provide adequate school facilities concurrent with the need created by the proposed developments, and accordingly permitted few if any such developments to proceed.

In the fall of 1977 the predecessor of petitioner Candid Enterprises, Inc. expressed its willingness to enter into an agreement with the District to permit its development to proceed: it would agree to pay fees for school facilities and the District would issue a school-availability letter to the county indicating that such facilities would be provided.[FN2] The District approved the agreement in principle and, in order to facilitate it and others like it, adopted Revised Policy FF, which allowed for assessment, under Policy I-43, of school-impact fees from developers, to be used for temporary or permanent facilities. In the spring of 1978 the District entered into an agreement with petitioner's predecessor secured by the real property under development. By its terms the developer agreed to pay the established fees at the time it sought building permits, and the District issued a school-availability letter advising the county of the agreement and of its ability to provide adequate school facilities through use of the fees.

FN2. The president of petitioner and its predecessor is one and the same person.

Meanwhile, the School Facilities Act had become effective on January 1, 1978. Under the Act, cities and counties were authorized to enact ordinances to require developers to pay fees for temporary school facilities. ***884** (§ 65974.) In the spring of 1978 the board of supervisors enacted such an ****881** ordinance, designated Ordinance 5120. Shortly thereafter, in order to facilitate *****308** agreements with developers for the payment of fees for temporary facilities under the Act, the District adopted a resolution finding that conditions of overcrowding existed and that it lacked financial resources to provide additional needed school facilities.

In 1978 and 1979 the District assessed some developers for fees for temporary facilities pursuant to the School Facilities Act and Ordinance 5120; with others it entered into secured agreements for the payment of fees for temporary or permanent facilities, in lieu of School Facilities Act fees, pursuant to Policy I-43 and Revised Policy FF. Because of a districtwide decline in enrollment, in February 1980 the District discontinued collecting School Facilities Act fees. At the same time it also discontinued entering into Policy I-43 secured agreements, although it stated its intent to continue to monitor proposed developments, enter into such agreements when necessary, and col-

lect fees under existing agreements in order to provide adequate facilities concurrent with the need that the subject developments were expected to create.

Petitioner, which had purchased a three-lot condominium project from its predecessor, sought building permits late in 1980. In early 1981 it paid under protest $23,500 in Policy I-43 school-impact fees pursuant to the secured agreement between the District and its predecessor. Petitioner then unsuccessfully sought a refund by a letter to the District. Next it requested to speak to the Board on the matter, and was granted permission. At the meeting petitioner asked that in view of declining districtwide enrollment, the Board refund the fees paid under protest and cancel its secured agreement and all other similar agreements. The Board found that the District (1) discontinued collecting School Facilities Act fees and entering into Policy I-43 secured agreements "since it was projected that funds committed under existing agreements would be sufficient to mitigate future impact[,]" (2) "reserved the right to require the commitment of fees from future developments which promised to upset this condition of balance[,]" and (3) never had "any intention to disregard existing agreements, since the housing from projects covered by those agreements will adversely impact the District at their time of completion." The Board then denied petitioner's request.

[1][2][3][4] Petitioner initiated this proceeding for a writ of mandate pursuant to Code of Civil Procedure sections 1094.5 (administrative mandate) and 1084 (ordinary mandate). Respondents filed a demurrer and an answer. After a hearing the trial court overruled the demurrer and ordered that mandate issue. ***885** From the ensuing judgment respondents appeal, arguing the substantive point that the imposition of Policy I-43 school-impact fees was not invalid on either preemption or equal protection grounds. As we explain below, we find their position meritorious.[FN3]

> FN3. Respondents also press the procedural point that their demurrer should have been sustained. This argument, however, is untenable. Although the writ of administrative mandate does not lie because the Board was not required by law to grant petitioner a hearing on its request (Code Civ.Proc., § 1094.5, subd. (a); *Court House Plaza Co. v. City of Palo Alto* (1981) 117 Cal.App.3d 871, 880, 173 Cal.Rptr. 161), the writ of ordinary mandate is available. Mandate requires that there be no "plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ.Proc., § 1086.) There was no such remedy here: an action on the contract for refund of fees paid and release from payment of the remainder was inadequate because there were no grounds on which to allege a breach or to seek rescission; no statutory action for a refund then existed, although one now does (§ 65913.5, subd. (e)); and an action for declaratory relief was inappropriate insofar as petitioner was attacking the local legislation as applied (*Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 307, 130 Cal.Rptr. 814). The writ of mandate may of course be used, as it is used here, to challenge the validity of a legislative measure. (E.g., *Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565, 570, fn. 2, 96 Cal.Rptr. 697, 488 P.2d 1.)

III

Respondents first contend that the imposition of Policy I-43 school-impact fees is *****309 **882** not preempted by the School Facilities Act and is accordingly valid. Petitioner concedes as it must that the imposition of school-impact fees is generally valid. (See *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court*, supra, 13 Cal.3d 225, 232, fn. 6, 118 Cal.Rptr. 158, 529 P.2d 582.) Respondents proceed to argue successfully that the local legislation is not preempted by the Act on the ground that there is no conflict.

[5] Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the "police power [of a county or city] under this provision ... is as broad as the police power exercisable by the Legislature itself." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140, 130 Cal.Rptr. 465, 550 P.2d 1001.)

[6][7] If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. (*People ex rel. Deukmejian v. County of Men-*

docino (1984) 36 Cal.3d 476, 484, 204 Cal.Rptr. 897, 683 P.2d 1150; *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 807, 100 Cal.Rptr. 609, 494 P.2d 681.) A conflict exists if the local legislation " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " (Citations omitted.) (*People ex rel. Deukmejian v. County of Mendocino,* supra, 36 Cal.3d at p. 484, 204 Cal.Rptr. 897, 683 P.2d 1150.)

***886** Respondents argue and petitioner concedes that Policy I-43 school-impact fees do not contradict or duplicate the provisions of the School Facilities Act. Respondents further assert that such fees have not entered an area fully occupied by state law. They are persuasive.

First, the area of financing of school facilities needed by new development has not been expressly occupied by state law. The Legislature has not voiced such an intent in any of its enactments, and petitioner admits as much.

[8] Second, the area has not been impliedly occupied by state law. "In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme. There are three tests: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.' " (*People ex rel. Deukmejian v. County of Mendocino,* supra, 36 Cal.3d 476, 485, 204 Cal.Rptr. 897, 683 P.2d 1150, quoting from *In re Hubbard* (1964) 62 Cal.2d 119, 128, 41 Cal.Rptr. 393, 396 P.2d 809; accord, *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 708, 209 Cal.Rptr. 682, 693 P.2d 261 and cases cited.)

Petitioner concedes, as it must, that the imposition of Policy I-43 school-impact fees does not satisfy the third test, and respondents successfully urge that it satisfies neither of the other two.[FN4]

FN4. How the relevant field occupied by the allegedly preemptive state legislation is defined is often crucial to the result: "If the definition is narrow, preemption is circumscribed; if it is broad, the sweep of preemption is expanded." (*California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 27-28, 61 Cal.Rptr. 618; see *Gregory v. City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 84, 191 Cal.Rptr. 47.) The issue of definition, however, is not crucial here. Whether the School Facilities Act is held to occupy the narrow field of the financing of temporary facilities (as it evidently should be) or the broad field of the financing of all facilities (as it evidently should not be) is of no consequence in the case before us. As we shall explain, the Act recognizes and in fact permits local action, and thereby fails to occupy either field to the exclusion of local legislation.

*****310 **883** First, the subject matter of the local measure-the financing of the construction of both temporary and permanent school facilities to meet the demands imposed by new development-has not been so fully and completely***887** covered by general law as to clearly indicate that it has become exclusively a matter of state concern.

Taken by itself, the School Facilities Act does not even purport to deal with the construction of permanent facilities (see §§ 65970, subd. (e), 65974), and does not fully and completely cover the construction of temporary facilities. The Act recognizes alternative, local financing arrangements: "One year after receipt of any apportionment pursuant to the Leroy F. Greene State School Building Lease-Purchase Law of 1976 ... for the construction of a school, the city or county shall not be permitted thereafter, pursuant to this chapter *or pursuant to any other school facilities financing arrangement such district may have with builders of residential development,* to levy any fee or to require the dedication of any land within the attendance area of the district." (§ 65979, italics added.) The Act, moreover, clearly permits such arrangements. The school district is required to notify the local legislative body if it finds that "(a) conditions of overcrowding exist in one or more atten-

dance areas within the district which will impair the normal functioning of educational programs including the reason for such conditions existing; and (b) that all reasonable methods of mitigating conditions of overcrowding have been evaluated and no feasible method for reducing such conditions exist [*sic*]...." (§ 65971.) The Act goes on to define "reasonable methods for mitigating conditions of overcrowding": they "shall include, *but are not limited to,* agreements between a subdivider and the affected school district whereby temporary-use buildings will be leased to the school district or temporary-use buildings owned by the school district will be used." (§ 65973, subd. (b), italics added.)

Even if we consider the School Facilities Act together with other related state legislation, we come to the same conclusion: the subject matter of this local measure has not been fully and completely covered by state law. Although, as petitioner correctly argues, there are several state and local programs that provide funding for the construction of school facilities, [FN5] the general situation may properly be described in the words already quoted of one of petitioner's principal authorities: "Since the passage of Proposition 13, financing for school construction and facility maintenance has been a series of stop-gap, patchwork measures. There still exists no long-term, comprehensive solution to the acute and chronic facilities financing needs of local school districts." (Financing School Facilities, supra, at p. 6.)

> FN5. These include, for example, the School Facilities Act, the Leroy F. Greene State School Building Lease-Purchase Law of 1976 (hereinafter the Greene Act) (Ed.Code, § 17700 et seq.), the Mello-Roos Community Facilities Act of 1982 (§ 53311 et seq.), and the New Schools Relief Act of 1979 (Ed.Code, § 39050 et seq.).

888** The evident absence of implied preemptive intent in the terms of the School Facilities Act-whether we consider it by itself or with other related legislation-is confirmed by the failure of the Legislature to fully cover the financing of school facilities. First, not all school districts in need of funds for permanent facilities can qualify to receive them under the Greene Act. (See Ed.Code, § 17740.) Second, for a variety of reasons the Legislature has failed to provide adequate funding for even such "stop-gap, patchwork" programs as currently exist. In such circumstances, to construe alternative, local arrangements such as that before us to be preempted would severely impede local governments and school districts in carrying out their responsibilities. It would also frustrate the intent of the Legislature in enacting the School Facilities Act: "Adequate school facilities should be available for children residing in new residential developments." (§ 65970, subd. (a).) Thus, under this test*884 ***311** -i.e., whether the subject matter of the local measure has been so fully covered by state law as to clearly indicate that it has become exclusively a matter of state concern-the Act is shown not to be preemptive.[FN6]

> FN6. We do not mean to imply that the Legislature may not occupy a field unless it appropriates the funds necessary to carry out its intent. We also note that in some cases the "inadequacy" of state funding may prove to be too speculative or subjective a criterion on which to base a conclusion that the Legislature has not intended to preempt local action.

Second, the subject matter of this local measure has not been partially covered by state law couched in such terms as to indicate clearly that a paramount state concern will not tolerate additional local action. The evidence on which we base our conclusion is compelling: the School Facilities Act, as we have explained, unmistakably recognizes and permits local action. Thus, under this test too the Act is shown not to be preemptive.

[9][10] To summarize: "Preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations." (*People ex rel. Deukmejian v. County of Mendocino,* supra, 36 Cal.3d 476, 485, 204 Cal.Rptr. 897, 683 P.2d 1150.) Accordingly, we conclude that the School Facilities Act, because it both permits and recognizes local measures such as this, does not have implied preemptive effect.

To avoid this conclusion, petitioner relies heavily on an opinion by the Attorney General. (62 Ops.Cal.Atty.Gen. 601 (1979).) Among the questions addressed in the opinion is whether the School Facili-

ties Act preempts the imposition of school-impact fees by local government to provide permanent facilities. (Id. at p. 601.) To this the Attorney General answered ***889** yes. (Id. at pp. 605-609.) The conclusion is erroneous, however, because the analysis is faulty.

[11][12] First, the opinion reasons that the Act restricts the fees that may be imposed to no more than " 'the amount necessary to pay five annual lease payments for the interim facilities,' " and that such a restriction "would be meaningless if a city council or board of supervisors could exact additional developer fees for permanent school facilities." (Id. at p. 607, quoting § 65974, subd. (d).) This position might be sound if the Act were intended to limit the authority of local government to make such exactions, but it is not. The purpose of the Act is to encourage local school districts to identify, and local governments to deal with, the effects of residential development on school facilities and to provide local government with "new and improved methods" to cope with the effects of such development "within a reasonable period of time" and on a short-term basis. (See §§ 65970-65971.) Accordingly, the restriction on the amount of fees that may be imposed is properly to be construed as an attempt on the part of the Legislature to ensure that local governments not indefinitely avoid the problem of the construction of permanent facilities by agreeing to the long-term use of temporary facilities.

[13][14] Second, the opinion reasons that the 1979 addition of section 65980, which expressly limits the scope of the Act to temporary facilities, when as initially enacted it "was arguably broad enough to cover permanent facilities [as well,] ... indicated an intent to restrict the amount and purpose of the fees to be collected from developers." (62 Ops.Cal.Atty.Gen., supra, at p. 607.) This position is undermined, however, by the conclusions we reach above: the Legislature evidently intended that local governments use fees authorized by the Act as a short-term solution-*not* that local governments be prohibited from developing and implementing long-term solutions. It is also undermined by the language of section 65979, which was added to the Act at the same time as section 65980: "One year after receipt of an apportionment pursuant to the [Greene Act] ... for the construction of a school, the city or county shall not be permitted thereafter, pursuant to this chapter *or pursuant***312 **885 to any other school facilities financing arrangement such district may have with builders of residential development,* to levy any fee or to require the dedication of any land within the attendance area of the district." (Italics added.) Thus, section 65979 expressly recognizes "other school facilities financing arrangement[s]" between local government and developers, and prohibits exactions pursuant to such arrangements *only* when the locality has received an apportionment for permanent facilities pursuant to the Greene Act. Had the Legislature intended the School ***890** Facilities Act to preempt such "school facilities financing arrangement[s]," the reference to them would have been meaningless.

Third, the opinion reasons by analogy to the Subdivision Map Act that "the express grant of authority to impose school impact fees and dedications upon developers under [the Act], with strict limitations as to amount, evidences an intent by the Legislature to preempt the field to the exclusion of local regulation." (62 Ops.Cal.Atty.Gen., supra, at p. 608.) But even if the opinion is correct in concluding that the intent of the Legislature in the Subdivision Map Act is to prohibit local government from making exactions that the Act does not expressly authorize, it errs in reading such an intent into the School Facilities Act. Here the Legislature recognizes (§ 65979) and in fact permits (§§ 65971, 65973, subd. (b)) local legislation, and has accordingly indicated its clear intent that the "new and improved methods of financing for interim school facilities" that the Act provides are merely supplementary to, and not preemptive of, local action (§ 65970, subd. (e)).

IV

Respondents' other contention is that the imposition of Policy I-43 school-impact fees does not violate the equal protection clause and is accordingly valid. This claim too is successful.

[15][16] The imposition of school-impact fees is an undisputed and indisputable instance of economic regulation. As such, we must review it under "the basic and conventional standard," which "invests legislation ... with a presumption of constitutionality and 'requir[es] merely that distinctions drawn by a challenged [measure] bear some rational relationship to a conceivable legitimate state purpose.' " (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 16, 112 Cal.Rptr. 786, 520 P.2d 10; see

Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court, supra, 13 Cal.3d 225, 232-233, 118 Cal.Rptr. 158, 529 P.2d 582.) As petitioner implicitly concedes, we may not review the challenged local measure under any stricter standard: developers do not constitute a "suspect class," and development is not a "fundamental interest" (see *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 328, 170 Cal.Rptr. 685). Under the conventional standard, "the burden of demonstrating the invalidity of a classification ... rests squarely upon *the party who assails it.*" (*D'Amico v. Board of Medical Examiners,* supra, 11 Cal.3d at p. 17, 112 Cal.Rptr. 786, 520 P.2d 10, italics in original.) Petitioner has failed to carry this burden.

[17] If, as respondents argue and we are inclined to hold, the class of similarly situated persons comprises all developers who have entered into a secured ***891** agreement to obtain a school-availability letter, then no discrimination at all appears: the Board has collected fees as they have become due and has stated its intent to continue to collect them. But even if, as petitioner responds, the class comprises all developers who are currently building in the district, still no unlawful discrimination emerges. The Board entered into secured agreements covering certain developments proposed in 1978 and 1979 because it expected them to cause or aggravate overcrowding in neighboring schools. The Board has not entered into such agreements covering developments proposed subsequently because it has not expected them to have such an adverse effect. Thus if developers currently building in the district are treated differently, such difference*****313 **886** is reasonable and therefore lawful: developers who are expected to cause or aggravate overcrowding are required to mitigate it, others are not.

The judgment is reversed.[FN7]

> FN7. Because of our disposition we do not reach the question whether petitioner waived its right to the fees it paid under protest by accepting the benefits of the agreement with the District.

BIRD, C.J., and KAUS, BROUSSARD, REYNOSO, GRODIN and LUCAS, JJ., concur.
Cal.,1985.
Candid Enterprises, Inc. v. Grossmont Union High School Dist.
39 Cal.3d 878, 705 P.2d 876, 218 Cal.Rptr. 303, 27 Ed. Law Rep. 950

END OF DOCUMENT

Supreme Court of California, In Bank.
SANTA BARBARA SCHOOL DISTRICT et al., Petitioners,
v.
The SUPERIOR COURT OF SANTA BARBARA COUNTY, Respondent;
C. Raymond MULLIN et al., Real Parties in Interest.
C. Raymond MULLIN et al., Plaintiffs and Respondents,
v.
SANTA BARBARA SCHOOL DISTRICT et al., Defendants and Appellants.
L.A. 30054, 30086.

Jan. 15, 1975.

Parents and taxpayers brought class action seeking writ of mandate to compel special election of Santa Barbara board of education and declaratory and injunctive relief to prevent implementation of desegregation plan. Following trial the Superior Court, Santa Barbara County, filed memorandum of intended decision. Before findings of fact and conclusions of law were filed defendants presented an original petition seeking a writ of prohibition limited to intended decision on third cause of action. Thereafter the trial court entered judgment on the first two causes of action and defendants appealed, which appeal was ordered transferred. The Supreme Court, Sullivan, J., held that that section of the initiative measure, denominated Proposition 21, barring assignment of pupils on the basis of race is unconstitutional, that those provisions of the Proposition repealing the Bagley Act are constitutional and are severable, that once board of education posted notice that at the May 18 meeting it would adopt one of the desegregation/integration plans presented at the May 4 meeting the board was without power, absent amendment of the agenda within 48 hours of the May 18 meeting, to consider or adopt a substantially different plan, that board's power to close schools exists independently of its constitutional obligation to desegregate and is not contingent on such closure being reasonably necessary to effectuate desegregation and that the board may lawfully be the common governing board of both the Santa Barbara Elementary School District and the Santa Barbara High School District despite the fact that such districts are not coterminous.

Peremptory writ of prohibition issued; judgment appealed from reversed and cause remanded.

West Headnotes

[1] Constitutional Law 92 990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
(Formerly 92k48(1))
Where possible a statute will be construed in the manner that will uphold its constitutionality.

[2] Schools 345 10

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k10 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 345k154)
Statute providing that no public school student shall, because of his race, creed or color, be assigned to or be required to attend a particular school, which statute constitutes section one of initiative measure denominated Proposition 21, is unconstitutional as applied to school districts manifesting either de jure or de facto segregation; to allow school authorities to rest content in the assumption that the pattern of segregation in their district is de facto and to claim that the statute prohibits them from eliminating that segregation by pupil assignment on the basis of race implemented through bussing would impermissibly impede the constitutionally mandated task of rooting out de jure segregation. West's Ann.Education Code, § 1009.6.

[3] Schools 345 13(5)

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k13 Separate Schools for Racial Groups
345k13(5) k. De Facto or De Jure Segregation. Most Cited Cases
(Formerly 345k13)
For purpose of determining whether school segregation is de jure, segregative intent on the part of a school board is not limited to actions in the immediate present; determination whether segregation in a school district is de jure can be ascertained only by examining the full history of acts by the school authorities and determining if, at any time in that course of action, some acts were undertaken with segregative intent.

[4] Schools 345 ⚿10

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k10 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 315k21, 315k1)
Proposition 21, by repealing the Bagley Act, which act declared the state policy to be elimination of racial imbalance in schools, neither abrogated a school district's constitutional duty not to segregate nor remove the state from involvement through local school districts in the field of education; the repealing provisions of the Proposition were not unconstitutional on ground that repeal of the Bagley Act encouraged and involved the state in racial discrimination; there was no problem of state involvement under the Fourteenth Amendment but simply a question whether the state involvement would be solely by local school districts or would include involvement by the state government as well. Education Code, §§ 5002, 5003, St.1971, p. 3814; U.S.C.A.Const. Amend. 14.

[5] Evidence 157 ⚿51

157 Evidence
157I Judicial Notice
157k51 k. Mode of Ascertaining Facts Required to Be Noticed; Motions and Notice of Reliance. Most Cited Cases
Even if it were within province of Supreme Court to take judicial notice that local school districts fail to fulfill their constitutional obligations to desegregate and, thus, to conclude that passage of Proposition 21, which repealed the Bagley Act, constituted state involvement in racial discrimination no such notice would be taken where no facts supportive of such contention had been presented. Education Code, §§ 5002, 5003, St.1971, p. 3814; U.S.C.A.Const. Amend. 14.

[6] Statutes 361 ⚿303

361 Statutes
361IX Initiative
361k303 k. Matters Subject to Initiative. Most Cited Cases
Since racial balance determined according to a precise statutory formula is not a constitutional prerequisite but a matter of state policy, the People of California through the initiative process, have the power to declare state policy; thus, provisions of Education Code declaring a state policy of eliminating racial imbalance in California schools and delineating the various factors to be considered in implementing such policy were vulnerable to change, including repeal, through an initiative measure. Education Code, §§ 5002, 5003, St.1971, p. 3814.

[7] Schools 345 ⚿13(4)

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k13 Separate Schools for Racial Groups
345k13(4) k. Desegregation and Integration and Duty to Desegregate in General. Most Cited Cases
(Formerly 345k13)
A policy in favor of neighborhood schools is a reasonably conceived one; however, it can in no way limit or affect the constitutional obligations of school districts not to segregate.

[8] Statutes 361 ⚿64(1)

361 Statutes
361I Enactment, Requisites, and Validity in Gen-

eral
361k64 Effect of Partial Invalidity
361k64(1) k. In General. Most Cited Cases
While normally allowing severability, a severability clause plus the ability to mechanically sever the invalid part of the statute does not conclusively dictate it; the final determination depends on whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute.

[9] Statutes 361 ⚷64(2)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(2) k. Acts Relating to Particular Subjects in General. Most Cited Cases
That portion of Proposition 21 repealing provisions of Education Code declaring the state policy of eliminating racial imbalance in California schools and delineating the various factors to be considered in implementing such policy were severable from the invalid portion, which bars assignment of pupils on the basis of race. West's Ann.Education Code, § 1009.6; Education Code, §§ 5002, 5003, St.1971, § 3814.

[10] Statutes 361 ⚷64(1)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(1) k. In General. Most Cited Cases
The same test of severability applies to an initiative measure as applies to a statute.

[11] Schools 345 ⚷57

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k57 k. Meetings. Most Cited Cases
A school board agenda indicating adoption of a "Desegregation/Integration Plan for the Elementary District" constitutes adequate notice to parents of students attending the district's elementary schools that their interests might be vitally affected, such as by pupil assignment, bussing, pairing of schools or closure of schools; such a notice satisfied statute requiring a school board to act at meetings open to the public and to post an agenda 48 hours prior to the meeting and is not deficient for failing to specify the particular means by which the students involved might be sent to different schools. West's Ann.Education Code, § 966.

[12] Schools 345 ⚷57

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k57 k. Meetings. Most Cited Cases
Where posted agenda of school board meeting concerning desegregation plans for the elementary district referred to sequence of procedures adopted by the board for formation of integration plans and specified that May 4 meeting was for presentation of plans while May 18 meeting was for adoption of a plan, such notice was not sufficient to inform parents that a desegregation plan, which had not previously been presented to the board and which, unlike other plans, called for closing of two schools, would be considered; defect in notice was not cured by newspaper publicity indicating that a new plan was to be presented at the May 18 meeting; board had no jurisdiction to consider or approve the new plan. West's Ann.Education Code, § 966.

[13] Schools 345 ⚷57

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k57 k. Meetings. Most Cited Cases
Under statute requiring the governing body of a school district to post an agenda 48 hours prior to a meeting, such governing body cannot change its posted agenda within the 48-hour period next immediately preceding a regular meeting; if such governing body wishes to change substantially its agenda within that period it must postpone the meeting at least 48 hours and post an amended agenda. West's

Ann.Education Code, § 966.

[14] Schools 345 ⚷57

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k57 k. Meetings. Most Cited Cases
Once school board posted notice that at May 18 meeting it would adopt one of the desegregation integration plans theretofor presented at the May 4 meeting it limited its power to consider any other substantially different plan since otherwise the posted agenda would be fatally misleading; if the board wished to consider such a plan it was necessary to amend the posted agenda and reschedule the meeting so as to afford notice for the 48-hour period specified by the statute. West's Ann.Education Code, § 966.

[15] Schools 345 ⚷57

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k57 k. Meetings. Most Cited Cases
Newspaper publicity cannot replace the proper posting of an agenda of a school board meeting. West's Ann.Education Code, § 966.

[16] Schools 345 ⚷13(4)

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k13 Separate Schools for Racial Groups
345k13(4) k. Desegregation and Integration and Duty to Desegregate in General. Most Cited Cases
(Formerly 345k13)
In desegregating a school system a school board is not limited in the exercise of its powers to those acts reasonably necessary to effectuating desegregation, i. e., in implementing desegregation plan the board can close schools for reasons other than effectuating desegregation, such as for health or safety reasons.

[17] Schools 345 ⚷72

345 Schools
345II Public Schools
345II(D) District Property
345k66 School Buildings
345k72 k. Control and Use. Most Cited Cases
A school board has power to close schools and convert them to other uses; however, a board is not free to exercise such power arbitrarily but must act reasonably and in accordance with established procedure.

[18] Schools 345 ⚷74

345 Schools
345II Public Schools
345II(D) District Property
345k66 School Buildings
345k74 k. Sale or Other Disposition. Most Cited Cases

Schools 345 ⚷154(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k149 Eligibility
345k154 Assignment or Admission to Particular Schools
345k154(1) k. In General. Most Cited Cases
(Formerly 345k154)
Where report indicated that it would cost $621,800 to make existing elementary school safe and $655,000 to build an entirely new building the school board, in fashioning desegregation plan, did not abuse its discretion in determining to abandon such building in view of the extreme cost; determination of whether a new school was needed to replace such structure or whether existing facilities could handle its students due to an expected drop in elementary enrollment was properly within the board's discretion; in exercising such discretion the board was not perforce limited to determining the reasonable necessity of replacing the building and thus automatically precluded from determining the necessity of assigning students in order to achieve desegregation.

[19] Schools 345 13(4)

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k13 Separate Schools for Racial Groups
345k13(4) k. Desegregation and Integration and Duty to Desegregate in General. Most Cited Cases
(Formerly 345k13)

Schools 345 74

345 Schools
345II Public Schools
345II(D) District Property
345k66 School Buildings
345k74 k. Sale or Other Disposition. Most Cited Cases
Absent proof that there were no school facilities to absorb elementary school students displaced by closing of one school for special education center or no need for such a center the school board, in reasonable exercise of its discretion, could lawfully close such school; fact that closure was part of a desegregation plan did not automatically strip the board of its otherwise substituting authority to act in the area; establishment of an education center was not contingent on its being reasonably necessary to accomplish desegregation. West's Ann.Education Code, §§ 6500-6742, 6750-6946.

[20] Prohibition 314 10(2)

314 Prohibition
314I Nature and Grounds
314k8 Grounds for Relief
314k10 Want or Excess of Jurisdiction
314k10(2) k. Particular Acts or Proceedings. Most Cited Cases
A writ of prohibition is the appropriate remedy where a threatened judgment of the trial court will be in excess of its jurisdiction, such as where it substitutes its judgment for that of a school board in the board's proper exercise of its discretion.

[21] Schools 345 55

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k55 k. Powers and Functions in General. Most Cited Cases
There is no constitutional right to a separate, elected elementary board of education; the same board may govern both elementary and secondary schools.

[22] Schools 345 53(1)

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k53 Appointment or Election, Qualification, and Tenure
345k53(1) k. In General. Most Cited Cases

Schools 345 55

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k55 k. Powers and Functions in General. Most Cited Cases
Santa Barbara board of education may lawfully act as the common governing board of both the Santa Barbara Elementary School District and the High School District notwithstanding that such districts are not coterminous, in that the city limits are the boundaries of the elementary district while the high school covers four additional elementary school districts; permitting those who reside outside the boundaries of the Santa Barbara Elementary School District to vote for board members does not violate the "one man, one vote" principle since each qualified elector is entitled to vote in the at-large election and is liable for tax to support the board.

[23] Schools 345 53(1)

345 Schools
345II Public Schools

345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k53 Appointment or Election, Qualification, and Tenure
345k53(1) k. In General. Most Cited Cases
Statute providing that whenever the charter of a city comprising in whole or in part an elementary school district fails to provide for appointment to members of the board of education the governing board of the elementary school district within which the city is located is the board of education for the city, rather than general statute governing number of board members of certain elementary districts controls where a charter city is involved. West's Ann.Education Code, §§ 924, 1222.

***318 ***641 **609** George P. Kading, County Counsel, Robert D. Curiel, Chief Asst. County Counsel, Marvin Levine and Don H. Vickers, Deputy County Counsel, Santa Barbara, for petitioners and for defendants and appellants.
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No appearance for respondent.
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***319** SULLIVAN, Justice.
In this class action brought against two school districts and their common governing board of education, we are called upon to determine the validity of a desegregation plan for elementary schools. Our task also requires us to examine and pass upon the constitutionality of a recent initiative measure enacting certain antibusing legislation and repealing existing statutes dealing with the prevention and elimination of racial and ethnic imbalance in pupil enrollment. Additionally we must examine the validity of the pertinent statute permitting the board of education in question to be the common governing board of the high school district and the elementary school district here involved. In essence, plaintiffs make two independent but cognate attacks-one against the board's plan and the other against the board itself. We take them up in that order, separately stating the facts proper to each. We first turn our attention to the desegregation plan.

I

Defendant Santa Barbara Board of Education (hereafter Board and referred to as defendant in the singular) is the common governing board of defendants Santa Barbara School District and Santa Barbara High School District. Defendant Norman B. Scharer is the Superintendent of Schools of Santa Barbara (superintendent).

Culminating a period of five years' planning and study aimed at correcting the racial imbalance in elementary schools, the Board on February 3, 1972, resolved 'to move immediately toward the total desegregation of all Santa Barbara elementary schools beginning in September 1972.'The Board adopted the following four-step procedure to effectuate this resolution: (1) the issuance by February 22, 1972, of a statement of policy on desegregation; (2) *****642 **610** the creation of a 'Task Force Committee for Desegregation,' consisting of 22 members, to develop criteria for the study of proposed desegregation plans and to present such criteria to the Board no later than March 2, 1972; (3) the establishment of an 'Education and Integration Study Committee,' consisting of more than 100 members, under the chairmanship of the superintendent, to review various plans submitted for carrying out the desegregation-integration policy and to present to the Board, no later than May 4, 1972, two or three alternate plans; and (4) the determination that '(o)n May 18, 1972, this Board of Education will adopt one plan to be implemented as fully as possible in September 1972.'

***320** Both committees met numerous times and completed all work on schedule. On March 2, 1972, the Board adopted 12 criteria for guidance in reviewing the proposed desegregation plans. One of the criteria stated that any desegregation plan should

'provide for optimum use of and be capable of being implemented within existing facilities.'

Nine desegregation plans were received and studied initially by the 'Task Force' and thereafter by the larger Education and Integration Study Committee. The latter committee by a vote of 74 to 4 recommended to the Board a specific desegregation plan known as the Hord-Mailes-Christian-Belden Plan, named after the four sponsoring elementary school principals. The committee also approved two alternate plans and prior to May 4, 1972, presented all three to the Board. These three plans, together with the West-Anderson plan not recommended by the committee, were formally presented to the Board at its meeting held on May 4, 1972.

Due to various objections raised by members of the Board in the ensuing discussion at that meeting, the superintendent decided to develop his own plan. On May 16, 1972, just two days prior to the Board meeting scheduled for final adoption of a desegregation plan, the superintendent announced, in an article appearing in the Santa Barbara New Press, that he proposed recommending a new desegregation plan at that meeting. The next day the same newspaper contained a longer article describing the general outlines of the so-called 'Administration Plan.' That night the plan was discussed at a meeting of the Education and Integration Study Committee. However, there was no time for study or review prior to the Board meeting the following night.

At its meeting on the next night-May 18, 1972-the Board discussed the three plans recommended by the committee, the West-Anderson Plan and the Administration Plan. The last named plan was presented orally because it had not yet been reduced to writing. Despite two petitions signed by 3,000 people requesting a postponement for further study, the Administration Plan was adopted by the Board as orally presented. On June 8, 1972, the plan was summarized in writing and submitted to the State Department of Education for approval.

On June 9, 1972, C. Raymond Mullin and Howard G. Larson, on behalf of themselves and of all other voters, parents and taxpayers similarly situated, commenced the instant action seeking: (1) a writ of mandate to compel a special election of the Board and (2) declaratory ***321** and injunctive relief to prevent the implementation of the allegedly unlawful and inadequate desegregation plan. The complaint contained three causes of action: The first two which we discuss separately (see Part II, Infra) concerned the validity of the election and composition of the Board; the third cause of action alleged that the adoption of the Administration Plan by the Board was: (1) invalid for failure to give notice as required by the Education Code and (2) an abuse of discretion, in that the Board hurriedly adopted an inadequately studied plan which failed to desegregate all the elementary schools, despite the closing of two elementary schools altogether and the changing of the kindergarten to grade six pattern in two other schools.

*****643 **611** Following an eight-day trial, the court filed a memorandum of intended decision. In respect to the third count[FN1] which attacked the validity of the Administration Plan, the court declared its intention to enjoin implementation of the plan. It rested this contemplated action on two bases. First, the court concluded that the Board had no jurisdiction to close the schools since it had failed to include notice of the proposed closure of two schools in its published agenda as required by section 966 of the Education Code. The court determined that the closure of the schools was such an integral part of the Administration Plan that the whole plan must fall. Secondly, the court concluded that the Board abused its discretion by adopting the Administration Plan requiring the closure of two schools since such closure was not reasonably necessary to the effective desegregation of the elementary schools.

> FN1. The memorandum of intended decision also included a proposed decision on the first two causes of action as well, which is discussed in Part II of this opinion.

Before findings of fact and conclusions of law, based on the court's memorandum of intended decision were filed, defendants presented to this court a petition invoking our original jurisdiction and seeking a writ of prohibition restraining the trial court from entering judgment in accord with the memorandum of intended decision. We issued an alternative writ of prohibition.[FN2] On August 28, 1972, plaintiffs petitioned this court to modify the alternative writ so as to omit any stay of the trial court's proposed order enjoining implementation of the plan. Since in issuing the alternative writ, we had determined that the

petition had made a prima facie showing that the proposed action of the trial court ***322** was in excess of its jurisdiction and therefore that its proposed enjoining of the Administration Plan must be prohibited pending our final determination of the issue, we denied the petition for modification.

> FN2. As prayed for in the petition, the alternative writ of prohibition was limited in effect to the intended decision on the third cause of action. The trial court thereafter entered judgment on the first two causes of action and defendants appealed. We ordered such appeal transferred from the Court of Appeal to this court so that we could consider it simultaneously with the writ proceeding.

Subsequently an additional factor was injected into the resolution of the above proceeding with the adoption by the electorate at the general election held on November 7, 1972, of the initiative measure denominated Proposition 21. Section 1 of that proposition added to the Education Code section 1009.6 providing: 'No public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school.'Sections 2 and 3 of Proposition 21 repealed sections 5002 and 5003[FN3] respectively of the Education Code, which had declared the *****644 **612** state policy of eliminating racial imbalance in California schools and had delineated the various factors to be considered in implementing this policy. Section 4 of Proposition 21, repealed the administrative guidelines toward achieving racial balance in the schools adopted by the State Board of Education. (ss 14020 & 14021 of tit. 5 of the Cal.Admin.Code.)

> FN3.Section 5002 provides: 'It is the declared policy of the Legislature that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall prevent and eliminate racial and ethnic imbalance in pupil enrollment. The prevention and elimination of such imbalance shall be given high priority in all decisions relating to school sites, school attendance areas, and school attendance practices.'
>
> Section 5003 provides: '(a) In carrying out the policy of Section 5002, consideration shall be given to the following factors:
>
> '(1) A comparison of the numbers and percentages of pupils of each racial and ethnic group in the district with their numbers and percentages in each school and each grade.
>
> '(2) A comparison of the numbers and percentages of pupils of each racial and ethnic group in certain schools with those in other schools in adjacent areas of the district.
>
> '(3) Trends and rates of population change among racial and ethnic groups within the total district, in each school, and in each grade.
>
> '(4) The effects on the racial and ethnic composition of each school and each grade of alternate plans for selecting or enlarging school sites, or for establishing or altering school attendance areas and school attendance practices.
>
> '(b) The governing board of each school district shall periodically, at such time and in such form as the Department of Education shall prescribe, submit statistics sufficient to enable a determination to be made of the numbers and percentages of the various racial and ethnic groups in every public school under the jurisdiction of each such governing board.
>
> '(c) For purposes of Section 5002 and this section, a racial or ethnic imbalance is indicated in a school if the percentage of pupils of one or more racial or ethnic groups differs significantly from the district-wide percentage.
>
> '(d) A district shall study and consider plans which would result in alternative pupil distributions which would remedy such an imbalance upon a finding by the Department of Education that the percentage of pupils of one or more racial or ethnic groups in a school differs significantly from the district-wide percentage. A district undertaking such

a study may consider among feasibility factors the following:

'(1) Traditional factors used in site selection, boundary determination, and school organization by grade level.

'(2) The factors mentioned in subdivision (a) of this section.

'(3) The high priority established in Section 5002.

'(4) The effect of such alternative plans on the educational programs in that district. 'In considering such alternative plans the district shall analyze the total educational impact of such plans on the pupils of the district. Reports of such a district study and resulting plans of action, with schedules for implementation, shall be submitted to the Department of Education, for its acceptance or rejection, at such time and in such form as the department shall prescribe. The department shall determine the adequacy of alternative district plans and implementation schedules and shall report its findings as to the adequacy of alternative district plans and implementation schedules to the State Board of Education. A summary report of the findings of the department pursuant to this section shall be submitted to the Legislature each year.

'(e) The State Board of Education shall adopt rules and regulations to carry out the intent of Section 5002 and this section.'

***323** Since the Administration Plan was adopted by the Board pursuant to and in furtherance of the repealed code sections, and since the plan involved the assignment of various ethnic minority students to certain schools in order to create a racial balance among the elementary schools in the district, Proposition 21, if valid, would provide an independent basis to support the trial court's intended invalidation of the Administration Plan. This court has, therefore, allowed various amici curiae to file briefs directed to the question of the validity and constitutionality of Proposition 21.

[1] In 1970 the Legislature had added to the Education Code, [FN4] section 1009.5 which provided: 'No governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian.'This court in San Francisco Unified School Dist. v. Johnson (1971) 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669 observed that this section was reasonably susceptible of two interpretations: 'The ambiguity of section 1009.5 inheres in the phrase 'require any student or pupil to be transported.'(Fn. omitted.) (Emphasis added.) One may 'require' a student to be transported by punishing a refusal or by physically forcing him onto a school bus; in a second sense, one may 'require' a student to be transported by Assigning him to a school beyond walking distance of his home.'(Id. at p. 945, 92 Cal.Rptr. at p. 313, 479 P.2d at p. 673.)We reasoned that if the section were construed to prohibit assignment of pupils to a school beyond a reasonable walking distance from the pupil's home it would be unconstitutional. Applying the doctrine that where possible a statute will be construed in a manner that would uphold its constitutionality,*****645 **613** we accordingly held that 'section 1009.5 does no more than prohibit a school district from compelling ***324** students, without parental consent, to use means of transportation furnished by the district.'(Id. at p. 961, 92 Cal.Rptr. at p. 324, 479 P.2d at p. 784.)

FN4. Hereafter, unless otherwise indicated, all section references are to the Education Code.

Shortly after our decision in Johnson, the Legislature passed the Bagley Act adding sections 5002 and 5003 (see fn. 3, Ante) which directed school districts to 'eliminate racial and ethnic imbalance in pupil enrollment' and specified certain factors to be considered in developing plans to achieve racial balance. The proponents of Proposition 21 in their published argument in support of the proposition characterized the Bagley Act as a 'forced integration measure . . . which could only be accomplished through forced busing . . . without regard to neighborhood schools or parental consent.'They asserted opposition to 'mandatory busing for the sole purpose of achieving forced integration' and to 'reassign(ing) pupils from their neighborhood schools to achieve racial and ethnic balance.'Proposition 21 purported to eliminate

this evil by repealing the Bagley Act (ss 5002 and 5003), as well as the complementary administrative regulations, and by adding section 1009.6 which would prohibit forced integration and mandatory busing by denying the school district's power to assign pupils to schools on the basis of race.

Defendants and various amici curiae urge that Proposition 21 is unconstitutional in its entirety, both insofar as it added section 1009.6 and as it repealed sections 5002 and 5003 along with the administrative guidelines.

[2][3] We declared in Johnson that section 1009.5, if construed to bar assignment of pupils to a school beyond reasonable walking distance 'would be unconstitutional if applied to districts manifesting racial segregation, whether de jure or de facto in character.'(San Francisco Unified School Dist. v. Johnson, Supra, 3 Cal.3d at p. 954, 92 Cal.Rptr. at p. 319, 479 P.2d at p. 679.)Section 1009.6 which bars the assignment of pupils on the basis of race is unconstitutional in the same manner and for the same reasons set forth by us in Johnson.We deem it unnecessary to repeat here at length or rationale in that case; our opinion speaks for itself. We merely outline here its essentials, and underscore our conclusions with reference to subsequent United States Supreme Court cases.

First: We emphasized in Johnson that 'Often the most effective program, and at times the only program, which will eliminate segregated schools requires pupil reassignment and busing. . . . Since the U.S. Supreme Court has held that under the Constitution school boards in De jure segregated districts are 'clearly charged with the affirmative duty to ***325** take whatever steps might be necessary' to eliminate segregation 'root and branch,' a statute which would proscribe a principal, and in some cases essential and exclusive step to achieve that end, must obviously violate constitutional requirements.'(San Francisco Unified School Dist. v. Johnson, Supra, 3 Cal.3d 937, 955, 92 Cal.Rptr. 309, 320, 479 P.2d 669, 680.)(Italics added.)

Approximately three months after we expressed these views in Johnson in dealing with section 1009.5, the United States Supreme Court in Board of Education v. Swann (1971) 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 struck down a statute virtually identical with section 1009.6[FN5] (added to the code in 1972 by Proposition 21) with an unmistakably clear and forceful expression of the same constitutional mandate. 'Just as the race of students must be considered in determining whether a constitutional*****646 **614** violation has occurred, so also must race be considered in formulating a remedy. To forbid . . . all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate dual school systems. ( ) Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. . . . ( ) We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations.'(Id. at p. 46, 91 S.Ct. at p. 1286.)

> FN5.North Carolina General Statutes section 115-176.1 (Supp.1969) provides in relevant part: 'No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited . . ..'

Second: We further held in Johnson that section 1009.5 was unconstitutional as applied to school districts manifesting de facto as well as de jure racial segregation. Citing a number of decisions of lower federal courts (3 Cal.3d at p. 956, fns. 21-23, 92 Cal.Rptr. 309, 479 P.2d 669), we observed that they had not drawn a clear distinction between de facto and de jure segregation and that some of them had defined de facto segregation as 'that resulting from residential patterns in a nonracially motivated neighborhood school system.'(Id. at p. 956, 92 Cal.Rptr. at p. 321, 479 P.2d at p. 681, fn. omitted; citing inter alia, Keyes v. School Dist. No. 1, Denver, Colorado (D.Colo.1970) 313 F.Supp. 61, 73-75; Swann v. Charlotte-Mecklenburg Board of Education (4th Cir. 1970) 431 F.2d 138, 141; 3 Cal.3d at p. 956, fns. 21 and 22, 92 Cal.Rptr. 309, 479 P.2d 669.)We noted the necessary ***326** influence of school board decisions on the racial composition of

residential areas.

Canvassing these federal precedents we concluded: 'Thus under the current pattern of court decisions, neither school districts nor lower courts can determine with any confidence whether a pattern of school segregation should be classed as de facto or de jure. Consequently, if we held section 1009.5 unconstitutional only as applied to destricts of de jure segregation, no school board in California . . . could ascertain whether section 1009.5 could constitutionally apply within its district. Such a holding would, therefore, entail uncertain enforcement of section 1009.5, a confusion which would inhibit and delay school boards in their efforts to bring about full equality of equcational opportunity. The Green decision (Green v. County School Board of New Kent County (1968) 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716) calls for desegregation now; a statute which imports confusion and delay in the uprooting of de jure segregation violates both the rule prohibiting partial enforcement of legislation, when such enforcement entails the danger of vague future application, and the mandate of the Supreme Court of the United States.'(San Francisco Unified School Dist. v. Johnson, Supra, 3 Cal.3d at p. 957, 92 Cal.Rptr. at p. 321, 479 P.2d at p. 681.)

This reasoning has been substantially buttressed by the recent decision of the United States Supreme Court in Keyes v. School District, No. 1, Denver, Colo. (1973) 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548.In Keyes the high court defined de jure segregation as 'current condition of segregation resulting from intentional state action.'(Id. at p. 205, 93 S.Ct. at p. 2696.)As potentially probative of an intentional segregative action on the part of school boards, the court referred to 'policies and practices with respect to schoolsite location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc.' (Id. at pp. 213-214, 93 S.Ct. at p. 2700.)

The high court further emphasized that segregatory intent on the part of the school board is not limited to actions in the immediate present. 'We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree ***647 **615 motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional." (Id. at p. 210, 93 S.Ct. at p. 2699.)We read this to mean that a school board therefore can ascertain *327 whether the segregation present in its district is de jure or de facto only by examining the full history of acts by the school authorities and determining if, at any time in that course of action, some acts were undertaken with segregatory intent. We think it is clear that no school board or lower court can ascertain with any degree of confidence whether section 1009.6 can constitutionally apply in its district and we further believe that therefore a determination by this court that section 1009.6 can apply to districts manifesting de facto segregation would involve uncertain enforcement and improperly delay elimination of de jure segregation.

The Supreme Court has continuously reiterated its commitment to eliminating de jure racial segregation and its unwillingness to accept any limitation upon procedures necessary to the resolute and thorough accomplishment of that task. To allow school authorities to rest content in the assumption that the pattern of segregation in their district is de facto and therefore to claim that section 1009.6 prohibits them from eliminating that segregation by pupil assignment on the basis of race implemented through busing, would impermissibly impede the constitutionally mandated task of rooting out de jure segregation.'(I)f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.'(Board of Education v. Swann, Supra, 402 U.S. at p. 45, 91 S.Ct. at p. 1286.)

The high court has also recognized the discouraging fact of the 'dilatory tactics of many school authorities'; the 'failure of local authorities to meet their constitutional obligations (has) aggravated the massive problem of converting from the state-enforced discrimination of racially separate school(s).' (Swann v. Board of Education (1971) 402 U.S. 1, 14, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554.)In view of this history, it is all too clear to us that the elimination of de jure segregation would be seriously impeded if school authorities could claim a legal disability to

assign or bus pupils merely by asserting that the segregation in their district was de facto in origin.

Consistently with our earlier holding in Johnson and indeed under the compulsion of the decision of the United States Supreme Court in Swann and Keyes which confirm our views in Johnson, we hold, as ***328** indeed we must, that section 1009.6 as applied to school districts manifesting either de jure or de facto segregation is unconstitutional.

We proceed to consider a related issue. It will be recalled that Proposition 21 not only added section 1009.6 but also repealed sections 5002 and 5003 as well as certain administrative guidelines. (See fn. 3, Ante.)Various amici curiae urge that the repealing provisions of Proposition 21 (i.e., ss 2, 3 and 4) are also unconstitutional, on two grounds: (1) the repeal of these sections significantly encourages and involves the state in racial discrimination and (2) even if constitutional in themselves, the repealing provisions are tainted by the unconstitutional portion of Proposition 21 and cannot be severed from it.

On the first point amici argue that our holding in Mulkey v. Reitman (1966) 64 Cal.2d 529, 50 Cal.Rptr. 881, 413 P.2d 825 compels the conclusion that the repealing provisions are themselves unconstitutional. In Mulkey we held unconstitutional as violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution, Article I, section 26 of the California Constitution, an initiative measure appearing as Proposition 14 on the statewide ballot in the general *****648 **616** election of 1964 and adopted by the electorate. That proposition nullified state statutes aimed at eliminating racial discrimination in housing and barred the state from legislating in the future so as to limit the right of private discrimination in the sale or leasing of property. We there focused on the distinction between racial discrimination resulting from state action and that resulting from the private acts of individuals, framing the issue before us thusly: 'The only real question . . . is whether the discrimination results solely from the claimed private action or instead results at least in part from state action which is sufficiently involved to bring the matter within the proscription of the Fourteenth Amendment.'(Mulkey v. Reitman, Supra, 64 Cal.2d at p. 536, 50 Cal.Rptr. at p. 886, 413 P.2d at p. 831.)Finding the requisite state action, we concluded: 'Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged . . .. Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final, private act of discrimination itself. . . . When the electorate assumes to exercise the lawmaking function, then the electorate is as much a state agency as any of its elected officials.'(Id. at p. 542, 50 Cal.Rptr. at 890, 413 P.2d at p. 834.)Amici contend that the repealing portions of Proposition 21 (i.e., ss 2, 3 and 4) similarly were intended to, and will result in, preserving racial discrimination and ***329** segregation, in this instance in the school systems, and thus that the very passage of Proposition 21 involves the state in racial discrimination.

[4] However, Mulkey is actually of no assistance to the amici's argument. The mere fact that the initiative measures in both instances-Proposition 14 in Mulkey and Proposition 21 in the case at bench-represent state action proves nothing, since in the instant case, the state, Independent of the passage of Proposition 21, is involved in education. Indeed in Mulkey we noted this critical difference: '(I)n Jackson v. Pasadena City School Dist. (59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878), the state, because it had undertaken through school districts to provide educational facilities to the youth of the state, was required to do so in a manner which avoided segregation and unreasonable racial imbalance in its schools.'(Mulkey v. Reitman, Supra, 64 Cal.2d at p. 537, 50 Cal.Rptr. at p. 887, 413 P.2d at p. 831.)Proposition 21 by repealing the involvement of the state government in discharging the state's duty not to segregate, neither abrogated the school district's constitutional duty not to segregate nor removed the state from involvement through local school districts in the field of education. There is no problem of state involvement under the Fourteenth Amendment-it is simply a question whether the state involvement shall be solely by the local school districts or shall include involvement by the state government as well.

Amici curiae assert that, prior to the adoption of sections 14020 and 14021 of title 5 of the California Administrative Code and the passage of sections 5002 and 5003, local school districts had been very slow in seeking and achieving racial balance in the school system. As a result of the adoption of these

sections and their enforcement in the courts, there was a significantly increased activity directed toward preventing, reducing and eliminating racial imbalance in the schools. It appears clear, amici argue, that the repeal pursuant to Proposition 21 (see fn. 3, Ante, and accompanying test) of sections 5002 and 5003 will have the effect of retarding, if not reversing, this process of establishing racial balance in the schools of California. Finally, it is urged, the avowed purpose of Proposition 21 was opposition to these sections as a 'forced integration measure . . . which could only be accomplished through forced busing . . . without regard to neighborhood schools or parental consent.'(Ballot Pamphlet, argument in favor of ***649 **617 Proposition 21, as presented to the voters of the State of California, General Election (Nov. 7, 1972).)

[5] In one respect the gist of amici's argument is to ask this court to take judicial notice that local school districts fail to fulfill their constitutional obligation to desegregate, and thus to conclude that the passage of *330 Proposition 21 constituted state involvement in racial discrimination. Even if it were within our province to take such judicial notice, no facts have been presented to us supportive of amici's contention.

[6][7] In another respect, the essence of the argument is to assert that the policy of the Legislature declared in sections 5002 and 5003 is inherently invulnerable to change through an initiative measure. On the contrary, since racial balance determined according to a precise statutory formula is not a constitutional prerequisite but a matter of state policy, the people of California through the initiative process, have the power to declare state policy. The repealing provisions of Proposition 21 can conceivably be interpreted as an expression by the people of this state of their preference for a 'neighborhood school policy.' (See Keyes v. School Dist. No. 1, Denver, Colo., Supra, 413 U.S. at p. 206, 93 S.Ct. 2686.)We deem it unnecessary to the resolution of the issues now before us to determine precisely what was the intention of the electorate in this respect and accordingly intimate no views on the subject. We merely conclude that since a policy in favor of neighborhood schools is a reasonably conceivable one and since such an expression of policy can in no way limit or affect the constitutional obligations of school districts, the repealing provisions found in sections 2, 3 and 4 cannot be struck down as constitutionally impermissible. It may be that our assessment of the people's desires in this respect is erroneous; if so, constitutional processes are available to the people to reinstate what has been repealed.

We turn now to the second point of the argument, namely that the repealing sections of Proposition 21 (i.e., ss 2, 3 and 4) cannot be severed from the unconstitutional portion thereof (i.e., s 1 adding s 1009.6 to the Ed.Code) and therefore the proposition in its entirety must fall as unconstitutional.

The rule on severability is set forth in In re Blaney (1947) 30 Cal.2d 643, 655, 184 P.2d 892, 900:'But if the statute is not severable, then the void part taints the remainder and the whole becomes a nullity. It is also true that in considering the issue of severability, it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part. This is possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words. (Citations.) On the other hand, where there is no possibility of mechanical severance, as where the *331 language is so broad as to cover subjects within and without the legislative power, and the defect cannot be cured by excising any word or group of words, the problem is quite different and more difficult of solution.'(Italics added.) (In accord: Villa v. Hall (1971) 6 Cal.3d 227, 236, 98 Cal.Rptr. 460, 490 P.2d 1148; Mulkey v. Reitman, Supra, 64 Cal.2d 529, 543-544, 50 Cal.Rptr. 881, 413 P.2d 825; In re Portnoy (1942) 21 Cal.2d 237, 242, 131 P.2d 1; In re Bell (1942) 19 Cal.2d 488, 498, 122 P.2d 22; Bacon Service Corporation v. Huss (1926) 199 Cal. 21, 32-33, 248 P. 235; McCafferty v. Board of Supervisors (1969) 3 Cal.App.3d 190, 193, 83 Cal.Rptr. 229.)

[8] Proposition 21 contained a severability clause.[FN6]The valid repealing portions can easily and accurately be mechanically severed from the invalid portion enacting***650 **618 section 1009.6. 'Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable. (Citation.)' (McCafferty v. Board of Supervisors, Supra, 3 Cal.App.3d at p. 193, 83 Cal.Rptr. at p. 231.)Such a clause plus the ability to mechanically

sever the invalid part while normally allowing severability, does not conclusively dictate it. The final determination depends on whether 'the remainder . . . is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute' (In re Bell, Supra, 19 Cal.2d 488, 498, 122 P.2d 22, 28) or 'constitutes a completely operative expression of the legislative intent . . . (and) are (not) so connected with the rest of the statute as to be inseparable.'(In re Portnoy, Supra, 21 Cal.2d at p. 242, 131 P.2d at p. 3.)

> FN6.'If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.'

[9][10] Amici curiae merely assert that the various portions of the proposition are clearly inseparable. However, it seems that the valid and invalid portions of the proposition, while submitted within an overall purpose to eliminate forced integration by busing without regard to the desirability of maintaining neighborhood schools, reflect separable methods of achieving this purpose. The repealing provisions (the valid part) would eliminate a commitment to achieving racial balance in the schools, leaving local school districts with sole responsibility and without direction other than constitutional mandate; the enactment of section 1009.6 (the invalid part) went further and forced upon the local school districts the neighborhood school concept without forced busing as the only acceptable policy. Even though this restriction of local school ***332** district discretion is unconstitutional and therefore the full purpose of Proposition 21 cannot be realized, it seems eminently reasonable to suppose that those who favor the proposition would be happy to achieve at least some substantial portion of their purpose, namely to eliminate a state commitment to racial balance in the schools regardless of other considerations, and thereby to allow local control subject only to constitutional restriction. Thus, the repealing provisions are not only mechanically severable in that they are physically separate sections of the proposition, but they are also severable as to purpose and method, of independent validity and not inconsistent with the elimination of the invalid part. We hold the repealing portions of Proposition 21 to be severable. We cannot say that these portions must necessarily fall, because we hold section 1009.6 unconstitutional.[FN7]

> FN7. Amici curiae also urge that a different test should be applied to the severability of portions of an initiative measure than the above described test applied to statutes passed by the Legislature. However, in applying settled rules of severability, we can discern no meaningful distinctions between statutes 'enacted' by the people and statutes enacted by the Legislature. The cases cited by amici curiae (e.g., Bennett v. Drullard (1915) 27 Cal.App. 180, 149 P. 368; Alexander v. Mitchell (1953) 119 Cal.App.2d 816, 260 P.2d 261) involved the question of severability prior to submission to a vote and also tested severability by the degree of integration between the valid and invalid parts. However, integration is determined by the test set forth by us Supra.

We therefore conclude that Proposition 21 does not provide an independent basis for sustaining the trial court's intended injunction of the implementation of the Administration Plan since section 1009.6 added to the Education Code by the proposition bars assignment of public school students by race and is therefore unconstitutional and void under the decisional law of the United States Supreme Court and of this court, regardless of the proposition's effective repeal of other sections of the code.

[11][12][13][14][15] We accordingly proceed to address ourselves to the question whether entry*****651 **619** of judgment by the trial court on the third count in accord with its memorandum of intended decision would be an act in excess of its jurisdiction. As we have already stated, the court intended to enjoin implementation of the Administration Plan on two grounds: (1) that the Board had no jurisdiction to close the Garfield and Jefferson Schools because it had failed to include notice of the proposed closure of these schools in its published agenda as required by section 966; (2) that the Board abused its discretion in adopting the Administration Plan which required the closure of the above two schools, when in fact their closure was not reasonably necessary to effective desegregation.

*333 Section 966 requires a school board to act at meetings open to the public, with certain exceptions relating to personnel and pupil discipline matters, and to post an agenda 48 hours prior to the meeting containing '(a) list of items that will constitute the agenda for all regular meetings.'[FN8] In Carlson v. Paradise Unified Sch. Dist. (1971) 18 Cal.App.3d 196, 95 Cal.Rptr. 650, the court held the provisions of section 966 are mandatory, so that noncompliance therewith by failing to list an item of business on the agenda invalidates the board's action in respect thereto. In Carlson the school board's agenda listed as one item 'Continuation school site change.' The action in fact taken was to move the 'continuation school' to the Canyon View school building, to discontinue elementary education at that school, and to transfer the Canyon View elementary pupils to Ponderosa School. The court held that the agenda listing 'was entirely inadequate notice to a citizenry which may have been concerned over a school Closure . . . was entirely misleading and inadequate to show the whole scope of the board's intended plans.'(Carlson v. Paradise Unified Sch. Dist., Supra, 18 Cal.App.3d at p. 200, 95 Cal.Rptr. at p. 652.)

FN8. Section 966 provides in pertinent part: 'Except as provided in Section 54957 of the Government Code or in Section 967, all meetings of the governing board of any school district shall be open to the public, and all actions . . . shall be taken at such meetings and Shall be subject to the following requirements: . . . (b) A list of items that will constitute the agenda for all regular meetings Shall be posted at a place where parents and teachers may view the same at least 48 hours prior to the time of said regular meeting . . ..' (Italics added.)

In the case at bench, the posted agenda of the meeting of May 18, 1972, contained under the heading 'Desegregation/Integration Plans' Item No. 3a which read as set forth in the margin.[FN9] At the meeting, the Board adopted the Administration Plan, which among other things, closed the Jefferson School and discontinued elementary school education at the Garfield School.

FN9. Item 3a headed 'Desegregation/Integration Plans' read as follows:

'On February 3, 1972 the Board of Education set the following timetable in regard to a Desegregation/Integration Plan for the Elementary District:

'Thursday, May 4, 1972

Presentation of plans to the Board

'Thursday, May 18, 1972

Adoption of a plan by the Board

'September 1972

Implementation of plan as fully as possible

'It is expected that the Board will take action at the meeting.'

The trial court in its memorandum of intended decision concluded: 'There was no possible way (the Administration Plan was not written and was not on file) that the public could discern from the posted agenda that the Board was about to consider the closure of two elementary schools, namely, Jefferson and Garfield, as indispensable ingredients of *334 any desegregation plan. . . . Any possible reference to such matters in a published newspaper article would in no event suffice to cure the deficiency. . . . The Board did not comply with the provisions of Section 966. It therefore lacked jurisdiction to adopt the Administration Plan . . .. The closure of the Jefferson and Garfield elementary***652 **620 schools is essential to this plan, and invalidates the same.'

The Board contends that by listing adoption of a desegregation/integration plan, the posted agenda gave full and adequate notice of a wide range of possible Board actions including possible closure of schools. It is common knowledge that a desegregation/integration plan by its very nature involves a complete reworking of the school system and is likely to involve substantial changes in school attendance patterns, including pupil assignment away from neighborhood schools and busing. Thus, the agenda item gave fair warning to parents of students at any of the elementary schools that the adoption of a plan might result in their children's not attending their neighborhood school, that is Jefferson, Garfield

or any other elementary school, as the case might be. The fact that their children might end up attending a different school due to closure of their current school rather than to pupil assignment or school pairing is of little monent. The critical point is that parents were on notice that the Board at its meeting on May 18, 1972, might act in such a way that their children would no longer be able to attend Jefferson or Garfield schools.

This case is therefore clearly distinguishable from Carlson. There the item 'continuation school site change' would have in no way notified parents of children attending Canyon View Elementary School that their children would be affected by such action and certainly would not have warned them that the school might be closed. It gave fair notice to parents of continuation school students as to impending changes and to people generally concerned about financial expenditures and priorities. However, the item in no way warned Canyon View Elementary School parents that their interests might be vitally affected.

In the case at bench, by contrast, the item concerning the adoption of a 'Desegregation/Integration Plan,' in our view gives clear notice to parents of students attending Jefferson, Garfield or any other elementary school that their interests might be vitally affected. We do not believe that the agenda item must specify the particular means by which the students involved would be sent to different schools, as for example by pupil assignment, busing, pairing of schools or closure of schools. It ***335** seems to us that all such actions are fairly contained within the comprehensive language of the notice.

Indeed, if the agenda had simply indicated the adoption of a 'Desegregation/Integration Plan for the Elementary District,' we would entertain no doubt that it would have given adequate notice. However, item 3a on the agenda referred to the sequence of procedures adopted by the Board for formation of an integration plan throughout the year-'Thursday, May 4, 1972-Presentation of plans to the Board. Thursday, May 18, 1972-Adoption of a plan by the Board.' (See fn. 9, Ante.)Concerned parents and citizens could reasonably infer from this notice that no new plans were to be presented on May 18 but rather that the Board would adopt one of the plans presented on May 4. If they had no objection to any of these plans, they might reasonably assume there was no need for them to attend the May 18 meeting.

However, the Administration Plan, which had Not been presented at the May 4 meeting, differed radically from all the previous plans in many respects, most notably in providing for the closure of the Jefferson and Garfield schools. Parents of Jefferson and Garfield elementary school students had no notice that a plan involving closure of those two schools would be considered on May 18. Consequently we think that the notice by referring to the May 4 presentation of plans was misleading, by indicating that only those plans presented on May 4 would be considered for adoption on May 18. This is substantially confirmed by the very elaborate procedures adopted by the Board and participated*****653 **621** in by the community in order to prepare and screen plans for presentation to the Board on May 4.

Section 966 specifies 48 hours' notice with respect to regular meetings. It is a fair construction of the section that a board cannot change its posted agenda within the 48-hour period next immediately preceding a regular meeting; in other words, if a board wishes to change substantially its agenda within that period, it must postpone a meeting at least 48 hours. Since the Administration Plan had not been presented at the May 4 meeting and since it differed substantially from all the other plans, the Board's decision to consider and act upon it represented a substantial deviation from the posted agenda and therefore required an amendment to the agenda and a postponement of the meeting for such a period of time as to provide no less than 48 hours' notice.

It is true that the Board could have adopted a plan involving the ***336** closure of schools, if it had posted an agenda merely giving general notice of intention to adopt a desegregation/integration plan. However, once the Board posted notice that it would adopt one of the plans theretofore presented at the May 4 meeting, it thereby limited its power to consider any other substantially different plan since otherwise the posted agenda would be fatally misleading. It then became necessary for the Board to amend the posted agenda and reschedule the meeting so as to afford notice for the period of time specified by the statute.

The Board contends that the misleading effect of the notice was cured by newspaper publicity indicating

that a new plan was to be presented at the meeting of May 18. Two newspaper articles appeared explaining some of the details of the new plan. Only one of the two articles was released 48 hours or more before the meeting. Moreover, newspaper publicity cannot replace the proper posting of an agenda. Section 966 requires notice by means of an agenda posted at a specified place. The newspaper article had no official status, its contents had not been checked or authorized by the Board, and there was no guaranty that it would have been read by all persons entitled to notice. On the other hand, under the statute all persons were presumed to know when and where the agenda of a meeting was to be posted and were entitled to rely on the contents of such statutory notice without being required to scour all newspapers and other publications for possible changes.

Accordingly we conclude that the trial court properly determined, albeit for the wrong reason, that the Board had no jurisdiction to consider or approve the Administration Plan due to its noncompliance with section 966. The trial court would therefore not act in excess of its jurisdiction in enjoining the implementation of the Administration Plan, unless and until the plan was adopted by the Board at a meeting preceded by the posting of an accurate and complete agenda as required by section 966.

[16][17] The trial court, however, went further in its memorandum of intended decision and purported to permanently enjoin implementation of the Administration Plan on the ground that its adoption was an abuse of discretion by the Board since the closure of the two schools was not reasonably necessary to accomplish desegregation.[FN10]The major premise in the trial court's reasoning-that in desegregating a school *337 system, a school board is limited in the exercise of its powers to those acts reasonably necessary to effectuating desegregation-is utterly without support. The trial court concedes, as indeed it must, that the Board has power to close schools and convert them to other uses. It is, of course true that the Board is not free to exercise this power arbitrarily, but must ***654 **622 act reasonably and in accordance with established procedure. '(A) court may not substitute its judgment for that of the administrative board (citation) and if reasonable minds may disagree as to the wisdom of the board's action, its determination must be upheld.'(Manjares v. Newton (1966) 64 Cal.2d 365, 371, 49 Cal.Rptr. 805, 809, 411 P.2d 901, 905.)We have not found, nor have we been referred to, any authority supportive of the proposition that once a school board undertakes a desegregation/integration plan, its otherwise independent power to close schools becomes limited to closing only those schools which must reasonably be closed in order to accomplish desegregation. Acceptance of such a proposition would blind school boards to the full realities of the world about them, as for example, by directing in effect that they are powerless to close unsafe schools because desegregation might be effectuated without such closure.

> FN10. Plaintiffs also contend that the Board abused its discretion in adopting the Administration Plan because the plan does not meet the requirements of section 5003. Since we have held the repeal of this section valid, this argument must fail.

[18] Indeed the case at bench presents exactly this situation. On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503.[FN11]The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516.[FN12]On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable manner were it to approve abandoning this building in view * of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion. We do not think that the Board in exercising this discretion was perforce limited to determining the reasonable necessity of replacing the building and thus automatically precluded from determining the necessity of assigning students in order to achieve desegregation.

FN11. Section 15503, added in 1959 as part of the Field Act, requires all school buildings, not constructed pursuant to the Field Act, to be examined by January 1, 1970, in order to determine whether the building is safe for school use according to the standards set forth in the Field Act (s 15451 et seq.). If a school building is found to be unsafe, the governing board of that school district must prepare an estimate of the cost necessary to make the building safe.

FN12. Section 15516 provides: 'No school building examined and found to be unsafe for school use pursuant to Section 15503 and not repaired or reconstructed in accordance with the provisions of this article shall be used as a school building for elementary and secondary school or community college purposes after June 30, 1975.'

[19] In 1969 the Board adopted a master plan to guide the development of the school district. Item 6 of that plan provided: 'As soon as funds become available in the Elementary District to provide housing at expanded schools elsewhere, that Garfield School be closed and converted to a Special Education Center to provide for certain parts . . . of the Special Education program.'The superintendent incorporated this provision into his Administration Plan. Absent proof that there were no school facilities to absorb these students or no need for a special education center,[FN13] the Board, in the reasonable exercise of its discretion, could lawfully take this action. The mere fact that this action was part of a desegregation plan did not automatically strip the Board of its otherwise***655 **623 subsisting authority to act in this area, so that the establishment of an education center was contingent upon it being reasonably necessary to accomplish desegregation.

FN13. School boards have the authority to provide special education programs and facilities. (ss 6500-6742, 6750-6946.)

[20] Since the trial court proposed to so limit the discretion of the Board, it would be substituting its judgment for that of the school board and therefore acting in excess of its jurisdiction. A writ of prohibition is the appropriate remedy where a threatened judgment of the trial court will be in excess of its jurisdiction. (City & County of S.F. v. Superior Court (1959) 53 Cal.2d 236, 243, 1 Cal.Rptr. 158, 347 P.2d 294; 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, ss 36, 39, pp. 3810-3811, 3813.)

As to the instant writ proceeding (L.A. 30054) which is confined to plaintiffs' third cause of action below, we arrive at these final conclusions: (1) That section 1009.6 being unconstitutional and void does not bar the Board's Administration Plan for desegregation; (2) that the Board's power to close schools exists independently of its constitutional obligation to desegregate and is not contingent upon such closure being *339 reasonably necessary to effectuate desegregation; (3) that the posted agenda was defective insofar as it related to the closure of the two elementary schools because of the Board's failure to comply with section 966 and that, since said proposed action for closure was an inseparable part of the Administration Plan, the adoption of the plan as a whole was invalid because of such noncompliance; and (4) that in respect to the third count the trial court will not act in excess of its jurisdiction by enjoining the implementation of the Administration Plan upon the basis heretofore set forth by us, namely, for the failure of the Board to comply with section 966 but that in all other respects the intended action of the trial court as set forth in its memorandum of intended decision is in excess of the court's jurisdiction. Nothing herein, of course, shall prevent, or be deemed to prevent, the Board from adopting the Administration Plan at a new meeting held upon proper notice and in compliance with all other legal requirements.

It follows that in L.A. 30054, petitioners (defendants below) are not entitled to a peremptory writ of prohibition restraining respondent court from enjoining the implementation of the Administration Plan for failure of the Board to comply with section 966 but are entitled to such writ restraining the court's intended action in all other respects. (See Brown v. Superior Court (1949) 34 Cal.2d 559, 566, 212 P.2d 878; see 5 Witkin, Cal.Procedure (2d ed. 1971) p. 3933.) The writ shall issue accordingly.

II

[21][22][23] We now turn our attention to the appeal before us. (See fn. 2, Ante.)This is from a judgment entered on the first two causes of action which were

not stayed by our alternative writ of prohibition. The central issue here confronting us is whether the Board may lawfully be the common governing Board of both the Santa Barbara (elementary) School District and the Santa Barbara High School District despite the fact that such districts are not coterminous.

We deem it necessary to set forth the facts in some detail. The original Santa Barbara School District, which was organized sometime in the 1870's comprised all the public schools within the city limits and conducted classes from kindergarten through high school, under the leadership of the school trustees. The initial charter for the City of Santa Barbara, adopted February 20, 1899, created a school department, consisting of all the public schools in the school district, governed by a ***340** five-man board of education. The charter specified the duties and powers of the board of education in great detail and provided that the board succeeded to all the property and rights of the former school trustees.

In 1902 this single geographical school district was divided functionally into two separate districts: the elementary school***656 **624** district (known as the Santa Barbara School District) and the high school district (known as the Santa Barbara High School District), comprising both junior and senior high schools. The two districts were coterminous; their boundaries were the city limits. The single board of education remained responsible for the governing of all the public schools in the school districts, since the charter was not amended following this functional division into two school districts. Upon the adoption of new charters in 1918 and again in 1927, former provisions dealing with the board of education were revised and simplified by replacing the detailed enumeration of the board's duties and powers with an incorporation of provisions set forth in the general laws of the state. Despite these revisions, nevertheless, the new charters retained a Single board of education invested with control over all schools in that city.[FN14]

> FN14. Section 83 of the Charter of the City of Santa Barbara adopted in 1927 provided: 'The Board of Education shall consist of five members. . . .'
>
> Section 84 provided: 'The Board of Education shall have the entire control and management of the public schools in the city of Santa Barbara in accordance with the constitution and general laws of the state and said board is hereby vested with all the powers and charged with all the duties of such control and management.'
>
> Section 55 and 56 of the charter adopted in 1918 contained virtually identical provisions.

Indeed the 1927 charter specified a single board of education even though the two school districts were no longer coterminous themselves or with the city. From 1902 to 1930 while the elementary school districts remained virtually constant in size, incorporating only minor portions of adjacent unincorporated territory, the high school district annexed large portions of adjacent territory and far outstripped the elementary school district in size. By 1930 the pattern of annexations was complete. The high school district was comprised of the original high school district (i.e., coterminous with the city limits and the elementary school district) plus the geographical area of four additional elementary school districts, Montecito Union School District, Cold Springs School District, Hope School District and Goleta Union School District. These four elementary school districts were annexed solely for the purpose of becoming part of the Santa Barbara High School District. They continued to function as ***341** wholly independent elementary school districts governed by their own elementary school board.

Despite these changes in the composition and size of the elementary and high school districts no change was made in the charter. That instrument continued to direct, as it did upon its adoption in 1927 that there be a single board of education having the entire control and management of all the public schools. In 1939, section 83 of the charter (see fn. 14, Ante) was amended to provide that the members of the board should serve staggered six-year terms.

No further changes were made in the charter provisions concerning the board of education until a new charter was adopted in 1967. The new charter retained the provision for a single elective board of education, directed that its adoption should not affect boundaries of existing school districts and generally provided that all other requirements should be 'as

now or hereafter prescribed by the Education Code.[FN15] Despite the changes in language ***657 **625 the new charter provisions continued essentially the same educational scheme. The changes appear to correspond with those introduced into the Education Code in 1963, since section 900 of the charter tracks the language of section 1223 of the code.[FN16] Thus, in short the charter directs that there shall be an elective board of education and leaves other requirements to those found in the code.

FN15. Article IX of the charter headed, Board of Education, provides: 'Section 900. State Law Governs. The manner in which, the times at which, and the terms for which the members of the Board of Education shall be elected or appointed, their qualifications, compensation and removal and the number which shall constitute such board shall be as now or hereafter prescribed by the Education Code of the State of California.

'Section 901. Effect of Charter on District. The adoption of this Charter shall not have the effect of creating any new school district nor shall the adoption of this Charter have any effect upon the existence or boundaries of any present school district within the City or of which the City comprises a part.'

FN16. Section 1223 of the Education Code provides: 'Except as provided in Section 1222, whenever the charter of any city fails to provide for the manner in which, the times at which, or the terms for which the members of the city board of education shall be elected or appointed, for their qualifications, removal, or for the number which shall constitute such board, the provisions of this division shall apply to the matter not provided for.'

Section 1224 provides that the members of the board of education shall be elected at large from the territory within the boundaries of the school district or districts under the jurisdiction of the board of education, that for election purposes such territory shall include outside territory annexed to the city for school purposes, and that all qualified electors residing within the full territory shall be eligible to vote for, and *342 to be a member of, the board of education.[FN17] Therefore all qualified electors residing within the high school district, which is geographically coterminous with the five elementary school districts (Montecito, Cold Springs, Hope and school district plus the four annexed districts (Montecito, Cold Springs, Hope and Goleta)-are entitled to vote for the city board of education. At the time of trial, there were 80,203 registered voters residing within the high school district, of whom 38,174 or 47.6 percent resided within the Santa Barbara elementary school district and 42,029 or 52.4 percent resided within the four annexed elementary school districts.

FN17. Section 1224 provides: 'The members of any elective city board of education shall be elected at large from the territory within the boundaries of the school district or districts which are under the jurisdiction of the city board of education, whether sitting as a board of education, high school board, or community college board, and any qualified elector of the territory shall be eligible to be a member of such city board of education.

'When outside territory has been annexed to a city for school purposes it shall be deemed a part of the city for the purpose of holding the general municipal election, and shall form one or more election precincts, as may be determined by the legislative authority of the city. The qualified electors of the annexed territory shall vote only for the board of education or the board of school trustees.'

The four annexed elementary school districts continued to be governed by four separate elementary school boards elected separately by qualified electors residing within each elementary school district. The Santa Barbara elementary school district, however, did not have its own separate elementary school board. Instead, by virtue of the charter provisions and section 1222 of the Education Code incorporated in the charter (see fn. 15, Ante), the Santa Barbara elementary school district was governed by the city board of education.[FN18] Thus, an elector residing within one of the four annexed districts, for example Montecito, would be entitled to cast two votes-one to elect members to the Montecito Elementary School Board from the residents within that district and one to elect members to the city board of education. An

elector residing within the Santa Barbara elementary school district would be entitled to cast only one vote-that one being to elect the city board of education.

> FN18.Section 1222 provides: 'Whenever the charter of a city comprising in whole or in part an elementary school district, fails to provide for the manner in which, the times at which, and the terms for which the members of the board of education of such city are appointed, and for the number which shall constitute such board, The governing board of the elementary school district within which the city is located or with which the city is coterminous Is the board of education of the city.'(Italics added.)

As mentioned earlier, plaintiffs in their first two causes of action challenge the validity of the law permitting the city board ***658 **626 of education to govern both the high school and the elementary school districts, despite the fact that the two districts are not coterminous. The first cause of *343 action alleged that this system unconstitutionally diluted the vote of each registered voter and taxpayer within the elementary school district by over 100 percent by virtue of the votes cast by that portion of the electorate who live outside the Santa Barbara elementary school district. The second cause of action alleged that this system violated the requirements of section 924 that the governing board of an elementary school district shall consist of members elected at large from the territory comprising the elementary school district.

Following trial by the court on these two causes of action, the court made findings of fact, substantially as recited above and concluded in essence that the above voting scheme was unconstitutional as being violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. We set forth in pertinent part in the margin the court's detailed conclusions.[FN19]

> FN19.'4. Insofar as the Board governs the affairs of the Elementary School District the scheme which permits the votes of 38,174 resident electors to be counted equally with the votes of the 42,029 non-resident electors, who are in no way concerned with the government of the Elementary District, constitutes a clear denial, dilution and debasement of the vote of the resident electors of the Elementary District and a deprivation of their constitutional right to the equal protection of the law.
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> '7. The present dual function of the School Board governing a large high school district and much smaller elementary school district does not serve any governmental purpose, but is rather the result of unplanned, irregular annexations to the High School District.
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> '9. The fact in this case that voters who reside outside the boundaries of the Elementary School District, who exceed in number those who reside within the district, are given the right to vote for the School Board which formulates policy for the district, even though they are in no way subject to such policy and do not contribute any tax support thereto, is contrary to the principle that the government is to be chosen by the governed.
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> '10. The equal voting strength principle, which underlies the 'one person, one vote' doctrine, applies in this case to the electoral scheme currently employed in the election of members to the governing board of the Santa Barbara Elementary School District. That principle is violated because the votes of qualified resident electors in the plaintiffs' class are being wrongfully denied, debased and diluted by the votes of non-qualified, non-resident electors in the Elementary District election.
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> '11. There is no State interest sufficiently compelling to justify the voting scheme described herein. That scheme is unconstitutional. It violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

'. . .her

'14. To interpret Section 1224 of the Education Code to sanction the election of a common governing board for two districts whose boundaries are not coterminous, by electing the members of such board at large from the territory of the larger district, which encompasses all of the area of the smaller district plus added territory of the larger district, is to unconstitutionally apply the statute.

'15. Section 1224 of the Education Code must be interpreted to grant common governing powers to an elective city board of education over two or more districts under its jurisdiction only in cases where the boundaries of the governed districts are coterminous. In a case such as here presented, where the boundaries of the districts are not coterminous, Section 1224 may not be so interpreted to grant multiple jurisdiction to such a single elective board.'

***344** By way of remedy the court concluded that the Santa Barbara elementary school district must be governed by an independent board of resident electors of the Santa Barbara elementary school district elected at large from the territory within the elementary school district; that the present city board of education should be allowed to continue as the governing board of the high school district; that a new board consisting of five members and governing only the elementary school district should be elected on April 17, 1973, by resident electors within the Santa Barbara elementary school district and take office on July 1, 1973; that the three members with the highest vote should serve until June 30, *****659 **627** 1977, and the remaining two members should serve until June 30, 1975, each member of the board thereafter serving a four-year term. Judgment granting a peremptory writ of mandate was entered accordingly. This appeal by defendants followed.[FN20]

FN20. See fn. 2, Ante, where the procedural history of this appeal as related to the disposition of the third cause of action is explained.

We begin by epitomizing the respective positions of the parties on the appeal. Plaintiffs contend that the method of electing members of the Santa Barbara Board of Education is invalid under the state and federal Constitutions as violative of the 'one man, one vote' principle because the votes of Qualified, resident electors in the elementary school district are debased and diluted by the votes of Non-qualified, non-resident electors in the elementary district election. Plaintiffs argue that there should be, and the trial court properly ordered, a separate board of education to govern the elementary school district. Defendants, on the other hand, contend that the present method of electing members of the Board complies with applicable state law, that it does not violate the 'one man, one vote' rule, and that the trial court's ruling on this issue is in error. As we explain, Infra, we conclude that there is no constitutional right to a separate, elected elementary board of education, that there is no constitutional infirmity in designating the city board of education, elected from the full territory within its jurisdiction, to govern the lesser, wholly included elementary school district and that the 'one man, one vote' principle has no relevancy to this case.

The city board of education is elected. Each qualified elector residing within the high school district, the largest geographical area within the ***345** jurisdiction of the board of education, is eligible to become a member of the board and is entitled to vote in the election. The members are elected at large. Each vote counts equally and is weighted equally. Each qualified elector is governed by the board, subject to the policy adopted by the board, and liable for tax to support the board. It is clear and undeniable that the city board of education is elected in full compliance with the 'one man, one vote' principle.

Indeed, as they must, plaintiffs concede the election of the city board of education is valid. However, plaintiffs claim that the election of the city board of education is also an election of the governing board of the Santa Barbara elementary school district and that the Latter election violates the 'one man, one vote' principle because the votes of non-resident electors dilute the votes of the electors residing in the Santa Barbara elementary school district. There is no basis in law or fact to support this claim. There is a single city board of education which is elected in a single election by qualified resident electors. This single city board of education, by virtue of section 1222, (see fn. 18, Ante) is the governing board of the

Santa Barbara elementary school district.[FN21] The city board of education, which is elected in accordance with section 1224 (see fn. 17 Ante) is designated by the Legislature in section 1222 to govern the Santa Barbara elementary school district.

FN21. See text accompanying fns. 15 and 16, Ante.

Thus, it is abundantly clear that the election of the city board of education is a single election of a single board. The real claim advanced by plaintiffs is that they, the resident voters, taxpayers and parents within the Santa Barbara elementary school district are entitled to be governed by an independent school board, comprised of members who reside within the district and elected solely by voters who reside in the district. The United States Supreme Court has held to the contrary. In Sailors v. Board of Education (1966) 387 U.S. 105, 108, 110-111, 87 S.Ct. 1549, 1553, 18 L.Ed.2d 650, the high court held that there is no constitutional right to elect members of boards of education: 'We find no constitutional***660 **628** reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election. . . . ( ) Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects nonlegislative*346 officers, a State can appoint local officials or elect them or combine the elective and appointive system as was done here. . . . For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative officers, the principle of 'one man, one vote' has no relevancy.'

The principles announced in Sailors were recently applied in California in O'Keefe v. Atascadero County Sanitation Dist. (1971) 21 Cal.App.3d 719, 98 Cal.Rptr. 878, to a factual situation so closely analogous to the facts in this case that we regard that case as highly persuasive authority. In O'Keefe the residents of the Atascadero sanitation district, which was located in San Luis Obispo County, challenged the procedure by which the directors of the sanitation district were selected. The county is divided into five districts for the purpose of electing the board of supervisors. The sanitation district was located wholly within the boundaries of one of the five supervisorial districts. The population within the sanitation district was approximately 10 percent of the county population. By virtue of state law, the directors of the sanitation district were the board of supervisors. Since the residents of the sanitation district lived wholly within one supervisorial district, they were able to vote for only one director, while the other nonresident voters elected the other four directors of the sanitation district. The sanitation district residents claimed that their votes were diluted and debased by the votes of electors who resided outside the sanitation district but within the county.

The court concluded, however, that the directors of the sanitation district were not elected but designated by the Legislature and that the election of a board of supervisors was a single election of a single board. 'The board of directors of a county sanitation district is not elected. Rather, the members of such board are designated in Health and Safety Code s 4730. The composition of the board is determined by the location of the district in relation to other political subdivisions within the county. . . .[FN4] ( ) Since the

FN4.'Health and Safety Code section 4730: The governing body of a sanitation district is a board of directors of not less than three members. . . . If the district includes no territory which is in cities or sanitary districts, then the county board of supervisors is the board of directors of the district.'

board of directors is not chosen by election, the 'one man, one vote' principle is not applicable . . .. Appellant argues that the principle nevertheless is applicable under the facts alleged, *347 because the county board of supervisors is elected (fn. omitted) and the members of the board of directors of the Sanitation District are 'in effect elected once removed.' . . . ( ) Under section 4730 the members of the board of directors of a sanitation district are chosen by the legislature, a method expressly sanctioned in Sailors.' (O'Keefe v. Atascadero County Sanitation Dist., Supra, 21 Cal.App.3d at pp. 724-726, 98 Cal.Rptr. at p. 883.)

As in O'Keefe, the members of the governing board of the Santa Barbara elementary school district are designated by the Legislature. The Legislature in section 1222 (see fn. 21, Ante, and accompanying text) designates the city board of education to be the governing board of the Santa Barbara elementary school district. ***661 **629** This is an entirely proper procedure under Sailors. The fact that the city board of education is elected does not somehow constitute an election 'once removed' of the governing board of the Santa Barbara elementary school district just as the election of the county board of supervisors did not constitute an election 'once removed' of the directors of the sanitation district in O'Keefe.

We discern no constitutional infirmity in a system whereby the Legislature designates an elected city board of education to govern a lesser included elementary school district. We hold therefore that the present method of electing members of the Santa Barbara Board of Education is not violative of either the United States Constitution or the California Constitution and is in all respects valid under applicable state law.[FN22]

> FN22. The second cause of action claiming that the system whereby the city board of education is designated to serve as the governing board of the Santa Barbara elementary school district violated the provisions of section 924 has apparently been abandoned, since the trial court made no mention of it and since it has not been urged on appeal. Moreover, section 1222 rather than section 924 controls where a charter city with a city board of education is involved.

In L.A. 30054 let a peremptory writ of prohibition issue in accordance with the views herein expressed.

In L.A. 30086 the judgment is reversed and the cause is remanded to the trial court with direction to enter judgment in favor of defendants on the first and second stated causes of action set forth in plaintiffs' complaint.

***348** Petitioners shall recover costs in L.A. 30054 and defendants shall recover costs in L.A. 30086.

WRIGHT, C.J., and McCOMB, TOBRINER, MOSK, CLARK and BURKE,[FN*] JJ., concur.

> FN* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

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