BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

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

Public Contract Code Section 22002;

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

Case Nos.: 01-TC-28

Prevailing Wage Rate

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(*Adopted on January 30, 2009*)

Statutes 1976, Chapter 1174 (AB 3365);
Statutes 1976, Chapter 861 (SB 1953);
Statutes 1976, Chapter 599 (AB 1125);
Statutes 1976, Chapter 538 (AB 2466);
Statutes 1976, Chapter 281 (AB 2363)

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

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

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

Antioch Unified School District Labor Compliance Program, January 17, 2003.

Filed on June 28, 2002, by Clovis Unified School District,

Application to Withdraw Test Claim Filed on July 23, 3008, by Clovis Unified School District,

Substitution of Parties Filed on August 21, 2008 by Grossmont Union High School District,

Grossmont Union High School District, Claimant.

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on January 30, 2009. Mr. Keith Petersen appeared for the claimant, Grossmont Union High School District. Ms. Donna Ferebee appeared for the Department of Finance. Mr. Anthony Mischel and Mr. Gary O'Mara appeared for the Department of Industrial Relations.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis, as modified, at the hearing by a vote of 5 to 1 to partially approve this test claim.

Summary of Findings

This test claim addresses changes to the California Prevailing Wage Law (CPWL), which is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds." Contractors for public works projects that exceed $1,000 are required to pay local prevailing wages to construction workers on those projects. The requirement to pay prevailing wages is only applicable to work performed under contract, and is not applicable to work carried out by a public agency with its own forces; the requirement is applicable to contracts let for maintenance work. Local prevailing wage rates are set by the Director of the Department of Industrial Relations.

The provisions of the CPWL are only applicable when a district contracts with a private entity to carry out a public works project. The cases have consistently held that when a district makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed. The underlying decision to undertake a public works project is mandated by the state only when the public works project is for the purpose of repair or maintenance of school buildings or property. The underlying decision to contract for such a project is mandated by the state under the Public Contract Code, only when the project is not an emergency as defined and under other specified conditions related to the size of the student body and cost of the project.

The test claim statutes and regulations mandate certain activities when the CPWL provisions are triggered under the above circumstances. Some of those activities impose a new program or higher level of service on districts within the meaning of article XIII B, section 6 of the California Constitution and impose costs mandated by the state pursuant to Government Code section 17514, thus imposing a partially reimbursable state-mandated program on K-12 school districts and community college districts.

The Commission finds that Labor Code section 1776, subdivisions (g) and (h), and sections 16403, subdivision (a), and 16408, subdivision (b), of the Department of Industrial Relations' regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, but only when those activities are triggered by projects for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113, and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000. (Pub. Contract Code, § 20114.)
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654, and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000. (Pub. Contract Code, § 20655.)
3. For any K-12 school district or community college district that is subject to the Uniform Public Contract Cost Accounting Act (UPCCAA), when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.[1] (Pub. Contract Code, § 22032.)

Only the following activities for the foregoing projects are reimbursable:

- Upon a request made to the awarding body by the public for certified payroll records:
    - Obtain certified payroll records from the contractor, including specified information in the request. (Cal. Code Regs., tit. 8, § 16400, subd. (c).)
    - Send an acknowledgment to the requestor including notification of the costs to be paid for preparing the records. (Cal. Code Regs., tit. 8, § 16400, subd. (d).)
    - Provide copies of the records to the requestor. (Lab. Code, § 1776, subd. (b)(3).)
    - Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Department of Industrial Relations' Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776 in the contract. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249); Cal. Code Regs., tit. 8, § 16408, subd. (b).)

[1] Prior to January 1, 2007, the dollar limit for public projects that could be performed by the district with its own forces was $25,000.

Any fees received by school districts and community college districts pursuant to Labor Code section 1776, subdivision (e), and title 8, California Code of Regulations, section 16402 for obtaining certified payroll records from the contractor, sending an acknowledgment to the requestor, and providing copies of the records to the requestor shall be identified as offsetting revenue in the parameters and guidelines. Furthermore, any grant funds available to awarding bodies under the deferred maintenance program, or any other eligible grant program, when used for the newly mandated activities in this test claim, shall be identified in the parameters and guidelines as possible offsetting revenues.

None of the other test claim statutes, regulations or alleged executive orders that were pled mandate a new program or higher level of service subject to article XIII B, section 6.

BACKGROUND

This test claim addresses 36 statutory changes to the California Prevailing Wage Law (CPWL),[2] involving 33 Labor Code sections and more than 90 regulatory provisions, which have taken place since 1975. The CPWL is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds."[3] Contractors for public works projects that exceed $1,000 are required to pay local prevailing wages to construction workers on those projects.[4] The requirement to pay prevailing wages is only applicable to work performed under contract, and is not applicable to work carried out by a public agency with its own forces; the requirement is applicable to contracts let for maintenance work.[5] Local prevailing wage rates are set by the Director of the Department of Industrial Relations.[6]

In addition to state agencies, the CPWL applies to "political subdivisions," which include any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.[7] Thus, the CPWL applies to both school districts and community college districts. The agency or authority awarding the contract for public work is known as the "awarding body."[8]

The overall purpose of the CPWL is to benefit and protect employees on public works projects.[9] Its specific goals are to: 1) protect employees from substandard wages that might be paid if contractors could recruit from cheap-labor areas; 2) permit union contractors to compete with nonunion contractors; 3) benefit the public through the superior efficiency of

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[2] Labor Code sections 1720 et seq.

[3] *Road Sprinkler Fitters, Local Union 669 v. G & G Fire Sprinkler, Inc.* (2002) 102 Cal.App.4th 765, 776.

[4] Labor Code section 1771.

[5] *Ibid.*

[6] Labor Code section 1770.

[7] Labor Code section 1721.

[8] Labor Code section 1720.

[9] *Lusardi Construction Co. v. Aubry* (1992) 1 Cal 4th 976, 987.

well-paid employees; and 4) compensate nonpublic employees with higher wages for the absence of job security and benefits enjoyed by public employees.[10]

The CPWL does not generally cover federal projects. Those projects are addressed in the federal Davis-Bacon Act (40 USC § 276a(a)), which was enacted for a similar purpose, i.e., to protect local wage standards by preventing federal contractors from basing their bids on wages lower than those prevailing in the area.[11] However, the application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies.[12]

Public Works Defined

The Labor Code generally defines "public works" as construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds,[13] and includes: 1) design and preconstruction work;[14] 2) work done for irrigation, utility, reclamation and improvement districts;[15] 3) street, sewer, or other improvement work for public agencies;[16] 4) laying of carpet;[17] 5) certain public transportation demonstration projects;[18] and 6) hauling of refuse from a public works site to an outside disposal location.[19] Public works projects also include maintenance,[20] as defined.[21]

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[10] *Ibid.*

[11] *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883.

[12] Title 8, California Code of Regulations, section 16001, subdivision (b).

[13] Labor Code section 1720, subdivision (a)(1).

[14] *Ibid.*

[15] Labor Code section 1720, subdivision (a)(2).

[16] Labor Code section 1720, subdivision (a)(3).

[17] Labor Code section 1720, subdivisions (a)(4) and (a)(5).

[18] Labor Code section 1720, subdivision (a)(6).

[19] Labor Code section 1720.3.

[20] Labor Code section 1771; Title 8, California Code of Regulations, section 16001, subdivision (f).

[21] "Maintenance" is defined as: (1) routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system, or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired; and (2) carpentry, electrical, plumbing, glazing, touchup painting, and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures. Janitorial services of a routine, recurring or usual nature are excluded. (tit. 8, Cal. Code Regs., § 16000.)

The Labor Code also defines "paid for in whole or in part out of public funds" as payment of funds directly to or on behalf of a public works contractor, subcontractor or developer,[22] including various other types of payments,[23] and provides several types of projects that are excluded from that definition.[24]

Prevailing Wage Rates

Prevailing wage rates are set by the Director of the Department of Industrial Relations (DIR),[25] generally by reviewing local wage rates established by collective bargaining agreements and rates that may have been predetermined for federal public works.[26] The awarding body for any contract for public works is required to specify in the call for bids, the bid specifications and the contract itself, what the prevailing wage rate is for each craft, classification or type of worker needed to execute the contract.[27] In lieu of specifying the wage rates in the call for bids, bid specifications and the contract itself, the awarding body may include a statement in those documents that copies of the prevailing wage rates are on file at its principal office, which shall be made available to any interested party on request.[28] The awarding body is required to post at each job site a copy of the determination by the DIR Director of the prevailing wage rates.[29]

Prospective bidders, representatives of any craft classification or type of worker involved, or the awarding body may challenge the declared prevailing wage rates with DIR within 20 days after commencement of advertising of the bids.[30] The Director of DIR begins an investigation and within 20 days, or longer if agreed upon by all the parties, makes a determination and transmits it in writing to the awarding body and the interested parties, which delays the closing date for submitting bids or starting of work until five days after the determination.[31] The Director's determination is final, and shall be considered the determination of the awarding body.[32]

Payroll Records

Contractors and subcontractors subject to the CPWL are required to keep accurate payroll records showing name, address, social security number, work classification, straight time and overtime hours worked each day and week and actual wages paid to each worker in connection

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[22] Labor Code section 1720, subdivision (b)(1).

[23] Labor Code section 1720, subdivisions (b)(2) through (b)(6).

[24] Labor Code section 1720, subdivision (c).

[25] Labor Code section 1770.

[26] Labor Code section 1773.

[27] Labor Code section 1773.2.

[28] *Ibid.*

[29] *Ibid.*

[30] Labor Code section 1773.4.

[31] *Ibid.*

[32] *Ibid.*

with the public work,[33] and provide certified copies or make such records available for inspection, upon request of the employee, the awarding body, Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards.[34] Requests by the public are required to be made through the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement,[35] and shall be redacted to prevent disclosure of an individual's name, address and social security number.[36] The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the entity through which the request was made.[37] The awarding body is required to insert stipulations in the contract to effectuate these provisions.[38]

Discrimination on Public Works Employment Prohibited

Labor Code section 1735 prohibits contractors from discriminating on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for a violation of the CPWL.

Enforcement of CPWL

The awarding body is required to "take cognizance" of violations of the CPWL committed in the course of the public works contract, and shall promptly report any suspected violations to the Labor Commissioner.[39]

The Labor Commissioner is charged with enforcing the CPWL.[40] If the Labor Commissioner determines after an investigation that there has been a violation of the CPWL, the Labor Commissioner issues a civil wage and penalty assessment to the contractor or subcontractor or both.[41] Prior to July 1, 2001, the only way to challenge such an assessment was in court. On and after July 1, 2001, contractors or subcontractors may obtain review of a civil wage and penalty assessment through an informal settlement meeting with the Labor Commissioner,[42] or via an administrative hearing.[43] Until January 1, 2009, hearings are conducted before the DIR Director with an impartial hearing officer; thereafter the hearing will be conducted by an administrative law judge.[44] An affected contractor or subcontractor may appeal the

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[33] Labor Code section 1776, subdivision (a).

[34] Labor Code section 1776, subdivision (b).

[35] Labor Code section 1776, subdivision (b)(3).

[36] Labor Code section 1776, subdivision (e).

[37] Labor Code section 1776, subdivision (b)(3).

[38] Labor Code section 1776, subdivision (h).

[39] Labor Code section 1726.

[40] Labor Code section 1741.

[41] *Ibid.*

[42] Labor Code section 1742.1, subdivision (b).

[43] Labor Code section 1742, subdivisions (a) and (b).

[44] Labor Code section 1742, as amended by Statutes 2004, chapter 685.

administrative decision within 45 days of service of the decision by filing a petition for writ of mandate under Code of Civil Procedure section 1094.5.[45] This process provides the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner.[46]

When the Labor Commissioner issues a civil wage and penalty assessment, the awarding body is required to withhold and retain such moneys from contractor payments sufficient to satisfy the assessment.[47] The amounts withheld cannot be disbursed until receipt of a final order that is no longer subject to judicial review.[48] The awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner.[49]

Labor Compliance Program

The awarding body can avoid paying prevailing wages for public works projects of $25,000 or less when the project is for construction, and $15,000 or less when the project is for alteration, demolition, repair or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program (LCP) for all of its public works projects.[50] As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.[51]

If the awarding body enforces the CPWL as an LCP, the awarding body is entitled to keep any penalties assessed. Before taking any action, the awarding body is required to provide notice of the withholding of any contract payments to the contractor and any subcontractor.[52] The same process for review of a civil wage and penalty assessment made by the Labor Commissioner, as set forth in Labor Code sections 1742 and 1742.1, is invoked.[53] Any amount recovered from the contractor shall first satisfy the wage claim, before being applied to penalties, and if insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.[54] Wages for workers who cannot be located are placed in the

[45] Labor Code section 1742, subdivision (c).

[46] Labor Code section 1742, subdivision (g).

[47] Labor Code section 1727, subdivision (a).

[48] Labor Code section 1727, subdivision (b).

[49] Labor Code section 1742, subdivision (f).

[50] Labor Code section 1771.5, subdivision (a).

[51] Labor Code section 1771.5, subdivision (b).

[52] Labor Code section 1771.6, subdivision (a).

[53] Labor Code section 1771.6, subdivisions (b) and (c).

[54] Labor Code section 1771.6, subdivision (d).

Industrial Relations Unpaid Wage Fund and held in trust.[55] Penalties of not more than $50 per day for each worker paid less than the prevailing wage rates[56] are paid into the general fund of the awarding body that enforced the CPWL.[57]

Awarding bodies that choose to use funds derived from the Kindergarten-University Public Education Facilities Bond Acts of 2002[58] or 2004[59] for public works projects are required to adopt and enforce an LCP or contract with a third party to adopt and enforce an LCP.[60] These funds are allocated through the School Facility Program established by Chapter 12.5 of the Education Code. The State Allocation Board was required to increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the LCP.[61] Awarding bodies that choose to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of 2006,[62] however, are not subject to this requirement.

Employment of Apprentices on Public Works Projects

Properly registered apprentices are allowed to work on public works projects and must be paid prevailing wages for apprentices in the trade.[63] Apprenticeship standards are established by the DIR Division of Apprenticeship Standards,[64] and ratios of apprentices to journey level workers in a particular craft or trade on the public work are established by the particular apprenticeship program.[65] Contractors must meet various requirements with regard to employing apprentices, and the awarding body is required to include stipulations to that effect in the contract.[66]

School Facility Construction, Repairs and Funding

Beginning in 1947, the Legislature authorized the State Allocation Board to allocate funds for building and repairing schools. Legislation enacted in the late 1940s and early 1950s established a loan-grant program "to aid school districts of the State in providing necessary

[55] Labor Code section 1771.6, subdivision (e).

[56] Labor Code section 1775.

[57] Labor Code section 1771.6, subdivision (e).

[58] Proposition 47, approved by the voters at the November 5, 2002 statewide general election.

[59] Proposition 55, approved by the voters at the March 2004 statewide direct primary election.

[60] Labor Code section 1771.7, subdivision (a).

[61] Labor Code section 1771.7, subdivision (e).

[62] Proposition 1D, approved by the voters at the November 7, 2006 statewide general election.

[63] Labor Code section 1777.5, subdivisions (a) and (b).

[64] Labor Code section 1777.5, subdivision (c).

[65] Labor Code section 1777.5, subdivision (g).

[66] Labor Code section 1777.5, subdivision (n).

and adequate school sites and buildings for the pupils of the public school system…"[67] The State Department of General Services[68] administers and the State Allocation Board (SAB) allocates and apportions the funds made available to the districts with priority given to districts where the children will benefit most from additional facilities.[69]

The School Facilities Act[70] establishes a state program to provide state per pupil funding for new construction and modernization of existing school facilities[71] to be administered by the SAB.[72]

The Education Code sets out requirements that potential school building sites must meet.[73] Prior to commencing acquisition of real property for a new schoolsite or addition to an existing schoolsite, the governing board of a school district is required to evaluate property at a public hearing using the site selection standards established by the Department of Education.[74] Moreover, in the exercise of its police power, the state may through legislative action control the protection of public health, safety, and comfort in the erection of school buildings.[75] The Department of General Services is generally required to supervise the design and construction of any school building or the reconstruction or alteration of or addition to any school building.[76] Nevertheless, *whether* a school district decides to engage in a project to construct a school building is within the discretion of its governing board.[77]

Education Code section 17366 states the Legislature's intent to provide safe educational facilities for California schoolchildren as follows:

> [T]he Legislature intends that the governing board of each school district adopt a plan for the orderly repair, reconstruction, or replacement of school buildings not repaired, reconstructed, or replaced in accordance with this article.

Whenever the structural condition of any school building has been examined by designated entities or under the authorization of law and a report of the examination has been made to the governing board showing the building is unsafe for use, the governing board is required to immediately prepare an estimate of the cost necessary to make such repairs to the building(s) as are necessary, or, if necessary, to reconstruct or replace the building so that the building

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[67] Education Code sections 15700, et seq.

[68] Education Code section 15702.

[69] Education Code section 15704.

[70] Education Code sections 17070.10 et seq.

[71] Title 2, California Code of Regulations, section 1859.

[72] Education Code section 17070.35.

[73] Education Code sections 17210, et seq.

[74] Education Code sections 17211 and 17251.

[75] *Hall v. City of Taft* (1956) 47 Cal.2d 177, 184.

[76] Education Code section 17280.

[77] *People v. Oken* (1958) 159 Cal.App.2d 456, 460.

when repaired or reconstructed, or any building erected to replace it, shall meet such standards of structural safety as are established in accordance with law.[78] Using the information from the examination and report, the governing board is required to establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings.[79] If the governing board of the school district complies with these provisions, no member of that governing board may be held personally liable for injury to persons or damage to property resulting from the fact that a school building was not constructed under the requirements of Education Code sections 17280 et seq.[80]

Education Code section 17593 requires K-12 school districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Education Code section 17002 defines "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction. The instrument shall not require capital enhancements beyond the standards for which the facility was designed and constructed.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. …

Thus, both K-12 school districts and community college districts are required by statute to repair the school property of their districts.

The Education Code provides for deferred maintenance funding from the state, on a dollar-for-dollar matching basis, to K-12 school districts and community college districts.[81] Typical deferred maintenance projects include roofing, plumbing, heating, air conditioning, electrical and floor systems. For K-12 school districts, an annual Basic Grant is provided to districts for major repair or replacement listed on the district's Five Year Plan, and an Extreme Hardship Grant is provided in addition to the Basic Grant where a critical project must be completed

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[78] Education Code section 17367.

[79] *Ibid.*

[80] Education Code section 17371.

[81] Education Code sections 17582-17588 and 84660.

within one year for health and safety or structural reasons.[82] Community college projects are also subject to a five-year maintenance plan submitted to the Chancellor, and the Chancellor allocates requested funding based on three criteria: 1) projects necessary to meet safety requirements and to correct hazardous conditions; 2) scheduled maintenance necessary to prevent substantially increased maintenance or replacement costs in the future; and 3) projects necessary to prevent disruption of instructional programs.[83]

The Education Code authorizes the County Superintendent of Schools to provide for the maintenance and repair of the property of school districts under his or her jurisdiction that elect to take advantage of this service by paying into the school maintenance and repair fund established for this purpose.[84] The superintendent is authorized to hire labor for such maintenance and repair:

> The superintendent of schools of the county may employ such extra help as is necessary to perform the labor for the maintenance and repair work, as well as to provide for the supervision and transportation of the labor together with the equipment and materials for the work. The cost price of the maintenance and repair services to any school district is the original cost thereof and in addition a sum sufficient to reimburse the county superintendent of schools for all supervision, transportation, equipment, and other expenses, but the sum added shall not in any case exceed 10 percent of the cost of labor and supplies.[85]

Contracting for Public Works Projects

The Public Contract Code establishes contracting requirements for school districts and community college districts.[86] Depending on the purpose of the project and estimated dollar amount, the district may be required to contract out to the lowest responsible bidder to accomplish the project. The major requirements are outlined below.

The governing board of any school district or any community college district shall let any contracts involving an expenditure of more than $50,000[87] to the lowest responsible bidder,[88] for any of the following: 1) the purchase of equipment, materials, or supplies to be furnished, sold or leased to the district; 2) services, except construction services; or 3) repairs, including

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[82] Deferred Maintenance Program Handbook, prepared on behalf of the State Allocation Board by the Office of Public School Construction, June 2007, page 1.

[83] California Code of Regulations, title 5, sections 57200 et seq.

[84] Education Code section 1266.

[85] Education Code section 1269.

[86] Public Contract Code sections 20110 et seq. and 20650 et seq.

[87] Adjusted annually for inflation pursuant to Public Contract Code sections 20111, subdivision (d), and 20651, subdivision (d).

[88] The lowest responsible bidder shall provide security as the board requires, or all bids shall be rejected. (Pub. Contract Code, § 20111 and 20651.)

maintenance,[89] that are not a public project as defined in section 22002, subdivision (c).[90, 91] Any contract for a public project, as defined, involving an expenditure of $15,000 or more shall be let to the lowest responsible bidder who shall give security as required by the board or the board shall reject all bids.[92]

Notwithstanding the preceding requirements, in the case of an emergency when any repairs, alterations, work, or improvement is necessary to any facility of the college or public schools to permit the continuance of existing classes, or to avoid danger to life or property, the governing board of a school district or community college district may, by unanimous vote, with the approval of the county superintendent of schools, either: 1) make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing materials or supplies without advertising for or inviting bids; or 2) without regard to the number of hours needed for the job, authorize the use of day labor or force account to carry out the project.[93]

Moreover, the governing board of a school district or community college district may make repairs, alteration, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance by day labor or by force account[94] whenever the total

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[89] Public Contract Code sections 21115 and 20656 define "maintenance" as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." It includes but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." It does not include, among other types of work: "janitorial or custodial services and protection of the sort provided by guards or other security forces." It further does not include painting, repainting, or decorating other than touchup, but instead it is the intent of the Legislature that such activities be controlled directly by the provisions of section 20114 or 20655.

[90] Public Contract Code sections 20111, subdivision (a), and 20651, subdivision (a).

[91] Section 22002, subdivision (c) defines "public project" as:
(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
(2) Painting or repainting of any publicly owned, lease, or operated facility.
(3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

[92] Public Contract Code sections 20111, subdivision (b), and 20651, subdivision (b).

[93] Public Contract Code sections 20113 and 20654.

[94] In the context of the CPWL, work done by "force account" means work done by the local agency's own employees as distinguished from work performed pursuant to contract with a commercial firm for similar services. (70 Ops.Cal.Atty.Gen. 92, 97 (1987).)

number of hours on the job does not exceed 350 hours; for any school district having an average daily attendance of 35,000 or more, or for any community college district whose number of full-time equivalent students is 15,000 or greater, the governing board may perform the above activities by day labor or force account whenever the total number of hours on the job does not exceed 750 hours or when the cost of material for the job does not exceed $21,000.[95]

The Uniform Public Construction Cost Accounting Act (UPCCAA)[96]

The Uniform Public Construction Cost Accounting Act was enacted to "promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state."[97] The Act provides for developing such cost accounting standards by the California Uniform Construction Cost Accounting Commission, and an alternative method for the bidding of public works projects by public entities.[98] A public agency whose governing board has by resolution elected to become subject to this Act may use its own employees to perform projects of $30,000 or less.[99]

Test Claim Statutes, Regulations and Alleged Executive Orders

Statutes

The test claim statutes encompass changes to the CPWL in the Labor Code beginning in 1976. The relevant provisions are summarized below.

Labor Code Sections 1720, 1720.2 and 1720.3: New types of public works projects were added with these sections:

- Section 1720 was modified to add public transportation demonstration projects, design and preconstruction, including land surveying, [100] and installation projects.

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[95] Public Contract Code sections 20114 and 20655.

[96] Public Contract Code sections 22000 et seq.

[97] Public Contract Code section 22001.

[98] *Ibid.*

[99] Public Contract Code section 22032; prior to January 1, 2007, the dollar limit for public projects that could be performed by the district was $25,000.

[100] Design and preconstruction was added by Statutes 2000, Chapter 881. The Senate Rules Committee Analysis stated that the bill codified current DIR practice and regulation by including construction inspectors and land surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project. (Senate Rules Committee, Office of Senate Floor Analyses, SB 1999, August 29, 2000, page 2.) On June 9, 2000, the DIR issued a decision (Public Works Case No. 99-046) finding that construction inspectors hired to do inspection for compliance with applicable building codes and other standards for a public works project were deemed to be employed upon public works and therefore entitled to prevailing wage. This DIR decision was the subject of a lawsuit, *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, which held that even though the DIR had interpreted

- Section 1720.2 was amended to include projects done under private contract where the property subject to the contract is privately owned but upon completion of the construction work more than 50 percent of the property is leased to the state or a political subdivision for its use, and the construction work is performed according to plans or specifications furnished by the state or a political subdivision with a lease agreement that is entered into between a lessor and the state or political subdivision as lessee, during or upon completion of the project.
- Section 1720.3 was amended to include the removal of refuse from the public works construction site.

Labor Code Section 1726: A requirement was added for the awarding body, which was already required to "take cognizance" of violations, to promptly *report* suspected violations to the Labor Commissioner. The section was further amended to state that if the awarding body determines as a result of its own investigation (under a Labor Compliance Program) that there has been a violation and withholds contract payments, the Labor Compliance Program procedures in section 1771.6 shall be followed.

Labor Code Section 1727: This section was amended to state that if the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a *subcontractor's* violations, the *contractor* is required to withhold money upon request of the Labor Commissioner and transfer that money to the awarding body. In either case, the awarding body is limited to disbursing such withheld assessments until after receipt of a final order that is no longer subject to judicial review.

Labor Code Section 1735: This section, as added and amended, prohibits discrimination on public works employment for specified categories of persons, and every contractor violating the section is subject to all the penalties imposed for violations of the chapter.

Labor Code Sections 1733, 1741, 1742, 1742.1 and 1743: These sections provide for an administrative process to challenge wage and penalty assessments as set forth:

- Section 1733, relating to court challenges to wage and penalty assessments, was repealed since a new administrative procedure was established.
- Section 1741 established that the Labor Commissioner, after an investigation, shall issue a civil wage and penalty assessment on contractors and/or subcontractors that violate the CPWL, and sets the procedures for issuing the assessment.
- Section 1742 provided that contractors or subcontractors may obtain review of a civil wage and penalty assessment by the Labor Commissioner, and established procedures and additional appeal provisions. The hearing is conducted before the DIR Director with an impartial hearing officer until January 1, 2009; thereafter the hearing is conducted by an administrative law judge. Subdivision (f) provides that the awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner. Subdivision (g) provides that the section is the exclusive remedy for review of a civil

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preexisting statute to include the pre-construction activities as public works and argued that the new statute merely clarified existing law, the Supreme Court found the change in the statute operated prospectively only.

wage and penalty assessment by the Labor Commissioner or the awarding body when it acts under a Labor Compliance Program pursuant to section 1771.5.

- Section 1742.1 established procedures to allow for the contractor or subcontractor to meet with the Labor Commissioner to settle a dispute over the civil wage and penalty assessment without the need for formal proceedings. Additional procedures were established to require the awarding body, when enforcing under a Labor Compliance Program, to afford the contractor or subcontractor, upon request of such contractor or subcontractor, the opportunity to meet with the awarding body to attempt to settle any dispute without the need for formal proceedings.
- Section 1743 provided that the contractor and subcontractor shall be joint and severally liable for all amounts due pursuant to a final order, but the Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

Labor Code Section 1750: This section allows the second lowest bidder a right of action against a successful bidder, when the successful bidder has violated the Unemployment Insurance Code. It does not require any activities of awarding bodies.

Labor Code Sections 1770, 1773, 1773.1, 1773.2, 1773.5 and 1773.6: These sections were amended to require the Director of the Department of Industrial Relations to determine the general prevailing rate of per diem wages, using specified criteria, rather than the pre-1975 requirement of having this responsibility rest with the awarding body. Section 1773.2 was thus amended to remove the requirement that the awarding body annually publish prevailing wage rate determinations in the newspaper. Section 1773.5, which previously gave the Director of DIR authority to establish rules and regulations, was amended to add "including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

Labor Code Section 1771: This section was amended to establish the threshold dollar amount for contracts subject to prevailing wages at $1,000.

Labor Code Sections 1771.5, 1771.6 and 1771.7: These new sections established the ability of an awarding body to elect to initiate and enforce a Labor Compliance Program (LCP). In exchange, payment of prevailing wages is not required for any public works project of $25,000 or less when the project is for construction, or for any public works project of $15,000 or less when the project is for alteration, demolition, repair or maintenance work. An awarding body that establishes an LCP is also allowed to keep any fines or penalties assessed when it takes enforcement action. As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred. A contractor may appeal an enforcement action by a political subdivision to the Director of DIR.

Section 1771.6 was repealed and added to establish notice and withholding procedures for an awarding body that elects to enforce the CPWL under an LCP.

Section 1771.7 was repealed and later added to require that an awarding body that chooses to use funds derived from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or 2004 for a public works project shall initiate and enforce, or contract with a third party to initiate and enforce, an LCP with respect to that public works project. The provision applies to public works that commence on or after April 1, 2003.

Any awarding body choosing to use such bond funds is required to make a written finding that the awarding body has initiated and enforced, or has contracted with a third party to initiate and enforce, the Labor Compliance Program. If the awarding body is a school district, the governing body of that district shall transmit to the State Allocation Board a copy of the finding. If the awarding body is a community college district, that awarding body shall transmit a copy of the written finding to the Director of the Department of Industrial Relations.

Labor Code Section 1772: This section, which existed prior to 1975, establishes that workers employed by contractors or subcontractors in the execution of any public works project are deemed to be employed on the public work.

Labor Code Section 1775: This section was amended to increase penalty amounts assessed by the Labor Commissioner to be paid by contractors and/or subcontractors for violations of the requirement to pay prevailing wages, and to delete a requirement that the awarding body provide notice to a worker making a wage claim that there is insufficient money available from the contractor to pay such claim. Additionally, the section was changed to extend to subcontractors the liability for insufficient wage payments, and to require contractors to withhold monies due a subcontractor for such insufficient payments that are the subject of a claim filed with the Division of Labor Standards Enforcement.

Labor Code Section 1776: This section was amended to expand the requirements for contractors and subcontractors to keep certified payroll records for public works projects and furnish copies of those records to the awarding body, the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards. The amendments also require that copies of such payroll records be made available to the public through the awarding body, the Division of Labor Standards Enforcement or the Division of Apprenticeship Standards (but not by the contractor or subcontractor); if the records have not already been made available to those entities, then the requesting party is required to reimburse the costs of preparation by the contractor, subcontractors and the entity through which the request was made. Any records made available to the public must be marked or obliterated to prevent disclosure of an individual's name, address or social security number. Any records made available to a joint labor-management committee must be marked or obliterated to prevent disclosure of an individual's social security number. The body awarding the contract is required to place stipulations to effectuate these provisions in the contract. In addition, the Director of the Department of Industrial Relations was required to adopt regulations consistent with the California Public Records Act and the Information Practices Act of 1977 governing release of the records including establishment of reasonable fees to be charged for reproducing copies of the records.

Labor Code Section 1777.1: This section was added and amended to deny a contractor or subcontractor the ability to bid on or be awarded a contract for a public works project, or perform work as a subcontractor on a public works project, when the contractor or subcontractor is found by the Labor Commissioner to be in violation of prevailing wage

requirements with intent to defraud or in willful violation of the requirements. The section was also modified to require the Labor Commissioner to semi-annually publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project.

Labor Code Sections 1773.3, 1777.5, 1777.6 and 1777.7: These sections generally address apprenticeship requirements that must be met by contractors, and penalties that may be assessed for violation of those requirements. Section 1773.3, a renumbered version of pre-1975 Labor Code section 3098, requires an awarding body whose public works contract will employ apprentices to send a copy of the award to the Division of Apprenticeship Standards within five days of the award.

Labor Code Sections 1812 and 1813: These provisions, which existed prior to 1975, deal with contractor violations of the 8-hour work day limit and 40-hour work week limit. Section 1813 requires the awarding body to cause stipulations regarding these requirements to be placed in the contract, to take cognizance of violations and to report such violations to the Division of Labor Standards Enforcement.

Labor Code Section 1861: This section, which existed prior to 1975, requires contractors to sign and file with the awarding body a certification that the contractor will provide workers' compensation or equivalent insurance.

Public Contract Code Section 22002 (previously section 21002): For purposes of contracting by public agencies and school districts, this section added a definition of "public project:"

> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, lease, or operated facility.
> (2) Painting or repainting of any publicly owned, leased, or operated facility.
> (3) Construction, erection, improvement or repair of dams, reservoirs, powerplants and electrical transmission lines of 230,000 volts or higher that are publicly owned utility systems.

"Public project" does not include maintenance work; for purposes of the section, "maintenance work" includes:

> (1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
> (2) Minor repainting.
> (3) Resurfacing of streets and highways at less than one inch.
> (4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

For purposes of the chapter, "facility" is defined as any plant, building, structure, ground facility, publicly owned utility system as limited above, real property, streets and highways, or other public work improvement.

Regulations

California Code of Regulations, Title 8, sections 16000 through 17264, as pled in the test claim, implement and make specific the statutory provisions cited above.

Alleged Executive Orders

School Facility Program Substantial Progress and Expenditure Audit Guide (May 2003): This document, prepared by the Department of General Services' Office of Public School Construction (OPSC), was developed to assist school districts in meeting program reporting requirements for the School Facilities Program (SFP).

Section 3.9 of the document states that for SFP projects that require the district to implement a Labor Compliance Program, the district must submit a copy of the Department of Industrial Relations approved Labor Compliance Program to which the project conformed and, if applicable, a copy of the third party provider contract. The district must also be prepared to submit, upon request: 1) all bid invitation and contracts that must contain language alluding to Labor Code section 1770 through 1780 compliance and verification; 2) evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set in Labor Code section 1770 through 1780; and 3) evidence of weekly submittals of certified copies of payroll for all contractors and subcontractors. If the district uses its own employees to implement and administer the Labor Compliance Program, the district must account for the name of the district employee performing the Labor Compliance Program duties, the salary and benefits of that employee including transportation costs, and a specific breakdown of hours spent by project subject to the Labor Compliance Program requirements.

AB 1506 Labor Compliance Program Guidebook (February 2003): The guidebook was issued by the DIR to address newly enacted Labor Code section 1771.7. Page 3 of the document states:

> This guidebook was prepared by the [Division of Labor Standards Enforcement] and knowledgeable individuals in the private and public sector with a wide range of experience in school district issues, construction projects, public works and labor compliance. This guidebook was intended to facilitate requests to the DIR director from awarding bodies seeking approval of their own LCPs to conform to the requirements of Labor Code section 1771.7.
>
> This guidebook is not intended to be used as a substitute for the full text of statutes and regulations which comprise the prevailing wage system, or the continually developing body of law which prevailing wage enforcement has generated over the past six decades and will continue to generate in the future. Rather, this information should be viewed as a framework for implementation of an effective LCP designed to enforce prevailing wage requirements consistent with the practice of DLSE.

The guidebook summarizes the relevant provisions of the Labor Code and Title 8, California Code of Regulations, provides instructional materials and practical advice for implementing an LCP, identifies contact and resource information, includes appendices with recommended forms, commonly used terms and a checklist of labor law requirements.

Antioch Unified School District Labor Compliance Program (January 17, 2003): This document was provided as an example of a recently approved LCP, and the DIR stated in its transmittal of the document that Antioch's LCP manual "could be a model for other districts because it contains the most up-to-date information about compliance with labor standards on public works projects."

Prior Test Claim

On December 6, 2007, the Commission heard and denied the *Prevailing Wages (03-TC-13)* test claim, filed by the City of Newport Beach. This test claim alleged various changes to the CPWL, but was applicable only to local agencies and did not show that the underlying decisions to undertake public works projects subject to the CPWL are mandated by the state. The Statement of Decision found the following:

> The provisions of the CPWL are only applicable when a local agency contracts with a private entity to carry out a public works project. The test claim statutes and regulations modified several provisions of the CPWL, and local agencies that contract out for their public works projects are affected by these changes. However, the cases have consistently held that when a local agency makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed.
>
> Public works projects can arise in a myriad of ways, but there is no evidence in the record or in law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. In fact, like the exercise of eminent domain in *City of Merced*, the local agency has discretion to undertake public works projects. The courts have underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision that requires the costs to be incurred. Therefore, the Commission finds that the test claim statutes and regulations do not mandate a new program or higher level of service, and thus do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6.

Claimant's Position

Claimant asserts that the test claim statutes and regulations result in school districts and community college districts incurring costs mandated by the state by creating new state-mandated duties related to the uniquely governmental function of providing for public works. When contracting with third parties for public works as an awarding body, school districts, county offices of education and community colleges are required to do the following:

1. Obtain the applicable general prevailing rate of per diem wages from the Director of Industrial Relations before awarding a contract for public works, pursuant to Labor Code section 1773 and Title 8, California Code of Regulations, section 16202.
2. Ensure that the correct prevailing wage rates have been determined by the Director of Industrial Relations, pursuant to Title 8, California Code of Regulations, section 16204.

3. Request from the Director of Industrial Relations a coverage determination regarding a specific project or type of work to be performed, pursuant to Title 8, California Code of Regulations, section 16001.
4. File a petition for review of a determination of the Director of Industrial Relations of any rate or rates, pursuant to Title 8, California Code of Regulations, section 16302.
5. Appeal an incorrect determination made by the Director of Industrial Relations, pursuant to Labor Code section 1773.4 and Title 8, California Code of Regulations, section 16002.5.
6. Pursuant to Labor Code section 1773.2, include a statement of prevailing rates of per diem wages in the call and advertisements for bids, the bid specifications and in the public works contract itself, or, in lieu of those requirements, the district may include in the call for bids, bid specifications and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in its principal office, and in that case the district must post the statement of prevailing wages at all job sites.
7. Maintain records of ineligible contractors and subcontractors and refuse to grant them public works projects of the district, pursuant to Labor Code section 1777.1 and Title 8, California Code of Regulations, sections 16800 through 16802.
8. Send copies of all awards to the Division of Apprenticeship Standards and notify the Division of any discrepancies, pursuant to Labor Code section 1777.3.
9. Inspect and audit payroll records of contractors and subcontractors working on district public works projects, when necessary or requested by the Director of Industrial Relations, pursuant to Labor Code section 1776.
10. Obtain and provide copies of the payroll records of the contractors and subcontractors working on district public works projects, when requested by appropriate parties; the records provided are required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number, pursuant to Labor Code section 1776 and Title 8, California Code of Regulations, section 16402.
11. Pay the reasonable fees of a third party when contracting with that third party to initiate and enforce a Labor Compliance Program (LCP), pursuant to Labor Code sections 1771.5 and 1771.7.
12. For works commencing on or after April 1, 2003, oversee compliance with all the requirements of Labor Code sections 1771.5 and 1771.7, Title 8, California Code of Regulations, sections 16425 through16439, and Chapters 2, 3 and 5 of the AB 1506 Labor Compliance Program Guidebook ("Program Guidebook") when contracting with a third party to initiate and enforce an LCP, including but not necessarily limited to the withholding of contract payments and collecting and disbursing penalties and wages at the direction of the third party LCP.

13. Pursuant to Title 8, California Code of Regulations, section 16426, subdivision (a), when seeking approval of an LCP, submit evidence of the district's ability to operate its LCP and offering evidence on the following factors:
    a. Experience and training of the awarding body's personnel on public works labor compliance issues.
    b. The average number of public works contracts the awarding body annually administers.
    c. Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved.
    d. The awarding body's record of taking cognizance of Labor Code violations and withholding in the preceding five years.
    e. The availability of legal support for the LCP.
    f. The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body.
    g. The method by which the awarding body will transmit notices to the Labor Commissioner of willful violations as defined in Labor Code section 1777.1, subdivision (d).
14. Complete a request for approval deemed by the Director of DIR to be deficient, or make other corrections as required, and resubmitting the request for approval of a LCP, pursuant to Title 8, California Code of Regulations, section 16426, subdivision (b).
15. Submit a request for an extension of an LCP at least 30 days prior to the anniversary date of the initial approval, pursuant to Title 8, California Code of Regulations, section 16426, subdivision (c).
16. Make a written finding that the district has initiated and enforced, or has contracted with a third party to initiate and enforce, an LCP as described in Labor Code section 1771.5, subdivision (b), pursuant to Labor Code section 1771.7, subdivision (d)(1). Transmit a copy of such written finding for school districts to the State Allocation Board, in the manner determined by that board, pursuant to Labor Code section 1771.7, subdivision (d)(2)(A). Transmit a copy of such written finding for community college districts to the Director of DIR, in the manner determined by DIR, pursuant to Labor Code section 1771.7, subdivision (d)(3).
17. Comply with all the requirements of an LCP, when initiated and enforced by the district, pursuant to Labor Code sections 1771.5 or 1771.7 (for works commencing on or after April 1, 2003), Title 8, California Code of Regulations, sections 16425 through 16439, and Chapters 2, 3, and 5 of the Program Guidebook. These requirements include:
    a. Place in all bid invitations and public works contracts appropriate language concerning the requirements of the prevailing wage laws comprising Labor Code sections 1720 through 1861.

b. Conduct a pre-job conference with the contractor and the subcontractors to discuss federal and state labor requirements applicable to the contract.

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

d. Review and, if appropriate, audit payroll records to verify compliance with prevailing wage laws. These investigations shall be conducted by monitoring certified payroll records, investigating complaints from workers, and monitoring agencies and contractors, pursuant to the Program Guidebook, Chapter 4, Parts (A) and (B). Upon conclusion of the audit, prepare audits and findings and obtain the approval of recommended forfeitures from the Labor Commissioner.

e. Withhold contract payments when payroll records are delinquent or inadequate.

f. Withhold contract payments equal to the amount of underpayments and applicable penalties when, after investigation, it is established that underpayment has occurred. Withhold contract payments when payroll records are delinquent or inadequate, pursuant to Chapter 3 of the Program Guidebook.

g. Serve on the contractor, any affected subcontractor, and any bonding company issuing a bond securing the payment of wages, a Notice of Withholding of Contract Payments using the form attached in Appendix 2 of the Program Guidebook.

h. Mail a notice to DIR on a form titled Notice of Transmittal, found in Appendix 3 of the Program Guidebook, pursuant to Chapter 4 of the Program Guidebook.

i. When a party requests review, mail a form titled Notice of Opportunity to Review Evidence, found in Appendix 4 of the Program Guidebook, pursuant to Chapter 4 of the Program Guidebook.

18. Provide contractors and subcontractors, bonding companies and sureties with Notice of Withholding of Contract Payments, using the form found in Appendix 2 of the Program Guidebook, when minimum wage law violations are discovered by the district, pursuant to Labor Code section 1771.6 and Title 8, California Code of Regulations, section 17220. The notice shall be in writing and include the following information:

    a. a description of the nature of the violation and basis for the notice;

    b. the amount of wages, penalties and forfeitures due, including a specification of amounts that have been or will be withheld from available contract payments, as well as all additional amounts that the enforcing agency has determined are due, including the amount of any liquidated damages that potentially may be awarded under Labor Code section 1742.1, using the form found in Appendix 4 of the Program Guidebook;

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

d. information on the procedures for obtaining review of an Assessment or a Notice of Withholding of Contract Payments;

e. notice of Opportunity to request a settlement meeting under Title 8, California Code of Regulations, section 17221; and

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

19. Complete and mail a Notice of Transmittal, as found in Appendix 3 of the Program Guidebook, to the DIR to begin the administrative review process.

20. Defend Notices to Withhold Contract Payments in administrative review proceedings and in court, pursuant to Chapter 4, paragraph iv(d) of the Program Guidebook.

21. Pursuant to Chapter 6 of the Program Guidebook, when investigating worker complaints of underpayment of prevailing wage rates: a) gather supporting documents from all available sources and analyze them for authenticity; and b) conduct a complete certified payroll record and/or project audit. This includes reviewing certified payroll records for errors, inconsistencies, discrepancies, falsification, misclassification, under-reporting, and any other omissions that render the records inaccurate where needed by comparing the inspector of records' daily log with all available records.

22. Pursuant to Chapter 6 of the Program Guidebook, conduct investigations on an as-needed basis by:

    a. Calculating back wages and penalties.

    b. Reviewing findings with the contractor and any subcontractor.

    c. Writing a complete summary of the investigation with a statement of findings and recommended action for submission to DIR's Division f Labor Standards Enforcement for approval of withholdings.

    d. Conducting settlement negotiations.

    e. Testifying on behalf of the school district in appeal hearings and litigation.

    f. Attending pre-bid and job-start meetings and monitoring active construction projects.

    g. Interviewing workers to validate complaints.

23. Pursuant to Chapter 9 of the Program Guidebook, conduct audits on a random or as-needed basis, to include comparing certified payroll records to source documents such as front and back copies of canceled checks, time cards, copies of pay check stubs, payroll registers, personnel sign in sheets, daily logs and any other document which authenticates or corroborates that which has been reported.

24. Pursuant to Chapter 9 of the Program Guidebook, prepare cases and documentation to include:

a. Copies of workers' complaints.

b. Copies of all correspondence to the contractor.

c. Certified payroll records.

d. Inspector's daily log.

e. Correct prevailing wage determination and applicable increases.

f. Scope of work for trade classifications used.

g. Tabulation of bids.

h. Notice to proceed.

i. Notice of Completion (if applicable).

j. Surety company information.

k. Contractor's previous record of violations (if applicable).

l. The Notice of Withholding of Contract Payments (if applicable).

m. Release of Notice of Withholding of Contract Payments (if applicable).

n. Memo(s) to file.

25. Pursuant to Section 3.9 of the School Facility Program Substantial Progress and Expenditure Audit Guide ("Audit Guide"), in the event of any postaward audit of a school district by the State Allocation Board, pursuant to Labor Code section 1771.7, subdivision (d)(2)(C), submit a copy of the DIR approved LCP to which the project conformed and a copy of any third party provider contract.

26. Pursuant to Section 3.9 of the Audit Guide, at the time of an OSPC audit, be prepared to submit, upon request, the following:

    a. All bid invitations and contracts that must contain language alluding to Labor Code sections 1770 through 1780 compliance and verification.

    b. Evidence that a pre-job conference was conducted with the contractor and subcontractor and that the district enforced the requirements as set forth in Labor Code sections 1770 through 1780.

    c. Evidence of weekly submittals of certified copies of payrolls for all contractors and subcontractors.

27. Pursuant to Section 3.9 of the Audit Guide, if a district elects to use its own employees for its LCP, provide the following additional information:

    a. The name of the district employee performing the LCP duties.

    b. The salary and benefits of the employee including transportation costs.

    c. A specific breakdown of hours spent by project subject to the LCP requirements.

28. Report any suspected violations of the prevailing wage laws to the Labor Commissioner, pursuant to Labor Code section 1726.

29. Withhold contract payments for underpaid wages and for penalties when, through the district's own investigation, the district determines a violation of prevailing wage laws has occurred, pursuant to Labor Code section 1726.

30. Withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner, pursuant to Labor Code section 1727.

31. Retain amounts withheld to satisfy a Civil Wage and Penalty Assessment until receiving a final order no longer subject to judicial review, pursuant to Labor Code section 1727.

32. After July 1, 2001, comply with all due process requirements for the benefit of contractors and subcontractors when amounts are withheld pursuant to a Civil Wage and Penalty Assessment or a Notice of Withholding of Contract Payments, including the providing of proper and timely notices, allowing review of evidence relied upon, appearance and participation at hearings and the appeals therefrom, pursuant to Labor Code section 1742 and Title 8, California Code of Regulations, section 17220.

33. After July 1, 2001, respond to petitions for writs of mandate filed by contractors and subcontractors seeking review of orders of the Labor Commissioner, including the retention of counsel to file timely responses, participating in pre-trial discovery matters, the trial of the cause, pre-trial and post-trial briefing, and the preparation of findings and judgment, pursuant to Labor Code section 1742.

34. Grant and participate in settlement meetings requested by contractors or subcontractors in an attempt to settle any disputed issue before formal hearing procedures, pursuant to Labor Code section 1742.1 and Title 8, California Code of Regulations, section 16413.

35. As a necessary party, appear and participate in legal proceedings resulting from any action against contractor or subcontractor filed by a joint labor-management committee for failure to pay prevailing wages, pursuant to Labor Code section 1771.2.

36. Furnish copies of payroll records of a contractor or subcontractor to a joint labor-management committee, when requested, obliterated only to prevent disclosure of social security numbers, pursuant to Labor Code section 1776.

The original claimant on this claim, Clovis Unified School District, estimated that the district has incurred, or will incur, in excess of $200 in staffing and other costs in excess of revenues annually, for the period from July 1, 2000 through June 2002, to implement the new duties mandated by the state, for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement. In an amendment filed on July 31, 2003, page 7 of the Second Declaration of William McGuire states:

> To the extent that Clovis Unified School District commences a public works project subject to Labor Code Section 1771.7, it is estimated that Clovis Unified School District will incur in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or

local government agency, and for which it cannot otherwise obtain reimbursement.

In that amendment, an additional declaration was provided by Thomas J. Donner from the Santa Monica Community College District alleging costs mandated by the state.

On September 2, 2008, Grossmont Union High School District filed a declaration from Scott H. Patterson, Deputy Superintendent, Business Services, for the district estimating costs in excess of $1000 for fiscal years 2001-2002 and 2002-2003 to implement the duties described above.

On December 2, 2008, Grossmont Union High School District filed comments to the revised draft staff analysis. These comments are addressed, as necessary, in the following analysis.

Position of Department of Finance

The Department of Justice filed comments on behalf of the Department of Finance, generally stating that the test claim statutes do not impose a new program or higher level of service on school districts or community college districts since there is no reimbursable mandate for costs of programs or services incurred as a result of the exercise of local discretion, citing *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783. The Department then provides a specific response to each claim; those responses are addressed, as necessary, in the following analysis.

With regard to the test claim amendment addressing Labor Code section 1771.7, the Department states the section does not create a state mandate because districts voluntarily participate in the underlying program, i.e., the construction of schools with state bond money, citing *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 740. Even assuming there was a mandate, the Department points out that the state has provided additional funds for the costs of LCPs, and LCPs also generate revenues and costs savings. The Department argues that the claimant has not shown that it has any costs above these additional funds, revenues and cost savings.

The Department concurred with the draft staff analysis and made the following additional comments:

> [W]e note that the State School Deferred Maintenance Program (Education Code section 17582, et seq.) and the Community Colleges Facility Deferred Maintenance and Special Repair Program (Education Code section 84660 et seq.) provide State-matching funds, on a dollar-for-dollar basis, to assist school and community college districts with expenditures for major repair or replacement of existing school building components. Therefore, any projects funded through the State School Deferred Maintenance Program or the Community Colleges Facility Deferred Maintenance and Special Repair Program would have received funding to cover the State's share of any related costs resulting from the activities as recommended by the Commission to be a reimbursable state-mandated program on pages 70-71 of the draft staff analysis. We suggest the Commission consider the availability of funding provided from the State School Deferred Maintenance Program and the Community Colleges Facility Deferred Maintenance and Special Repair Program to school districts and community colleges as offsetting revenues, should the Commission adopt a decision finding a reimbursable mandate.

These comments are addressed, as necessary, in the following analysis.

Position of Department of Industrial Relations (DIR)

The DIR states that, since 1975, the state has taken on more of local agencies' historic responsibilities for determining and enforcing prevailing wages to make the prevailing wage duties clearer and less onerous, and leaving behind only minimal recordkeeping tasks. This type of shift from local agencies to the state does not trigger reimbursement under the requirements of article XIII B of the California Constitution. DIR points out that to the extent there has been any expansion in the scope of public works, the consequent obligation to pay prevailing wages directly affects private contractors and only indirectly affects local governments. DIR then provides specific responses to each claim, which are addressed, as necessary, in the following analysis.

In additional comments, DIR applies the principles of the *Department of Finance v. Commission on State Mandates (Kern High School District)* case to the test claim, concluding that claimant has not met its burden of showing districts are compelled to participate in the underlying programs, i.e., either engage in construction of school facilities or engage in such projects via contract. DIR further notes that state funding for school construction is already provided through the State Allocation Board, which allocates money to districts based on formulas that pay between 40% to 80% of the cost of construction. DIR argues that the claimant has not made a credible case that such funding does not take care of whatever costs they have incurred.

With regard to the test claim amendment addressing Labor Code section 1771.7, the DIR states that no reimbursement is required because the newly created LCPs are voluntary programs for local school districts, and districts already receive state construction bond funding for their activities from the State Allocation Board. DIR further points out that district LCPs also are allowed to retain any penalties assessed and collected while enforcing the CPWL.

The DIR filed comments on the draft staff analysis stating that:

- Any mandate that exists is so negligible as to not require subvention pursuant to *Kern High School District*, since partial state funding already exists for maintenance and repair projects in school districts and community college districts, and such funding can be used for the newly mandated tasks.
- Retaining certified payroll records for six months at most results in a negligible increase in levels of service, which should be considered de minimis.
- Inserting a clause in public works contracts pursuant to Labor Code section 1776, subdivision (h), at most results in a negligible increase in levels of service.
- Retaining contract payments for certified payroll record violations pursuant to Labor Code section 1776, subdivision (g), is not a mandate since it does not require any activity of the awarding body. Additionally, this requirement does not result in a new program or higher level of service because the obligation already was subsumed in Labor Code section 1727 which required "the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to … the terms of this chapter," and Labor Code section 1776, subdivision (g), is part of the same chapter as section 1727.

- Regarding the requirement that districts put certain projects out for bid, Public Contract Code section 22030 allows a school district or community college district to decide whether to subject itself to the thresholds set forth in the Uniform Public Construction Cost Accounting Act (UPCCAA) or the other work limits thresholds set forth in sections 20114 or 20655 of the Public Contract Code. Therefore, any project that does not create a mandate to contract with private parties under both sets of thresholds should not be considered a mandate for subvention purposes.
- The Commission should require a new declaration from the claimant to justify the test claim, since in the limited circumstances in which a mandate might exist to contract with private parties for a public project, the three alleged mandates cause virtually no increased costs.

These comments are addressed, as necessary, in the following analysis.

Position of Department of General Services, Office of Public School Construction

The Office of Public School Construction (OSPC), in commenting on the test claim amendment addressing Labor Code section 1771.7, states that participation by a school district in the School Facility Program (SFP), established by Chapter 12.5 of the Education Code, is voluntary:

> The Education Code does not compel a district to obtain funding from the State through the SFP as a condition of building schools. School districts may choose to build facilities through the use of district raised funds. Program elements are only required if a district chooses to participate in the program. Additionally, Labor Code … Section 1771.7 states "an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of 2002 … for a public works project, shall initiate and enforce … a labor compliance program".[101]

The OSPC further states that the State Allocation Board (SAB) has authority to increase the per pupil grant amount to accommodate the State's share for the additional costs due to the initiation and enforcement of an LCP; the increases were approved by the SAB on July 2, 2003, and are currently being provided.

OSPC filed an amendment to its September 15, 2003 comments addressing new bond money for public school construction that subsequently became available. The comments were amended to state:

> … Additionally, Labor Code … Section 1771.7 states "an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Act of *either* 2002 *or 2004* … for a public works project, shall initiate and enforce … a labor compliance program."
>
> The OSPC further states that the State Allocation Board (SAB) has authority to increase the per pupil grant amount to accommodate the State's share for the

[101] Comments from Department of General Services, Office of Public School Construction, Luisa M. Park, Executive Officer, September 15, 2003, page 1.

additional costs due to the initiation and enforcement of a LCP *for school projects funded from Proposition 47 or Proposition 55. Proposition 1D does not require school districts to enforce a LCP; therefore, projects that include LCPs are not eligible for funding increases under this bond.*

These comments are addressed as necessary in the following analysis.

Interested Person -- State Building and Construction Trades Council of California (AFL-CIO)

The State Building and Construction Trades Council (SBCTC) filed comments on the test claim as an interested person, pursuant to Title 2, California Code of Regulations, section 1181.1, subdivision (*l*). The SBCTC states that the test claim should be denied for the following reasons:

1. Any "mandate" imposed by the CPWL is on private contractors, not the local agency. It is possible that if private contractors have higher labor costs, such costs might be passed on to their customers; however, the contractor's cost of paying higher wages to workers on a project may well be offset by the increased skill and productivity of those workers. Several recent studies conclude that the prevailing wage law does not actually increase total school construction costs, and the claimant has presented no evidence to the contrary. SBCTC provided a copy of one study: "A Comparison of Public School Construction Costs" by Peter Philips, Ph.D., Professor of Economics, University of Utah, February, 2001.[102]
2. Although the CPWL does impose minor direct costs on school districts to administer and enforce the law, what has occurred since 1975 is the opposite of an unfunded state mandate since the state has taken upon itself responsibilities that were formerly borne by local agencies ─ i.e., determining prevailing wage rates and enforcing the CPWL.
3. It is correct to state that there has been some expansion in the definition of "public work" since 1975; however, many of the changes to that definition were actually clarifications of the pre-1975 statutory language and claimant has not presented any evidence that these minor changes have had any practical effect on school district construction projects.

The SBCTC did not file comments on the draft staff analysis.

[102] The claimant is not seeking reimbursement for the cost of increased salaries, which would not be reimbursable in any case pursuant to *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[103] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[104] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[105]

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[106] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[107]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[108] To determine if the program is new or imposes a higher level of service, the test claim requirements must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes.[109] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[110]

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[103] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[104] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735.

[105] *County of San Diego v. State of California* (*County of San Diego*) (1997) 15 Cal.4th 68, 81.

[106] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[107] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[108] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[109] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[110] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[111]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[112] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[113]

The analysis addresses the following issues:

- Do the test claim statutes, regulations or alleged executive orders impose a state-mandated program on K-12 school districts or community college districts within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes or regulations impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes or regulations impose costs mandated by the state within the meaning of Government Code section 17514 and article XIII B, section 6 of the California Constitution?

Issue 1: Do the test claim statutes, regulations or alleged executive orders impose a state-mandated program on K-12 school districts or community college districts within the meaning of article XIII B, section 6 of the California Constitution?

For the test claim statutes, regulations or alleged executive orders to impose a state-mandated program, the language must order or command a school district or community college district to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the district has made an underlying discretionary decision causing the requirements to apply, or where participation in the underlying program is voluntary, courts have held that resulting new requirements do not constitute a reimbursable state mandate.[114] Stated another way, a reimbursable state mandate is created when the test claim statutes or regulations establish conditions under which the state, rather than a local entity, has made the decision requiring the district to incur the costs of the new program.[115]

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[111] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[112] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[113] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817 (*City of San Jose*).

[114] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[115] *San Diego Unified School Dist., supra* (2004) 33 Cal.4th 859, 880.

The claimant asserts the test claim statutes, regulations and alleged executive orders require districts to perform new activities to comply with state prevailing wage requirements, the costs of which are reimbursable under article XIII B, section 6. Since the provisions of the CPWL are only applicable to public works projects performed under contract, and not to work carried out by a public agency with its own forces,[116] the analysis must first address whether the state is requiring a school district or community college district to engage in any public works projects or to contract out for such projects. Then, the alleged new activities must be analyzed to determine whether they are required or mandated by the plain language of the test claim statutes, regulations, or alleged executive orders.

Do Districts Have Discretion to Undertake Public Works Projects?

Types of Public Works Projects Subject to CPWL

The Labor Code sets forth the types of projects that are considered "public works," subject to the CPWL. Prior to 1975, public works projects subject to prevailing wages generally included: 1) construction; 2) alteration; 3) demolition; 4) repair work; 5) work done for irrigation, utility, reclamation and improvement districts; 6) street, sewer or other improvement work; 7) laying of carpet; and 8) maintenance work.[117] Since 1975, the test claim statutes added new types of public works projects:

- Labor Code section 1720 was modified to add:
    - public transportation demonstration projects (effective August 7, 1989);
    - design and preconstruction, including land surveying (effective January 1, 2001); and
    - installation projects (effective January 1, 2002).
- Effective January 1, 1981, Labor Code section 1720.2 was amended to include projects done under private contract where the property subject to the contract is privately owned but upon completion of the construction work more than 50 percent of the property is leased to the state or a political subdivision for its use *and* the construction work is performed according to plans or specifications furnished by the state or a political subdivision with a lease agreement that is entered into between a lessor and the state or political subdivision as lessee during or upon completion of the project.
- Effective January 1, 2000, Labor Code section 1720.3 was amended to state that contracts for the removal of refuse from a public works construction site entered into by "any political subdivision" – which includes K-12 school districts and community college districts – are public works projects.

Each of these new types of public works projects is now subject to the CPWL.[118] The timing for CPWL coverage is significant here for purposes of the mandates analysis. The pre-existing

[116] Labor Code section 1771.

[117] Labor Code sections 1720 and 1771 in effect as of January 1, 1975.

[118] Labor Code section 1771: "… not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed … shall be paid to all workers employed on public works."

public works projects were already subject to the pre-existing CPWL administrative requirements, while the new public works projects only became subject to and therefore triggered the pre-existing requirements at the time they were enacted.[119] Thus, for pre-existing public works projects, only the *newly-imposed* CPWL administrative requirements that are claimed could be subject to reimbursement. For *newly-covered* public works projects, however, all CPWL administrative requirements *that are claimed*, both pre-existing and new, could be subject to reimbursement.

Discretion to Undertake Public Works Projects

The foregoing provisions show that the CPWL covers a broad range of public works projects. The decision to undertake such projects could arise in a myriad of ways, from a district-level decision to an initiative enacted by the voters.

With regard to K-12 school districts, Education Code section 17593 requires those districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Moreover, Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Education Code section 17002 defines "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction. The instrument shall not require capital enhancements beyond the standards for which the facility was designed and constructed.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. …

Thus, both K-12 school districts and community college districts are required by statute to repair the school property of their districts. Since "property" includes "any external thing over which the rights of possession, use, and enjoyment are exercised,"[120] the requirement to repair includes real property as well as facilities owned by the district. Moreover, because the term "repair" is defined as "to restore to sound condition after damage or injury" and "to renew or

[119] See footnote 97 regarding effective date for CPWL coverage of design and pre-construction, including land surveying.

[120] Black's Law Dictionary, Seventh Edition, 1999, page 1232, column 2.

refresh,"[121] the Commission finds that "repair" includes "maintenance" for purposes of these provisions.

These statutes, therefore, require K-12 school districts and community college districts to repair and maintain their facilities and property.

Aside from the above statutory requirements, however, the state has not required districts to undertake other public works projects that *do not* involve repair or maintenance, including the newly-covered public works projects. In fact, with regard to new construction of school buildings, the Second District Court of Appeal has stated: "Where, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[122]

In comments filed December 2, 2008, claimant argues that local school districts are required by state law to construct school facilities and use state funds and, therefore, the activities required by the test claim statutes and regulations are reimbursable in those circumstances. The claimant states, on page 2 of its comments, the following:

> Article IX, Section 5, of the California Constitution requires the Legislature to " … provide for a system of common schools by which a free school shall be kept up and supported in each district …" The Constitution makes public education a matter of statewide rather than local concern. [Citation omitted.] The Legislature's power over the public school system is plenary, subject only to constitutional restraints. [Citation omitted.] "Where the Legislature delegates the local functioning of the school system to local boards, districts or municipalities, it does so, always, with its constitutional power and responsibility for ultimate control for the common welfare in reserve." [Citation omitted.]
>
> The Legislature has stated repeatedly that it is an obligation and function of the state to provide adequate school sites and buildings for the public school system and has delegated this duty to local school districts. [Footnote omitted citing Education Code sections on the State School Building Aid Law of 1949 and 1952, School Housing Aid for Rehabilitation and Replacement of Structurally Inadequate School Facilities, Urban School Construction Law of 1968, the Leroy Greene State School Building Lease-Purchase Law of 1976, and the School District Revenue Bond Act.] Indeed, there is a tremendous unmet need for new construction and modernization. The California Department of Education estimated as of September 2007 that 16 new classrooms and 21 modernized classrooms *per day* are needed. …Once the local school districts are funded, hundreds of state statutes and regulations govern all aspects of planning and building new school facilities. … Numerous helpful publications have been issued by the California Department of Education and the Office of Public School Construction. Regardless, the actual construction of the facilities is the responsibility of the local school districts to be accomplished pursuant to these state rules when utilizing state funds.

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[121] Webster's II, New Collegiate Dictionary, 1999, page 939, column 2.

[122] *People v. Oken, supra,* 159 Cal.App.2d 456, 460.

> There are also specific statutory requirements for providing school facilities. Governing boards are legally required to build new school facilities when there is a vote by the district directing them to do so, as required by Education Code section 17340. Section 17573 requires the governing board to provide a "warm, healthful place" for children to eat their lunches. Section 17576 requires that sufficient restrooms are provided. If a school facility is found unsafe, Education Code Sections 17367 and 81162 (pertaining to K-12 school districts and community college districts respectively) require that the governing board adopt a plan to either repair, reconstruct, or replace the unsafe school building.

The Commission disagrees with the claimant's argument that school districts are required by state law to construct school facilities and use state funds. It is true, as claimant states, that courts have consistently held public education to be a matter of statewide rather than a local or municipal concern, and that the Legislature's power over the public school system is plenary.[123] These conclusions are true for every Education Code statute that comes before the Commission on the question of reimbursement under article XIII B, section 6 of the California Constitution. It is also true that the state is the beneficial owner of all school properties and that local school districts hold title as trustee for the state.[124]

Nevertheless, article IX, section 14 of the California Constitution allows the Legislature to authorize the governing boards of all school districts to initiate and carry on any program or activity, or to act in any manner that is not in conflict with state law. In this respect, it has been and continues to be the legislative policy of the state to strengthen and encourage local responsibility for control of public education through local school districts.[125] The governing boards of K-12 school districts may hold and convey property for the use and benefit of the school district.[126] Governing boards of K-12 school districts have also been given broad authority by the Legislature to decide when to build and maintain a schoolhouse and, "when desirable, may establish additional schools in the district."[127] Governing boards of community college districts are required to manage and control all school property within their districts, and have the power to acquire and improve property for school purposes.[128] Thus, under state law, the decision to construct a school facility lies with the governing boards of school districts and community college districts, and is not legally compelled by the state.

Moreover, the claimant misinterprets Education Code sections 17367 and 81162. These statutes do not require the governing boards of K-12 and community college districts to reconstruct or replace school buildings. These statutes require school district and community college district governing boards to prepare an estimate of the costs when a report from an

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[123] See, *Hayes, supra*, 11 Cal.App.4th 1564, 1579, fn. 5; *California Teachers Assn. v. Huff* (1992) 5 Cal.App.4th 1513, 1524; *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179.

[124] *Hayes, supra*, 11 Cal.App.4th 1564, 1579, fn. 5.

[125] *California Teachers Assn., supra*, 5 Cal.App.4th 1513, 1523; Education Code section 14000.

[126] Education Code sections 35162.

[127] Education Code sections 17340, 17342.

[128] Education Code sections 81600, 81606, 81670 et seq., 81702 et seq.

examination of a school building shows that it is unsafe, and to use the information acquired to establish a system of priorities for the repair, reconstruction, or replacement of that building based on the estimate of costs. The statutes state in relevant part the following:

> Whenever an examination of the structural condition of any school building of a school district has been made by the Department of General Services, or by any licensed structural engineer or licensed architect for the governing board of the school district, or under the authorization of law, and a report of the examination, including the findings and recommendations of the agency or person making the examination, has been made to the governing board of the district, and the report shows that the building is unsafe for use, t*he governing board of the district shall immediately have prepared an estimate of the cost* necessary to make such repairs to the building or buildings as are necessary, or, if necessary, to reconstruct or replace the building so that the building when repaired or reconstructed , or any building erected to replace it, shall meet such standards of structural safety as are established in accordance with law. The estimate shall be based on current costs and may include other costs to reflect modern educational needs. Also an estimate of the cost of replacement based on the standards established by the State Allocation Board for area per pupil and cost per square foot, shall be made and reported.
>
> The report repaired by this section shall include a statement that each of the buildings examined is safe or unsafe for school use. For the purpose of this statement the sole consideration shall be protection of life and the prevention of personal injury at a level of safety equivalent to that established by Article 3 (commencing with Section 17280) of this chapter and the rules and regulations adopted thereunder, disregarding, insofar as possible, such building damage not jeopardizing life which would be expected from one disturbance of nature of the intensity used for design purposes in said rules and regulations.
>
> The governing board, utilizing the information acquired from the examination and report developed pursuant to this section, *shall establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings*. (Emphasis added.)

There are no statutes or regulations requiring the governing boards of school districts to construct or reconstruct unsafe buildings. The decision to reconstruct, or even abandon an unsafe building, is a decision left to the discretion of a school district. In *Santa Barbara School District v. Superior Court*, the California Supreme Court addressed a school district's decision to abandon two of its schools that were determined unsafe, instead of reconstructing a new building, as part of its desegregation plan.[129] The court held that absent proof that there were no school facilities to absorb the students, the school district, "in the reasonable exercise of its discretion, could lawfully take this action."[130] The court describes the facts and the district's decision as follows:

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[129] *Santa Barbara School District v. Superior Court* (1975) 13 Cal.3d 315, 337-338.

[130] *Id.* at page 338.

> On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503 [a former statute with language similar to Education Code sections 17367 and 81162]. The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516. On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable manner were it to approve abandoning this building in view of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion.[131]

Thus, the state has not legally compelled school districts to construct new school facilities in these circumstances.

Moreover, the financing of school facilities has traditionally been the responsibility of local government, with *assistance* provided by the state. In 1985, the California Supreme Court decided *Candid Enterprises, Inc. v. Grossmont Union High School District*, which provides a good historical summary of school facility funding up until that time.[132]

> In California the financing of public school facilities has traditionally been the responsibility of local government. "Before the *Serrano v. Priest* decision in 1971, school districts supported their activities mainly by levying ad valorem taxes on real property within their districts." [Citation omitted.] Specifically, although school districts had received some state assistance since 1947, and especially since 1952 with the enactment of the State School Building Aid Law of 1952 (Ed. Code, § 16000 et seq.), they financed the construction and maintenance of school facilities through the issuance of local bonds repaid from real property taxes.
>
> After the *Serrano* decision [citation omitted] and to the present day, local government remained primarily responsible for school facility financing, but has often been thrust into circumstances in which it has been able to discharge its responsibility, if at all, only with the greatest difficulty. In these years, the burden on different localities has been different: extremely heavy on those that have experienced growth in enrollment, light on those that have experienced decline, and somewhere in between on those that have remained stable.

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[131] *Id*. at page 337.

[132] *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878.

> In the early 1970's, because of resistance to increasing real property taxes, localities throughout the state began to experience greater difficulty in obtaining voter approval of bond issues to finance school facility construction and maintenance. As a result, a number of communities chose to impose on developers school-impact fees … in order to make new development cover the costs of school facilities attributable to it. [Citation omitted.]
>
> With the passage of Proposition 13 in 1978 the burden of school financing became even heavier. "Proposition 13 prohibits ad valorem property taxes in excess of 1% except to finance previously authorized indebtedness. Since most localities have reached this 1% limit, school districts cannot raise property taxes even if two-thirds of a district's voters wanted to finance school construction." [Citation omitted.] Moreover, although Proposition 13 authorizes the imposition of "special taxes" by a vote of two-thirds of the electorate, such special taxes have rarely been imposed, remain novel, and as consequence are evidently not perceived as a practical method of school facility financing – especially in view of the need for a two-thirds vote of the electorate to approve them. [Citation omitted.]
>
> In the face of such difficulties besetting local governments, the state has not taken over any substantial part of the responsibility of financing school facilities, less still full responsibility. To be sure, in order to implement the *Serrano* decision the Legislature has significantly increased assistance to education. But it has channeled by far the greater part of such assistance into educational programs and the lesser part into school facilities; in fiscal year 1981-1982, for example, only 3.6 percent went for such facilities. [Citation omitted.][133,134]

State assistance for construction of school facilities comes exclusively from statewide general obligation bonds, and is implemented through the State Allocation Board.[135] The general obligation bonds approved by the voters from 1949 through 1998 for school facilities, and the amounts available for assistance, are listed below:

Bond Initiative	Funds Authorized
School Building Aid Law of 1949	$250,000,000
School Building Aid Law of 1952	$185,000,000
	$100,000,000
	$220,000,000
	$300,000,000
	$200,000,000

[133] *Id.* at pages 881-882.

[134] See also Exhibit Q, pages 1613-1659, "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," by Joel Cohen, Prepared at the Request of Senator Quentin Kopp, February 1999.

[135] *Id*. at page 1636.

School Building Aid Law of 1952 (continued)	$260,000,000
	$275,000,000
	$350,000,000
	$150,000,000
School Building Lease-Purchase Bond Law of 1982	$500,000,000
School Building Lease-Purchase Bond Law of 1984	$450,000,000
Green-Hughes School Building Lease- Purchase	$800,000,000
School Facilities Bond Act of 1988	$800,000,000
1988 School Facilities Bond Act	$800,000,000
1990 School Facilities Bond Act	$800,000,000
School Facilities Bond Act of 1990	$800,000,000
School Facilities Bond Act of 1992	$1,900,000,000
1992 School Facilities Bond Act	$900,000,000
Public Education Facilities Bond Act of 1996 (Proposition 203)	$3,000,000,000
Class-size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998 (Proposition 1A)	$9,200,000,000

In 2002, the voters approved Propositions 47 and 55, the Kindergarten-University Public Education Facilities Bond Acts, which provided an additional $21.4 billion in state funding for school facility projects.[136] In 2006, the voters approved Proposition 1D to provide an additional $7.3 billion in bond funds to assist K-12 school districts to repair and modernize older facilities, and to accommodate overcrowding and future enrollment growth.[137]

Before Proposition 13, these bond funds were provided to school districts through loan programs, in which districts were required to repay their assistance with property tax revenues or local bond funds. After Proposition 13, the State Allocation Board shifted its policy of providing bond fund assistance from a loan-based program to a grant-based program.[138] Today, the grant funds are provided through the School Facility Program, under the provisions

[136] See ante, pages 12-13.

[137] Exhibit BB to Item 6, January 30, 2009 Commission Hearing, School Facility Program Handbook, July 2007, page 2104.

[138] Exhibit Q to Item 6, January 30, 2009 Commission Hearing, pages 1622-1623, 1629, "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," by Joel Cohen, Prepared at the Request of Senator Quentin Kopp, February 1999.

of the Leroy F. Greene School Facilities Act of 1998 (Ed. Code, § 17170.10 et seq.). The School Facility Program Handbook, published by the State Allocation Board, Office of Public School Construction in July 2007, is in Exhibit BB of the record. Under the School Facility Program, state bond funding is provided in the form of per pupil grants, with supplemental grants for site development, site acquisition, and other project specific costs when warranted.[139] New construction grants provide funding on a 50/50 state and local match basis. Modernization grants provide funding on a 60/40 basis. Districts that are unable to provide local matching funds and are able to meet the financial hardship provisions may be eligible for additional state funding.[140]

Not all school districts elect to receive assistance from state bond funds when constructing new facilities. The "School Facility Financing" handbook prepared in February 1999, states in endnote 2 on page 1653, that:

> If a school district wants state funding for construction or repair of a school, it must apply to the State Allocation Board for the money. *There are school districts that repair and construct school buildings without the assistance from the State Allocation Board* (i.e., San Diego Unified School District, San Luis Unified School District). (Emphasis added.)

Moreover, Education Code section 17268 further provides that a governing board of a school district that "elects not to receive state funds" pursuant to the School Facility Program is not required to comply with specified environmental reports when constructing school facilities.

In addition, school districts have the authority to seek financing from alternative local sources. For example, in 1986, the voters approved Proposition 46, which amended Proposition 13 (Cal. Const., art. XIII A, § 1, subd. (b)) by restoring to local governments, including school districts, the ability to issue local obligation bonds and to levy a property tax increase to pay the debt service subject to a two-thirds vote of the local electorate. This amendment allowed school districts to augment the 1% cap on property taxes and to secure additional bond indebtedness to build and improve their schools.[141] Also in 1986, the Legislature authorized school districts to directly impose developer fees on new developments to finance school

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[139] Exhibit BB to Item 6, January 30, 2009 Commission Hearing, School Facility Program Handbook, July 2007, page 2103.

[140] *Ibid*.

[141] See also, Education Code sections 15100 et seq., 81901 et seq.

construction.[142] Proceeds from the sale of surplus property, [143] Mello-Roos funds, and federal grants may also be available.[144]

Therefore, the state has not legally compelled school districts to construct new school facilities or undertake other public works projects that *do not* involve repair or maintenance. "Where, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[145]

Moreover, the Commission finds that school districts are not practically compelled by the state to construct new facilities and use state funds. Claimant argues that school districts are practically compelled to construct new school facilities when existing facilities become inadequate. Claimant further argues that practical compulsion exists because the "Legislature has not provided local districts sufficient taxing authority."[146]

Absent such legal compulsion, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences.[147] Rather, local entities that have discretion will make the choices that are ultimately the most beneficial for the entity and its community:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will

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[142] Exhibit Q to Item 6, January 30, 2009 Commission Hearing, page 1631; see also, Education Code section 17620, subdivision (a)(1), which states that "The governing board of any school district is authorized to levy a fee, charge, dedication, or other requirement against any construction within the boundaries of the district, for the purpose of funding the construction or reconstruction of school facilities, subject to the limitations set forth in [Government Code section 65995 et seq.] …"

[143] Education Code section 17100.

[144] Exhibit BB to Item 6, January 30, 2009 Commission Hearing, School Facility Handbook, July 2007, page 2114.

[145] *People v. Oken, supra,* 159 Cal.App.2d 456, 460.

[146] Claimant comments dated December 2, 2008.

[147] *Kern High School Dist., supra,* 30 Cal.4th727, 754.

> decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[148]

Here, there is no evidence in the law or in the record that school districts that elect not to construct new school facilities and use state bond funds face certain and severe penalties such as double taxation or other draconian consequences. Instead, public works projects, including construction of school facilities, that are entered into for purposes other than repair and maintenance are discretionary decisions of the district, analogous to the situation in *City of Merced*. There, the issue before the court was whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill, when a local agency exercised the power of eminent domain.[149] The court stated:

> Whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[150]

The Supreme Court in *Kern High School District* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[151]

The Code of Civil Procedure provision that was cited in *City of Merced* states:

> Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.[152]

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[148] *Id*. at 753.

[149] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

[150] *Id.* at 783.

[151] *Kern High School District, supra,* 30 Cal.4th 727, 743.

[152] Code of Civil Procedure section 1230.030.

The Law Revision Commission's comment on this provision stated:

> Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. …[153]

The holding in *City of Merced* applies in this instance. Any costs incurred under the prevailing wage statutes result from the school district's decision to undertake a public works project to construct or reconstruct school facilities, rather than from a decision made by the state. Under such circumstances, reimbursement is not required.[154]

Therefore, the Commission finds that the state has required K-12 school districts and community college districts to undertake public works projects to repair or maintain facilities and property of K-12 school districts and community college districts, pursuant to Education Code sections 17002, 17565, 17593 and 81601. The state has *not* required these districts to undertake any other public works projects. Consequently, any prevailing wage requirements, *when triggered by a public works project that does not address repair or maintenance*, are not mandated by the state and are not subject to article XIII B, section 6.

Moreover, since repair and maintenance types of public works projects were covered by the CPWL prior to 1975, only those CPWL administrative requirements claimed that were imposed *on or after January 1, 1975*, could be subject to reimbursement.

Do Districts Have Discretion to Contract for Repair or Maintenance Public Works Projects?

Since the requirement to pay prevailing wages is limited to work performed under contract, the next question is whether the state requires K-12 school districts or community college districts to contract for public works projects for repair or maintenance of school facilities or property, or whether the district can use its own forces for the project. As more fully described below, the state sometimes requires districts to contract for repair and maintenance of school facilities and property, depending upon project variables and the laws under which the district operates.

The Public Contract Code governs when districts are required to contract with private entities, and generally requires school districts and community college districts to contract with the lowest responsible bidder for construction, repairs and maintenance.[155] There are exceptions, however. For instance, when emergency repairs are needed for any facility to permit the continuance of existing classes or to avoid danger to life or property, the governing board of a school district or community college district is allowed to use its own forces to make such repairs.[156] In addition, the governing board of a school district or community college district is

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[153] California Law Revision Commission comment, 19 West's Annotated Code of Civil Procedure (1982 ed.) following section 1230.030, p. 414.

[154] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 880.

[155] Public Contract Code sections 20111 and 20651.

[156] Public Contract Code sections 20113 and 20654.

allowed to use its own forces to make repairs and other improvements under certain labor hour or material cost limits. For K-12 school districts, Public Contract Code section 20114 provides the following labor hour or material cost limits:

> (a) In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20115[157, 158] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20115, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of material does not exceed

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[157] Public Contract Code section 20115 defines "maintenance" in this instance as "routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purpose in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired." This includes, but is not limited to: "carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures." These provisions express the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20114.

[158] For purposes of the Labor Code, "maintenance" is similarly defined:

> (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
> (2) Carpentry, electrical, plumbing, glazing, touchup painting, and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continually usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.
> EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.
> EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.
> (3) Landscape maintenance. See Public Contract Code Section 21002 [subsequently renumbered to section 22002].
> EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded. (Title 8, Cal. Code Regs., tit. 8, § 16000.)

twenty-one thousand dollars ($21,000).
(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

For community college districts, Public Contract Code section 20655 provides the following labor hour or material cost limits:

(a) In each community college district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20656[159] by day labor, or by force account, whenever the total number of hours on the job does not exceed 350 hours. Moreover, in any district whose number of full-time equivalent students is 15,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus, or equipment, including painting or repainting, and perform maintenance, as defined in Section 20656, by day labor or by force account whenever the total number of hours on the job does not exceed 750 hours, or when the cost of materials does not exceed twenty-one thousand dollars ($21,000).
(b) For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

Notwithstanding the above provisions, a flat dollar threshold for public projects, as defined in Public Contract Code section 22002,[160] is established when a K-12 school district or

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[159] Public Contract Code section 20656 defines "maintenance" for this purpose in the same manner as Public Contract Code section 20115. Section 20656 expresses the Legislature's intent that maintenance does not include painting, repainting, or decorating other than touchup, but instead those activities are to be controlled directly by the work limits under section 20655.

[160] Subdivision (c) defines "public project" as:

(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and *repair* work involving any publicly owned, leased, or operated facility.[160]
(2) Painting or repainting of any publicly owned, lease, or operated facility.
(3) In the case of a publicly owned utility system, "public project" shall include only construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher. (Emphasis added.)

Subdivision (d) states that "public project" does not include "maintenance work" which includes all of the following:

(1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.
(2) Minor repainting.
(3) Resurfacing of streets and highways at less than one inch.
(4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler

community college district operates under the Uniform Public Construction Cost Accounting Act (UPCCAA).[161] Public Contract Code section 22001 sets forth the following findings and declarations regarding the UPCCAA:

> The Legislature finds and declares that there is a statewide need to promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state. This chapter provides for the development of cost accounting standards and an alternative method for the bidding of public works projects by public entities.

Section 22030 provides that the UPCCAA is only applicable to a district whose governing board has by resolution elected to become subject to its procedures and has notified the State Controller of the election. Once the district has elected to become subject to the UPCCAA, in the event of a conflict with any other provision of law relative to bidding procedures, the alternative bidding procedures and cost threshold under the UPCCAA for public projects, as defined, shall apply.[162]

The UPCCAA provides that public projects, which exclude maintenance, of $30,000 or less may be performed by a school district or community college district by its own forces.[163] In cases of emergency when repair or replacements are necessary, the work may be done by a district with its own forces.[164] Thus, for those districts subject to the UPCCAA, when the public project is not an emergency, contracting is required for a public project, as defined, when the cost of such project will exceed $30,000. When the project is for maintenance or other work that does not fall within the definition of public project, districts subject to the UPCCAA *may* use the bidding procedures set forth under the UPCCAA and in that situation would likewise be required to contract when the cost of the project will exceed $30,000.[165] Here, repair or maintenance projects – those that are legally required by Education Code sections 17002, 17565, 17593 and 81601 as noted above – could fall under the UPCCAA definition for public project, or may not. But in either case, for districts subject to the UPCCAA, when the project is not an emergency, contracting is required only when the cost of the project will exceed $30,000.

The Department of Industrial Relations (DIR) states that section 22030 of the Public Contract Code allows a school district to decide whether to subject itself to the UPCCAA thresholds or

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

[161] Public Contract Code sections 22000 et seq.

[162] Public Contract Code section 22030.

[163] Public Contract Code section 22032; prior to January 1, 2007, the dollar limit for public projects that could be performed by the district was $25,000.

[164] Public Contract Code section 22035.

[165] Public Contract Code section 22003.

the K-12 and community college thresholds and thus being subject to one or the other is a choice.[166] DIR concludes that "any project that does not create a mandate to contract with private parties under both sets of thresholds should not be considered a mandate for subvention purposes."[167]

The Commission agrees that there is a choice on the part of the school district to become subject to the UPCCAA. However, the Commission disagrees with DIR's conclusion that unless the project is required to be contracted under both sets of thresholds it should not be considered a mandate for subvention purposes.

A district choosing the UPCCAA is subject to an entirely different set of bidding and accounting procedures for public projects, as defined, and is required to adopt an informal bidding ordinance for public projects of $125,000 or less.[168] And, where there is a conflict with any other provision of law relative to bidding procedures on public projects, the alternative bidding procedures set forth in the UPCCAA, including the $30,000 threshold, are controlling.[169] Thus, once the election is made, both the state and local UPCCAA rules are in place.

DIR appears to be reading a requirement into the law that is not there. A basic rule of statutory construction requires that a statute be given its plain meaning, and express requirements that the Legislature has not placed in the statute may not by implication be brought into a statute's interpretation.[170] The Legislature has given districts a choice to be subject to the UPCCAA, and a public works project is *either* subject to the labor hour/material cost thresholds, which vary significantly depending on the size of the district and the type of project, *or* the UPCCAA $30,000 project threshold, but not both. In either case, the CPWL program requirements will be triggered at the applicable threshold, and variables from the project itself will determine whether the threshold is reached. A district's decision to fall within the UPCCAA – a decision that may not have anything to do with a particular public project – does not operate as a trigger or a limit to what may be reimbursable. To require the district to apply both sets of thresholds each time it undertakes a project for purposes of determining the point at which subvention is allowed is not consistent with mandates case law or the purpose of article XIII B, section 6. Consequently, the Commission concludes that the threshold at which a project must be let to contract depends upon the applicable Public Contract Code bidding procedures under which the district operates.

Accordingly, the Commission finds that the state has required K-12 school districts and community college districts to undertake public works projects to repair or maintain their facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, via contract under the following circumstances:

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[166] Letter from Anthony Mischel, Attorney At Law, Department of Industrial Relations, April 14, 2008, page 4.

[167] *Ibid.*

[168] Public Contract Code section 22034.

[169] Public Contract Code section 22030.

[170] *In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.`

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.
3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Thus, repair or maintenance public works projects, but only when contracted for under the circumstances set forth above, are not discretionary. Moreover, since repair and maintenance public works projects were covered by the CPWL prior to 1975, only those CPWL administrative requirements claimed, that were imposed *on or after January 1, 1975*, could be subject to reimbursement.

Do the Test Claim Statutes, Regulations and Alleged Executive Orders Mandate Any Activities When a District is Required to Contract for Repairs or Maintenance of School Buildings or Property?

The next question is whether the plain language of the test claim statutes, regulations or alleged executive orders, on or after January 1, 1975, mandates any activities on K-12 school districts or community college districts when a district is required by law to contract for repair or maintenance public works projects.

A. Determining Prevailing Wage Coverage and Rates

1. Obtain Correct Prevailing Wage Rates – Labor Code Section 1773 and Title 8, California Code of Regulations, Sections 16202 and 16204

Labor Code section 1773 states in relevant part:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director of Industrial Relations.

Section 16202 of the regulations states in relevant part:

> (a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

Section 16204 of the regulations, dealing with effective dates of rate determinations and rates, states in relevant part:

> (a)(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

The plain language of this regulation requires the awarding body to "ensure" that the correct determination is used. This provision does not impose the activity of ensuring that the Director of Industrial Relations made a correct determination, as claimant asserts; rather it imposes the activity of ensuring that the appropriate wage rates, as determined by Director of Industrial Relations and as obtained by the awarding body, are properly used in the contract.

Thus, the plain language of the statute and regulations cited require the awarding body to obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract.

2. Coverage Determinations – Title 8, California Code of Regulations, Section 16001

Section 16001 of the regulations states in relevant part:

> (a)(1) Any interested party … *may* file with the Director of Industrial Relations … a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as a public works under the Labor Code. …
>
> (2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director … any documents, arguments, or authorities it *wishes* to have considered in the coverage determination process. (Emphasis added.)
>
> (3) All parties to the coverage determination request shall have a continuing duty to provide the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, with relevant documents in their possession or control, until a determination is made. Where any party or parties' agent has a document in their possession, *but refuses to release a copy*, the Department shall consider that the documents, if released, would contain information adverse to the withholding party's position and may close the record and render a decision on the basis of that inference and the information received. (Emphasis added.)

Section 16000 defines "interested party" to include contractors, subcontractors, workers, and "[a]ny awarding body or association or other representative of awarding bodies concerned with the administration of a public works contract or proposed contract, which is subject to the particular prevailing wage determination."

The claimant argues that section 16001, subdivision (a)(3), results in a mandate for the school district to provide the Director of Industrial Relations relevant documents in possession or control until a coverage determination is made. The claimant states that "[t]he school district, as the awarding body, is necessarily a party to any coverage determination request."[171]

The plain language of section 16001 shows that an awarding body may, but is not required to, request a coverage determination from the Director of Industrial Relations. The awarding body must provide documentation to the Director by a date certain if it *wishes* to have that documentation considered. Thus, no activities are required of the awarding body by section 16001, subdivision (a)(1) and (2).

Moreover, the Commission finds that section 16001, subdivision (a)(3), does not impose a state-mandated duty on school districts. The plain language of subdivision (a)(3), covers the situation where a party, which by definition includes the awarding body, can refuse to release documents to the Director of Industrial Relations. Under such circumstances, the Department can still render a decision. Thus, any costs incurred under section 16001 results from the decision of a school district, rather than the state, to release relevant documents. Under such circumstances, reimbursement is not required.[172]

3. Review of Prevailing Wage Rate Determination – Title 8, California Code of Regulations, Section 16302

Section 16302 of the regulations provides that an interested party, including an awarding body, "*may* file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director …" (Emphasis added.) Thus, the awarding body is not required to file such a petition, and no activities are required.

4. Appeal of Public Work Coverage Determination – Labor Code Section 1773.4 and Title 8, California Code of Regulations, Section 16002.5

Section 16002.5 of the regulations, as it interprets Labor Code section 1773.4, provides that an interested party, including an awarding body, "*may* appeal to the Director of Industrial Relations … a determination of coverage under the public works laws … regarding either a specific project or type of work …" (Emphasis added.) Thus, the awarding body is not required to make such appeal, and no activities are required.

B. Notices and Reports

1. Statement of Prevailing Wage Rates – Labor Code Section 1773.2

Labor Code section 1773.2 states:

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

[171] Claimant's comments dated December 2, 2008, pages 6-7.

[172] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 880.

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

Labor Code section 1773.2 does impose on the awarding body the activity of providing notice, in either of the fashions set forth.

2. Ineligible Contractors and Subcontractors – Labor Code Section 1777.1 and Title 8, California Code of Regulations, Sections 16800, 16801, subdivision (a), [173] and 16802.

Labor Code section 1777.1, subdivision (d), requires the Labor Commissioner, not less than semi-annually, to "publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project …" Contractors and subcontractors are ineligible to bid on or be awarded a public works contract whenever it is found that the contractor violated the prevailing wage law with the intent to defraud. Sections 16800 through 16802 set forth procedures for the Division of Labor Standards Enforcement to investigate and conduct hearings for debarment of contractors and subcontractors.

The claimant contends that section 16801, subdivisions (a), requires the awarding body to comply with a subpoena issued by the Division of Labor Standards Enforcement. Section 16801, subdivision (a)(2)(C), states in relevant part the following:

> … The Respondent [as defined in section 16800 as "any person or entity subject to the proceedings set forth in this article"] shall be entitled to a reasonable number of subpoenas but shall be liable for any costs of service of the subpoenas, or any other witness or mileage fees incurred.
>
> Mileage and Witness fees shall be set as specified in Government Code section 68093. In the exercise of his or her discretion, the Hearing Officer may limit the number of witnesses subpoenaed either for the purpose of corroboration or for establishing a single material fact in issue, or where the Respondent has not furnished satisfactory evidence that the witness will be able to give necessary and competent testimony material to the issues at the hearing.

The plain language of section 16801, subdivision (a)(2)(C), provides for subpoena authority, but does not require or mandate awarding bodies to comply.

Accordingly, the Commission finds that Labor Code section 1777.1, and title 8, California Code of Regulations, sections 16800, 16801, subdivision (a), and 16802 do not impose any mandated activities on the awarding body.

[173] Title 8, California Code of Regulations, section 16801, subdivision (b), is discussed below with the requirements of Labor Code section 1776, subdivision (h).

3. Notice Regarding Apprenticeship Standards – Labor Code Sections 1773.3 and 1777.5, Subdivision (n)

Labor Code section 1773.3 states:

> An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. … Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

Section 1777.5 sets apprenticeship standards. Subdivision (n) states:

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

The plain language of the test claim statute requires the awarding body, when apprentices will be used in the contract, to include language in the contract regarding apprenticeship requirements and provide a copy of the contract award to the Division of Apprenticeship Standards.

4. Take Cognizance of and Report Suspected Violations ─ Labor Code Section 1726

Labor Code section 1726 states in relevant part:

> The body awarding the contract for public work shall take cognizance of violations of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

Thus, the plain language of this test claim statute requires the awarding body to take cognizance of and report any suspected violations to the Labor Commissioner.

D. Payroll Records – Labor Code Section 1776 and Title 8, California Code of Regulations, Sections 16400 – 16403, 16801, subdivision (b)

Labor Code section 1776 states in relevant part:

> (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury …
>
> (b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

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

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

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

…

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

…

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

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

(i) The director shall adopt rules consistent with the California Public Records Act … and the Information Practices Act of 1977 … governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section. (Emphasis added.)

Section 16801, subdivision (b), of the regulations requires the awarding body to inform the contractor of the requirements of Labor Code section 1776. That section states the following:

> Awarding Bodies. Any awarding body which has awarded or let a contract or purchase order to be paid for in whole or in part from public funds … *shall, in accordance with Labor Code section 1776(g)*, inform prime contractors of the requirements of Labor Code section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code section 1777.1. (Emphasis added.)

This regulation specifically requires the awarding body to inform the contractor of the provisions of Labor Code section 1776 in accordance with Labor Code section 1776, subdivision (g). Former Labor Code section 1776, subdivision (g), required the awarding body to insert the prevailing wage requirements of the code section into the contract with the contractor.[174] That requirement is now in Labor Code section 1776, subdivision (h). Thus, the Commission finds that the requirement to "inform prime contractors of the requirements of Labor Code section 1776" in section 16801, subdivision (b), is required to be accomplished by inserting the requirements in the contract.

Section 16400 of the regulations further provides in relevant part:

> (c) Acknowledgment of Request. The public entity receiving a request for payroll records *shall* acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.
>
> (d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:
>
> (1) Specify the records to be provided and the form upon which the information is to be provided;
>
> (2) Conspicuous notice of the following:

[174] See Statutes 1983, chapter 681.

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty-five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and

(4) Provide for inspection.

(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice. (Emphasis added.)

Section 16401 provides that the format for reporting payroll records by the contractor shall be on a form provided by the public entity and that copies of such forms are available at any office of the Division of Labor Standards Enforcement throughout the state. The section also provides specified words for the required certification, but allows the public entity to require a more strict or extensive form of certification.

Section 16402 of the regulations states:

> The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

Section 16403 of the regulations states:

> (a) Records received from the employing contractor *shall* be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;
>
> (b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;
>
> (c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying

nature which will reasonably preclude release of private or confidential information. (Emphasis added.)

In summary, requests by the public for certified payroll records can only be made through the awarding body, the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards. Once the awarding body receives a request for the records from the public, the awarding body is required to send an acknowledgment to the requesting party and indicate to the requestor the costs for preparing the records. The awarding body's request to the contractor for the records must include specified information. Any copies of certified payroll records provided to the public shall be redacted to prevent disclosure of an individual's name, address, social security number and other private information. However, the activity of redacting payroll records can be performed by the contractor and is not mandated by the state to be performed by the awarding body. The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the awarding body or other entity through which the request was made; the regulation establishes those costs, and requires that payment be made by the person seeking the record prior to release of the documents to cover the actual costs of preparation. The regulations further require that the awarding body keep unredacted copies of any such payroll records on file for at least 6 months following completion and acceptance of the project, or longer if the project is disputed. Upon request of the Division of Apprenticeship Standards or the Division of Labor Standards, the awarding body is required to withhold from contractor progress payments any penalties for the contractor's noncompliance. The body awarding the contract is also required to include in the contract stipulations regarding the contractor's requirements regarding payroll records.

With regard to providing certified payroll records to a joint labor-management committee under Labor Code section 1776, subdivision (e), it is unclear from the plain language of the statute whether such records must be provided by the awarding body or if such records may be provided by the contractor, since subdivision (b)(3) states: "The public shall not be given access to the records at the principal office of the contractor."

In interpreting statutes, the primary rule is to ascertain the intent of the Legislature so as to effectuate the purpose of the statute.[175] The first step is to examine the statutory language, giving the words their usual and ordinary meaning.[176] If there is ambiguity, extrinsic sources including legislative history may be used so that the general purpose of the statute is promoted rather than defeated.[177]

In this case, the Legislature enacted statutes to allow a joint labor-management committee the ability to independently enforce prevailing wage requirements under Labor Code section 1771.2.[178] As part of that enactment, section 1776 was modified to address certified payroll records released to a joint labor-management committee. The Senate Rules Committee bill analysis stated:

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[175] *Estate of Griswold* (2001) 25 Cal 4th 904, 910.

[176] *Id.* at 911.

[177] *Ibid.*

[178] Statutes 2001, chapter 804.

> This bill provides that a federally recognized joint labor-management committee may obtain a copy of a certified payroll from a *contractor* on a public works project, but with names and social security numbers deleted. If the committee discovers unpaid prevailing wages or fringe benefits due, and related penalties, it may file a civil action to collect them. …[179] (Emphasis added.)

Thus it is clear from the legislative history that the provisions were intended to allow the joint labor-management committee to obtain certified payroll records directly from the contractor rather than the awarding body.

Therefore, the test claim statutes and regulations require awarding bodies to perform the following activities:

- Upon a request made to the awarding body by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
  - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
  - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
  - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
- Withhold penalties from contractor progress payments for noncompliance with section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
- Insert stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776 in the contract. (Lab. Code, § 1776, subd. (h); Cal. Code Regs, tit. 8, § 16801, subd. (b).)

DIR asserts that withholding penalties from contractor progress payments for certified payroll record violations pursuant to Labor Code section 1776, subdivision (g), is not a mandate because it does not require any action by an awarding body. Instead, DIR argues, the same analysis of Labor Code section 1727 applies here, i.e., where the plain language of the test claim statute *prohibits* the awarding body from disbursing withheld money, no activities are required.

DIR misconstrues the mandate analysis of Labor Code section 1727 in E.2. below. There, the analysis found that the plain language of the statute *does* require the awarding body to engage in the activity of withholding money from contractor payments to satisfy a civil wage and penalty assessment issued by the Labor Commissioner. The plain language of that section also *prohibits* disbursement of such funds to any entity – either the Labor Commissioner or the contractor – until a final order that is no longer subject to judicial review is issued. Thus, the

[179] Senate Rules Committee, Office of Senate Floor Analyses, Senate Bill No. (SB) 588 Bill Analysis, September 12, 2001, page 2.

analyses of the two sections are consistent and Labor Code section 1776, subdivision (g), and does in fact mandate the awarding body to withhold penalties from contractor progress payments for noncompliance with section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement.

E. Withholdings

1. Withhold Contract Payments Based on District Determination – Labor Code Section 1726

Labor Code section 1726 states in relevant part that "if the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed." The plain language of this statute does not require the awarding body to engage in the activity of investigating a potential violation of the chapter.

2. Withhold and Retain Contract Payments to Satisfy Civil Wage and Penalty Assessments – Labor Code Section 1727

Labor Code section 1727 states:

> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.
>
> (b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed until receipt of a final order that is no longer subject to judicial review.

Thus, the Commission finds that the plain language of the statute requires the awarding body to withhold from contractor payments the amount necessary to satisfy a civil wage and penalty assessment issued by the Labor Commissioner. If the awarding body has not retained sufficient money to satisfy the assessment, the awarding body is required to receive from the contractor any money withheld from the subcontractor for such purpose.

3. Release Withheld Funds – Labor Code Section 1742, Subdivision (f)

Labor Code section 1742, subdivision (f), states in relevant part that "[a]n awarding body that has withheld funds in response to a civil wage and penalty assessment … shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds … to the Labor Commissioner."

The plain language of this statute requires the activity of releasing funds to the Labor Commissioner upon receipt of the final order.

F. Labor Compliance Program

Claimant pled several activities required of districts when they implement a Labor Compliance Program pursuant to Labor Code section 1771.5.[180] Ordinarily, the prevailing wage requirements are applicable for every public works project that exceeds $1,000.[181] Section 1771.5 states in pertinent part that if an awarding body *elects* to initiate and enforce a Labor Compliance Program, the awarding body can avoid prevailing wage requirements for public works projects of up to $25,000 for construction work or up to $15,000 for alteration, demolition, repair or maintenance work. Section 1771.7 further provides that an awarding body that *chooses* to use funds derived from the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004 *shall* initiate and enforce a Labor Compliance Program. Nothing in the plain language of section 1771.5 *requires* the awarding body to elect to initiate or enforce, and therefore undertake any activities related to, a Labor Compliance Program, nor does the plain language of sections 1771.5 or 1771.7 *require* the awarding body to use funds derived from the referenced bond measures. The claimant further alleges that school districts participating in a design-build contract pursuant to Education Code section 17250.10, et seq. and 81700, et seq., are required to establish and enforce a labor compliance program. School districts are authorized by Education Code sections 17250.20 and 81702 to enter into design-build contracts, but are not required to do so. The Commission therefore finds there is no "legal" compulsion for K-12 school districts or community colleges to initiate and enforce a Labor Compliance Program.

Absent such legal compulsion, the courts have ruled at times that "practical" compulsion might be found. As noted above, the Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences.[182]

The Department of General Services, Office of Public School Construction, asserts that the law does not compel a district to obtain funding from the state as a condition of building schools, and school districts may choose to build facilities through the use of district raised funds. Claimant argues that the use of *district* raised funds is not realistic, citing several Education Code provisions which "strictly limit" the district's ability to issue local school bonds and manifest the Legislature's intent that the state should provide financing for school construction.

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[180] With regard to initiating and enforcing a Labor Compliance Program, claimant pled Labor Code sections 1771.5, 1771.6 and 1771.7, Title 8, California Code of Regulations sections 16425 – 16439 and 17220 – 17221, "AB 1506 Labor Compliance Program Guidebook," "School Facility Program Substantial Progress and Expenditure Audit Guide," and "Antioch Unified School District Labor Compliance Program."

[181] Labor Code section 1771.

[182] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

Claimant summarized the argument as follows:

> In summary, the last 60 years of legislative history shows repeated and consistent recognition that school districts are unable to meet the school construction needs of their pupils. The history repeatedly reveals an admission that the education of school children is the primary responsibility of the state. The history of the inability of school districts and the obligation of the state to educate children results in the above recited litany of state money for school construction at low or no interest rates, repayment requirements of less than the amounts apportioned, and repayment terms unavailable anywhere else. Education of children is an obligation and function of the state. Classrooms are required to provide that education. Therefore, building classrooms is a state obligation.[183]

In the foregoing analysis regarding public works projects, however, the Commission found that the only public works projects mandated by the state are projects the districts undertake for repair and maintenance. Since no compulsion to undertake other types of public works projects was found, the only issue here is whether K-12 school districts and community college districts are compelled to use Kindergarten-University Public Education Facilities Bond Act of 2002 and 2004 funds for repair and maintenance projects, thereby triggering the requirement for the district to implement an LCP. For the reasons stated below, the Commission finds no such compulsion exists under the test claim statutes, regulations, or alleged executive orders, or under other law or in the record.

Claimant argues that requiring the district to use district-raised funds rather than state funds "results in non-legal compulsion in the form of double taxation which is prohibited by *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70-76."[184] That California Supreme Court case dealt with a claim seeking subvention of costs imposed as a result of a state statute which extended federally-mandated coverage of the state's unemployment insurance law to include state and local agencies.[185] The court noted that federal law provides powerful incentives to enactment of unemployment insurance protection by the individual states, i.e., "certified" state programs, and described the current situation as follows:

> In current form, the Federal Unemployment Tax Act (hereafter FUTA) … assesses an annual tax upon the gross wages paid by covered private employers nationwide. The tax rate, which has varied over the years, stands at 6.2 percent for calendar year 1990. (Citations omitted.) However, employers in a state with a federally "certified" unemployment insurance program may credit their contributions to the state system against up to 90 percent of the federal tax. … A "certified" state program also qualifies for federal administrative funds. (Citations omitted.)[186]

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[183] Claimant comments, submitted October 20, 2003, page 10.

[184] *Ibid.*

[185] *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 51.

[186] *Id.* at 58.

One of the questions before the court was whether the new state law, because of the federal incentives for enacting it, was in fact a "federal" mandate.[187] The court ruled that the state statute in question was actually a federal mandate; since the statute was not subject to the tax and spend limitations of articles XIII A and B, the local agency could tax and spend as necessary to meet expenses of the new legislation.[188] The court reasoned that "certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense,"[189] and provided the following explanation:

> If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty – full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.
>
> …
>
> Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[190]

Claimant points out that in November of 2002 the voters approved Proposition 47, the Kindergarten-University Public Education Facilities Bond Act of 2002, which allocated more than $8 billion for new construction and more than $3 billion for the modernization of school facilities, which is a state general obligation bond measure to be repaid by taxation levied on all residents of the state, including school district constituents.[191] In response to the Office of Public School Construction's suggestion that a school district has the discretion to build new facilities through the use of district raised funds, claimant argues that any district raised funds "would need to be repaid from taxes raised only from the constituents of that school district."[192] Claimant further argues that since any election to use district funds does not relieve the residents of that district from still paying taxes to reduce the state bonds, the citizens of the district would then be subject to "double taxation."[193] Claimant concludes that

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[187] *Id.* at 70.

[188] *Id.* at 76.

[189] *Id.* at 73-74.

[190] *Id.* at 74.

[191] Claimant comments, submitted October 20, 2003, page 14.

[192] *Ibid.*

[193] *Ibid.*

the "only reasonable alternative to school districts is to use available Proposition 47 state funds and to enforce a labor compliance program."[194]

The Commission disagrees that using local general obligation bonds constitutes the "intolerable expense" of "double taxation" as described by the Supreme Court in *City of Sacramento*, or that school districts have no reasonable alternative to using funds available from Proposition 47 (2002 Kindergarten-University measure) or Proposition 55 (2004 Kindergarten-University measure). In fact, the ballot measure that enacted Proposition 47 states that, in addition to funding from state and local general obligation bonds, school districts also receive significant funds from developer fees and special local bonds known as "Mello-Roos" bonds.[195] The School Facility Program Handbook, which provides assistance to districts in applying for and obtaining these bond funds, notes that additional sources of funds for districts include, in addition to general obligation bonds, proceeds from the sale of surplus property and federal grants.[196] Under the Deferred Maintenance Program, K-12 school districts and community college districts can receive state matching funds, on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of existing school building components so that the educational process may safely continue.[197] None of these additional sources of funds triggers the requirement to initiate and establish an LCP.

Moreover, the purposes for the 2002 and 2004 bond measures, as stated in the ballot materials, were to provide funds for K-12 school districts to buy land, construct new buildings, reconstruct or modernize existing buildings, provide relief for critically overcrowded schools, and construct buildings for joint use; and for community college districts, the funds were intended to construct new buildings and related infrastructure, alter existing buildings, and purchase equipment for use in these buildings.[198]

Thus, although some of the 2002 and 2004 bond funds will likely be used for repairs, that was not their primary purpose. Furthermore, as noted above, K-12 school districts and community college districts have several funding alternatives to accomplish repair and maintenance. The Supreme Court in *Kern* stated that school districts, in the exercise of their discretion, will make the choices that are ultimately the most beneficial for the district:

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[194] *Ibid.*

[195] Official Voter Information Guide, General Election Tuesday, November 5, 2002, Proposition 47, Analysis by the Legislative Analyst, page 1.

[196] School Facility Program Handbook, A guide to assist with applying for and obtaining grant funds, prepared by the Office of Public School Construction, July 2007, page 12.

[197] Education Code sections 17582 – 17588 and 84660 et seq.; Deferred Maintenance Program Handbook, A guide to assist school districts in applying for and obtaining "grant" funds for the purposes of performing deferred maintenance work on school facilities, prepared by the Office of Public School Construction, June 2007, page 1.

[198] Official Voter Information Guide, General Election, Tuesday, November 5, 2002, Proposition 47, Analysis by the Legislative Analyst, page 2; Official Voter Information Guide, California Primary Election, Tuesday, March 2, 2004, Proposition 55, Analysis by the Legislative Analyst, page 6.

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[199]

Therefore, the Commission finds there is no evidence in the record or in law to demonstrate that districts are legally or practically compelled to use Kindergarten-University Public Education Facilities Bond Act of 2002 or 2004 funds to undertake repair or maintenance public works projects. Since none of the activities that flow from implementation of an LCP pursuant to the test claim statutes, regulations or alleged executive orders[200] have been triggered by a state-mandated requirement, none of those statutes, regulations or alleged executive orders are subject to article XIII B, section 6.

G. Hearings and Court Proceedings

Claimant pled several activities related to a new administrative hearing process pursuant to Labor Code sections 1742 and 1742.1 and Title 8, California Code of Regulations, sections 16413 and 17220, et seq. This new process was established for contractors and subcontractors to obtain review of civil wage and penalty assessments issued by the Labor Commissioner, or decisions of the awarding body to withhold contract payments when enforcing under a Labor Compliance Program pursuant to Labor Code section 1771.5, or under Labor Code section 1726.

Labor Code section 1742 states in relevant part:

> (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.
>
> (b)(1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge … The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the

[199] *Kern High School Dist., supra*, 30 Cal. 4th 727, 753.

[200] Labor Code sections 1771.5, 1771.6 and 1771.7, Title 8, California Code of Regulations sections 16425 – 16439 and 17220 – 17221, "AB 1506 Labor Compliance Program Guidebook," "School Facility Program Substantial Progress and Expenditure Audit Guide," and "Antioch Unified School District Labor Compliance Program."

receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

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

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error except that a clerical error may be corrected at any time.

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

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

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

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

…

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this

> chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.
>
> …

Section 16413 of the regulations further establishes procedures for a contractor or subcontractor to follow when requesting a hearing under Labor Code section 1742.

Labor Code section 1742.1 requires the Labor Commissioner to afford the affected contractor or subcontractor, upon his or her request, to meet with the Labor Commissioner to attempt to settle the dispute without the need for formal proceedings. The section further states in relevant part:

> The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6 [i.e., under a Labor Compliance Program], afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. …

Sections 17220 et seq. of the regulations set forth procedures for an awarding body to follow when enforcing under a Labor Compliance Program pursuant to Labor Code section 1771.6.

The plain language of Labor Code sections 1742 and 1742.1, and the regulations cited, does not require awarding bodies to engage in any hearing activities, respond to writs of mandate, or participate in settlement meetings, unless the awarding body is voluntarily exercising enforcement authority under Labor Code section 1726 or 1771.5.[201] As noted above, Labor Code section 1726 *does not* require an awarding body to investigate potential violations of the chapter, nor does Labor Code section 1771.5 require an awarding body to initiate and enforce a Labor Compliance Program. Since both of these underlying activities are discretionary, Labor Code sections 1742 and 1742.1, and sections 16413 and 17220 et seq. of the regulations, do not mandate any activities on the awarding body.

Labor Code section 1771.2 allows a joint labor-management committee, established pursuant to federal law, to bring an action in court against an employer, i.e., a contractor or subcontractor, that fails to pay the prevailing wage to its employees as required. Nothing in that statute requires the awarding body to appear or participate in legal proceedings from such action by the joint labor-management committee. Thus, Labor Code section 1771.2 does not mandate any activities on the awarding body.

Summary of Required Activities

Therefore, the Commission finds only the following activities are required by the plain language of the test claim statutes and regulations:

- Obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract. (Lab. Code, § 1773, tit. 8, Cal. Code Regs., §§ 16202 & 16204.)

[201] Labor Code section 1771.6, Title 8, California Code of Regulations, section 17202, subdivision (c).

- Include a statement of prevailing rates of per diem wages in the call and advertisement for bids, the bid specifications, and in the public works contract itself, or, in lieu of those requirements, the district may include in the call for bids, bid specifications, and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in the awarding body's principal office, and in that case the district must post the statement at all job sites. (Lab. Code, § 1773.2.)
- Provide a copy of the contract award to the Division of Apprenticeship Standards, when apprentices will be used in the contract, and include language in the contract regarding apprenticeship requirements. (Lab. Code, §§ 1773.3 & 1777.5, subd. (n).)
- Take cognizance of violations of the prevailing wage laws in the course of the execution of the contract, and report any suspected violations to the Labor Commissioner. (Lab. Code, § 1726.)
- Regarding certified payroll records, perform the following activities:
    - Upon a request made to the awarding body by the public for payroll records:
        - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
        - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
        - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)); and
        - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
    - Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g).)
    - Insert stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776 in the contract. (Lab. Code, § 1776, subd. (h); Cal. Code Regs, tit. 8, § 16801, subd. (b).).
- Withhold amounts necessary to satisfy Civil Wage and Penalty Assessments issued by the Labor Commissioner and receive from the contractor any money withheld for such purpose by the contractor from the subcontractor. (Lab. Code, § 1727.)
- Transmit funds withheld in response to a civil wage and penalty assessment to the Labor Commissioner upon receipt of a certified copy of a final order that is no longer subject to judicial review. (Lab. Code, § 1742, subd. (f))

The Commission further finds that these activities are only mandated by the state for repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.
3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Issue 2: Do the test claim statutes or regulations impose a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

A "new program or higher level of service" is imposed when the mandated activities: a) are new in comparison with the pre-existing scheme; *and* b) result in an increase in the actual level or quality of governmental services provided by the district.[202] To make this determination, the mandated activities must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes or regulations.

Obtain Prevailing Wage Rate (Lab. Code, § 1773, Cal. Code Regs, tit. 8, §§ 16202 & 16204)

The statute and regulations require the awarding body to obtain both the general prevailing wage rate and any special rates from the Director of Industrial Relations, and ensure that the appropriate rates are used in the contract. The claimant contends that these activities constitute a new program or higher level of service.

Prior to 1975, Labor Code section 1773 stated in relevant part:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall *ascertain* the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract. …

[202] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

> In determining such rates, the *awarding body* shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the *awarding body* shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.
>
> If the *awarding body* determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the *awarding body* may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the *awarding body* determines that another rate should be adopted. (Emphasis added.)[203]

The Department of Industrial Relations explains how this pre-existing process worked:

> Labor Code section 1773 required the local agency to consider the "rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works." [Citations.] If these two mandatory sources of information were insufficient to determine the rate actually prevailing, local agencies had to "obtain and consider further data from the labor organizations and employers or employer associations concerned." *Id.* Local agencies had to obtain further information on what rates to pay each craft for overtime and holiday work, depending on which collective bargaining agreement, if any, applied.[204]

In this pre-existing law, the burden was on the awarding body to ascertain and determine the prevailing wage rates for public works projects.

Labor Code section 1773 now requires the awarding body to "obtain" the general prevailing rate of per diem wages from the Director of Industrial Relations.[205] Section 16202 of the regulations requires the awarding body to request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination.

Thus, the test claim statute and regulation shifted this responsibility for ascertaining and determining prevailing wage rates *from* the awarding body *to* the Director of Industrial Relations. The Department of Industrial Relations explains the current process as follows:

> Currently, the Director performs this arduous task of determining what are prevailing wages. [Citations.] The definition of prevailing wages has not

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[203] Statutes 1971, chapter 785.

[204] Department of Industrial Relations comments, submitted January 15, 2003, page 9.

[205] Statutes 1976, chapter 281.

> changed substantially since prior to 1975, including the requirement that the wages be set for each local geographic area. The Director, through the Division of Labor Statistics and Research ("DLSR") publishes general prevailing wage determinations twice each year for each craft or trade, by county. [Citations.] In addition, DLSR provides special determinations when requested. [Citations.] This work costs the Department approximately $2,071,082.39 per year, based on the prior two and a half fiscal years. [Citations.] This is work local agencies no longer do. Instead, local agencies are required simply to check the most recent determination before advertising a request for bids.

With regard to the obligation to "ensure" that the correct rate is used, the Department states:

> Prior to 1975, when local agencies determined local prevailing wages, the duty to obtain the correct prevailing wage was subsumed in the requirement that agencies ensure they were using the correct rate. However, any interested party could request review of the local agency's determination, and the local agency then had to justify its determination. [Citations.]
>
> In exchange for the Director's making rate determinations, local agencies now obtain the correct prevailing wages from the Director. [Citations.] This task no longer requires local agencies to do the actual investigations, surveys, and calculation ("determination") of the prevailing wage. That is, while the local agencies assume the burden of sending a letter, making a phone call, or checking the Department's website, this writing, sending or calling is substantially less expensive than was their prior obligation to investigate and calculate prevailing wages for each craft or trade on public works projects. …[206]

The Supreme Court has stated that a reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided.[207] Here that has not occurred. Rather, the test claim statute accomplishes a shift of responsibility *from* school districts *to* the state. And, although the district is left with the responsibility for obtaining the prevailing wage rates from the state and continuing to ensure that the proper rate is used in the contract, this result constitutes not a higher level of service but a lower level of service on the part of the district.[208]

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[206] *Id.* at page 10.

[207] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[208] See also Government Code section 17517.5, which states:

> "Cost savings authorized by the state" means any decreased costs that a local agency or school district realizes as a result of any statute enacted or any executive order adopted that permits or requires the discontinuance of or a reduction in the level of service of an existing program that was mandated before January 1, 1975.

Based on the foregoing, the Commission finds Labor Code section 1773 and sections 16202 and 16204, mandating the activity of obtaining the prevailing wage rates from the Department of Industrial Relations and ensuring the proper rate is used in the contract, do not impose a new program or higher level of service on school districts.

Statement of Prevailing Wages (Lab. Code, § 1773.2)

The statute requires the awarding body to include a statement of prevailing rates of per diem wages in the call and advertisement for bids, the bid specifications, and in the public works contract itself, or, in lieu of those requirements, the awarding body may include in the call for bids, bid specifications, and the contract itself a statement to the effect that copies of the prevailing rate of wages are on file in the awarding body's principal office, and in that case must post the statement at all job sites.

Prior to 1975, Labor Code section 1773.2 stated:

> The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract.
>
> In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy of the prevailing rate of per diem wages on file at its principal office, in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year, and in such event, the awarding body shall cause a copy thereof to be posted at each jobsite.[209]

In the 1977 test claim statute, section 1773.2 was amended *solely* to remove the requirement that the awarding body publish prevailing wage rate determinations in the newspaper each year when the awarding body chooses the option of referring to a copy of the prevailing wage rates on file at its principal office.[210]

A reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided. Here, that has not occurred. Instead, the burden on school districts has been lessened by removing the requirement to annually publish their prevailing wage rates in the newspaper under specified circumstances. This result constitutes not a higher level of service but a lower level of service.[211] Therefore, the Commission finds Labor

[209] Statutes 1974, chapter 876.

[210] Statutes 1977, chapter 423.

[211] See also Government Code section 17517.5.

Code section 1773.2 does not impose a new program or higher level of service on school districts.

Certified Payroll Records (Lab. Code, § 1776, subdivisions (b), (e), (g) & (h), Cal. Code Regs., tit. 8, §§ 16400, 16403, 16801, subd. (b))

The statute and regulations require the awarding body to perform the following activities:

- Upon a request made to the awarding body by the public for payroll records:
  - send an acknowledgment to the requestor including the costs to be paid for preparing the records;
  - obtain certified payroll records from the contractor, including specified information in the request;
  - provide copies of the records to the requestor; and
  - retain copies of the records for at least 6 months.
- Withhold penalties from contractor progress payments for noncompliance with Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement.
- Insert stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776 and title 8, California Code of Regulations, section 16801, subdivision (b) in the contract.

Prior to 1975, Labor Code section 1776 stated:

> Every contractor and subcontractor shall keep an accurate record showing the name, occupation, and the actual per diem wages paid to each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the body awarding the contract and to the Division of Labor Law Enforcement.[212]

The test claim statutes modified Labor Code section 1776 as follows:

1. *Statutes 1976, Chapter 599* – The contractor's and subcontractor's payroll records were required to be available for inspection at all reasonable hours, and a copy had to be made available to the employee or his authorized representative, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards. After a complaint was filed with the awarding body or the Division of Labor Standards Enforcement alleging that a contractor or subcontractor paid less than the prevailing wage on a public works project, the contractor or subcontractor was required upon written notice from either the awarding body or the Division of Labor Standards Enforcement within 10 days to file with the awarding body a certified copy of the payroll records. The awarding body could charge a reasonable fee for copying such

[212] Statutes 1949, chapter 127.

records, and the awarding body was required to retain such records for 90 days after completion of the contract.

2. *Statutes 1978, Chapter 1249* – The requirement on the awarding body to retain copies of payroll records for 90 days after completion of the contract was removed. The payroll records were required to be certified.[213] Upon request, the contractor was required to furnish certified copies of payroll records to, among other entities, the awarding body.[214] A certified copy of the payroll records was required to be made available to the public, provided the request was made through either the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement; the public could not be given access to such records by the contractor.[215] Any copy of certified payroll records made available to the public or any public agency by the awarding body, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement was required to be marked or obliterated to prevent disclosure of an individual's name, address and social security number.[216] In the event of non-compliance with these requirements, the contractor had 10 days in which to comply after written notice specifying in what respects the contractor had to comply; when non-compliance was evident after the 10-day period, the contractor was required to pay an administrative penalty to the state or political subdivision on whose behalf the contract was made of $25 for each calendar day, or portion thereof, for each worker, until strict compliance was effectuated, and upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, the penalties were required to be withheld from progress payments then due.[217] The awarding body was required to have inserted in the contract stipulations to effectuate these provisions.[218] The Director of the Department of Industrial Relations was required to adopt rules consistent with the California Public Records Act and the Information Practices Act of 1977 governing release of such records including the establishment of reasonable fees to be charged for reproducing copies of such records.[219]

3. *Statutes 1983, Chapter 681* – Subdivision (b)(3) was amended to require that when requested certified payroll records were not provided, the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made.

4. *Statutes 2001, Chapter 804* – Subdivision (e) was amended to require that any copies of payroll records made available for inspection by or furnished to a joint labor-

[213] Labor Code section 1776, subdivision (b).

[214] Labor Code section 1776, subdivision (b)(2).

[215] Labor Code section 1776, subdivision (b)(3).

[216] Labor Code section 1776, subdivision (d).

[217] Labor Code section 1776, subdivision (f).

[218] Labor Code section 1776, subdivision (g).

[219] Labor Code section 1776, subdivision (h).

management committee shall be obliterated to prevent disclosure of an individual's name and social security number until January 1, 2003; thereafter any such records provided to a joint labor-management committee shall be obliterated only to prevent disclosure of an individual's social security number.[220]

Title 8, California Code of Regulations, sections 16400 through 16403 of the regulations were added to:

1. require the awarding body to acknowledge a request for payroll records to the requestor, and provide the costs the requestor must pay for the awarding body and contractor to prepare the records;
2. specify the information required in a request to the contractor for the records;
3. establish fees to be charged for preparing and reproducing the records; and
4. require the awarding body to keep unredacted copies of requested payroll records for at least 6 months following completion and acceptance of the project. These requirements are new in comparison to the preexisting law.

The Department of Industrial Relations states that the test claim statutes modifying Labor Code section 1776 did not significantly change any awarding body requirement:

> Prior to 1975, there was no provision for local agencies to obtain or copy [Certified Payroll Records]. Since local agencies did their own enforcement, however, they routinely obtained them. … Before 1975, the Public Records Act made such information disclosable on demand from the public. See Government Code §§ 6252 ["Local agency" includes school district], 6252 (d) [definition of public record]. The post 1975 amendments to § 1776 did not change local agencies' pre-existing requirements to provide copies of public records (including payroll records) to the public. …
>
> Labor Code § 1776 did not change any local agency requirement in any meaningful way. Test Claimant claims that there is a new mandate because local agencies now have to make copies of the [Certified Payroll Records] on request by members of the public and obliterate certain personal information. First, the requirement to obliterate personal information is not necessarily with the local agency. Labor Code § 1776(e) merely requires that the copy provided to the public by DLSE or the local agency "be obliterated," which can be done by the private contractor. … [221]

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[220] However, legislation enacted in 2003, effective January 1, 2004 (Stats. 2003, ch. 62), modified this provision to require that records provided to a joint labor-management committee be marked or obliterated to prevent disclosure of an individual's name and social security number. That statute was not pled in the test claim and thus staff makes no finding with regard to it.

[221] Department of Industrial Relations comments, submitted January 15, 2003, pages 14-15.

The Commission finds that the required activities do constitute a new program or higher level of service. The pre-existing statute did not provide for the awarding body to *obtain a copy* of the payroll records, merely the ability to inspect them. The California Public Records Act[222] provides public access only to writings that are in the *possession* of state or local agencies.[223] Consequently, there was no pre-existing duty on the district to provide public access to the records. The fact that such copies were routinely obtained by the awarding body in the course of enforcing the CPWL does not change the duties imposed by the previous statute, which plainly did not require the awarding body to obtain the records on behalf of the public. Moreover, Government Code section 17565 provides that if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate.

The DIR also states that the requirement to withhold contract payments for violations of Labor Code section 1776 pursuant to subdivision (g) of that section is not new because the obligation already was subsumed in Labor Code section 1727, which at that time required "the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to … the terms of this chapter," and Labor Code section 1776, subdivision (g), is part of the same chapter as section 1727.[224] However, the provisions of subdivision (g) require withholding of contractor progress payments for *administrative penalties assessed for violations of section 1776* – i.e., failure to provide certified payroll records – upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. There was no pre-existing provision in law to assess and withhold administrative penalties for payroll record violations. Therefore, the requirements are new in comparison to the pre-existing general references to the chapter.

Thus, there are new requirements of school districts as awarding bodies that were not required under pre-existing law:

- Perform the following activities upon a request by the public for payroll records:
    - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
    - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));
    - provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3) (as amended by Stats. 1978, ch. 1249)); and
    - retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon

[222] Government Code section 6250 et seq.

[223] Government Code section 6252, subdivision (e); "public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

[224] Department of Industrial Relations comments, submitted April 14, 2008, pages 3-4.

request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249)).

- Insert stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776 in the contract. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249; Cal. Code Regs., tit. 8, § 16408, subd. (b).)

These new requirements do provide a higher level of service to the public since the public now has access to certified payroll records through the awarding body. Withholding penalties from progress payments helps enforce the law to ultimately ensure contractors' cooperation. Moreover, placing stipulations in the contract provides notice to the contractor of his or her requirements before the contract is signed. And finally, the amendments adding these new requirements in 1978 and 2001 were not associated with other shifts of responsibility from awarding bodies to the state for making prevailing wage rate determinations under Labor Code sections 1770 and 1773 (Stats. 1976, ch. 281) and enforcing the CPWL under Labor Code sections 1726, 1727, and 1741 (Stats. 2000, ch. 954). Thus, in every sense the requirements impose an increased level of service.

DIR asserts that retaining copies of certified payroll records for at least 6 months and inserting a clause in public works contract pursuant to Labor Code section 1776, subdivision (h), at most result in negligible increases in levels of service, and should be considered de minimis under the analysis in *Kern High School District*. While the Commission does not disagree that the increased levels of service may be small, there is nothing in *Kern* or other mandates case law to support denial of the claim based on a finding that the newly mandated activities result in only a de minimis increase in the level of service.

Although the Supreme Court in *Kern* found that newly mandated notice and agenda costs were modest, the determination that such costs were not reimbursable was based on the fact that the underlying program was completely funded by the state and there was nothing in the record to show that such administrative costs could not be paid for from state funds already provided, rather than the fact that there was only a de minimis increase in the level of service. [225]

In *San Diego Unified School District*, the Supreme Court addressed another narrowly drawn situation where there was a de minimis increase in the level of service. There, school districts were seeking reimbursement for activities that exceeded federal due process requirements in relation to discretionary school expulsions.[226] The court denied the claim based on another case, *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, which had found that procedural requirements enacted to comply with a general federal mandate, which were reasonably articulated to make the underlying federal right enforceable and to set forth necessary procedural details, and which did not significantly increase the cost of compliance with the federal mandate, were not reimbursable. The *San Diego Unified* court likewise held that:

> [F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and

[225] *Kern High School District, supra,* 30 Cal.4th 727, 727.

[226] *San Diego Unified School District v. Commission on State Mandates, supra,* 33 Cal.4th 859, 888.

> whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate.[227]

Here, the prevailing wage requirements are not intended to implement a federal law and cannot be likened to the *San Diego Unified* circumstances. Thus, neither *San Diego Unified* nor *County of Los Angeles* is applicable.

DIR also asserts that "[s]egregating the minimal costs to retain records for the purpose of subvention creates a further dilemma" since the awarding body must separate the costs of retaining payroll records from countless other documents it retains.[228] DIR further asserts that [i]f *de minimis* has any meaning, it has to include some balance of the relative costs of subvention versus the administrative cost to the local agencies to track the alleged mandate's costs."[229] However, beyond requiring the claimant to assert a minimum amount for test claims and for actual reimbursement claims,[230] the mandates process does not provide for such a balancing test.

The Commission therefore finds that the new requirements imposed on school districts as awarding bodies for handling certified payroll records and modifying contract language constitute a new program or higher level of service within the meaning of article XIII B, section 6.

Apprenticeship Requirements (Lab. Code, §§ 1773.3 & 1777.5, subd. (n))

The statutes require the awarding body to provide a copy of the contract award to the Division of Apprenticeship Standards when apprentices will be used in the contract, and include language in the contract regarding apprenticeship requirements.

Prior to 1975, Labor Code section 3098 stated:

> An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. … Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.[231]

Section 3098 was renumbered to section 1773.3 in Statutes 1978, chapter 1249, with substantially the same language. Therefore, the requirements existed prior to 1975 and no new program or higher level of service is imposed.

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[227] *Id.* at 890.

[228] Letter from Anthony Mischel, Attorney At Law, Department of Industrial Relations, April 14, 2008, page 3.

[229] *Ibid.*

[230] Government Code section 17564 sets the minimum for test claims and reimbursement claims at $1,000.

[231] Statutes 1974, chapter 1095.

Prior to 1975, Labor Code section 1777.5 stated in relevant part:

> The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.[232]

This exact language was ultimately renumbered to subdivision (n) in Statutes 1999, chapter 903. Therefore, the requirements existed prior to 1975 and no new program or higher level of service is imposed.

Take Cognizance of and Report Suspected Violations (Lab. Code, § 1726), Withhold Funds for Civil Wage and Penalty Assessments (Lab. Code, § 1727), and Transmit Funds to Labor Commissioner (Lab. Code, § 1742, subd. (f))

These statutes require the awarding body to: 1) take cognizance of violations of the prevailing wage laws in the course of the execution of the contract, and report any suspected violations to the Labor Commissioner; 2) withhold any amounts necessary to satisfy a Civil Wage and Penalty Assessment issued by the Labor Commissioner and receive from the contractor any money withheld for such purpose by the contractor from the subcontractor; and 3) transmit funds withheld in response to a civil wage and penalty assessment to the Labor Commissioner upon receipt of a certified copy of a final order that is no longer subject to judicial review.

With regard to the awarding body's role in reporting CPWL violations, prior to 1975, Labor Code section 1726 stated:

> The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract.[233]

The test claim statute, Statutes 2000, chapter 954, modified section 1726 to state in relevant part:

> The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of execution of the contract, and *shall promptly report* any suspected violations to the Labor Commissioner. (Emphasis added.)

Thus, there was a pre-existing requirement for awarding bodies to "take cognizance" of violations, and this requirement does not impose a new program or higher level of service. There is, however, a new requirement to "report" suspected violations to the Labor Commissioner.

With regard to withholding funds from contractor payments for CPWL violations, prior to 1975, Labor Code section 1727 stated:

> Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to any stipulation in a

[232] Statutes 1974, chapter 965.

[233] Statutes 1937, chapter 90.

> contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body.[234]

The test claim statute, Statutes 2000, chapter 954, modified section 1727, which states:

> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom any amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.
>
> (b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

Thus, the only change in the awarding body's responsibility is to now withhold amounts required to satisfy a civil wage and penalty assessment made by the Labor Commissioner, rather than the previous requirement to withhold amounts forfeited pursuant to a stipulation in the contract or for other violations of the CPWL, once a full investigation was conducted by the Division of Labor Law Enforcement or by the awarding body.

In the same test claim statute, Statutes 2000, chapter 954, Labor Code section 1742 was added to provide a hearing procedure for contractors or subcontractors to appeal a civil wage and penalty assessment. Subdivision (f) of that section requires an awarding body that has withheld funds in response to a civil wage and penalty assessment to transmit the withheld funds to the Labor Commissioner, upon receipt of a certified copy of a final order that is no longer subject to judicial review.

The Department of Industrial Relations argues that these are not new requirements, explaining the historical and current processes as follows:

> Prior to 1975, local agencies were required both to "take cognizance" of violations and to withhold funds owed to contractors for prevailing wage violations. Labor Code §§ 1726, 1727. If there were insufficient funds available for withholding, then local agencies notified the Labor Commissioner of the violation. The local agency, with the Labor Commissioner's assistance filed civil lawsuits against the offending contractors. *Id.*

[234] Statutes 1945, chapter 1431.

> This obligation to report violations to the Labor Commissioner has not changed. Enforcement of prevailing wage violations was removed from local agencies as of 2001, Stats. 2000, ch. 954. In exchange for this reduction in work for local agencies, the [L]egislature added a reporting responsibility. …
>
> Prior to 1975, local agencies withheld funds owed contractors for prevailing wage violations. Labor Code § 1727. This obligation did not change after 1975. In 2000, as part of the overall change in enforcement, private contractors had to withhold funds from offending subcontractors if the local agency had not withheld sufficient funds. The local agency had no role in this process. [Citations.]
>
> … [T]he Labor Commissioner did not issue citations against contractors prior to 1975. Local agencies did the bulk of the enforcement.
>
> Currently, the Labor Commissioner does all the enforcement work, and local agencies do no more than withhold funds when the Labor Commissioner informs them of violations. This is identical to local agencies' historic responsibility to "take cognizance" of violations and withhold payments. [235]

Under the previous process, the awarding body would take cognizance of CPWL violations pursuant to Labor Code section 1726, do its own investigations and enforcement, and withhold any penalties from contractor payments pursuant to Labor Code section 1727, seeking assistance from the Labor Commissioner as needed. Currently, according to the Department of Industrial Relations, the Labor Commissioner does all the enforcement work, unless the awarding body enforces the CPWL violations by voluntarily establishing a Labor Compliance Program. Thus, the test claim statutes have shifted primary enforcement of the CPWL from local agencies to the state, leaving awarding bodies the option to implement a Labor Compliance Program. In addition, there is no substantive change in the requirement that awarding bodies withhold funds from contractors for CPWL violations; the triggering mechanism is now a civil wage and penalty assessment issued by the Labor Commissioner rather than the completion of an investigation by the Division of Labor Law Enforcement or by the awarding body.

The Supreme Court has stated that a reimbursable "higher level of service" must result in an increase in the actual level or quality of governmental services provided.[236] Here that has not occurred. Rather, the test claim statute accomplishes a shift of responsibility *from* school districts *to* the state with regard to enforcement of the CPWL. And, although the district is left with some minor responsibility for reporting suspected violations of the CPWL to the Labor Commissioner and transmitting withheld funds at the appropriate time, this result constitutes

[235] Department of Industrial Relations comments, submitted January 15, 2003, pages 16-17.

[236] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

not a higher level of service but a lower level of service.[237] With regard to withholding funds from contractors for CPWL violations, there is no change in that level of service.

Based on the foregoing, the Commission finds that Labor Code sections 1726, 1727 and 1742, subdivision (f), do not impose a new program or higher level of service on school districts or community college districts as awarding bodies.

Summary

Therefore, the Commission finds the activities listed below that are required of K-12 school districts or community college districts when acting as an awarding body, constitute a new program or higher level of service within the meaning of article XIII B, section 6, but only when triggered by repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or
    b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.
3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Activities constituting a new program or higher level of service under the foregoing circumstances:

- Perform the following tasks upon a request made to the awarding body by the public for certified payroll records:
    - send an acknowledgment to the requestor including the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (c));
    - obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (d));

[237] See also Government Code section 17517.5.

- provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3) as amended by Stats. 1978, ch. 1249)); and
- retain copies of the records for at least 6 months (Cal. Code Regs., tit. 8, § 16403, subd. (a)).

- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776 in the contract. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249); Cal. Code Regs., tit. 8, § 16408, subd. (b).)

Issue 3: Do the test claim statutes or regulations impose costs mandated by the state within the meaning of Government Code section 17514 and article XIII B, section 6 of the California Constitution?

For these statutes to impose a reimbursable, state-mandated program, two additional elements must be satisfied. First, the statutes must impose "costs mandated by the state" pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant alleged in the original test claim "it is estimated that the district has incurred, or will incur, in excess of $200 in staffing and other costs in excess of revenues annually, for the period from July 1, 2000 through June 2002, to implement the new duties mandated by the state, for which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement." On page 7 of Exhibit 6, "Second Declaration of William McGuire," of the test claim amendment filed July 31, 2003, claimant states:

> To the extent that Clovis Unified School District commences a public works project subject to Labor Code Section 1771.7, it is estimated that Clovis Unified School District will incur in excess of $1,000, annually, in staffing and other costs to implement these new duties mandated by the state for which the district will not be reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

Similarly, Grossmont Union High School District estimates the same costs in its filing of September 2, 2008.

The Department of Industrial Relations (DIR) commented that while the original test claim contained a general, non-specific declaration of the increased cost, a new declaration, limited to whatever mandates the Commission believes might exist, should be required to justify the test claim.[238] However, there is no provision in the Government Code or the Commission's

[238] Department of Industrial Relations comments, submitted April 14, 2008, pages 4-5.

regulations to authorize the Commission to impose such a requirement on the test claimant. Government Code section 17564 does provide the following:

> (a) No claim shall be made pursuant to Sections 17551, 17561, or 17573, nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, or pursuant to a legislative determination under Section 17573, unless these claims exceed one thousand dollars ($1,000). However, a county superintendent of schools … may submit a combined claim on behalf of school districts … if the combined claim exceeds one thousand dollars ($1,000) even if the individual school district's … claims do not each exceed on thousand dollars ($1,000). The county superintendent of schools … shall determine if the submission of the combined claim is economically feasible and shall be responsible for disbursing the funds to each school …

The Commission therefore finds there is evidence in the record, signed under penalty of perjury, that the claimant will or has incurred "costs mandated by the state" for purposes of the existence of a reimbursable state-mandated program.

Government Code section 17556, subdivision (d), states in relevant part that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds:

> the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

The increased level of service at issue is the preparation and copying of certified payroll records under Labor Code section 1776, subdivisions (b) and (e). Subdivision (e) states "the requesting party shall, prior to being provided the records, reimburse the costs of *preparation* by … the entity through which the request was made." Subdivision (i) of that section provides that the Director of the Department of Industrial Relations "shall adopt rules consistent with the California Public Records Act … and the Information Practices Act of 1977, … governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section." Section 16402 of those regulations states:

> The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

In the staff analysis issued on November 12, 2008, staff found that school districts and community college districts have authority to charge fees sufficient to pay for the activities listed below pursuant to Labor Code section 1776, subdivision (e), and section 16402 of the regulations, and thus, Government Code section 17556, subdivision (d), was applicable to deny reimbursement for these activities:

- obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (c));

- send an acknowledgment to the requestor including notification of the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (d));
- provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)).

The finding was made on the ground that the Department of Industrial Relations established "reasonable fees to be charged" of the requesting party to cover the costs of preparation of the records, and that the Department's construction of a Labor Code section 1776, subdivision (e), is entitled to great weight in court.[239]

The claimant contends in response, however, that:

> …there is also no evidence in the record that the fees *are* sufficient. Further, there is no guarantee that the fees will be increased to accommodate inflation, or that they will be adjusted if experience demonstrates that they are not sufficient. Finally, the rates are dependent on the number of pages requested. The act of making the redactions is also dependent on the length of the document, but the process of sending an acknowledgment, requesting the records, and providing them to the requestor is not in any way correlated with the number of pages. Thus, it is quite possible that the staff time and other costs will exceed the authorized fees. There should not be a denial of increased costs on this basis. Instead, claimants should be required to deduct any fees received as offsetting revenue.[240]

The Commission agrees with the claimant's arguments. There is no evidence that the fee authority, which is capped at $1 for the first page and 25 cents for each page thereafter, is sufficient to cover the costs incurred for obtaining certified payroll records from the contractor, sending an acknowledgment to the requestor, and providing copies to the requestor for every individual request made. Therefore, the Commission finds that the following activities impose costs mandated by the state pursuant to Government Code section 17514:

- obtain certified payroll records from the contractor, including specified information in the request (Cal. Code Regs., tit. 8, § 16400, subd. (c));
- send an acknowledgment to the requestor including notification of the costs to be paid for preparing the records (Cal. Code Regs., tit. 8, § 16400, subd. (d)); and
- provide copies of the records to the requestor (Lab. Code, § 1776, subd. (b)(3)).

Any money received by school districts pursuant to Labor Code section 1776, subdivision (e), and title 8, California Code of Regulations, section 16402 is offsetting revenue that must be identified in the parameters and guidelines.

With regard to the remaining activities, Government Code section 17556, subdivision (e), states in relevant part that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds:

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[239] *State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (1995) 37 Cal.App.4th 675, 683.

[240] Claimant comments dated December 2, 2008.

> The statute, executive order, or an appropriation in the Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The state provides matching funds in the form of grants for deferred maintenance for K-12 school districts and community college districts.[241] In most cases, the funding is only available from the state when the district demonstrates its own funding is available.[242] Additional assistance for extreme hardship is also available for K-12 districts that meet certain criteria.[243] Funding is also available for new construction and modernization grants.[244] It is possible that grant funding for modernization might be available for repair or maintenance projects, but it is not likely that funding for new construction could be used for such projects.

The DIR commented that any mandate that exists is so negligible as to not require subvention since partial state funding already exists for maintenance and repair projects in school districts and community colleges pursuant to Education Code sections 17582-17588 and 84660, the Deferred Maintenance Program. The Department of Finance also pointed out the availability of this funding, and recommended the Commission consider the funding as offsetting revenues for any reimbursable mandate finding.

Although state funding is provided which might be used for the new activities, there is no evidence in the record that such funding results in no net costs to the district or was "specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." Therefore, the Commission finds that Government Code section 17556, subdivision (e), is inapplicable to deny reimbursement for the remaining activities. Nevertheless, any grant funds available to awarding bodies under the deferred maintenance program, or any other eligible funding, when used for the newly mandated activities in this test claim shall be identified as possible offsetting revenues.[245]

The Commission finds the following remaining activities do impose costs mandated by the state, but only when such activities are triggered by repair or maintenance to school facilities and property, pursuant to Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113; and
    a. for districts with an average daily attendance of less than 35,000, when the total number of hours on the job exceeds 350; or

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[241] Education Code sections 17582-17588, and 84660.

[242] *Ibid.*

[243] Education Code section 17587.

[244] Education Code sections 17072.10 and 17074.10.

[245] Eligible grant funding for such projects will be clarified further at the parameters and guidelines stage.

b. for districts with an average daily attendance of 35,000 or greater, when the total number of hours on the job exceeds 750, or the material cost exceeds $21,000.

2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and

   a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or

   b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000.

3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000.

Activities Reimbursable Under Circumstances Cited Above:

- Upon a request made to the awarding body by the public for certified payroll records:
  - Obtain certified payroll records from the contractor, including specified information in the request. (Cal. Code Regs., tit. 8, § 16400, subd. (c).)
  - Send an acknowledgment to the requestor including notification of the costs to be paid for preparing the records. (Cal. Code Regs., tit. 8, § 16400, subd. (d).)
  - Provide copies of the records to the requestor. (Lab. Code, § 1776, subd. (b)(3).)
  - Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert stipulations regarding the contractor's and subcontractor's obligations pursuant to Labor Code section 1776 in the contract. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249); Cal. Code Regs., tit. 8, § 16408, subd. (b).)

CONCLUSION

The Commission concludes that Labor Code section 1776, subdivisions (g) and (h), and sections 16403, subdivision (a), and 16408, subdivision (b), of the Department of Industrial Relations' regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, but only when those activities are triggered by projects for repair or maintenance to school facilities and property, pursuant to

Education Code sections 17002, 17565, 17593 and 81601, when the project constitutes a public works project pursuant to the CPWL, and when the project must be let to contract under the following circumstances:

1. For *K-12 school districts*, when the project is not an emergency as set forth in Public Contract Code section 20113, and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000. (Pub. Contract Code, § 20114.)
2. For *community college districts*, when the project is not an emergency as set forth in Public Contract Code section 20654; and
    a. for districts with full-time equivalent students of fewer than 15,000, when the total number of hours on the job exceeds 350; or
    b. for districts with full-time equivalent students of 15,000 or more, the total number of hours on the job exceeds 750 hours or the material cost exceeds $21,000. (Pub. Contract Code, § 20655.)
3. For any K-12 school district or community college district that is subject to the UPCCAA, when a project is not an emergency as set forth in Public Contract Code section 22035, and the project cost will exceed $30,000. (Pub. Contract Code, § 22032.)

Only the following activities for the foregoing projects are reimbursable:

- Upon a request made to the awarding body by the public for certified payroll records:
    - Obtain certified payroll records from the contractor, including specified information in the request. (Cal. Code Regs., tit. 8, § 16400, subd. (c).)
    - Send an acknowledgment to the requestor including notification of the costs to be paid for preparing the records. (Cal. Code Regs., tit. 8, § 16400, subd. (d).)
    - Provide copies of the records to the requestor. (Lab. Code, § 1776, subd. (b)(3).)
    - Retain copies of payroll records requested by the public and provided by the awarding body for at least 6 months. (Cal. Code Regs., tit. 8, § 16403, subd. (a).)
- Withhold penalties from contractor progress payments for noncompliance with the requirement to provide certified payroll records under Labor Code section 1776, upon request of the Department of Industrial Relations' Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. (Lab. Code, § 1776, subd. (g) (as amended by Stats. 1978, ch. 1249).)
- Insert stipulations regarding the contractor's and subcontractor's requirements pursuant to Labor Code section 1776 in the contract. (Lab. Code, § 1776, subd. (h) (as amended by Stats. 1978, ch. 1249); Cal. Code Regs., tit. 8, § 16408, subd. (b).)

Any fees received by school districts pursuant to Labor Code section 1776, subdivision (e), and title 8, California Code of Regulations, section 16402 for obtaining certified payroll records from the contractor, sending an acknowledgment to the requestor, and providing copies of the records to the requestor shall be identified as offsetting revenue in the parameters and guidelines. Furthermore, any grant funds available to awarding bodies under the deferred maintenance program, or any other eligible grant program, when used for the newly mandated activities in this test claim, shall be identified in the parameters and guidelines as possible offsetting revenues.

None of the other test claim statutes, regulations or alleged executive orders that were pled mandate a new program or higher level of service subject to article XIII B, section 6.