STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

AGENCY:	**STATE ALLOCATION BOARD**	)	**DECISION OF DISAPPROVAL OF EMERGENCY REGULATORY ACTION**
ACTION:	**Amend sections 1859.90, 1859.106 and Form SAB 50-05 of Title 2 of the California Code of Regulations**	)	**(Gov. Code, sec. 11349.6)**
		)	**OAL File No. 2011-0422-03 E**

SUMMARY OF RULEMAKING ACTION

This proposed emergency rulemaking action seeks to amend Title 2 of the California Code of Regulations, sections 1859.90 and 1859.106 and SAB 50-05, a form incorporated by reference, to require that school districts with specified contracts awarded between August 1, 2010 and November 4, 2010 must have either a Department of Industrial Relations (DIR) approved third party Labor Compliance Program (LCP)[1] or a DIR approved in-house LCP, if required pursuant to Labor Code section 1771.7, no later than May 1, 2011. The specified contracts are those associated with projects funded from the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004.

SUMMARY OF DECISION

On April 22, 2011, the State Allocation Board (Board) submitted to the Office of Administrative Law (OAL) a proposed emergency rulemaking action to require that school districts with specified contracts awarded between August 1, 2010 and November 4, 2010 must have either a DIR approved third party LCP or a DIR approved in-house LCP, if required pursuant to Labor Code section 1771.7, no later than May 1, 2011. The specified contracts are those associated with projects funded from the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004.

On May 2, 2011, OAL notified the Board that OAL disapproved this emergency rulemaking action for failure to comply with specified standards and procedures of the California Administrative Procedures Act (APA). The reasons for the disapproval are summarized below:

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[1] As provided in the State Allocation Board's rulemaking record, the purpose of the LCP is "to ensure appropriate compliance with certain labor laws for school construction projects, such as appropriate prevailing wage payments for construction work."

A. The Finding of Emergency does not demonstrate the existence of an emergency and the need for immediate action to avoid serious harm to the public peace, health, safety, or general welfare (Gov. Code, secs. 11342.545, 11346.1, and 11349.6);
B. The rulemaking record does not meet the Necessity standard (Gov. Code, sec. 11349.1); and
C. The proposed text does not meet the Clarity standard (Gov. Code, sec. 11349.1).

DISCUSSION

The adoption of regulations by the Board must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure is subject to the APA unless a statute expressly exempts the regulation from APA coverage.

In its review, OAL is limited to the proposed regulation and the record of the rulemaking proceeding and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. The OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed. Pursuant to Government Code section 11349.6(b), OAL must complete its review of proposed emergency regulations within ten calendar days.

The use of emergency regulations limits one of the key purposes of the APA – public participation in the rulemaking process. Since emergency regulations require the regulated public to obey rules that it had little or no opportunity to review and comment upon, the APA limits the use of emergency regulations. Proposed emergency regulations must be submitted with a Finding of Emergency. If the Finding of Emergency does not include a description of specific facts demonstrating the existence of an emergency and the need for immediate action to avoid serious harm to the public peace, health, safety, or general welfare, OAL must disapprove the proposed emergency regulation.

The emergency amendments proposed by the Board concerning Labor Compliance Program requirements must be adopted pursuant to the APA unless a statute expressly exempts or excludes it from APA requirements (Gov. Code, secs. 11340.5 and 11346). No express statutory exemption applies to the proposed emergency amendments. Thus, before the amendments may become effective, they must be reviewed and approved by OAL for compliance with the APA. OAL reviews emergency regulations for compliance with: the emergency standard in Government Code sections 11342.545, 11346.1, and 11349.6; the six standards for administrative regulations in Government Code section 11349.1; and the applicable APA procedural requirements.

A. The Finding of Emergency does not demonstrate the existence of an emergency and the need for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

Government Code section 11342.545 defines an "emergency" as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." The adoption of an emergency regulation by the Board must satisfy the requirements of Government Code section 11346.1, which provides in part:

> (b)(1) ...[I]f a state agency makes a finding that the adoption of a regulation or order of repeal is necessary to address an emergency, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.
> (2) Any finding of an emergency *shall include a written statement that contains ...a description of the specific facts demonstrating the existence of an emergency and the need for immediate action,* and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. (Emphasis added.)

An agency must provide specific facts that an emergency exists and that immediate action is needed to avoid serious harm. If this threshold showing is not made, Government Code section 11349.6(b) provides:

> (b) ... The office *shall disapprove* the emergency regulations if it determines that the situation addressed by the regulations is not an emergency, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines the agency failed to comply with Section 11346.1. (Emphasis added.)

In this proposed emergency rulemaking, the Board provided the following "Specific Facts Showing the Need for Immediate Action:"

> Immediate action is needed to approve emergency regulatory amendments to the School Facility Program (SFP) Regulations to clarify the Labor Compliance Program (LCP) requirements due to the Department of Industrial Relations (DIR) repealing its LCP monitoring service on November 4, 2010. Eighteen school districts have been identified as impacted by the repeal of this DIR service and related regulations. The SAB adopted language specifying "no later than May 1, 2011" as the date for the impacted districts to implement another acceptable LCP compliance method as required by Labor Code Sections 1771.5 and 1771.7, without a negative impact to the district's participation in State-funded programs.
> This repeal by the DIR placed these school districts into an immediate technical violation of State law and SFP Regulations, thereby jeopardizing their projects' participation in State-funded programs. Approval of the emergency regulations will afford the districts a reasonable time to implement another acceptable LCP compliance method as required by law. Approval on an emergency basis will provide an effective date before the

> "May 1, 2011" deadline.
> From August 1 to November 4, 2010, the DIR provided LCP monitoring services for all State bond-funded public works projects (Propositions 1D, 55, and 47). The regulations establishing that DIR service were repealed on November 4, 2010, and school districts that had been using the service were required to either hire a third party LCP administrator or seek approval from the DIR to initiate and enforce the LCP internally. This required change in the compliance method applies to projects funded from the University Public Education Facilities Bond Act of 2002 (Proposition 47) or the Kindergarten-University Public Education Facilities Bond Act of 2004 (Proposition 55). Labor Code (LC) Section 1771.7 requires school districts using funds from those Acts to initiate and enforce, or contract with a third party to initiate and enforce a LCP.
> LC Section 1771.5 outlines the requirements of a LCP for projects subject to LC Section 1771.7.
> LC Section 1771.7(d)(2)(C) requires the SAB to verify school district compliance.
> The proposed amendments would allow affected school districts sufficient time for such steps as school board approval, advertising and obtaining bids from third party contractors, awarding contracts, amending existing contracts to enforce or conform with LCP requirements, and other contractual and documentary matters. The OPSC currently verifies that school districts have a LCP for projects at the time of fund release and during the audit, so the proposed amendments are to the pertinent regulation sections and SAB Form.

The Board's attempt to describe specific facts demonstrating the existence of an emergency and the need for immediate action to avoid serious harm to the public peace, health, safety, or general welfare can be summarized in three points as follows:

1) Immediate action is needed "... to clarify the Labor Compliance Program (LCP) requirements due to the Department of Industrial Relations (DIR) repealing its LCP monitoring service on November 4, 2010." The Board states that eighteen school districts were affected by the repeal of the DIR monitoring service regulations and that specifying the need for implementing another acceptable compliance method, as required by Labor Code sections 1771.5 and 1771.7, by no later than May, 1, 2011 would prevent "negative impact to the district's participation in State-funded programs."

2) The repeal of the DIR service has "placed these school districts into an immediate technical violation of State law and SFP Regulations, thereby jeopardizing their projects' participation in State-funded programs," therefore, the "[a]pproval of the emergency regulations will afford the districts a reasonable time to implement another acceptable LCP compliance method as required by law. Approval on an emergency basis will provide an effective date before the May 1, 2011 deadline."

3) The proposed emergency regulations "would allow affected school districts sufficient time for such steps as school board approval, advertising and obtaining bids from third party contractors, awarding contracts, amending existing contracts to enforce or conform with LCP requirements, and other contractual and documentary matters."

As noted in #1 above, Labor Code sections 1771.5 and 1771.7 include provisions for LCP requirements. Labor Code section 1771.5(b) specifies the required components of a LCP. Labor Code section 1771.7(a)(1) requires that when a school district chooses to use funds for a public works project from either the Kindergarten-University Public Education Facilities Bond Act of 2002 or the Kindergarten-University Public Education Facilities Bond Act of 2004, it must:

> ... initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program, as described in subdivision (b) of Section 1771.5, with respect to that public works project.

Senate Bill X2 9 (Chapter 7, Statutes of 2009) created Labor Code sections 1771.55 and 1771.75 that authorized DIR to promulgate regulations to implement a monitoring service to ensure LCP compliance. DIR adopted regulations providing for a DIR monitoring service for LCP compliance. These regulations were approved by OAL and became effective on August 1, 2010. Approximately three months later, DIR repealed these DIR monitoring service regulations. This repeal was approved by OAL and became effective on November 4, 2010. Upon the repeal of the DIR monitoring service regulations, school districts that had been awarded contracts between August 1, 2010 and November 4, 2010 and had been using the DIR service were now required to comply with one of the two previously established options for an LCP as provided in Labor Code section 1771.7(a)(1): a DIR approved in-house LCP or a DIR approved third party LCP. Since November 4, 2010, and up to the present time, school districts have had these two remaining options to choose from in existing law to comply with the LCP requirements.

The only requirement in the proposed emergency regulation text promulgated by the Board that is not already in existing law is the compliance date of May 1, 2011—requiring school districts to implement one of the two remaining LCP options by that date. The rulemaking record includes the minutes from a Board meeting on February 23, 2011, during which the Board approved these emergency regulations. The minutes reflect that the date initially considered by the Board in order to allow sufficient time for affected school districts to comply with the LCP laws without negative impact to a district's participation in State-funded programs was November 1, 2011. There was some discussion about changing the date to July 1, 2011, which was supported by the Department of Finance representative at the Board meeting. After additional discussion, the Board approved changing the date to May 1, 2011. However, the record contains no discussion of what this "negative impact" may entail or why any of the specific compliance dates discussed during the Board meeting, or the May 1, 2011 date in particular, was necessary to avoid serious harm to the public peace, health, safety, or general welfare. The record only concludes that there will be a "negative impact to the district's participation in State-funded programs" if the school district does not implement, by no later than May 1, 2011, another acceptable LCP compliance method as required by Labor Code Sections 1771.5 and 1771.7. A conclusionary statement does not arise to *a description of the specific facts demonstrating the existence of an emergency*-- "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare."

Furthermore, the affected school districts are already required by Labor Code section 1771.7(a)(1) to implement one of the two remaining LCP options, along with meeting other statutorily required criteria, in order for the Board to release the apportioned funds. This

proposed emergency rulemaking action would have required school districts to meet the LCP compliance requirements by May 1, 2011. As noted in #3 above, the Board stated in the record that school districts need "sufficient time for such steps as school board approval, advertising and obtaining bids from third party contractors, awarding contracts, amending existing contracts to enforce or conform with LCP requirements, and other contractual and documentary matters." Because this proposed emergency rulemaking action was submitted to OAL on April 22, 2011, the earliest possible effective date for this action, pursuant to Government Code section 11349.6(b), was April 27, 2011, thus, providing only four calendar days (two working days) prior to the May 1, 2011 compliance deadline. As noted in #2 above, the Board stated that the proposed emergency regulations "will afford the districts a reasonable time to implement another acceptable LCP compliance method as required by law." It is hard to imagine that two working days would have been a "reasonable" amount of time or "sufficient time" for a school district to accomplish all of the steps noted above by the Board by May 1, 2011. Therefore, in regard to the proposed regulatory text amendments and the related amendments to the form incorporated by reference, the Board has not included specific facts demonstrating the need for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

In addition, Form SAB 50-05, which is incorporated by reference, includes some amendments regarding Joint-Use Projects that are unrelated to either identifying the contract award date to determine whether the school district might be one that was affected by the repeal of the DIR monitoring service, setting a date for compliance with LCP requirements, or determining whether the school district has met those requirements. The Finding of Emergency contains no specific facts regarding these unrelated amendments to Form SAB 50-05 that demonstrate the need for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

Neither the Finding of Emergency nor the Statement of Emergency as a whole meets the emergency standard. OAL informed the Board of this fact and requested additional information concerning the need for immediate action and the specific harm that would be avoided if the regulations were adopted immediately. The Board did not provide any additional information to be included in the record to supplement the Finding of Emergency.

Based upon a review of the documents provided by the Board, OAL concludes that the rulemaking file does not demonstrate the existence of an emergency and the need for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

B. The regulations fail to comply with the Necessity standard of Government Code section 11349.1.

In the record of a rulemaking proceeding, an agency must state the specific purpose of each regulatory provision, and explain why the provision is reasonably necessary to accomplish that purpose. The Necessity standard set forth in Government Code section 11349(a) provides:

> 'Necessity' means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute... that the

> regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the Necessity standard. To further explain the meaning of substantial evidence in the context of the Necessity standard, subdivision (b) of section 10 of the Title 1 of the California Code of Regulations provides:

> In order to meet the 'necessity' standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:
>
> (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
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> (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information.

School districts that were awarded contracts between August 1, 2010, and November 4, 2010, and were using the DIR monitoring service are now required by statute to comply with one of the two previously established options for an LCP as provided in Labor Code section 1771.7(a)(1): a DIR approved in-house LCP or a DIR approved third party LCP. Since November 4, 2010, and up to the present time, school districts have had these two remaining options to choose from in existing law to comply with the LCP requirements. The rulemaking record does not include any facts to indicate the necessity for restating the statutory LCP requirements in regulation or for setting the date of May 1, 2011, for compliance with LCP requirements. Taking into account the totality of the record, it does not contain substantial evidence demonstrating the need for this regulation to effectuate the purpose of the statute that the regulation implements, interprets, or makes specific. Consequently, these regulations do not comply with the Necessity standard of Government Code section 11349.1.

C. The regulations fail to comply with the Clarity standard of Government Code section 11349.1.

The Legislature in establishing OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them. (Gov. Code, sec. 11340(b).) For this reason, Government Code section 11349.1(a)(3) requires that OAL review all regulations adopted pursuant to the APA for compliance with the Clarity standard. "Clarity," as defined by Government Code section 11349(c), means "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

The proposed emergency rulemaking also amended the Fund Release Authorization form (SAB 50-05), a form incorporated by reference in CCR, title 2, section 1859.2. This is the form used by school districts to submit a request to the Board to release their approved funding. The amendments made to the regulatory text were also to be added to this form to allow the Board to verify the contract award date(s). Due to these form amendments, the Board updated the version date on the form to "REV 2/11." However, the version date was not simultaneously updated in CCR, title 2, section 1859.2. Section 1859.2 contains definitions for the Board's regulations dealing with the Leroy F. Greene School Facilities Act of 1998, in title 2, subgroup 5.5 (commencing with section 1859). This section defines and incorporates by reference Form SAB 50-05 with an earlier version date of "Revised 06/08." The inconsistency in version dates could potentially be confusing to the affected public. A member of the affected public might reasonably use the older version of the form as defined by section 1859.2 rather than the Form SAB 50-05 with the more recent "REV 2/11" date. To allow internal inconsistencies regarding the Form SAB 50-05 version dates within the CCR would violate the Clarity standard because the regulations would not be easily understood by those persons directly affected by them. Consequently, these regulations do not comply with the Clarity standard of Government Code section 11349.1.

CONCLUSION

For the reasons stated above, OAL disapproved the Board's proposed emergency rulemaking action.

Date: May 9, 2011

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