

**State of California  
Office of Administrative Law**

**In re:  
Department of General Services**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Regulatory Action: Title 2  
California Code of Regulations**

**Government Code Section 11349.3**

**Adopt sections: 1896.71, 1896.72,  
1896.73, 1896.74,  
1896.76, 1896.77,  
1896.78, 1896.81,  
1896.82, 1896.83,  
1896.84, 1896.88,  
1896.91, 1896.92,  
1896.96, 1896.97**

**OAL File No. 2012-0716-03 S**

**Amend sections: 1896.60, 1896.61,  
1896.62, 1896.70,  
1896.75, 1896.80,  
1896.90, 1896.95,  
1896.98**

**Repeal sections: 1896.63, 1896.64,  
1896.85**

---

**SUMMARY OF REGULATORY ACTION**

This rulemaking by the Department of General Services (DGS) proposed to adopt, amend and repeal several sections in the California Code of Regulations, title 2, Division 2, Chapter 3, Subchapter 10.5, commencing with section 1896.60, known as the Disabled Veteran Business Enterprise (DVBE) Participation regulations. Legislation chaptered in years 2003 through 2010 require the addition or deletion of regulatory content and the restructuring and renumbering of the regulations because code references, terms, and definitions have become obsolete.

**DECISION**

On July 16, 2012, the DGS submitted to the Office of Administrative Law (OAL) proposed amendments to several sections in the California Code of Regulations (CCR), title 2, Division 2, Chapter 3, Subchapter 10.5, commencing with section 1896.60, known as the Disabled Veteran Business Enterprise (DVBE) Participation regulations.

On August 27, 2012, OAL notified DGS that OAL disapproved the proposed regulatory action for failure to comply with specified standards and procedures of the California Administrative Procedure Act (APA). The reasons for the disapproval are summarized below:

- A. The agency failed to follow required APA procedures;
- B. The proposed regulations fail to comply with the clarity standard of Government Code section 11349.1(a)(3) and 1 CCR section 16(a).

All APA issues must be resolved prior to OAL approval of any resubmission of the regulations.

### **DISCUSSION**

Any regulation adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute 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 review (Gov. Code, secs. 11340.5 and 11346). OAL reviews all regulatory submissions for compliance with applicable APA procedural requirements and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. 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 in order to provide meaningful opportunity to comment on rules and regulations before they become effective.

This disapproval decision contains examples of identified issues in the proposed rulemaking submitted by DGS, but is not exhaustive. Many issues have been identified and discussed with DGS staff. All APA issues must be resolved before the regulations can be approved by OAL. OAL reserves the right to conduct a complete review for compliance with both the procedural and substantive requirements of the APA upon resubmission.

#### **A. FAILURE TO FOLLOW REQUIRED PROCEDURES.**

##### **1. FORM 399.**

Government Code section 11347.3(b)(5) requires that a rulemaking file contain the estimate, together with the supporting data and calculations, required by section 11346.5(a)(6). Section 11346.5(a)(6) identifies, in pertinent part, the estimate of the cost to any state agency and defines cost as additional cost, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations. The Department of Finance (DOF) adopted instructions pursuant to Government Code section 11357 in the State Administrative Manual (SAM) prescribing the methods that any agency shall use in making the estimate required by section 11346.5(a)(6).

For purposes of reporting this estimate, and other information, the DOF has developed, and requires regulatory agencies to use, the STD. 399. (SAM section 6614.) SAM section 6615 establishes when financial estimates contained in an STD. 399 require the concurrence of the DOF. Section 6615 states in pertinent part:

A state agency is not required in all instances to obtain the concurrence of DOF in its estimate of the fiscal effect of its proposed regulation on governmental entities. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- |                                  |                   |
|----------------------------------|-------------------|
| A.1-Reimbursable Local Costs     | B.1-State Costs   |
| A.2-Non-Reimbursable Local Costs | B.2-State Savings |
| A.3-Local Savings                | B.4-Other         |
| A.6-Other                        |                   |

In this rulemaking file, DGS has indicated in sections A. 6 – and B. 4- “Other. Please see attachment to STD. 399.” The STD. 399, therefore, requires DOF concurrence. The STD. 399 in the rulemaking file does not contain DOF concurrence and, therefore, the proposed regulatory action cannot be approved.

## **2. THE REGULATIONS CONTAIN CHANGES THAT WERE NOT MADE AVAILABLE TO THE PUBLIC.**

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are adopted:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. *If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.* Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. [Emphasis added.]

Section 44 of title 1 of the CCR specifies how such sufficiently related changes are to be made available:

- (a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within

which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
  - (2) all persons who submitted written comments at the public hearing; and
  - (3) all persons whose comments were received by the agency during the public comment period; and
  - (4) all persons who requested notification from the agency of the availability of such changes.
- (b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

The text of the regulations submitted to OAL for filing with the Secretary of State contains changes from the text that was made available to the public during the initial 45 day comment period. These changes are contained in subdivisions (m) and (ff) of section 1896.62; subdivisions (a), (a)(3), (a)(4), (a)(5), (b) and (e) of section 1896.73; subdivision (j) of section 1896.82; section 1896.83; subdivision (d)(3) of section 1896.84; and subdivision (d) of section 1896.92. Although one might argue that some of these changes may be “nonsubstantial or solely grammatical in nature”, it is not clear that all of them are. For example, section 1896.73(e) made available to the public states, in part:

Requests and resulting amendments generated by a DVBE substitution should be processed timely so as not to unreasonably delay the contractor’s performance of the contract.

The corresponding provision in section 1896.73(e) submitted to OAL for filing with the Secretary of State provides:

Requests and resulting amendments generated by a DVBE substitution should be processed timely so as not to unreasonably delay the contractor’s performance of the contract. OSDS will respond to substitution requests within three (3) business days.

The last sentence added to section 1896.73(e) above is a substantive change, and therefore, must be made available for comment pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations. In that the changes made to the other regulation sections listed above may also be changes with regulatory effect, OAL recommends that all of the changes be made available for public comment at the same time unless DGS can explain in the record why these changes are without regulatory effect.

### **3. FAILURE TO SHOW CONSULTATION AS REQUIRED BY STATUTE.**

Military and Veterans Code section 999.5(a) contains a consultation requirement:

The Department of General Services shall consult with the California Disabled Veteran Business Enterprise Program Advocate, appointed by the Secretary of the Department of Veterans Affairs pursuant to Section 999.11, on all matters related to the California Disabled Veteran Business Enterprise Program.

There is nothing in the rulemaking file establishing that DGS consulted with the California Disabled Veteran business Enterprise Program Advocate as required by the Military and Veterans Code. Upon resubmittal of this rulemaking DGS must provide documentation in the rulemaking file that this consultation occurred.

#### **B. CLARITY.**

In adopting the APA, the Legislature found that many regulations were unclear and confusing to the persons who must comply with the regulations (Gov. Code, sec. 11340(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the "Clarity" standard. Section 11349(c) defines "Clarity" to mean "... written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them."

Section 16 of title 1 of the California Code of Regulations declares that:

In examining a regulation for compliance with the 'clarity' requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the 'clarity' standard if any of the following conditions exists:

- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
- (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
- (3) the regulation uses terms which do not have meanings generally familiar to those 'directly affected' by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
- (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
- (5) the regulation presents information in a format that is not readily understandable by persons 'directly affected;' or
- (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be 'directly affected' if they:

- (1) are legally required to comply with the regulation; or

- (2) are legally required to enforce the regulation; or
- (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this rulemaking several sections did not satisfy the “Clarity” standard, as discussed below.

1. Proposed section 1896.73(d) violates the “Clarity” standard because it contains key terms or phrases that are undefined, ambiguous or inconsistent with the agency’s description of the intended effect of the regulation.

Proposed section 1896.73(d) provides:

If a contractor requests substitution of its listed DVBE subcontractor(s) by providing a written request to the awarding department in accordance with this section, the DGS may consent to the substitution of another DVBE as a subcontractor in any of the following situations:

...

(5) When the contractor demonstrates that the incorrect name of the DVBE was listed.

....

The word “demonstrates” in proposed section 1896.73(d) is undefined and ambiguous because a member of the regulated public would not know how to “demonstrate” that the incorrect name of the DVBE was listed. In addition, DGS’ rulemaking file documents show that DGS intends for this subdivision to allow “...for DVBE substitution where *clerical error* is merely the wrong name of the firm, but the one that was always intended by the bidder.” This information is found in DGS’ Initial Statement of Reasons (ISOR). Additionally, the ISOR states that this subdivision “...clarifies that the exemption is the actual name being in error, but the same contractor is intended.” This is contradictory to the language of section 1896.73 that states, “...DGS may consent to the substitution of *another* DVBE as a subcontractor in any of the following situations...” [Emphasis added.]

As a result of this ambiguity and inconsistency with DGS’ description of the intended effect of the regulation, the language in proposed section 1896.73(d) constitutes a presumed “Clarity” violation under title 1 CCR section 16(a)(1) and (2).

2. Proposed section 1896.75(a) is unclear because it does not present information that is readily understood by the regulated public. Section 1896.75(a) indicates that certain declarations must be submitted and further states, “Declarations may be submitted on a form made available as part of the solicitation information (or incorporated by reference and available on a Web site).” Persons directly affected have no way of determining where or what form might be

“incorporated by reference” and on what website. This ambiguity constitutes a presumed “Clarity” violation under title 1 CCR section 16(a)(5).

3. Proposed section 1896.80 is titled “Application” and indicates that “An application for DVBE status may be electronically submitted in the certification database via the DGS’ Web site....” This is unclear because there is nothing in this section to identify what is required to be contained in this “application.”

In dealing with the application DGS has three options. DGS may 1) incorporate the application by reference (if so, DGS must comply with 1 CCR section 20), 2) DGS could include the regulatory contents of the application in the regulation, or 3) DGS could include the application with the regulations to be printed in the CCR. Whatever DGS chooses to do, the application must also be included in the rulemaking file.

4. Proposed section 1896.83 violates the “Clarity” standard because it contains key terms or phrases that are undefined and ambiguous. Section 1896.83 states, “...the OSDS may determine if the applicant establishes the intent and apparent ability to perform a CUF...” The words “intent” and “apparent ability” in proposed section 1896.83 are undefined and ambiguous. The regulation is silent on what constitutes “intent” and “apparent ability.” How would the regulated public know what and how to establish “intent” and “apparent ability” to perform a CUF? This is a presumed “Clarity” violation under title 1 CCR section 16(a)(1) and (3).

5. Proposed section 1896.84(d)(3) has the same issue as identified in section 1896.83 above.

6. The language of subdivisions (e) and (f) of section 1896.84 is as follows:

(e) Certification will be valid for up to twenty-four (24) months. Prior to the end of a certification period of twelve (12) months or less, at its sole discretion, the OSDS may extend the certification period up to an additional twelve (12) months after certification eligibility re-verification or confirmation.

(f) In order to ensure uninterrupted DVBE certification, the business must provide a completed renewal application and documentation to the OSDS at least thirty (30) calendar days, and not earlier than ninety (90) calendar days, before the certification expires. If eligible, a new certification period of up to twenty-four (24) months will begin.

Subdivisions (e) and (f) in section 1896.84 violate the “Clarity” standard because a member of the regulated public would not be able to determine how long their certification period is. The language of subdivisions (e) and (f) creates uncertainty and is unclear for those directly affected by the regulation. This is a presumed “Clarity” violation under title 1 CCR section 16(a)(3).

Section 1896.84(f) also violates the “Clarity” standard with the use of the terms “renewal application” and “documentation.” There is nothing to identify what is required to be contained in this “renewal application” or what “documentation” must be provided. This is a presumed “Clarity” violation under title 1 CCR section 16(a)(1) and (3).

In dealing with the renewal application DGS has three options. DGS may 1) incorporate the renewal application by reference (if so, DGS must comply with 1 CCR section 20), 2) DGS could include the regulatory contents of the renewal application in the regulation, or 3) DGS could include the renewal application with the regulations to be printed in the CCR. Whatever DGS chooses to do, the renewal application must also be included in the rulemaking file.

Any changes made to the regulations to address the above "Clarity" concerns must be made available to the public pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.


**D. ERRORS IN THE TEXT.**

The proposed text includes errors. The text has typos, internal inconsistencies and incorrect display of changes with respect to the existing regulations. None of the errors present a significant substantive issue with regard to the notice that was provided to the public or impair the adequacy of DGS' rulemaking proceeding, but they must nevertheless be corrected prior to OAL approval and filing with the Secretary of State. All of these various errors have been discussed with DGS' staff.

**CONCLUSION**

For the reasons set forth above, OAL has disapproved this regulatory action.

Date: September 4, 2012

  
Peggy J. Gibson  
Senior Counsel

FOR: DEBRA M. CORNEZ  
Director

Original: Fred Klass  
Copy: Diana T. Alfaro