FINDING OF EMERGENCY

The State Allocation Board (SAB) finds that an emergency exists, and that the proposed regulations are necessary for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

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 The regulations establishing that DIR service were repealed on November 4, 2010, and school districts that had been using the service were required to either hire a third party LCP administrator or seek approval from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.

Authority and Reference Citations

Authority: Section 17070.35 of the Education Code.

Reference: Sections 17070.35, 17070.50, 17071.75, 17072.12, 17072.13, 17072.14, 17072.18, 17072.30, 17072.35, 17074.15, 17074.25, 17076.10, 17077.40, 17077.42, 17077.45, 17078.52 and 17251 of the Education Code.

Informative Digest/Policy Overview Statement

Senate Bill 50, Chapter 407, Statutes of 1998, established the School Facility Program which streamlined funding processes, eliminated State oversight, and made school districts more accountable for their projects. The SAB adopted regulations to implement the Leroy F. Greene School Facilities Act of 1998, which were adopted by the Office of Administrative Law and filed with the Secretary of State on October 8, 1999.

Background:

Law following 2002: AB 1506, Chapter 868, Statutes of 2002 (Wesson), required an LCP for school construction projects funded from either Proposition 47 or Proposition 55. School districts subject to these requirements had to either contract with a DIR-approved third party to perform the LCP or seek approval from the DIR to initiate and enforce the LCP internally. The purpose of the LCP was to ensure appropriate compliance with certain labor laws for school construction projects, such as the appropriate prevailing wage payments for construction work.

Law changed in 2009: Chapter 7, Statutes of 2009 (SB X2 9 - Padilla, see LC Sections 1771.55 and 1771.75). AB 1506 only applied to projects funded from Propositions 47 and 55, but this new law applied the LCP requirements to any State bond funded public works project, including Proposition 1D (the Kindergarten-University Public Education Facilities Bond Act of 2006). SB X2 9 specified that the LCP must be either directly administered by the DIR, or by the school district if approved by the DIR. <u>It superseded AB 1506 in that contracting with a third party administrator no longer demonstrated LCP compliance</u>. On August 1, 2010 the DIR began providing monitoring services for labor compliance for all bond-funded public works projects, and school districts that did not have an approved in-house LCP began using the DIR services instead of a third party administrator.

Repeal of DIR Implementing Regulations: On October 21, 2010, the DIR began notifying participating school districts of the impending repeal of its implementing regulations and that the DIR would no longer be providing LCP monitoring services. The Office of Administrative Law (OAL) approved the DIR's request to repeal the regulations effective November 4, 2010. <u>The LCP requirements then reverted back to those of LC Section 1771.7 as created by AB 1506, and contracting with a third party LCP administrator was again a permissible compliance method</u>. The DIR advised school districts that projects funded from Propositions 47 and 55 must either continue using their DIR-approved in-house LCP or contract with a third party administrator, pursuant to LC Section 1771.7. The repeal of the DIR regulations also made applicable the provision that an LCP is not required for projects funded from Proposition 1D.

The proposed amendments affect projects with contracts awarded between August 1, 2010 and November 4, 2010. The proposed amendments will only impact projects funded from Propositions 47 and 55 because those projects funded from Proposition 1D are not required to have an LCP, pursuant to LC Section 1771.7.

The OPSC currently verifies that school districts have an LCP for the project at the time of fund release and during an audit. School districts would provide the contract award date(s) on the amended Form SAB 50-05, which would allow the OPSC to determine if the award date falls between August 1, 2010 and November 4, 2010.

The SAB approved emergency amendments to SFP Regulation Sections 1859.90 and 1859.106 and Form SAB 50-05, to provide sufficient time for affected school districts (that awarded construction contracts between August 1 and November 4, 2010) to comply with LC Section 1771.7. The DIR regulations to implement their LCP monitoring services were repealed on an emergency basis, further limiting the time for impacted school districts to switch to a different LCP compliance method.

A summary of the proposed emergency regulatory amendments is as follows:

Existing Regulation Section 1859.90 specifies the process for school districts to request the release of funds for SAB-approved apportionments, and requires that their requests be submitted within 18 months of the SAB apportionment approval. The proposed emergency amendments add the following new paragraph:

> "For all contracts associated with the project (as defined in LC Section 1720) awarded between August 1, 2010 and November 4, 2010, school districts must have either a Department of Industrial Relations approved third party Labor Compliance Program or a Department of Industrial Relations approved in-house Labor Compliance Program, if required pursuant to Labor Code (LC) Section 1771.7, no later than May 1, 2011."

Existing Regulation Section 1859.106 specifies allowable district expenditures and State apportionments for new construction projects, Joint-Use projects, Critically Overcrowded School Facilities projects, charter school projects, modernization projects, projects with additional DTSC costs, and compliance with site acquisition guidelines, upon audit review. The proposed emergency amendments add the following new paragraph:

> "For all contracts associated with the project (as defined in LC Section 1720) awarded between August 1, 2010 and November 4, 2010, school districts must have either a Department of Industrial Relations approved third party Labor Compliance Program or a Department of Industrial Relations approved in-house Labor Compliance Program, if required pursuant to Labor Code (LC) Section 1771.7, no later than May 1, 2011."

Existing Form SAB 50-05, Fund Release Authorization, is the Form submitted by school districts and charter schools asking for the State to release their approved funding, provided the project is at least 50 percent under contract and the school district has met other specific criteria. The proposed emergency amendments add the following paragraph under "General Information:"

> "For all contracts associated with the project (as defined in LC Section 1720) awarded between August 1, 2010 and November 4, 2010, school districts must have either a DIR approved third party LCP or a DIR approved in-house LCP, if required pursuant to Labor Code (LC) Section 1771.7, no later than May 1, 2011."

The proposed emergency amendments to Form SAB 50-05 also add data and document submittal requirements, with corresponding data fields, for fund releases for new construction/modernization/charter school rehabilitation, and Joint-Use projects, including contract award dates, construction contract signature dates, Division of the State Architect approval date, percent of construction under binding contract, and issue date of first Notice to Proceed.

Finally, the proposed emergency amendments make paragraph numbering corrections, clarify the need for the "First" Notice to Proceed, and add concluding data fields for school district representatives to enter their name and job title, e-mail address and telephone number.

Mandate on Local Agencies or School Districts

The Executive Officer of the SAB has determined that the proposed emergency regulations do not impose a mandate or a mandate requiring reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. It will not require local agencies or school districts to incur additional costs in order to comply with the proposed emergency regulations.

Cost Estimate

The Executive Officer of the SAB has assessed the potential for significant adverse economic impact that might result from the proposed emergency regulatory action and it has been determined that:

- There will be no costs or savings to the State.
- There will be no non-discretionary costs or savings to local agencies.
- There will be no costs to school districts except for the required district contribution toward each project as stipulated in statute.
- There will be no costs or savings in federal funding to the State.