



OFFICE OF ADMINISTRATIVE HEARINGS

**RULEMAKING FILE 2002-2003
OAL File # 02-0920-01**

**PROCEDURES FOR
PUBLIC WORKS
CONTRACT
ARBITRATIONS**

**FINAL STATEMENT OF REASONS FOR
PROPOSING THE MODIFICATION AND ADOPTION OF REGULATIONS FOR
PROCEDURES FOR PUBLIC WORKS CONTRACT ARBITRATIONS IN
CHAPTER 3 (SECTIONS 1300 TO 1393) OF DIVISION 2 OF
TITLE 1 OF THE CALIFORNIA CODE OF REGULATIONS**

OVERVIEW

*DESCRIPTION OF STATUTORY REQUIREMENT THAT
THE PROPOSED REGULATIONS ARE INTENDED TO ADDRESS
SPECIFIC PURPOSE OF EACH REGULATION*

The Overview, Description of Statutory Requirements that the Proposed Regulations are Intended to Address, and Specific Purpose of Each Regulation sections remain the same as in the Initial Statement of Reasons. The only change that was made from the regulations originally noticed was to regulation 1322. That change does not revise the purpose of the regulation to require revised language.

In Compliance with Public Contract Code section 10240.2, the Public Works Contract Arbitration (PWCA) Committee – created pursuant to Public Contract Code section 10245 – was actively involved in the development, revision, and approval of these regulations at every step of the way. The committee is composed of appointees of the Directors of the Departments of General Services, Transportation, and Water Resources, and three Governor’s appointees from the construction industry. A subcommittee of the PWCA Committee drafted these regulations, in consultation with the Office of Administrative Hearings, and the entire PWCA Committee reviewed the proposed regulations at regular intervals.

DETERMINATION OF LOCAL MANDATE

The Directors of the Departments of General Services, Transportation, and Water Resources (Regulating Authority) have determined that these proposed regulations do not impose a mandate on local agencies or school districts.

ALTERNATIVES TO THE PROPOSED REGULATION

No alternatives to having any regulations were considered by the Regulating Authority because these regulations were required by statute. While preparing the proposed regulations, the Regulating Authority determined that no alternative considered by the Regulating Authority would be either more effective in carrying out the purpose for which the regulations were proposed or would be as effective and less burdensome to affected persons than the adopted regulations.

SUMMARY OF COMMENTS RECEIVED DURING COMMENT PERIODS
AND RESPONSES THERETO

The OAH received seven letters of comment during the comment periods on behalf of the Regulating Authority.

The **first letter**, by Paul M. Mahoney of Jones, Mahoney, Brayton & Soll, made a general objection to the proposed amendments to the regulations based on his disagreement with the procedure by which arbitrators are placed on the PWCA panel.

The Regulating Authority's Response: The process for placing arbitrators on the PWCA panel is created in statute and not subject to revision in regulation. Therefore, no change was made in response to this comment.

The **second letter**, by Patrick J. Duffy of Monteleone & McCrory, LLP, indicated concern about the apparent limitations of the application of **regulation 1332**. The **third letter**, by Bernard S. Kamine, Kamine Ungerer LLP, concurred with Mr. Duffy's recommendation. The **fourth letter**, also from Patrick J. Duffy, clarified his comments and proposal for revising regulation 1332. The **fifth letter**, by Stephen Cameron, California Department of Transportation, concurs with Mr. Duffy's recommendation.

The Regulating Authority's Response: Regarding regulation 1332, you propose amending the regulation to clarify the basis on which a contractor may bring an OAH proceeding to include the instance when a state entity refuses to accept a project that the contractor believes has been completed to enforce acceptance. Regulation 1332 was revised as proposed by Mr. Duffy and put out for an additional 15 day comment period. During that comment period, additional comments were received that caused regulation 1332 to be returned to its original proposed version. See below for further explanation.

The **sixth letter**, by Paul A. Lax of Lax & Stevens, expressed his opinion that the revisions of **regulation 1332** were not a positive change because it "would broaden the scope of issues which could be separately adjudicated before a separate arbitrator and only increase the cost and delay associate with public works contract arbitrations." A **seventh letter**, by Michael C. Doughton, California Department of Corrections, also disputed the value of the revisions to regulation 1332 and recommended return to the originally proposed version of the regulation.

The Regulating Authority's Response: Due consideration was given to the alternatives suggested on **regulation 1332** and it was decided to return to the original proposed version of regulation 1332. The original proposed version gives the contractor an opportunity to have an arbitrator rule on the authority for opening of an arbitration, but does not create a dual arbitral tribunal where duplication of effort and excess costs are at stake.

Updated Informative Digest

One revision was made to the regulations previously noticed. In **regulation 1322** subdivision (d) of Standard 10 and subdivisions (m), (n) and (q) of Standard 2 of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration are no longer incorporated. Instead, specific definitions are added to the regulation for “member of the arbitrator’s immediate family” and “member of the arbitrator’s extended family.” In addition, a comma is moved in subdivision © and the last sentence of subdivision (c), which reads “If neither Petitioner or respondent objects within the time specified, the Arbitrator shall continue to be deemed acceptable.” Is moved to earlier in the subdivision (c). It was also pointed out that in the previous revisions to 1322 (a) “including one selected by the Superior Court” should have been underscored as an addition to the language of that section. This does not require a change in the informative digest from that stated in the Notice of Proposed Regulatory Action. It is reprinted below.

INFORMATIVE DIGEST / OVERVIEW

The Office of Administrative Hearings, a division of the Department of General Services, may, jointly with the Departments of Transportation and Water Resources, modify, revise, or repeal uniform regulations to implement the provisions of Articles 7.1 (commencing with Section 10240) and 7.2 (commencing with Section 10245) of Chapter 1 of Division 2 of the Public Contract Code. These regulations may include but need not be limited to:

- (a) The method of initiating arbitration.
- (b) The place of hearing based upon the convenience of the parties.
- (c) Procedures for the selection of a neutral arbitrator.
- (d) The form and content of any pleading.
- (e) Procedure for conducting hearings.
- (f) The providing of experts to assist the arbitrator if the assistance is needed.
- (g) The content of the award.
- (h) Simplified procedures for claims of fifty thousand dollars (\$50,000) or less.

Amendments to these regulations are proposed to streamline and clarify the arbitration process. The articles and regulations within the articles are reordered into a more logical order that follows the order of proceedings in arbitration. The intent of the regulation revisions is to clarify procedures and improve the content of the regulations. Some issues, such as costs, attorney's fees, discovery, and arbitration selection procedures have been the subject of dispute. These revisions are intended to resolve such disputes. Cross-complaint filing fees are being eliminated, since the filing of cross-complaints has not presented a significant administrative burden to OAH. Further, OAH is disentangling itself from some simple matters which are more fittingly disposed of by the arbitrator or the parties themselves, such as setting locations and arranging transcriptions. The parties would also be allowed to choose the simplified claims procedures for aggregate claims exceeding \$50,000. Finally, regulatory provisions have been more closely tailored to the arbitration process and modified to be more consistent with both statutes and current practice.