

## INITIAL STATEMENT OF REASONS

<b><u>HEARING DATE(S):</u></b>	June 2, 2016, at 10:00 a.m. Room 150, 801 Capitol Mall, Sacramento, California
<b><u>SUBJECT MATTER OF THE PROPOSED REGULATIONS:</u></b>	Written Justification for Government Code 19130(b) Contracts
<b><u>SECTIONS AFFECTED:</u></b>	Title 2, Chapter 1, California Code of Regulations, Section 547.60 (Amend) and Section 547.61 (Adopt)

### **PURPOSE, NECESSITY, AND BENEFITS OF REGULATORY ACTION:**

#### **Background:**

State agencies are permitted to enter into personal services contracts with private contractors only if the criteria specified in Government Code section 19130, subdivisions (a) and (b) (referred to hereafter as Cost-Savings contracts and Subdivision (b) contracts, respectively) are satisfied.<sup>1</sup> In addition, state agencies, as a general rule, must have the approval of the Department of General Services (DGS) for all service contracts over \$50,000. (Gov. Code, § 14616; Pub. Contract Code, §§ 10335, subd. (a) & 10295; State Contracting Manual Volume I §§ 4.03 & 4.04.)

The State Personnel Board (Board) may establish standards and controls that are "necessary to assure that the approval is consistent with the merit employment principles and requirements contained in article VII of the California Constitution." (Pub. Contract Code, § 10337, subd. (a).) The Board, though, may not establish a program separate from the contract approval program of DGS. (*Ibid.*) The Board is also empowered to audit, among other things, a state agency's personal services contracts to ensure compliance with civil service laws and Board regulations. (Gov. Code, § 18661, subd. (a).) When

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<sup>1</sup> Government Code section 19130, subdivision (a) concerns cost-savings contracts that must meet certain specified conditions. Subdivision (b) concerns other types of services the Legislature has deemed appropriate for public contracting of services, e.g., a new state function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors; the services are urgent, temporary or of an occasional nature; or, a conflict of interest necessitates a state agency to hire outside legal counsel.

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conducting an audit, the Board may inspect an appointing power's documents, policies, practices, and procedures. (Gov. Code, § 18661, subd. (b).) Each appointing power is required to provide the Board with access to its records and to prepare reports, as required by the Board. (Gov. Code, § 18573.)

As to Cost-Savings contracts, state agencies are required to "retain and provide all data and other information relevant to the contracts and necessary for a specific application of the standards set forth in subdivision (a) of Section 19130." (Gov. Code, § 19131.) Unlike Cost-Savings contracts, there is no statutory recordkeeping requirement for Subdivision (b) contracts. Section 547.60, Title 2, California Code of Regulations (Rule 547.60), however, requires an agency to document the reasons why a personal services contract satisfies the Government Code section 19130, subdivision (b) criteria. In particular, Rule 547.60 mandates that when a state agency requests approval from DGS for a Subdivision (b) contract, the agency include with its contract transmittal to DGS a written justification that demonstrates how the contract meets one or more of the conditions specified in subdivision (b) of the Government Code. The written justification must be factually detailed and specific.

By way of its compliance review authority, the Board evaluates whether or not agencies have followed Rule 547.60. To make this determination, the Board instructs agencies that have entered into Subdivision (b) contracts to produce a copy of DGS form STD 215, since the form, pursuant to Rule 547.60, requires a written justification for contracting out.<sup>2</sup>

Rule 547.60 does not apply when agencies enter into Subdivision (b) contracts that are exempt from DGS approval, e.g, the contract is under fifty thousand dollars. Consequently, for exempt Subdivision (b) contracts, agencies are not obligated to document the reasons why the contract is permissible under Government Code section 19130, subdivision (b). Absent such documentation, the Board cannot determine whether an agency has properly complied with the law.

This regulatory action updates the Rule 547.60 to require that agencies document the reasons why a Subdivision (b) contract is permissible, regardless of the contract amount. The regulatory action also ensures that that if DGS approval of a Subdivision (b) contract is required the agency must include a written justification with its contract transmittal. The changes also include re-numbering and non-substantive style changes needed for clarity and consistency.

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<sup>2</sup> DGS form STD 215 (REV 1-2014) includes box 17(a), which is entitled JUSTIFICATION FOR CONTRACTING OUT," and requires the contracting agency to check one of two boxes: (1) "Contracting out is based on cost savings per Government code 19130(a). The State Personnel Board has been so notified"; (2) "Contracting out is justified based on Government Code 19130(b). Justification for the Agreement is described below."

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Discussion of Each Adoption, Amendment, and Repeal, and Anticipated Benefits:

The following paragraphs set forth the problems with the current regulations, a summary of the proposed changes, the purpose and rationale of each adoption, amendment or repeal, and the anticipated benefits of each adoption, amendment, or repeal.

**I. Amend Rule 547.60. Written Justification.**

**A. Strike Reference to DGS Approval.**

The standards of Government Code section 19130, subdivision (b) apply to personal services contracts regardless of the dollar amount of the contract. The problem is that Rule 547.60 currently only applies when an agency submits a Subdivision (b) contract to DGS for approval. Yet, not all Subdivision (b) contracts require DGS approval. Generally, personal services contracts of less than fifty thousand dollars do not require DGS approval. (Gov. Code, § 14616; Pub. Contract Code, §§ 10335, subd. (a) & 10295; State Contracting Manual Volume I §§ 4.03 & 4.04.)

The proposed amendment to Rule 547.60 strikes reference to DGS approval for a Subdivision (b) contract and instead requires that whenever an agency executes a Subdivision (b) contract the agency shall document the reasons why the contract satisfies one or more of the conditions specified in Government Code section 19130, subdivision (b).

The purpose for this amendment is to ensure that agencies record and maintain written justifications for Subdivision (b) contracts, regardless of the amount of the contract. This is a necessary change because agencies must follow Government Code section 19130, subdivision (b), no matter the amount of the services contract, and compliance with subdivision (b) cannot be effectively determined without requiring that agencies maintain documentation for all Subdivision (b) contracts.

The anticipated benefits of this regulatory action are to conserve the fiscal interests of the State by promoting compliance with Government Code section 19130, subdivision (b); enable the Board to conduct thorough and effective compliance reviews of Subdivision (b) contracts; and increase openness and transparency in state government related to contracting out for services.

**B. Set Standards for Written Justification.**

Rule 547.60 does not set forth a legibility standard for the written justification of Subdivision (b) contracts. Documentation that is not legible can lead to confusion, erroneous conclusions, and time consuming efforts to clarify information.

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The amendment requires that the written justification is signed by a person who is authorized to do so and who signs based on his or her personal knowledge, information, or belief. In addition, the date of signing, the representative's name, title, address, e-mail address, and telephone number must be included and legible.

The purpose of the amendment is to set a legibility standard for written justifications. This addition is a critical requirement for the Board to perform effective and thorough audits of Subdivision (b) contracts.

The anticipated benefits of this change are to promote effectiveness and efficiency of the Board's compliance reviews, and increase openness and transparency in state government related to contracting out for services.

#### C. Maintain Written Justifications in Accordance with Section 26.

Rule 547.60 does not address the manner or length of time agencies must keep the written justification for Subdivision (b) contracts. The lack of a retention requirement will lead to disparity in not only how, but how long, agencies will retain written justifications. This will negatively impact the Board's ability to effectively audit written justifications.

The amendment requires that written justifications are maintained in accordance with the Board's record retention requirements found in Section 26. Section 26 requires that records be retained for five years.

The purpose of the amendment is to set a record retention requirement. The change is necessary for thorough and effective audits.

The anticipated benefits include increasing the effectiveness of the Board's audits and ensuring agencies comply with Government Code section 19130, subdivision (b).

#### D. Miscellaneous Amendments.

The proposed changes to Rule 547.60 require other miscellaneous amendments. The title of the rule is changed to "Written Justification." This change is necessary to accurately describe the subject matter covered by the amendments. The authority cited deletes reference to Public Contract Code section 10337, subdivision (a). The deletion is necessary because the amendments strike reference to DGS approval of the personal services contract. Reference to Government Code section 18661 is added. This addition is

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necessary, since this law sets the Board's authority to audit personal services contracts and inspect documents, policies, practices, and procedures.

The benefits of these changes are to ensure that the regulation is accurate and current.

## **II. Adopt Rule 547.60.1. Standard and Control for Approval of Contracts.**

DGS is authorized by law to approve personal services contracts. Because the reference to DGS is stricken in Rule 547.60, as amended, there may be confusion as to the role of DGS in approving personal services contracts.

Therefore, the adoption requires that if approval of DGS is required for a Subdivision (b) contract, the agency must include with its contract transmittal the written justification described in Rule 547.60, subdivision (a).

The purpose of this adoption is to ensure that that if DGS approval of a Subdivision (b) contract is required the agency must include a written justification with its contract transmittal. This is necessary to avoid any confusion regarding the process of contract transmittals to DGS.

The anticipated benefits of this adoption are clarity and consistency with the laws and rules related to DGS's authority to review and approve personal service contracts.

### **ECONOMIC IMPACT ASESMENT:**

The proposed regulations set a standard only related to the recordkeeping and transmittal procedures state agencies must follow when entering into personal services contracts under Government Code section 19130, subdivision (b). Therefore, the adoption of these regulations will not:

1. Create or eliminate jobs within California.
2. Create new businesses or eliminate existing businesses within California.
3. Affect the expansion of businesses currently doing business within California.
4. Affect worker safety or the state's environment.

The adoption of these regulations, however, will have a positive impact on the health and welfare of California residents in that the benefits of this regulatory action include openness and transparency in state government and improved efficiency in the Board's compliance reviews of personal services contracts.

### **TECHNICAL, THEORETICAL AND/OR EMPIRICAL STUDIES, REPORTS OR DOCUMENTS:**

None.

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### **ANTICIPATED BENEFITS OF THE REGULATORY ACTION:**

The benefits of this regulatory action include: (1) conserving the fiscal interests of the State by promoting compliance with Government Code section 19130, subdivision (b); (2) enabling the Board to conduct thorough and effective compliance reviews of Government Code section 19130, subdivision (b) contracts; and (3) increasing openness and transparency in state government related to personal services contracting.

### **SPECIFIC TECHNOLOGIES OR EQUIPMENT:**

This regulation does not mandate the use of specific technologies or equipment.

### **EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS:**

Not applicable. The Board is not a department, board, or commission within the Environmental Protection Agency, the Resources Agency, or the Office of the State Fire Marshall.

### **SIGNIFICANT ECONOMIC IMPACT ON BUSINESS:**

The proposed regulations set a standard only related to the recordkeeping and transmittal procedures state agencies must follow when entering into personal services contracts under Government Code section 19130, subdivision (b). Accordingly, it has been determined that the adoption of the proposed regulations would not have a significant, statewide adverse economic impact affecting California businesses, including the ability of California businesses to compete with businesses in other states.

### **CONSIDERATION OF ALTERNATIVES:**

The Board has initially determined that no reasonable alternatives have been identified that would be more effective in carrying out the purposes for which the instant action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.