

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
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Service Employees International Union, Local 1000 (California State Employees' Association))	PSC No. 05-03
)	
from the Executive Officer's February 16, 2005 Approval of a Contract for Information Technology Services between the California Department of Health Services and IDNS, Inc.)	October 3, 2005
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APPEARANCES: Anne M. Giese, Attorney, on behalf of Service Employees International Union, Local 1000 (California State Employees' Association); Timothy E. Ford, Senior Staff Counsel, on behalf of California Department of Health Services.

BEFORE: Maeley Tom, Vice President; Ron Alvarado, Sean Harrigan and Anne Sheehan, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the Service Employees International Union, Local 1000 (California State Employees' Association) (CSEA), appealed from the Executive Officer's February 16, 2005 decision approving the contract (Contract) between the California Department of Health Services (DHS) and IDNS, Inc. (IDNS), for information technology services. In this decision, the Board finds that the Contract is justified under Government Code section 19130, subdivision (b)(3), based on the unavailability of state civil service employees to perform the contract duties at the time DHS entered into the Contract. The Board will not, however, approve any future contract for the services at issue here, absent a showing by DHS that it engaged in a diligent effort to hire state civil service employees to perform the contract duties, but, despite such diligent efforts, it was unable to do so.

BACKGROUND

DHS's Center for Health Statistics (CHS or Center) maintains a large database of vital statistics for the State of California. Within CHS is the Office of Vital Records (OVR), which is responsible for the registration and permanent preservation of all vital records, and the dissemination of vital event information for statistical, research, and individual purposes. Each year, OVR records over one million birth, death, fetal death, marriage, and dissolution documents. This vital information was originally maintained on an IBM mainframe computer.

During December 2002, DHS entered into Agreement 0304-058 (Contract) with IDNS for the purpose of obtaining information technology services. The stated duration of the Contract is from December 24, 2002 through December 31, 2007. In accordance with the Statement of Work set forth in the Contract, IDNS agreed to supply information technology personnel who would provide application maintenance and production support for the following systems operated by CHS: Universal Search Database, Optical Imaging of California's Vital Record Systems, Center's Request Tracking Systems, County Transmittal Systems, Web Application Center, FileNET AVSS System Integration, and Key Data Entry System.

Some of IDNS' specific tasks and responsibilities under the Contract include assisting Center staff with programming support, diagnosing and resolving system problems, generating and analyzing system statistics and reports, providing preventive database maintenance and support, providing daily and monthly production support, and database development and maintenance. In addition, IDNS assisted CHS in migrating the information from the obsolete IBM mainframe to Microsoft NT applications.

IDNS has provided all the database management services needed by CHS since it migrated to the NT platform. In addition, IDNS has performed the high-level systems analysis, design, programming, and network support. IDNS also provides CHS with application programming services.

The Notice of Contract explained the need for the services provided by IDNS as follows:

The impact if not approved will result in the lack of expert knowledge and skills require [sic] to maintain and support the Center's mission critical databases and systems, thus resulting in the increase [sic] of system failure. A database/system failure will interrupt essential services to the public and State and Federal agencies as well as the Center's mission critical business function. The expert knowledge and skill provided will help ensure system database operability, infrastructure & data integrity and provide the Center with the means to meet Federal contractual requirements and meet it's the [sic] legislative mandate.

On or about September 26, 2003, CSEA asked the SPB to review the proposed Contract for compliance with Government Code section 19130, subdivision (b).¹ CSEA essentially maintains that the Contract is improper because DHS could have contracted with Teale Data Center (TDC) – a state entity that employs civil service employees fully capable of performing the types of functions performed by IDNS – to perform the Contract. In the alternative, CSEA maintains that DHS should have utilized existing state civil service classifications to hire employees who were capable of performing the duties currently performed by IDNS.

¹ By letter dated December 2, 2003, the SPB determined that it did not have jurisdiction to review certain contracts that had expired before SPB review was requested by CSEA. Accordingly, this decision is limited to the review of Agreement 0304-058 between DHS and IDNS.

DHS maintains that it could not contract with TDC to perform the duties contemplated under the Contract because TDC does not provide the type of on-site services that DHS required. DHS further asserts that, although it made efforts to recruit employees who were capable of performing the type of high-level work currently being performed by IDNS, its hiring efforts were ultimately unsuccessful due to a dearth of qualified candidates. Most notably, DHS cited to the significant pay differential that exists between state civil service information technology classifications and the salaries received by information technology personnel in the private sector as a primary reason for its inability to recruit qualified applicants to perform the necessary duties successfully. DHS contends, therefore, that the Contract is justified pursuant to the provisions of Government Code section 19130(b)(3).

PROCEDURAL HISTORY

By letter dated September 26, 2003, pursuant to Government Code section 19132 and SPB Rule 547.59 et seq.,² CSEA asked SPB to review the Contract for compliance with Government Code section 19130, subdivision (b).

On October 27, 2003, DHS responded to CSEA's review request.

On December 19, 2003, CSEA submitted a reply. In its reply, CSEA asserted that civil service employees at TDC perform the types of information technology services described in the Contract and that DHS should have obtained those services from TDC, instead of IDNS.

² Cal. Code Regs., tit. 2, § 547.59 et seq.

By memorandum dated March 30, 2004, SPB staff asked the TDC Director to respond to the following questions:

1. When the Contract was entered into in October 2003, could TDC have provided to DHS the information technology services described in the Statement of Work set forth in the Contract?
2. If TDC could not have provided all the services described in the Contract's Statement of Work, which of those services could TDC have provided and which of those services could TDC not have provided? For any of those services that TDC could not have provided, was TDC's inability to provide those services due to the lack of expertise, the lack of adequate civil service staff, or any other reason?
3. Is there any other additional information that TDC could provide to the SPB that would assist it in reviewing whether the Contract could have been adequately and competently performed by state civil service employees at TDC?

TDC responded to the above-listed questions on November 8, 2004. In its response, TDC stated that it does not typically support client hardware, operating systems, or applications that are physically located at a client's facility. Instead, application support remains the client's responsibility.

On December 15, 2004, both CSEA and DHS submitted replies to TDC's response.

The Executive Officer issued his decision approving the Contract on February 16, 2005, finding, in relevant part:

Although CSEA contends that state civil service employees are capable of performing the contracted services, the only specific source of those services is identified as Teale. The response from Teale, however, indicates that the services are not available through Teale. As the Board stated in *Department of Pesticide Regulation*,³ in order for a contract to be justified under Government Code section 19130(b), 'it must be shown that the services contracted are not available through the civil service system, i.e., there are no existing civil service job classifications through which a

³ (2002) PSC No. 01-09, at pp. 12-13.

state agency could either appoint, or retain through other state agencies that offer to state departments, employees with the knowledge, skills, expertise, experience, or ability needed to perform the required work.’ While CSEA asserts that, theoretically, employees in certain state civil service classifications could be used to perform the work, it has not demonstrated that the services are actually available through the civil service system. Instead, the response of Teale to SPB staff’s inquiry indicates that the services are not available through Teale. Nor are they available through DHS’s own employees. Therefore, I conclude that the contract is justified under Government Code section 19130, subdivision (b)(3). [Emphasis in original.]

CSEA timely appealed to the Board from the Executive Officer’s decision.

The Board has reviewed the record, including the written arguments of the parties and, at its regularly scheduled meeting on July 13, 2005, heard the oral arguments of the parties, and now issues the following decision.

ISSUE

The following issue is before the Board for review:

Is the Contract justified under Government Code section 19130, subdivision (b)(3)?

DISCUSSION

In *Professional Engineers in California Government v. Department of Transportation*,⁴ the California Supreme Court recognized that, emanating from Article VII of the California Constitution, is an implied “civil service mandate” that prohibits state agencies from contracting with private entities to perform work that the state has historically and customarily performed and can perform adequately and competently. Government Code section 19130 codifies the exceptions to the civil service mandate recognized in various court decisions. The purpose of SPB’s review of contracts under

⁴ (1997) 15 Cal.4th 543, 547.

Government Code section 19130 is to determine whether, consistent with Article VII and its implied civil service mandate, state work may legally be contracted to private entities or whether it must be performed by state employees.

DHS asserts that the Contract is justified under Government Code section 19130, subdivision (b)(3), which authorizes a state agency to enter into a personal services contract with a private contractor when:

The services contracted are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system.

As noted above and in the Executive Officer's decision, in *Department of Pesticide Regulation*, the Board concluded that in order for a contract to be justified under Government Code section 19130(b),

...it must be shown that the services contracted are not available through the civil service system, i.e., there are no existing civil service job classifications through which a state agency could either appoint, or retain through other state agencies that offer to state departments, employees with the knowledge, skills, expertise, experience, or ability needed to perform the required work.⁵

Here, DHS contends that TDC was unable to perform the types of duties required under the Contract because, as noted in TDC's November 8, 2004 response to an inquiry from SPB staff, TDC acknowledged that it does not typically support client hardware, operating systems, or applications that are physically located at a client's facility, and that application support remains the client's responsibility. Given the unrefuted information provided by TDC, the Board finds that DHS could not have

⁵ PSC No. 01-09, at pp. 12-13.

entered into a contract with TDC for the types of services currently provided by IDNS, because TDC simply does not provide those types of services.

DHS further contends that it was unable to successfully hire state civil service employees to perform those duties currently being performed by IDNS, due to a paucity of qualified candidates. As CSEA correctly points out, it is not CSEA's burden to prove that sufficiently skilled civil service personnel were not available to perform the contracted-for duties, but rather DHS must establish either: (1) that there are no civil service job classifications to which it could appoint employees with the requisite expertise needed to perform the required work; or (2) that it was unable to successfully hire suitable candidates for any of the applicable classifications.

According to DHS, the existing state civil service classifications impacted by the Contract are: Systems Analyst II; Systems Analyst I; Systems Analyst; and Programmer II. DHS has failed to present sufficient information to establish that the duties being performed by IDNS could not adequately be performed by personnel in one or more of the above-listed existing civil service classifications. DHS concedes, in fact, that approximately 60 percent of the Contract duties are currently being performed by state civil service employees in these classifications, and that it anticipates that an increasingly higher percentages of the contract duties will be performed by state civil service employees in the future. Consequently, DHS failed to meet its burden of proving that the Contract duties in question cannot adequately be performed by individuals employed in existing state civil service classifications.

Whether appropriate civil service classifications exist to support the contracted functions is not, however, the end of the inquiry. Despite the existence of adequate civil

service classifications to perform the required duties, private contracting may still be permissible under the provisions of Section 19130(b)(3) in those situations where a state department is simply unable, despite reasonable, good-faith efforts, to successfully recruit employees into those existing classifications. The unavailability of civil service employees cannot, however, have occurred as the result of a department creating an artificial need for contracting by refusing to hire sufficient civil service employees to perform the state's work, and then relying upon the workforce shortage it has created to justify the hiring of private contractors.⁶

Here, DHS asserts that it was unable to recruit suitable employees into existing civil service classifications successfully, in large part because the pay rate for state civil service information technology classifications – and particularly those classifications that perform the more complex information technology duties – are simply too far below the salaries that qualified information technology personnel can command in the private sector. Save for its bare assertion, however, DHS failed to present any actual evidence in support of its contention that it had made reasonable efforts to hire state civil service information technology employees prior to entering into the disputed Contract.

This lack of recruitment and hiring evidence on DHS's part is very troubling to the Board and could very well warrant a finding that, because DHS failed to make reasonable efforts to hire individuals into existing civil service classifications prior to entering into the Contract with IDNS, the Contract is not permissible pursuant to Section 19130(b)(3).

⁶ *Professional Engineers in California Government*, 15 Cal. 4th at 571-572. (finding that Caltrans created an artificial "need" for private contracting that resulted from its practice of maintaining an inadequate level of civil service staff, rather than from any legitimate lack of available or obtainable qualified personnel).

These misgivings notwithstanding, the Board is also cognizant of the difficulties experienced by the state civil service in general during the past several years in recruiting experienced information technology personnel to perform high-level duties in that field.⁷ Moreover, the Board is wary of taking precipitous action that could have serious irreversible consequences to the State's maintenance of vital records, including the potential irretrievable loss of such records. The Board, therefore, finds the Contract justified under Government Code section 19130(b)(3), on the grounds that, at the time DHS entered into the Contract, suitable civil service candidates were not available in sufficient numbers to perform the requisite Contract duties.

The Board is, however, very sympathetic to CSEA's assertion that, unless the state takes prompt, appropriate action consistent with Article VII and the state's civil service mandate to recruit and hire suitable individuals into existing state civil service information technology classifications, then not only DHS, but a large number of state departments, will remain on an unacceptable, circuitous path of forever contracting for information technology services due to a lack of qualified civil service personnel. During oral argument, DHS represented that, at present, approximately 60 percent of the Contract's required duties are being performed by state civil service employees, and that DHS reasonably expects that figure to increase during the course of the contract. The Board likewise expects that figure to increase and further expects DHS to engage in diligent, good-faith efforts to recruit and retain civil service employees who are fully capable of assuming 100 percent of the duties required under the Contract. Because

⁷ In so finding, the Board takes official notice of the *California Performance Review Report*, 2004, Ch. 7A Information Technology, § SO03 "Creating the Organizational Capacity to Support the State's Information Technology Infrastructure and Emerging Services."

the Contract is scheduled to expire on December 31, 2007, the Board believes that DHS will have more than ample time to prepare for the transition from having an outside contractor performing the Contract duties, to having those duties being fully assumed by civil service employees.

In short, the Board will not approve any further contract between DHS and any outside vendor for performance of those duties specified under the Contract, unless DHS is able to present clear and compelling evidence that it has engaged in good-faith, diligent efforts to hire qualified civil service employees to perform those same duties, but was unsuccessful in its hiring efforts. Toward that end, the Board hereby directs DHS to provide annual updates to the Board, commencing on December 31, 2005, as to those efforts it has made to recruit suitable civil service employees to perform those Contract duties currently being performed by non-civil service personnel.

CONCLUSION

The Board finds the Contract is justified under Government Code section 19130, subdivision (b)(3) on the grounds that, at the time DHS entered into the contract, DHS was unable to hire a sufficient number of suitably skilled personnel into existing state civil service classifications to perform the requisite duties under the Contract. The Board has given the Department the benefit of the doubt in this regard, based on our having taken official notice of the difficulties state departments have previously experienced in hiring and retaining qualified employees in the information technology classifications, and based on our concern for the serious consequences that might result, such as the irretrievable loss of vital state records, if highly qualified personnel are not selected to perform certain of the Contract duties. The Board trusts and fully

expects that DHS will, however, without delay, take all necessary and appropriate action to transition the contracted work to state workers consistent with Article VII and its implied civil service mandate.

ORDER

(1) The Board hereby sustains the Executive Officer's February 16, 2005 decision approving the Contract under Government Code section 19130, subdivision (b)(3); and

(2) DHS shall provide annual updates to the Board, commencing on December 31, 2005, as to those efforts it has made to recruit suitable civil service employees to perform those Contract duties currently being performed by non-civil service personnel.

STATE PERSONNEL BOARD⁸

Maeley Tom, Vice President
Ron Alvarado, Member
Sean Harrigan, Member
Anne Sheehan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on October 3, 2005.

Floyd Shimomura
Executive Officer
State Personnel Board

⁸ President Elkins did not participate in the vote on this Decision.