

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
CALIFORNIA ATTORNEYS,)
ADMINISTRATIVE LAW JUDGES AND)
HEARING OFFICERS IN STATE)
EMPLOYMENT (CASE))
)
from the Executive Officer's April 1, 2005)
Approval of a Contract for Legal Services)
between the Secretary of State's Office and)
Renne & Holtzman Public Law Group, LLP)
_____)

BOARD DECISION

PSC No. 05-04

December 6, 2005

APPEARANCES: Stephen B. Bassoff, Attorney, on behalf of California Attorneys, Administrative Law Judges and Hearing Officers In State Employment (CASE), Pam Guirizzo, Chief Counsel, Office of the Secretary of State, on behalf the Office of the Secretary of State; Charity Kenyon, Attorney, Riegels Campos & Kenyon, LLP, on behalf of Renne & Holtzman Public Law Group, LLP.

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

DECISION

This case is before the State Personnel Board (Board) after California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) appealed from the Executive Officer's April 1, 2005 decision approving a contract (Contract) between the Office of the Secretary of State (SOS) and Renne & Holtzman, LLP (Renne), for legal services. In this decision, the Board finds that the Contract is justified under Government Code section 19130, subdivision (b)(10) as an urgency agreement. The Board, therefore, sustains the Executive Officer's decision approving the Contract.

BACKGROUND

This case concerns an amendment to a contract between SOS and Renne for legal advice and assistance in implementing the Help America Vote Act (HAVA) of 2002 in California, particularly with regard to local government issues. CASE has not challenged the original contract, entered into on January 29, 2004, but challenges only an amendment to the contract (Amended Contract) entered into in around May 2004. CASE asserts that the work under the Amended Contract can be done adequately and competently by civil service employees.

HAVA was enacted as a result of voting problems that occurred during the 2000 presidential election and was intended to improve the administration of elections by replacing punch card voting systems with more modern systems, including electronic voting systems, and to assure the security, reliability and accessibility of those systems.

The Original Contract

On January 29, 2004, SOS and Renne entered into a Contract for \$70,000 for the performance of legal services by Renne. The term of that Contract was from December 1, 2003 to December 31, 2004. The Agreement Outline of that Contract states that the reason for the Contract is to:

Provide the SOS with essential expert election-related legal advice from the local level legal perspective on legal issues, procedures and programs facing local election officials to ensure the successful implementation of the HAVA mandates.¹

¹ "HAVA" refers to the "Help America Vote Act of 2002."

The Scope of Work set forth in the original Contract states, in relevant part:

1. Contractor agrees to provide to the Secretary of State (SOS) local level election-related legal services as described herein:

...the Contractor will provide SOS with essential expert legal advice on legal issues, procedures and programs facing local election officials to ensure the successful implementation of the HAVA mandates.

The original Contract specifies Government Code section 19130, subdivisions (b)(5) and (b)(10) as justifications for contracting out.

According to Renne, SOS first hired Renne to assist with the 2003 gubernatorial recall election, which resulted in numerous lawsuits against the state regarding the use of punch card voting systems. Subsequently, SOS became a party to over two dozen lawsuits, many of which involved the use of punch card voting systems. Renne provided assistance to the Attorney General who was representing the SOS in this litigation.

Renne asserts that, during the period of April through August 2004, the SOS was facing numerous legal battles concerning electronic voting issues, including some arising out of problems with electronic voting systems that had been discovered after the March 2004 election. At the same time, it lost much of its legal staff assigned to handle these issues. Both of the two attorneys who had been responsible for those issues had left the SOS, leaving only the Chief Counsel and the Special Counsel, who were unable to provide all of the legal and policy advice necessary. SOS's Chief

Counsel,² Randy Riddle, left at the end of April 2004 and was replaced by a new Chief Counsel who did not have experience in these areas.

The Amended Contract

In May 2004, SOS and Renne amended the Contract to add an additional \$150,000. The December 31, 2004 contract termination date remained the same.

The Agreement Outline to the Amended Contract sets forth the following reasons for the Contract:

Changes to Exhibit A and B, along with the increase in amount payable under the Agreement, which provides the SOS with essential expert election-related legal advice from the local level legal perspective on legal issues, procedures and programs facing local election officials to ensure the successful implementation of the HAVA mandates.

The Amended Contract replaced the original scope of work with an Updated Scope of Work that states, in relevant part:

Contractor agrees to provide to the Secretary of State (SOS) local level election-related legal services as described herein:

The California Secretary of State oversees the administration of elections overall but the primary jurisdiction for implementing elections programs rests with local elections officials. The Secretary of State, as Chief Elections Officer (Elections Code section 10; Government Code section 12172.5) works with the local level legal perspective on legal issues, procedures and programs facing local election officials to ensure the successful implementation of the HAVA mandates. Thus, it is important to have as a consultant, an expert in local government issues, which is not readily available in state service, to assist the Secretary in the implementation of the various federal election requirements, particularly the Help America Vote Act (HAVA).

The successful implementation of HAVA requires close and concerted consultation and coordination with county, city and district elections officials, as well as with local elected officials. In conjunction with the HAVA mandates, state law has been or

² Riddle left SOS on April 30, 2004 to work for Renne. On May 3, 2005, the SPB disapproved a contract between SOS and Renne covering Mr. Riddle's services. PSC No. 04-04.

needs to be amended to meet federal requirements. This has an impact on local elections and many reforms must be coordinated with local governments. Having a legal expert in local government issues assist the Secretary in traversing local government concerns is beneficial in the implementation of HAVA. Since there are many local government issues, this kind of expertise is not readily available within state civil service. While the complaint procedures and the processing of provisional ballots is underway, there are other local government issues that still remain unresolved. Therefore, the Secretary requires the assistance of and consultation with experts, conversant in local government issues in order to implement the requirements of HAVA.

Renne asserts that, during the period April through August 2004, it provided legal advice and assistance to the SOS concerning issues related to electronic voting systems. Some of the major items included the Secretary's Accessible Voter Verified Paper Trail (AVVPAT) directive, touchscreen security directives related to the March 2004 primary, a report on problems encountered with touchscreen technology during the March 2004 primary, a report on problems experienced with Diebold Election Systems and its touchscreen technology, orders decertifying Diebold's touchscreen system, and ten orders recertifying touchscreen systems that had previously been decertified after having been certified by the former Secretary of State, and assisting the SOS in litigation challenging the SOS's determinations in these areas.

PROCEDURAL HISTORY

By letter dated September 15, 2004, pursuant to Government Code section 19132 and SPB Rule 547.59 et seq., CASE requested SPB to review the Contract for compliance with Government Code section 19130, subdivision (b).

On November 15, 2004, SOS submitted its response to CASE's review request. On November 29, 2004, CASE submitted its reply. On November 24, 2004, pursuant to

SPB Rule 547.68, Renne filed a motion to intervene as a party in this matter. On December 9, 2004, the Executive Officer granted Renne's motion to intervene. On January 4, 2005, Renne submitted its response to CASE's review request. On January 11, 2005, CASE submitted its reply to Renne's response.

On April 1, 2005, the Executive Officer issued his decision approving the Contract. CASE timely appealed to the Board from the Executive Officer's decision. Both CASE and Renne filed written briefs and participated in oral argument before the Board. SOS did not file a written brief on appeal to the Board, but did participate in oral argument.

ISSUES

The following issues are before the Board for review:

Is the Amended Contract justified under Government Code section 19130, subdivision (b)(10)?

DISCUSSION

In *Professional Engineers in California Government v. Department of Transportation*,³ the California Supreme Court recognized that, emanating from Article VII of the California Constitution, is an implied "civil service mandate," which 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

³ (1997) 15 Cal.4th 543, 547.

that various court decisions have recognized. The purpose of SPB's review of contracts under 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.

Government Code section 19130, subdivision (b)(10), authorizes a state agency to enter into a personal services contract with a private contractor when:

The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

In order to justify a personal services contract under Government Code § 19130(b)(10), a state agency must provide sufficient information to show: (1) the urgent, temporary, or occasional nature of the services; and (2) the reasons why a delay in implementation under the civil service would frustrate the very purpose of those services.

Renne asserts that the work it performed under the Amended Contract was highly complex and time-sensitive, requiring a great deal of work to be performed in a short period of time. Renne asserts that, in early April 2004, the following critical events converged: First, in the wake of March 2004 problems with touchscreen systems, the SOS's office was generating two complex reports, one on the problems with touchscreen systems in the March 2, 2004 election, and one on its dealings with Diebold Election Systems' voting system. Second, the SOS had less than two months to decide whether to decertify touchscreen systems before a 6-month deadline for the November 2004 election. Third, after SOS's Chief Counsel left the SOS, neither the new Chief counsel nor the remaining special counsel, Tony Miller, had expertise with

local agencies. Renne further asserts that it has no plans to renew the contract in the future.

CASE asserts that the claimed series of events that converged to make Renne's services urgent and necessary all occurred before the Amended Contract was entered into in May or June 2004, and that neither SOS nor Renne have shown that Renne provided any services subsequent to the amendment of the contract that were urgent or could not have been performed by civil service attorneys.

While it is true that the Amended Contract does not appear to have been fully executed until July 12, 2004,⁴ Renne has provided sufficient information to establish that it continued to perform work related to the decertification and recertification of DRE systems and related litigation until December 2004. The recertification of voting systems occurred from June 2004 through August 2004, a court order upholding the SOS's authority to decertify voting systems was issued on July 6, 2004, and the Diebold False Claims Act litigation was not finally resolved until December 2004. While the decertification and recertification actions were taken by SOS, Renne has provided sufficient information to establish that it provided legal advice to SOS concerning both the decertification litigation and the recertification process.

During the period of the amended Contract, the SOS was faced with a large amount of time-sensitive work related to the establishment of electronic voting systems. While CASE asserts that the information fails to establish precisely what work was

⁴ The information provided indicates that, on May 15, 2004, a SOS accounting officer certified the availability of budgeted funds for the current budget year for the period and purpose of the Amended Contract, and that the Amended Contract was executed by Renne on June 23, 2004, and by the Chief Assistant Secretary of State on July 12, 2004.

performed and how it related to the scope of work set forth in the amended Contract, we find that the work was sufficiently related to the implementation of HAVA, as set forth in the scope of work of both the original and the amended Contract. Given the extreme time constraints and lack of available legal staff employed by SOS, we find that sufficient evidence exists to establish that the services provided by Renne were urgent and temporary within the meaning of Government Code section 19130(b)(10).⁵

CONCLUSION

Given the specialized nature of the work, the lack of available civil service staff with expertise that area, and the extreme time constraints associated with the resolution of the multiple legal issues surrounding the use of electronic voting systems in California, we agree with the Executive Officer's determination that amended Contract was justified as an urgency contract under Government Code section 19130(b)(10). We take note of Renne's representation that it does not intent to extend this contract, and expect that SOS now has sufficient, qualified legal staff to handle any future matters relating to these issues.

ORDER

The Board hereby sustains the Executive Officer's April 1, 2005 decision approving the Contract.

⁵ Like the Executive Officer, given our conclusion that the amended Contract was justified under Government Code section 19130(b)(10), we do not reach the issue of whether it was also justified under the other grounds asserted by Renne and SOS.

STATE PERSONNEL BOARD⁶

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

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision and Order at its meeting on December 6, 2005.

Floyd D. Shimomura
Executive Officer
State Personnel Board

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⁶ President Elkins was not present during oral argument and did not participate in this decision.