



CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall • Sacramento, CA 95814

In the Matter of the Appeal by)	PSC No. 10-02
)	
DEPARTMENT OF DEVELOPMENTAL)	RESOLUTION
SERVICES)	
)	July 20, 2010
from the Executive Officer's March 17,)	
2010, Decision disapproving the)	
Personal Services Contract (PSC No.)	
10-02) for Community Program)	
Assessment Services [SPB File No. 09-)	
031(b)])	

WHEREAS, the State Personnel Board (Board) has carefully considered the Decision issued by the Executive Officer in SPB File No. 09-031(b) on March 17, 2010, disapproving the Department of Developmental Services' (DDS) proposed Personal Service Contract, as well as the written and oral arguments presented by DDS and Service Employees International Union, Local 1000 (SEIU), during the Board's July 6, 2010, meeting.

IT IS RESOLVED AND ORDERED that:

1. The Decision of the Executive Officer is hereby adopted by the State Personnel Board as its Decision in the case on the date set forth below;
2. A true copy of the Executive Officer's Decision shall be attached to this Resolution for delivery to the parties in accordance with the law;
3. Adoption of this Resolution shall be reflected in the record of the meeting and the Board's minutes.

* * * * *

The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 10-02 at its meeting on July 20, 2010, as reflected in the record of the meeting and Board minutes.



Telephone: (916) 653-1403

Facsimile: (916) 653-4256

TDD: (916) 653- 1498

March 17, 2010

Ms. Anne Giese
Senior Staff Attorney
Service Employees International Union
1808 14th Street
Sacramento, CA 95811

Ms. Dianne Robbins
Senior Staff Counsel
Department of Departmental Services
1600 Ninth Street, Room 240, MS 2-14
Sacramento, CA 95814

Re: Amended Request for Review of Proposed or Executed Personal Services Contract for
Community Program Assessment Services (RFP # HD 099067)
[SPB File No. 09-031(b)]

Dear Ms. Giese and Ms. Robbins:

By letter dated November 25, 2009, Service Employees International Union Local 1000 (SEIU) asked the State Personnel Board (SPB or Board) to review for compliance with Government Code section 19130, a community program assessment services contract (Contract) entered into by the Department of Developmental Services (DDS) and Human Services Research Institute (HSRI).¹ The request for review is made under Government Code section 19132 and California Code of Regulations, title 2, section 547.59 et seq.

SPB notified DDS of SEIU's request. DDS provided the Contract and filed its response with the SPB on December 15, 2009. SEIU filed its reply brief on December 30, 2009. The matter was then deemed submitted.

For the reasons set forth below, it is concluded that the Contract is not permissible under Government Code section 19130, subdivision (b).

Position of DDS

DDS asserts that Welfare and Institutions Code section 4571 mandates that DDS enter into a community program assessment services contract with an independent contractor and that DDS must follow the legislative mandate under the California Constitution, article III, section 3.5. DDS also asserts that SPB lacks jurisdiction to review the Contract because Government

¹ SEIU originally requested on November 24, 2009, that the SPB review the Contract executed by the State Council on Developmental Disabilities, and subsequently amended its request on November 25, 2009, to name DDS as the state contracting party.

Code section 19130 was repealed following the California Supreme Court's decision in *Consulting Engineers and Land Surveyor of California, Inc. v. Professional Engineers in California Government* (2007) 42 Cal.4th 578 (*CELSI*). Alternatively, DDS argues that the Contract is authorized under Government Code section 19130, subdivision (b)(2).

Position of SEIU

SEIU asserts that the California Constitution, article VII, authorizes SPB to review the State's outsourced personal services contracts for compliance with Government Code section 19130. SEIU further asserts that DDS misconstrued *CELSI, supra*, 42 Cal.4th 578, in concluding that Government Code section 19130 was repealed, and that the Contract is not justified under Government Code section 19130, subdivision (b)(2).

Analysis

1. Did the passage of Proposition 35 repeal Government Code section 19130 and therefore divest SPB of its jurisdiction to review personal services contracts?

It is well-established that SPB has jurisdiction to review state personal services contracts. In *Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547 (*PECG*), 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 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.

In *CELSI, supra*, 42 Cal.4th 578, the California Supreme Court held that Proposition 35,²

² Proposition 35 added two sections to the California Constitution, article XXII:

SECTION 1. The State of California and all other governmental entities, including, but not limited to, cities, counties, cities and counties, school districts and other special districts, local and regional agencies and joint power agencies, **shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement.** The choice and authority to contract shall extend to all phases of project development including permitting and environmental studies, rights-of-way services, design phase services and construction phase services. The choice and authority shall exist without regard to funding sources whether federal, state, regional, local or private, whether or not the project is programmed by a state, regional or local governmental entity, and whether or not the completed project is a part of any state owned or state operated system or facility.

SECTION 2. Nothing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State or any other governmental entities, including, but not limited to, cities, counties, cities and counties, school districts and other special districts, local and

which included both constitutional and statutory amendments, allowed the State to contract with private entities for *architectural and engineering services*. Citing *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, the Court states that Proposition 35 does not usurp the Legislature's plenary authority to regulate private contracting by public agencies in a global sense, but simply permits public agencies to enter into contracts with private entities for architectural and engineering services without California Constitution, article VII, derived restrictions on their ability to do so. The California Supreme Court was explicit that Proposition 35 did not create "far reaching changes to our basic governmental plan as to amount to a revision [of Article VII]." (*Id.* at p. 1047.) Thus, the constitutional amendment by Proposition 35 is not to be construed as to revise and nullify Article VII and thereby invalidate the implied "civil service mandate." Rather, it provided an exception to Article VII to allow private contracting in limited areas.

As such, Proposition 35 is a result of the electorate exercising its initiative power, exempting certain personal services contracts from SPB review. SPB's general jurisdiction under Government Code section 19130 to review non-exempt personal services contracts, such as the one at hand, remains intact.

2. Was the Contract permissible under Government Code section 19130, subdivision (b)(2)?

Government Code section 19130, subdivision (b)(2), permits contracting for "a new state function not previously conducted by any state agency and performed by contract under legislative direction and authority." (*California State Employees Association v. Williams* (1970) 7 Cal.App.3d 390, 401 (*Williams*)). In order to meet the requirements of subdivision (b)(2), DDS must show that the Contract satisfies two conditions: (1) the Contract was for a "new state function" at the time it was executed; and (2) the Legislature specifically mandated or authorized the performance of the work by independent contractors. (*Department of Transportation v. Chavez* (1992) 7 Cal.App.4th 407, 416 (*Chavez*)).

Pursuant to *Chavez, supra*, 7 Cal.App.4th 407, and *PECG, supra*, 15 Cal.4th 543, to qualify as a "new state function" under subdivision (b)(2), a contracted service must constitute a new program or activity *not previously performed by any existing agency of state government* to ensure that no civil service employees will be displaced. In order to be a "new state function," the contracted service must truly comprise a new governmental activity; it cannot merely be a new technique for performing an existing function.

Here, DDS contracted with HSRI, a private entity, to implement an improved, unified quality assessment system utilizing a "new quality assurance instrument" for purposes of enabling DDS to assess the performance of the state's developmental services system and to improve services for the state's developmentally disabled, in accordance with Welfare and

Institutions Code (WIC) section 4571.³ DDS asserts that the implementation of the “new quality assurance instrument” constitutes a “new state function.”

In examining DDS' claim, the Board's previous decisions are reviewed for guidance. In its decision *In the Matter of Appeal by Department of Personnel Administration* (2000) PSC No. 00-01, the Board held that the “mini-arbitration” procedures for minor adverse actions set forth in the Bargaining Unit 8 Memorandum of Understanding merely comprised a new method by which the adjudicatory functions previously conducted by SPB Administrative Law Judges would be performed by the arbitrators. Such procedures do not constitute a new state function, but merely a new technique for performing a long-standing state function.

³ Welfare and Institutions Code section 4571 provides, in pertinent part:

(b) The department, in consultation with stakeholders, shall identify a valid and reliable quality assurance instrument that includes assessments of consumer and family satisfaction, provision of services, and personal outcomes. The instrument shall do all of the following:

(1) Provide nationally validated, benchmarked, consistent, reliable, and measurable data for the department's Quality Management System.

(2) Enable the department and regional centers to compare the performance of California's developmental services system against other states' developmental services systems and to assess quality and performance among all of the regional centers.

(3) Include outcome-based measures such as health, safety, well-being, relationships, interactions with people who do not have a disability, employment, quality of life, integration, choice, service, and consumer satisfaction.

...

(d) The department shall contract with an independent agency or organization to implement by January 1, 2010, the quality assurance instrument described in subdivision (b). The contractor shall be experienced in all of the following:

(1) Designing valid quality assurance instruments for developmental service systems.

(2) Tracking outcome-based measures such as health, safety, well-being, relationships, interactions with people who do not have a disability, employment, quality of life, integration, choice, service, and consumer satisfaction.

(3) Developing data systems.

(4) Data analysis and report preparation.

(5) Assessments of the services received by consumers who are moved from developmental centers to the community, given the Legislature's historic recognition of a special obligation to ensure the well-being of these persons.

The Board in its decision *In The Matter of the Appeal by California Department of Forestry and Fire Protection (CDF)* (2001) PSC NO. 01-04, similarly disapproved CDF's contracts with private medical providers pursuant to the new Cal-OSHA regulations to provide initial and periodic subsequent medical examinations to employees who might wear respirators while performing their firefighting duties. The Board held that CDF was not required to perform a new state function, but instead was compelled to expand upon an existing state function. The expansion of an already existing state function does not constitute a new state function under the first condition of subdivision (b)(2).

In order to determine whether the contracted services constitute a new state function, it is essential to identify the statutory requirements under WIC section 4571 and the scope of the Contract, and examine whether the existing state functions would be able to fulfill these requirements.

WIC section 4571, subdivision (b) requires that the DDS “*identify* a . . . quality assurance instrument,” and that the instrument: (1) “provide nationally validated, benchmarked, consistent, and measurable data”; (2) enable DDS and the regional centers to compare and assess the performance of California’s developmental services system against other states’ developmental services system; and (3) “include outcome-based measure such as health, safety, well-being, relationships, . . .” WIC section 4571, subdivision (d) further requires that the contractor *implement* the quality assurance instrument and that the contractor be experienced in: designing valid quality assurance instruments, tracking outcome-based measures, developing data systems, data analysis and report preparation, and assessment of the services received by consumers. It is unclear what “quality assurance instrument” DDS has identified for the contractor to implement. In her Declaration in support of DDS, Renee Kurijaka, Chief of DDS Quality Management Section, appeared to indicate that a tool named “National Core Indicators (NCI)” is the new quality assurance instrument identified by DDS and to be implemented by the contractor.⁴

To meet the statutory requirement that the contractor “implement” the quality assurance instrument identified by DDS, the Contract requires that the Contractor provide or design a reliable, nationally validated assessment instrument⁵ that collects data that measures the enumerated areas specified by the WIC section 4571, subdivision (b)(3), conduct analysis of the collected data, and make specific findings.⁶ The inquiry then becomes whether these functions constitute “new state functions.”

⁴ The NCI is a data collection or survey tool used in the Bay Area Quality Management System project, a DDS pilot project contracted out to HRSI, administered by HRSI’s sub-contractor XenologiX. Although it is unclear who developed NCI, NCI is reported to have been widely used across the country by 27 state developmental disabilities service systems and by one other regional center in California. (See Bay Area Quality Management System, NCI Consumer & Family Survey Results Executive Summary, Final Report, July 2008, by HRSI, at p. 3.)

⁵ The Contract appears to use the terms “assessment instrument” and “survey instrument” interchangeably.

⁶ The specific tasks of the Contract are: (1) provide a reliable, nationally validated survey instrument; (2) allow for periodic modification of the assessment tool; (3) provide annual training and ongoing technical assistance as needed to DDS and the State Council on Developmental Disabilities (SCDD); (4) provide recommendations regarding the methodology by which the assessment instrument is administered, and design the stratified, random sample; (5)

DDS failed to prove that they are “new state functions.” Designing a reliable and valid survey or assessment instrument by implementing an existing survey mechanism such as NCI, analyzing data collected, and preparing reports on the collected data appear to be within the DDS Community Program Specialist (CPS) class series (levels I – IV) job specifications. Namely, the DDS CPS III is responsible for, among other things, developing and implementing procedures for data gathering and interpretation, developing procedures for resolving program⁷ problems, and monitoring and evaluating program activities. This could be interpreted to mean that it is an existing function of the DDS CPS III to develop and implement data gathering or survey procedures and interpret data gathered. Incumbents in this classification could also develop procedures to resolve program problems and provide evaluation and modification of these programs when necessary. Further, the DDS CPS II is responsible for, among other things: assisting in program implementation, monitoring and evaluating programs, assessing program operations by using evaluation instruments approved by DDS, collecting, compiling, and analyzing data, and providing training and technical assistance. These duties are in line with those required by the Contract such as implementing the quality assurance instrument identified by DDS and making specific findings based on the evaluation of the program. In addition, it is within the functions of a DDS CPS IV to personally direct or develop the most complex and difficult programs with major regional impacts and interface with high level administrators in other state agencies and the federal government. DDS presented no evidence to show why designing a quality assessment survey by implementing an existing survey tool (NCI) for DDS purposes would be beyond the existing functions of the DDS CPS class series (levels I – IV) and constitute a “new state function.”

Even assuming, *arguendo*, that the tasks required by the Contract are outside the scope of existing civil service functions within DDS, the functions are not “new state functions” if the functions are performed by civil service employees in classifications within other state departments. (See *Chavez, supra*, 7 Cal.App.4th 407; *PECG, supra*, 15 Cal.4th 543.) For instance, the duties of the Research Specialist and Research Manager class series include using statistical methods, planning, organizing, and directing different levels of research studies, and synthesizing data from a variety of disciplines. It suffices to say that designing a survey using statistical method, modifying the survey tool when necessary, synthesizing and analyzing data collected, providing training and technical assistance, and generating periodic reports and

design data collection protocols (data to be collected by SCDD, and when possible, utilizing existing DDS data); (6) provide a detailed description of the method for assuring the data to be reliable and valid; and (7) conduct a reliable and statistically valid set of analysis of the data. The tasks also include procedural requirements such as designating a contact person, setting a contract timeline, meeting with DDS and SCDD staff as needed, and providing and presenting monthly progress reports and annual analysis. (See Contract, Exhibit A, Scope of Work.)

⁷ “Program” is defined as a plan or system under which action may be taken toward a goal. “Survey,” for purposes of this case, is defined as an act or instance to query (someone) in order to collect data for the analysis of some aspect of a group or area. (Merriam-Webster Online Dictionary.) As such, the word “program” can be construed as a broader term to encompass a specific plan or systematic act such as a survey.

recommendations are expected functions of these civil service employees.⁸ Perhaps the Legislature envisioned such collaboration between state departments by authorizing DDS to contract with another state agency to implement the "quality assurance instrument." (WIC, sec. 4571, subd. (d).)

It is inescapable that the community program assessment services as specified in the Contract, if outsourced to a private entity, would result in displacing or failing to adequately staff state employees in the classification series of Community Program Specialist, Research Specialist, and Research Manager, and potentially other classifications, such as Standard Compliance Coordinator, Psychologist, and Associate Government Program Analyst, that may be utilized to assist in developing and implementing the survey specified in the Contract.⁹

To support its argument that the contracted service constitutes a "new state function," DDS compared a summary report prepared by HRSI for the DDS' Bay Area Quality Management System, a pilot project for the "new quality assurance instrument," with a report prepared by the State Council on Developmental Disabilities (SCDD)¹⁰ for the Life Quality Assessment Program (LQA).¹¹ DDS stresses that because the two reports were dramatically different, the implementation of the "new quality assurance instrument" constitutes a "new state function."

DDS' argument is not persuasive. It is not surprising that HRSI's summary report appeared to be different than the SCDD's LQA report; the two reports were based on different premises, targeted different geographical areas, and used different methodologies. LQA was to assess whether the rights of the developmentally disabled were protected and quality services were delivered, and the Bay Area pilot project was aimed at improving the state's Developmental Services System. (Declaration of Renee Kurjiaka in Support of DDS.) The former assessed the 21 Regional Centers using the prescribed method, i.e. "conversation," while the later implemented an existing survey tool (NCI) and conducted interviews and mailed surveys to targeted individuals in three Bay Area Regional Centers. The fact that two reports are different does not necessarily mean that one served an existing state function and the other constituted a "new state function," or that civil service employees are incapable of performing

⁸ See Class Specification for class series of Community Program Specialist, Research Specialist and Research Manager published by the SPB: Job Descriptions and Statistical Information. <http://www.spb.ca.gov/employment/spbpayrd.htm>

⁹ State Council on Developmental Disabilities, a state agency, intended to reduce civil service employees in DDS CPS I & II due to decrease in funding for its Life Quality Assessment program (LQA) from DDS (see Anne Giese's Declaration in Support of SEIU) as LQA and another program are consolidated into a "single quality assessment tool and data collection effort" under WIC section 4571. (DDS Request for Proposal for the Contract.)

¹⁰ SCDD is established by state and federal law as an independent state agency to ensure that people with developmental disabilities and their families receive the services and support they need. (see www.scdd.ca.gov, SCDD official website.)

¹¹ The LQA was developed in 1994 and fully implemented in 1996. (Declaration of Renee Kurjiaka in Support of DDS.) The use of LQA was discontinued by operation of law as of January 1, 2010. (see WIA § 4570, subd. (m)).

both services. Although the LQA report was found to be inadequate to meet the evolving standards of quality assurance established by the federal government (Declaration of Renee Kurjiaka in Support of DDS), DDS did not present any evidence or adequate analysis to show the later survey was a new state function, not a mere improvement or expansion of an existing state function, that civil service employees were not equipped to perform. One can reasonably argue that the implementation of the "new quality assurance instrument" is no more a "new state function" than the LQA when it was first implemented by DDS.

Indeed, programs introduced with the intention of improving the existing state system will not always be considered a "new state function," especially when necessary skills to implement the newly-conceived program are present within civil service classification(s). It is undisputed that government programs, like any other program, should and must be evaluated, modified, and enhanced in order to meet the increasing and shifting demand of the people they serve. Improving and expanding existing state programs under new statutory schemes or by using new or improved technology are inherent functions of the state government. If such improvement is deemed a "new state function," all civil service functions, unless remaining stagnant, would eventually give way to private contracting. This could not have been what the implied "civil service mandate" intended.

Conclusion

The Contract does not constitute a "new state function" under Government Code section 19130, subdivision (b)(2). Accordingly, the Contract is invalid and disapproved pursuant to Government Code section 19130.¹²

The parties have a right to appeal this decision to the five-member State Personnel Board pursuant to California Code of Regulations, title 2, section 547.66. Any appeal should be filed no later than 30 days following receipt of this letter in order to be considered by the Board.

Sincerely,

/s/ SUZANNE M. AMBROSE

SUZANNE M. AMBROSE
Executive Officer

¹² While the Contract may be permissible under other exceptions provided by Government Code section 19130, subdivision (b), the Executive Officer is precluded from making any findings in that regard as DDS did not make an argument or present any evidence thereof.