

THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
CALIFORNIA DEPARTMENT OF)	PSC No. 03-04
EDUCATION)	
and)	
UNIVERSITY OF THE PACIFIC, McGEORGE)	March 9, 2004
SCHOOL OF LAW)	
)	
from the Executive Officer's April 30, 2003)	
Disapproval of their Contract for Special)	
Education Mediation Conferences and Due)	
Process Hearings)	

APPEARANCES: Steven B. Bassoff, Attorney, on behalf of California Attorneys, Administrative Law Judges and Hearing Officers in State Employment; Gregory J. Rousseve, Deputy General Counsel, on behalf of California Department of Education; Charity Kenyon, Attorney, on behalf of University of the Pacific, McGeorge School of Law.

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

DECISION

This matter is before the State Personnel Board (SPB or Board) after the California Department of Education (CDE) and University of the Pacific, McGeorge School of Law (McGeorge) appealed from the Executive Officer's April 30, 2003 decision disapproving their contract (Contract) for special education mediation conferences and due process hearings. The Executive Officer reviewed the Contract at the request of the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE). In this decision, a majority of the Board finds that CDE and McGeorge have submitted sufficient evidence to show that the Contract is authorized under Government Code § 19130(b)(3).

BACKGROUND

Federal law guarantees “free appropriate public education” to all students with disabilities. To comply with federal law and obtain federal funding, states must provide certain procedural safeguards, including special education mediation conferences and due process hearings, for parents and students who wish to challenge decisions public schools may make with respect to the identification, evaluation, placement and delivery of free appropriate public education to students with disabilities.

Federal law prohibits CDE from conducting the special education mediation conferences and due process hearings itself. From 1981 through 1988, the Office of Administrative Hearings (OAH) conducted the due process hearings for CDE. OAH never conducted the mediation conferences for CDE. In 1989, OAH stopped conducting the due process hearings for CDE. Since 1989, CDE has contracted with McGeorge to conduct both the special education mediation conferences and due process hearings.

In February 2000, CDE issued a Request for Proposals (RFP) to enter into a contract to conduct the special education mediation conferences and due process hearings. Pursuant to the RFP, a proposal had to receive a minimum score of 90 to avoid rejection. Both McGeorge and OAH submitted proposals in response to the RFP. CDE accepted and rated both proposals. CDE gave OAH’s proposal a 76.20 and McGeorge’s proposal a 93.30. CDE awarded the Contract to McGeorge. OAH did not protest that award. The Contract’s term was from June 1, 2000 through May 31, 2003 and its total amount was \$23,277,916.00. In its submissions, CASE has informed the

Board that the term of the Contract has been extended through May 31, 2004 for an additional \$11,479,000.

CASE has challenged the Contract, asserting that the contracted services could be provided adequately and competently by state civil service employees.

PROCEDURAL HISTORY

By letter dated June 25, 2002, pursuant to SPB Rule 547.59 et seq.,¹ CASE asked SPB to review the Contract for compliance with Government Code § 19130(b).

On July 11, 2002, pursuant to SPB Rule 547.68,² McGeorge asked to intervene in this matter. McGeorge's request was granted on July 24, 2002.

On September 16, 2002, CDE and McGeorge submitted their responses to CASE's review request. On October 7, 2002, CASE submitted its reply to CDE's and McGeorge's responses.

The Executive Officer issued his decision disapproving the Contract on April 30, 2003.

Both CDE and McGeorge appealed from the Executive Officer's decision. They filed their written arguments dated July 11, 2003. CASE filed its response dated August 8, 2003. CDE and McGeorge filed their replies dated August 27, 2003.

Protection and Advocacy, Inc. (PAI) submitted an "amicus brief and supporting declarations" on October 6, 2003.

The Board heard oral argument from the parties to this appeal during its Board meeting on October 7, 2003. During oral argument, PAI was permitted to provide public testimony in support of CDE's and McGeorge's positions.

¹ California Code of Regulations, Title 2, § 547.59 et seq.

On December 16, 2003, in order to assist the Board in reaching a determination, the Board asked that the parties submit additional written briefs, together with supporting declarations, to respond to the following questions:

1. Why did OAH stop conducting the due process hearings after 1989?³
2. Describe in detail the particular expertise that is needed to conduct special education mediation conferences and due process hearings that CDE believes that McGeorge possesses and OAH does not.
3. If OAH currently lacks the required expertise and/or sufficient staff to conduct the hearings and mediations, how long will it take OAH to acquire the expertise and/or sufficient staff to perform the contracted services?

CASE, CDE and McGeorge submitted responses to the Board's questions. In addition, PAI submitted a response.

The Board has reviewed the record, including the written arguments of the parties, and has heard the oral arguments of the parties, and now issues the following decision.

ISSUES

The following issues are before the Board for review:

- 1) Should the Board accept the written submissions of PAI?
- 2) Does Education Code § 56504.5 mandate that SPB approve the Contract under Government Code § 19130(b)?
- 3) Is CDE's determination that OAH submitted an unacceptable proposal in response to the RFP binding upon SPB?
- 4) Is the Contract justified under Government Code § 19130(b)?

² California Code of Regulations, Title 2, § 547.68.

³ The parties were unable to provide information as to why OAH stopped conducting the hearings in 1989.

DISCUSSION

PAI's Submissions

During the hearing before the Board on October 7, 2003, CASE objected to PAI's submitting its "amicus brief and supporting declarations." For the reasons set forth below, the Board overrules CASE's objection.

The Board considers oral arguments in contract appeals to be public hearings in which members of the public are permitted to address the Board, either orally and/or in writing, to support or oppose a challenged contract. CASE was given an opportunity to review PAI's October 6, 2003 written submission and to hear PAI's October 7, 2003 oral comments and respond thereto. The Board, therefore, accepts PAI's written and oral arguments as comments from a member of the public.

Education Code § 56504.5

At the time the Contract was executed, Education Code § 56504.5 provided:

The department shall contract with a single, nonprofit organization or entity to conduct mediation conferences and due process hearings that does the following:

- (a) Employs persons knowledgeable in administrative hearings and the laws and regulations governing special education.
- (b) Does not have a conflict of interest under state and federal laws and regulations governing special education and related services in conducting mediation conferences and due process hearings.
- (c) Is not in the business of providing, or supervising, special education, related services, or care to children and youth.

Pursuant to AB 1859, effective January 1, 2003, Education Code § 56504.5 was amended to provide:

The department shall contract with a single, nonprofit organization or entity to conduct mediation conferences and due process hearings in accordance with Section 300.506 of Title 34 of the Code of Federal Regulations.

CDE and McGeorge assert that the Board is bound by Article III, § 3.5 of the California Constitution (Section 3.5) to enforce Education Code § 56504.5. CDE and McGeorge misconstrue Section 3.5 and the scope of the Board's authority.

By its terms, Section 3.5 prohibits a state agency from declaring a statute unconstitutional or refusing to enforce it on the basis of its being unconstitutional.⁴ In accordance with Section 3.5, SPB cannot declare Government Code § 56504.5 to be unconstitutional or refuse to enforce Government Code § 56504.5 on the grounds that SPB may believe that it is unconstitutional.

There is nothing in Section 3.5, however, that grants SPB the jurisdiction to review the Contract for compliance with Education Code § 56504.5.

⁴ Section 3.5, in relevant part, provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional

Pursuant to Article VII, § 3 of the California Constitution, SPB was created to enforce the state's civil service statutes.⁵ The state's civil service statutes are located in the State Civil Service Act, which begins at Government Code § 18500. The authority of SPB to review personal services contracts is set forth in Government Code §§ 19131 and 19132 of the State Civil Service Act. Because the Contract was executed pursuant to Government Code § 19130, subdivision (b), Government Code § 19132 applies in this case. It provides:

The State Personnel Board, at the request of an employee organization that represents state employees, shall review the adequacy of any proposed or executed contract which is of a type enumerated in subdivision (b) of Section 19130. The review shall be conducted in accordance with subdivision (c) of Section 10337 of the Public Contract Code. However, a contract that was reviewed at the request of an employee organization when it was proposed need not be reviewed again after its execution.

Public Contract Code § 10337, subdivision (c), in relevant part, provides:

A contract proposed or executed pursuant to subdivision (b) of Section 19130 of the Government Code shall be reviewed by the State Personnel Board if the board receives a request to conduct such a review from an employee organization representing state employees. Any such review shall be restricted to the question as to whether the contract complies with the provisions of subdivision (b) of Section 19130 of the Government Code. The board shall delegate the review of such a contract to the executive officer of the board... (Emphasis added.)

⁵ Pursuant to Article VII, § 3 of the California Constitution provides:

(a) The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.

(b) The executive officer shall administer the civil service statutes under rules of the board.

Thus, pursuant to Government Code § 19132 and Public Contract Code § 10337, SPB has jurisdiction to review the Contract to determine only whether it is authorized under Government Code § 19130(b).⁶

Government Code § 19130(b) sets forth ten (10) exceptions to the state's civil service mandate upon which state agencies may rely when contracting with private entities for personal services. If a state agency relies upon one or more of those 10 exceptions to support a personal services contract, an employee organization, such as CASE, may ask the Board to review the challenged contract to determine whether the chosen exceptions apply. The 10 exceptions listed in Government Code § 19130(b) are the only provisions that SPB may rely upon in making a determination as to whether a contract is authorized under Government Code § 19130(b).⁷

None of the exceptions to the state civil service mandate included in Government Code § 19130(b) authorize a state agency to enter into a contract pursuant to Education Code § 56504.5 or require that SPB review a challenged contract to determine whether it complies with Education Code § 56504.5.

⁶ See, Ferdig v. State Personnel Board (1969) 71 Cal. 2d 96, 103 (“It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute.”)

⁷ Pursuant to Government Code § 19131 and Public Contract Code § 10337, subdivision (b), the Board may also review a contract justified under Government Code § 19130(a) to determine whether it is a cost-savings contract authorized by that provision.

SPB has no jurisdiction under the Constitution or the State Civil Service Act to enforce statutes within the Education Code or to determine whether the Contract may be authorized under any provisions within the Education Code.⁸ Government Code § 19130 and Education Code § 56504.5 are separate and distinct contract authorization statutes. Whether Education Code § 56504.5 may provide independent authorization for the Contract that is consistent with the state's civil service mandate is a question for the courts, not SPB.

SPB will, therefore, confine its review to determining only whether sufficient information has been submitted to show that the Contract is authorized under any of the exceptions listed in Government Code § 19130(b) upon which CDE and McGeorge have relied.

The RFP Process

CDE and McGeorge assert that the expertise required to perform the services under the Contract was set forth in the RFP and that CDE's determination that the proposal submitted by OAH was unacceptable is binding upon SPB. In addition CDE and McGeorge assert that OAH's failure to file a protest with the Department of General Services (DGS) to challenge CDE's award of the Contract to McGeorge precludes CASE from asserting that civil service employees at OAH should be performing the contracted services. CDE's and McGeorge's assertions are not well-taken.

⁸ See, Professional Engineers in California Government v. Department of Transportation (PECG v. Caltrans) (1997) 15 Cal.4th 543, 551-2. (The court recognized that, while SPB had authority to review the subject contracts for compliance with Government Code § 19130, the court had initial jurisdiction to determine whether Chapter 433, beginning at Government Code § 14130, provided independent authority for the challenged contracts.)

The fact that CDE did not award the Contract to OAH is irrelevant to SPB's determination of whether civil service employees should be performing the contracted work. In Professional Engineers in California Government v. Department of Transportation (PECG v. Caltrans),⁹ the California Supreme Court held that an implied "civil service mandate" emanates from Article VII of the California Constitution, 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. State employees do not have to compete with private contractors for state work that must be performed by state employees in accordance with the civil service mandate. If the state work that is to be performed is the type of work that civil service employees have historically and customarily performed and can perform adequately and competently, that work must be assigned to state employees.

As set forth above, SPB's only task is to determine whether the Contract is justified under one or more of the exceptions to the civil service mandate set forth in Government Code § 19130. The fact that CDE may have decided that OAH's proposal in response to the RFP was unacceptable is irrelevant to SPB's determination. While the information generated during the RFP process may be considered by SPB during its deliberations, CDE's decision with respect to OAH's proposal is not binding upon SPB's determination as to whether the Contract is authorized under Government Code § 19130(b).

Similarly, the fact that OAH did not file a protest with DGS to contest CDE's award of the Contract to McGeorge does not preclude CASE from filing its Contract

⁹ (1997) 15 Cal.4th 543, 547.

challenge with the Board. Government Code § 19132 requires that SPB must review a contract that a state agency has justified under Government Code § 19130(b) if that review is requested by an employee organization, such as CASE.

OAH's failure to protest the Contract award to McGeorge does not estop CASE from challenging the Contract under Government Code § 19132. Collateral estoppel bars relitigation of an issue decided at a previous proceeding only if: (1) the issue necessarily decided in the previous proceeding is identical to the one which is sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding.¹⁰ None of these three factors has been met in this matter. First, the contract award and protest process before DGS and the contract challenge process before SPB are very different processes with very different issues and concerns. Second, because OAH did not file a protest with DGS, there was no adjudicatory proceeding before DGS with respect to the Contract that could have binding or preclusive effect. Finally, there is no indication in any of the materials that have been submitted to the Board that CASE was a party to the Contract award process or that it is in privity with OAH in order to attribute OAH's failure to protest the Contract to CASE.

CDE's awarding the Contract to McGeorge and OAH's failure to protest that award have no binding effect on either the Board or CASE and do not preclude the Board from reviewing whether the Contract is justified under Government Code § 19130(b).

¹⁰ Teresa Desiderio (2000) SPB Dec. No. 00-03, p. 7, citing to People v. Sims, 32 Cal.3d 468, 484.

Government Code § 19130(b)

CDE and McGeorge assert that the Contract is justified under Government Code § 19130(b)(3), which authorizes a state agency to enter into a personal services contract with a private entity 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.

In response to the Board's December 16, 2003 questions, CASE filed a submission that asserts that OAH is currently conducting mediations and hearings for the Department of Developmental Services (DDS) that are similar to the mediations and hearings that McGeorge is conducting under the Contract for CDE. While the mediations and hearings that OAH is conducting for DDS may be similar in type to the special education mediations and hearings that McGeorge is conducting for CDE, the information submitted by PAI shows that, given the number of special education mediations and hearings that must be conducted and the intensive amount of work that must be performed on each case, OAH was not capable of performing the contracted work in a timely and effective manner when the Contract was executed.

As PAI asserts, the expertise required to conduct the special education mediations and hearings, which McGeorge currently possesses and OAH does not, requires a thorough knowledge of both the substantive law and procedural requirements set forth in state and federal special education statutes, regulations, judicial and administrative decisions, as well as other authorities. The hearing officers and mediators also must possess a thorough knowledge of the techniques and methods of educating children with disabilities. In order to develop this degree of expertise, special

education hearing officers and mediators must focus exclusively on special education procedural and substantive law, and must be entirely devoted and dedicated to conducting these types of mediations and hearings. The information submitted shows that, at the time the Contract was executed, OAH did not possess and could not provide the degree of specialization and expertise required to conduct the special education mediations and hearings.

CDE, McGeorge and PAI also assert that OAH lacks sufficient professional and support staff to provide all the contracted services. According to the information submitted by PAI, McGeorge's hearing office receives, on average, 12 new requests for due process hearings each business day and approximately 260 new requests each month. In addition, each month, McGeorge conducts approximately 220 mediations. McGeorge also responds to approximately 1,500 calls per month from parents and school districts seeking specific and detailed assistance. OAH does not currently have adequate staff to process this amount of work.

OAH estimates that it would take one year for it to acquire the necessary expertise and sufficient support staff to conduct the special education mediation conferences and due process hearings required by CDE. PAI estimates that OAH would need at least two years to hire and train the necessary professional and support staff to assume the responsibilities under the Contract. What is apparent from both these estimates is that, at the time the Contract was executed, OAH did not have either the specialized expertise or the necessary staff to perform the contracted services.

CONCLUSION

From the information submitted by CDE, McGeorge and PAI, it is clear that the contracted services were of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability was not available in the civil service at the time the Contract was entered into. The Contract is, therefore, authorized under Government Code § 19130(b)(3).¹¹

ORDER

The Executive Officer's April 30, 2003 decision is hereby overruled and the Contract is approved under Government Code § 19130(b)(3).

STATE PERSONNEL BOARD

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

* * * * *

William Elkins, President, and Sean Harrigan, Member, dissenting:

We respectfully dissent from the majority's decision. We believe that the April 30, 2003 disapproval of the Executive Officer was well-reasoned and should be sustained.

In Department of Pesticide Regulation,¹² the Board made clear that, in order to justify a contract under Government Code § 19130(b)(3), a state agency must show that the contracted services are not available through the civil service system; i.e., there are no existing civil service job classifications through which the state agency could appoint

¹¹ Because the Board is approving the Contract under Government Code § 19130(b)(3), there is no reason to review whether the Contract may also be justified under the other subdivisions of Government Code § 19130(b) initially asserted by CDE and McGeorge.

¹² (2002) PSC No. 01-09 at pp. 12-13.

or retain employees with the knowledge, skills, expertise, experience or ability needed to perform the required work. Government Code § 19130(b)(3) does not apply when the services could be performed through the civil service system, but not enough civil service employees are currently employed to perform those services. The decision that the majority of the Board adopts today is contrary to this standard for determining whether Government Code § 19130(b)(3) applies.

CASE's submission in response to the Board's December 16, 2003 questions shows that OAH currently conducts mediation conferences and due process hearings for DDS under the California Early Intervention Services (Early Start) program that are virtually identical to the mediations and hearings that McGeorge conducts under the Contract. In addition, OAH conducts "fair hearings" for the DDS under the Lanterman Developmental Disabilities Services Act that are very similar to the due process hearings that McGeorge is conducting. This information shows that civil service employees currently possess the knowledge, skills, expertise, experience and ability needed to perform the contracted work.

In addition, we are troubled that most of the information that the majority relies upon to support its decision came not from the parties but, instead, from PAI. CDE and McGeorge did not submit sufficient information to show that the Contract is justified under Government Code § 19130(b)(3). We believe that it is inappropriate for the majority of the Board to rely so heavily upon submissions from an entity that was not a party to this case. We are also concerned that PAI's information was submitted so late in the process that CASE may not have been given an adequate opportunity to respond.

For all the reasons set forth in the Executive Officer's April 30, 2003 decision, we believe that the Contract is not authorized under Government Code § 19130(b) and should be disapproved.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 9, 2004.

Laura Aguilera
Interim Executive Officer
State Personnel Board

[CDE-McG-CASE-03-04-dec]

DECLARATION OF SERVICE BY MAIL

**CASE NAME: CALIFORNIA DEPARTMENT OF EDUCATION and
UNIVERSITY OF THE PACIFIC, McGEORGE SCHOOL OF LAW**

PSC CONTRACT CASE NO.: 03-04

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 801 Capitol Mall, P. O. Box 944201, Sacramento, CA 94244-2010.

On March 18, 2004, I served the attached **BOARD DECISION** in said cause, by facsimile and placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on March 18, 2004.

ELLA B. COWDEN
Legal Secretary

[PSC Contract POS]