

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
SECRETARY OF STATE)	PSC No. 04-04
)	
from the Executive Officer's October 15, 2004)	May 3, 2005
Disapproval of a Contract with Renne &)	
Holtzman Public Law Group for Legal Services)	
_____)	

APPEARANCES: Steven B. Bassoff, Attorney, on behalf of California Attorneys, Administrative Law Judges and Hearing Officers in State Employment; Pamela Giarrizzo, General Counsel, on behalf of the Office of the Secretary of State; Charity Kenyon, Attorney, on behalf of Renne & Holtzman Public Law Group.

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

DECISION

This matter is before the State Personnel Board (SPB or Board) after the Office of the Secretary of State (SOS) appealed from the Executive Officer's October 15, 2004 decision disapproving its contract (Contract) with Renne & Holtzman Public Law Group (Renne) for legal services. 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 SOS did not submit sufficient information to the Executive Officer to show that the Contract was authorized under Government Code section 19130, subdivision (b)(3). The Board, therefore, sustains the Executive Officer's disapproval of the Contract.

BACKGROUND

The Contract calls for legal services to be provided to SOS by Randy Riddle (Riddle), who was employed as SOS's Chief Counsel from May 5, 2003 through April 30, 2004, and began working for Renne immediately after he left SOS. SOS states that Riddle's services under the Contract were limited solely to those matters in which he was involved as SOS's Chief Counsel prior to leaving state service, including assisting the Office of the Attorney General (OAG) in formulating SOS's defense in *American Association of People with Disabilities, et al. v. Shelley, et al.*, providing legal advice to SOS on the use of electronic voting systems for the November 2004 election, and providing legal guidance to SOS and the OAG in the investigation of a false claims case involving Diebold Elections Systems, Inc. (Diebold).

The Contract's term is from May 1, 2004 through April 1, 2005 and its total amount is \$125,000. According to SOS, Riddle has not performed any work under the Contract since August 6, 2004, and no further expenditures under the Contract are currently contemplated. During oral argument, SOS stated that Renne has billed SOS for approximately \$20,000 in legal services provided under the Contract.

PROCEDURAL HISTORY

By letter dated September 13, 2004, pursuant to Government Code section 19132 and SPB Rule 547.59 et seq.,¹ CASE asked SPB to review the Contract for compliance with Government Code section 19130, subdivision (b).

On September 24, 2004, SOS submitted its response to CASE's review request. On October 4, 2004, CASE submitted its reply to SOS's response.²

¹ Cal. Code Regs., tit. 2, § 547.59 et seq.

The Executive Officer issued his decision disapproving the Contract on October 15, 2004. SOS timely appealed to the Board from the Executive Officer's decision.

On November 23, 2004, pursuant to SPB Rule 547.68,³ Renne moved to intervene in the appeal. Renne's motion was granted on November 29, 2004.

The Board has reviewed the record, including the written arguments of the parties and, at its regularly scheduled meeting on March 9, 2005, heard the oral arguments of the parties, and now issues the following decision.

ISSUES

The following issues are before the Board for review:

- (1) Is the Board bound by Public Contract Code section 10411, subdivision (b) to approve the Contract?
- (2) May SOS and Renne assert that the Contract is authorized under Government Code section 19130, subdivision (b)(10) if they did not assert that subdivision before the Executive Officer?
- (3) Is the Contract justified under Government Code section 19130, subdivision (b)(3)?

² On October 8, 2004, SOS submitted a letter correcting a mistake in CASE's reply as to Riddle's last day as SOS's Chief Counsel.

³ California Code of Regulation, title 2, section 547.68, in relevant part, provides:

At any time after an employee organization requests that that board review a contract for compliance with Government Code §19130(a) or §19130(b), a contractor to the disputed contract may move to intervene as a party in the contract review process....

DISCUSSION

Public Contract Code section 10411, subdivision (b)

Public Contract Code section 10411, subdivision (b) (Section 10411(b)) provides that:

For a period of 12 months following the date of his or her retirement, dismissal, or separation from state service, no person employed under state civil service or otherwise appointed to serve in state government may enter into a contract with any state agency, if he or she was employed by that state agency in a policymaking position in the same general subject area as the proposed contract within the 12-month period prior to his or her retirement, dismissal, or separation. The prohibition of this subdivision shall not apply to a contract requiring the person's services as an expert witness in a civil case or to a contract for the continuation of an attorney's services on a matter he or she was involved with prior to leaving state service.

SOS states that, pursuant to the exemption set forth in the last sentence of Section 10411(b), it retained the services of Riddle under the Contract to provide legal advice pertaining to complex and intricate legal matters to which he was assigned prior to leaving state service. According to SOS, it ceased utilizing Riddle's services under the Contract when those matters were either successfully concluded or SOS's own in-house legal staff gained sufficient familiarity with the issues to go forward without Riddle's input. SOS asserts that the exemption set forth in Section 10411(b) that permitted SOS to enter into the Contract is sufficient to establish the authority for SOS to contract under Government Code section 19130 (Section 19130).

SOS's assertion is not correct.

In *Professional Engineers in California Government v. Department of Transportation*,⁴ the California Supreme Court recognized that an implied "civil service

⁴ (1997) 15 Cal.4th 543, 547.

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. Section 19130 codifies the exceptions to the civil service mandate that various court decisions have recognized as constitutionally permissible. The purpose of SPB’s review of contracts under Section 19130 is to determine whether, consistent with Article VII and its implied civil service mandate, state work may be contracted to private contractors or must be performed by state employees.

If a state agency relies upon one or more of the judicially recognized exceptions to the civil service mandate set forth in Section 19130, subdivision (b) (Section 19130(b)) as its authority for contracting, the agency must submit sufficient information to show that the challenged contract falls within the selected exceptions, notwithstanding any separate statutory authority that may exist for the contract.⁵ Because SOS relied upon Section 19130(b)(3) as its justification for contracting, it must show that the Contract meets the criteria set forth in that exception, notwithstanding any compliance with Section 10411(b).⁶

Renne asserts that the Board has no authority to determine whether Section 10411(b) may provide independent authorization for the Contract apart from Section 19130(b), or to declare that Section 10411(b) is unconstitutional in violation of the civil

⁵ See California Department of Education and University of the Pacific, McGeorge School of Law (2004) PSC Dec. No. 03-04, pp. 8-9.

⁶ The Board notes that, on its face, Section 10411(b) neither explicitly authorizes a state agency to contract out state work, nor exempts a state agency from compliance with the state’s civil service mandate. Instead, it prohibits a state agency from contracting with a former policymaking state employee for 12 months after that employee leaves state service, but exempts from this 12-month prohibition, a contract with an attorney for continuing work on matters that he or she was working on prior to leaving state service.

service mandate implied in Article VII of the California Constitution. Based upon these assertions, Renne concludes that the Board must give deference to Section 10411(b) and approve the Contract under that statute.

Renne is correct that the Board will not determine whether Section 10411(b) provides independent authorization for the Contract, separate and apart from Section 19130(b). If an employee organization, pursuant to Government Code section 19132,⁷ requests that the Board review a state agency contract for compliance with Section 19130(b), in accordance with Public Contract Code section 10337, subdivision (c), the Board will review only whether the contract complies with those provisions of Section 19130(b) that the state agency relies upon as its justification for the contract.⁸

Renne is also correct that the Board has no authority to declare Section 10411(b) to be unconstitutional. Section 3.5 of Article III of the California Constitution states that a state agency cannot declare a statute unconstitutional or refuse to enforce a statute on the grounds of unconstitutionality.⁹

⁷ Government Code section 19132 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.

⁸ Public Contract Code section 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... (Underlining added.)

⁹ Article III, section 3.5 of the California Constitution provides:

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

However, it does not follow from these two premises that the Board is required to relieve SOS of its obligation to prove that the Contract is justified under Section 19130(b) and to approve the Contract under Section 10411(b). Article VII, section 3, subdivision (a) of the California Constitution¹⁰ provides that the Board shall enforce the civil service statutes. Section 10411(b) is not a civil service statute. The Board has not found, and Renne has not cited, any law or regulation that imposes a duty upon the Board to approve a contract based solely on Section 10411(b).

Renne lastly asserts that, if the Board does not enforce section 10411(b), it must, at a minimum, take steps to harmonize Section 10411(b) with Section 19130(b). As set forth above, the Board's only role in this matter is to determine whether, consistent with Article VII and the state's civil service mandate, the Contract is justified under those provisions of Section 19130(b) timely relied upon by SOS. The Board need not harmonize Section 19130(b) with Section 10411(b) to make this determination.

The Board will, therefore, confine its analysis to whether the Contract complies with the provisions of Section 19130(b) timely relied upon by SOS.

(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;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

¹⁰ Article VII, section 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.

SPB's Contract Review Process

The Board has adopted regulations specifying the procedures that SPB will follow when reviewing personal services contracts for compliance with Section 19130.¹¹ As set forth in the regulations, when a state agency requests approval from the Department of General Services (DGS) to enter into a contract under Section 19130(b), the agency must include in its contract transmittal to DGS a written justification that includes specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified Section 19130(b).¹²

If an employee organization would like the Board to review a contract proposed or executed by a state agency pursuant to Section 19130(b), it may file with SPB, and serve upon the state agency, a written request for review.¹³

The state agency may submit a written response to the employee organization's review request. SPB Rule 547.62¹⁴ provides that a state agency's written response shall include:

- (1) specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code §19130(b); and
- (2) documentary evidence and/or declarations in support of the state agency's position.

The employee organization may file a reply to the state agency's response.¹⁵

¹¹ Cal. Code Regs., tit. 2, § 547.59 et seq.

¹² Cal. Code Regs., tit. 2, § 547.60.

¹³ Cal. Code Regs., tit. 2, § 547.61.

¹⁴ Cal. Code Regs., tit. 2, § 547.62. By memorandum dated September 22, 2004, SPB staff notified SOS that CASE had filed a request for review in this matter and informed SOS of the requirements of this regulation with respect to filing a response.

¹⁵ Cal. Code Regs., tit. 2, § 547.63.

In addition, SPB Rule 547.62 provides that, within "7 days after the state agency receives a copy of the employee organization's request for review, the state agency shall serve a copy of that request upon the contractor(s) to the disputed contract."¹⁶ The contractor may seek to intervene as a party in a contract dispute.¹⁷

The Executive Officer issues a decision based upon the information that the parties submit.¹⁸ A party may appeal to the Board from a decision issued by the Executive Officer. If a party appeals to the Board, SPB Rule 547.66¹⁹ provides, in relevant part, that:

The board will decide the appeal upon the factual information, documentary evidence, and declarations submitted to the executive officer before he or she issued his or her decision. Upon the objection of a party, the board will not accept additional factual information, documentary evidence, or declarations that were not previously filed with the executive officer if the board finds that the submission of this additional factual information, documentary evidence, or declarations would be unduly prejudicial to the objecting party. (Underlining added.)

New Factual Information and Declarations

In this matter, CASE asked SPB to review the Contract. In response to CASE's request, SOS submitted a 2 ½ page response, together with a copy of the Contract and the notice of the Contract that had previously been sent to CASE.²⁰ CASE submitted a

¹⁶ By memorandum dated September 22, 2004, SPB staff informed SOS of its obligation to serve a copy of CASE's request on Renne within 7 days of receipt of that memorandum.

¹⁷ Cal. Code Regs., tit. 2, § 547.68.

¹⁸ Cal. Code Regs., tit. 2, § 547.64. The Executive Officer may also review comments received by members of the public. In addition, the Executive Officer has the discretion to ask the parties to submit additional information. The Executive Officer may refer a matter for evidentiary hearing if the Executive Officer determines that an evidentiary hearing is necessary to resolve material issues of fact in dispute.

¹⁹ Cal. Code Regs., tit. 2, § 547.66.

²⁰ SOS also submitted a 1-page letter to correct CASE's assertion in its reply as to Riddle's last day in office.

reply to that response. The Executive Officer issued his decision based upon the information included in these submissions.

SOS appealed to Board from the Executive Officer's decision. Renne moved to intervene in the appeal and that motion was granted. On appeal, both Renne and SOS submitted substantially more factual information to support the Contract than SOS had initially provided to the Executive Officer. In addition, for the first time on appeal, Renne filed lengthy and detailed declarations from both Riddle and Linda Cabatic, who succeeded Riddle as SOS's Chief Counsel.

Although CASE did not object to the submission of this additional factual information and declarations, we believe that permitting SOS and Renne to include in their appeal briefs significantly more factual information than SOS provided to the Executive Officer undermines the contract review process that the Board has established.

All the new factual information that SOS and Renne submitted for the first time on appeal was available at the time SOS submitted its response to the Executive Officer. By failing to include this information in its response, SOS deprived CASE of the opportunity to respond to that information in its reply. SOS also deprived the Executive Officer of the opportunity to make findings with respect to that information in his October 15, 2004 decision. It would be unduly prejudicial to the contract review process to allow SOS and Renne to raise for the first time on appeal factual information that was available when SOS filed its response to CASE's review request. Therefore, in reaching its decision in this matter, the Board will not consider the additional factual information filed by SOS and Renne for the first time on appeal.

New Reliance Upon Section 19130(b)(10)

In its contract transmittal to DGS, as its justification for contracting out, SOS checked the box that stated: "Contracting out is justified based on Government Code 19130(b). Justification for the Agreement is described below." In the space below this box, SOS inserted, "(b)(3) – The services which are being contracted are of such highly specialized nature which require the expert knowledge and experience of the Secretary of State's former Chief Counsel, Randy Riddle, as allowable under PCC 10411(b)."

With its response to CASE's review request, SOS included a copy of a letter that it had previously sent to CASE, which stated that the Contract was justified under Section 19130(b)(3).

In his October 15, 2004 decision, the Executive Officer analyzed whether the Contract was justified under Section 19130(b)(3).

For the first time on appeal, SOS and Renne seek to raise Section 19130(b)(10) as additional authority for the Contract.²¹ CASE has objected to SOS and Renne raising this subdivision before the Board when SOS did not raise it either in its contract transmittal to DGS or in its response to CASE's review request. Renne argues that the Board should reject CASE's reliance on this "highly technical defense" and, instead, determine the case on the merits.

In *Department of Pesticide Regulation* (2002) PSC Dec. No. 01-09 at pp. 10-11, the Board refused to review for the first time on appeal an assertion that a contract was

²¹ Section 19130(b)(10) permits 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.

justified under a provision of Section 19130(b) that was neither included as a justification in the state agency's contract transmittal to DGS nor raised before the Executive Officer in the state agency's response to the employee organization's request for review.

For the same reasons that we are disinclined to accept new factual information submitted for the first time on appeal, we are also unwilling to accept a new Section 19130(b) justification for the Contract.

Government Code section 19130, subdivision (b)(3)

Section 19130(b)(3) 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.

According to SOS's response filed with the Executive Officer, Riddle was SOS's Chief Counsel when *American Association of People with Disabilities, et al. v. Shelley, et al.* was filed. SOS asserted that, even though the OAG represented SOS in that matter, Riddle's continued advice was critical because he was intimately familiar with the specific details of the voting systems and the legal basis of SOS's decisions with respect to those systems that were challenged in that litigation. SOS contended that the OAG needed to consult with Riddle in order to successfully defend SOS in that matter.

In its response, SOS also summarily stated that, during his tenure as Chief Counsel, Riddle was responsible for providing legal advice to SOS on the use of

electronic voting systems for the November 2003 election. SOS's order relating to that use was issued on Riddle's last day as Chief Counsel. According to SOS, Riddle's advice during the period after that order was issued was critical in shaping the follow-up clarification orders. In addition, SOS asserted that Riddle was instrumental in providing legal guidance in the investigation of Diebold.

In reply, CASE asserted that SOS's response did not include enough information to show the extent and scope of the legal services that Riddle provided under the Contract or to explain why those services were not available through the civil service.

In order to show that the Contract is justified under Section 19130(b)(3), SOS had to submit sufficient information to the Executive Officer to show that the services contracted were not available through the civil service system; i.e., there were no existing civil service job classifications through which SOS could either have appointed, or retained through other state agencies that offer services to state departments, employees with the knowledge, skills, expertise, experience or ability needed to perform the required work. Section 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.

SOS's very summary response to the Executive Officer did not include sufficient information to explain exactly what services Riddle performed or why those services were so highly specialized or technical in nature that they could not be performed by counsel hired through the civil service process.²²

²² During oral argument, SOS asserted that Riddle was an exempt employee. Whether Riddle was in an exempt or civil service position when he was SOS's Chief Counsel is not relevant to the Board's analysis. The relevant issue for the Board is whether the services that were contracted could be performed by civil service employees.

CONCLUSION

The Board finds that SOS did not submit sufficient information to the Executive Officer to support that the Contract was justified under Section 19130(b)(3).

ORDER

The Board hereby sustains the Executive Officer's October 15, 2004 decision disapproving the Contract.

STATE PERSONNEL BOARD²³

William Elkins, President
Sean Harrigan, Member
Maeley Tom, Member

* * * * *

Anne Sheehan, Member, dissenting:

I respectfully dissent from the majority's decision. I agree that SOS did not do a very good job of justifying the Contract before the Executive Officer. On appeal, however, both SOS and Renne submitted sufficient information to show that Riddle provided expert legal advice that was not available to SOS within the civil service, and was urgently needed to adequately defend SOS in litigation and to guide SOS on the use of electronic voting systems for the November 2004 election. I think the Board should focus its attention on reviewing all the available facts to determine whether the Contract meets the requirements of Section 19130(b). The factual information that SOS and Renne submitted to the Board is sufficient to meet these requirements.

For these reasons, I believe that the Contract is justified under Government Code section 19130, subdivision (b) and should be approved.

²³ Member Ron Alvarado did not participate in this decision.

* * * * *

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

Floyd D. Shimomura
Executive Officer
State Personnel Board

[PSC 04-04-CASE-SOS-Renne]