

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	PSC No. 08-02
)	
DEPARTMENT OF)	RESOLUTION
DEVELOPMENTAL SERVICES)	
)	
from the Executive Officer's January 6,)	April 7, 2008
2008, Disapproval of a Personal)	
Services Contract for Information)	
Technology Services Proposed or)	
Executed by the Department of)	
Developmental Services)	

WHEREAS, the State Personnel Board (Board) has considered carefully the findings of fact and Decision issued by the Executive Officer on January 16, 2008, in the above-entitled matter, as well as the written and oral arguments presented by the Department of Developmental Services (Department) and Service Employees International Union, Local 1000 (SEIU), during the Board's April 7, 2008, meeting; and

WHEREAS, by said Decision the personal services contract for Information Technology Services proposed or executed by the Department was disapproved;

IT IS RESOLVED AND ORDERED that:

1. The findings of fact and conclusions of law of the Executive Officer in said matter are 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; and
3. Adoption of this Resolution shall be reflected in the record of the meeting and the Board's minutes.

STATE PERSONNEL BOARD¹

Sean Harrigan, President
Richard Costigan, Vice-President
Patricia Clarey, Member
Maeley Tom, Member

* * * * *

The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 08-02 at its meeting on April 7, 2008, as reflected in the record of the meeting and Board minutes.

¹ Member Anne Sheehan did not participate in this Decision.



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January 16, 2008

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Re: Request for Review of Proposed or Executed Personal Services Contracts
Promulgated by the Department of Developmental Services for Information
Technology Services [SPB File No.07-032(b)]

Dear Counsel:

By letter dated November 14, 2007, Service Employees International Union (SEIU) asked the State Personnel Board (SPB) to review for compliance with Government Code section 19130, subdivision (b), a contract between the California Department of Developmental Services (DDS) and KIS Computer Center for information technology services (Contract).

By letter dated November 19, 2007, the SPB advised DDS that it would review the Contract to determine whether it was justified under any of the provisions of Government Code section 19130, subdivision (b). In its correspondence to DDS, the SPB informed DDS that, pursuant to Title 2, California Code of Regulations (2 CCR) § 547.62 and by no later than December 4, 2007, DDS was "required to file with the SPB and serve on SEIU a copy of the proposed or executed contracts(s) (including the STD. 15 Contract Transmittal or STD. 215 Agreement Summary forms)" and DDS' "written response to SEIU's request for review, which shall include: [s]pecific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code § 19130(b)" and "[d]ocumentary evidence and/or declarations in support of the Department's position."

By letter dated December 4, 2007, DDS opposed SEIU's challenge on the grounds that (1) SPB "approval is not necessary, because the proposed contract is for short-term technical assistance to complete three limited technical objectives related to system upgrades, all to be completed within a single fiscal year;" (2) the Contract "was solicited after DDS determined that the resources available through the Department of Technology Services (DTS) were inadequate to meet the required timeframes for the system upgrades;" and (3) the Contract is for commodity purchases and "is not primarily focused on labor of any kind." DDS did not submit a copy of the Contract and provided no other evidence to justify its position.

By letter dated December 13, 2007, SEIU submitted its reply brief contending that DDS failed to meet its burden of establishing any justification for contracting out the services in question and requesting disapproval on that basis or, in the alternative, requesting an evidentiary hearing to determine the precise nature and extent of the services to be provided pursuant to the agreement.

Analysis

In *Professional Engineers in California Government v. Department of Transportation*,² the California Supreme Court recognized that, emanating from Article VII of the California Constitution, there 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 order to obtain approval of a proposed contract as a "cost savings" contract under Government Code section 19130, subdivision (a), the contracting agency must submit the contract to the SPB for approval prior to its execution. In order to justify a contract pursuant to Government Code section 19130, subdivision (b), a department must provide specific and detailed factual information that demonstrates that the state is not capable of providing the custodial services pursuant to one of the exceptions to the prohibition against contracting out enumerated in paragraphs (1) through (10). The agency seeking to contract out civil service work bears the burden of establishing an exemption to the civil service mandate (*State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 134-135).

DDS has not met its burden. Preliminarily, I reject the argument that SPB approval is not necessary because of the short duration of the Contract. Nothing in the applicable statutes or regulations exempts state contracts from SPB review solely on a durational basis. Moreover, 2 CCR § 547.59 defines a personal services contract as "any contract,

² (1997) 15 Cal.4th 543, 547.

requisition, purchase order, etc. (except public works contracts) under which labor or personal services is a significant, separately identifiable element.” Though DDS raises other viable arguments, it has failed to provide any evidence in support thereof. Instead, DDS has provided nothing but conclusory statements as to its position, leaving the SPB with no option but to attempt to glean some bit of support for DDS’ arguments from the Contract itself. This is tantamount to DDS having submitted no opposition at all.

Moreover, in reviewing the Contract submitted by SEIU, DDS claims to need the Contract, which appears to provide for the provision of general IT services on an as-needed basis for an hourly fee, pursuant to the exception contained in Government Code § 19130(b)(3).³ The SPB has repeatedly held that, in order to justify contracting out pursuant to section 19130(b)(3), the state must demonstrate that there is no existing civil service classification through which the agency could appoint or retain employees with the knowledge, skills, expertise, experience or ability to perform the work.⁴ Indeed, the Board has expressly held that Government Code § 19130(b)(3) does not apply when the services could be performed in the civil service, but not enough civil servants are currently employed to perform them.⁵ Although not clearly specified, the potential services appear to be the type that could be performed by civil servants employed in one or more existing civil service IT classifications. While DDS claims that it has exhausted DTS’ civil service resources, the fact that not enough civil servants have been hired to perform necessary state tasks is insufficient to override the constitutional civil service mandate.

Finally, my review of the Contract compels the result that, in the absence of some additional information or explanation provided by DDS as to the basis of its “commodity” argument, the Contract at issue is, in fact, one for personal services. It expressly requires the contractor to “assist DDS in maintaining its LAN and WAN services and to make recommendations for upgrading, testing, implementing or fixing network problems as the need arises.” It requires the contractor to provide “technical assistance” and calls on the contractor to provide its “own inside Netware and Microsoft technical support/maintenance consulting services as an additional resource” and excludes from the hourly rate costs for equipment, hardware and software. Although DDS may have additional evidence supporting its “commodity” claim, none was presented and, therefore, I cannot conclude that the agreement at issue was merely incidental to a purchase of goods.

Conclusion

DDS has failed to establish that the Contract is authorized pursuant to Government Code section 19130(b). Accordingly, the Contract is hereby disapproved.

³ Gov. C. § 19130(b)(3) provides for contracting out when the services contracted are not available within the civil service, cannot be performed satisfactorily by civil servants, or are of such a highly specialized or technical nature that the expert knowledge, experience and ability are not available within the civil service.

⁴ *In the Matter of the Appeal by Department of Pesticide Regulation* (2002) PSC No. 01-09.

⁵ *Id.* at pp 12-13.

This letter constitutes my decision to disapprove the Contract. Any party has the right to appeal this decision to the five-member State Personnel Board pursuant to SPB Rule 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,

Suzanne M. Ambrose
Executive Officer