

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
CALIFORNIA DEPARTMENT OF)
VETERANS AFFAIRS)
)
from the Executive Officer's June 18,)
2009, Disapproving the Proposed Cost)
Savings Contract for Food Purchases,)
Preparation, and Nutrition Services))
entered into by the California Department)
of Veterans Affairs)

PSC No. 09-09

RESOLUTION

December 1, 2009

WHEREAS, the State Personnel Board (Board) has considered carefully the findings of fact and Decision issued by the Executive Officer in SPB File No. 09-004(a) on June 18, 2009, disapproving the above-entitled matter, as well as the written and oral arguments presented by the Department and Service Employees International Union, Local 1000 (SEIU), during the Board's November 9, 2009, meeting.

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;
3. The Department is not precluded from submitting new or revised proposed contract for the Executive Officer's review under Government Code section 19130, subdivision (a).

* * * * *

The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 09-09 at its meeting on December 1, 2009, as reflected in the record of the meeting and Board minutes.



CALIFORNIA STATE PERSONNEL BOARD

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ARNOLD SCHWARZENEGGER, Governor



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June 18, 2009

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Re: Proposed Cost Savings Personal Services Contract Promulgated by the Department of Veterans Affairs for Food Purchasing, Preparation and Nutrition Services (Contract No. 08SS0001 – Morrison Senior Dining) at the Veterans Home of California – Barstow (VHC-B), and at the Veterans Home of California – Chula Vista (VHC-CV)
[SPB File No. 09-004(a)]

Dear Ms. Brown and Ms. Giese:

By letter dated April 14, 2009, the Department of Veterans Affairs (Department) requested, pursuant to Gov. Code § 19131, that the State Personnel Board (SPB) approve a proposed personal services contract (Contract No. 08SS0001 (hereinafter “Contract”)) with Morrison Senior Dining (MSD), for the provision of food purchasing, preparation and nutrition services at VHC-B and VHC-CV, as a cost savings contract under Gov. Code § 19130(a). The term of the Contract is for five years, commencing on July 1, 2009 and expiring on June 30, 2014. By letter dated April 20, 2009, the SPB notified Service Employees International Union, Local 1000 (SEIU), that it had received the Department’s request to approve the Contract, and provided SEIU an opportunity to request that the SPB review the Contract for compliance with Section 19130(a). By letter dated May 5, 2009, SEIU submitted its request for review with the SPB. The Department subsequently filed its reply with the SPB on May 18, 2009, after which the matter was deemed submitted for review by the Executive Officer.¹

Having reviewed the briefs submitted by the parties, I have concluded, for those reasons set forth below, that the Contract does not comply with the cost savings provisions of Section 19130(a). As a result, the Contract is disapproved.

¹ On June 4, 2009, the Department submitted a correction to a portion of the materials it filed with the SPB on May 18, 2009.

I. Legal Principles

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, 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.

Government Code section 19130, subdivision (a) authorizes a state agency to enter into a personal services contract with a private contractor under certain specified conditions to achieve cost savings to the state. In order to justify a personal services contract under Government Code section 19130, subdivision (a), all of the following conditions must be met:

- (1) The contracting agency clearly demonstrates that the proposed contract will result in actual overall cost savings to the state, provided that:
 - (A) In comparing costs, there shall be included the state's additional cost of providing the same service as proposed by a contractor. These additional costs shall include the salaries and benefits of additional staff that would be needed and the cost of additional space, equipment, and materials needed to perform the function.
 - (B) In comparing costs, there shall not be included the state's indirect overhead costs unless these costs can be attributed solely to the function in question and would not exist if that function was not performed in state service. Indirect overhead costs shall mean the pro rata share of existing administrative salaries and benefits, rent, equipment costs, utilities, and materials.
 - (C) In comparing costs, there shall be included in the cost of a contractor providing a service any continuing state costs that would be directly associated with the contracted function. These continuing state costs shall include, but not be limited to, those for inspection, supervision, and monitoring.
- (2) Proposals to contract out work shall not be approved solely on the basis that savings will result from lower contractor pay rates or benefits. Proposals to contract out work shall be eligible for approval if the contractor's wages are at the industry's level and do not significantly undercut state pay rates.

² (1997) 15 Cal.4th 543, 547.

- (3) The contract does not cause the displacement of civil service employees. The term "displacement" includes layoff, demotion, involuntary transfer to a new class, involuntary transfer to a new location requiring a change of residence, and time base reductions. Displacement does not include changes in shifts or days off, nor does it include reassignment to other positions within the same class and general location.
- (4) The contract does not adversely affect the state's affirmative action efforts.
- (5) The savings shall be large enough to ensure that they will not be eliminated by private sector and state cost fluctuations that could normally be expected during the contracting period.
- (6) The amount of savings clearly justifies the size and duration of the contracting agreement.
- (7) The contract is awarded through a publicized, competitive bidding process.
- (8) The contract includes specific provisions pertaining to the qualifications of the staff that will perform the work under the contract, as well as assurance that the contractor's hiring practices meet applicable nondiscrimination, affirmative action standards.
- (9) The potential for future economic risk to the state from potential contractor rate increases is minimal.
- (10) The contract is with a firm. A "firm" means a corporation, partnership, nonprofit organization, or sole proprietorship.
- (11) The potential economic advantage of contracting is not outweighed by the public's interest in having a particular function performed directly by state government.

In addition to the requirements of Section 19130(a), the Contract must also meet the requirements set forth in the implementing regulations adopted by the SPB.³ In order to ensure that a proposed contract achieves sufficient cost-savings to justify contracting under Section 19130(a), Title 2, Cal. Code Regs., § 547.72 provides that:

When a Personal Services Contract is based on cost savings, a contractor's wages shall be at or above the industry's level and shall not undercut the State's pay rate for comparable work by more than 15%, except that if in a nonmetropolitan area of the State the contractor's rate of pay is more than 15% below the State rate, the contract may be approved if the contractor's rate of pay is closer to the State rate than it is to the comparable industry rate in the local area. In no case shall a

³ Title 2, Cal. Code Regs., §§ 547.59 and 547.69 – 547.74.

contractor's wages be more than 25% below the State's pay rate. Comparison of wages for this purpose shall not include the cost of benefits.

(a) Comparison of the contractor's and State's hourly rates will be made as follows:

(1) For contracts of one year or less duration, comparison shall be to the first step of the salary range of the class designated as the type of work performed by the Personal Services Contract except for classes with a special in-grate salary adjustment (SISA). In this case, comparison shall be made to the midpoint between the first and second steps.

(2) For contracts with durations of over one year up to two years, comparison shall be made to the midpoint between the first and second steps of the salary range of the class designated as the type of work performed by Personal Services Contract except for classes with a SISA. Comparison in this case shall be made to the second step.

(3) For contracts with durations of over two years, comparison shall be made to the second step of the salary range for the class designated as the type of work performed by Personal Services Contract.

(b) Cost-savings based Personal Services Contracts with duration of more than one year shall contain a clause indicating that in the event of an increase in the State's pay rates, the contractor's wage rate will be reviewed and adjusted in subsequent years of the contract so as not to exceed the relationship with State and industry rates identified in the first paragraph of this section.

(c) The term "industry rate" as used in this section means the prevailing hourly rate of pay for the type of work in question in the local area where the contract would be let, as measured by reliable and statistically representative wage surveys such as those conducted by the Bureau of Labor Statistics of the Department of Industrial Relations. In the event the most relevant wage survey data published by the Department of Industrial Relations differs from the wage survey data published by the Bureau of Labor Statistics, the board shall rely upon the wage survey data published by the Department of Industrial Relations, unless the wage survey data published by the Bureau of Labor Statistics is based on more recent information. (Emphasis added.)

Title 2, Cal. Code Regs., § 547.73 further provides that:

(a) Savings generated through cost-savings based personal services contracting must justify the size and duration of the contracting agreement. To do so, such contracts must meet one of the following criteria:

(1) Achieve a savings of 10% or more compared to the cost of performing the same function within the civil service over the duration of the contract; or

(2) Achieve a savings of at least \$50,000, in terms of 1988 dollars, per year compared to the cost of performing the same function within the civil service over the duration of the contract, provided that the savings equal at least 5% of the comparable civil service cost. The \$50,000 standard shall be adjusted at the beginning of each fiscal year to reflect changes in the California Consumer Price Index as reported by the Department of Industrial Relations, and the adjusted figure shall be communicated by Board staff to all departments.⁴

(b) Such savings need not be attained during each year of a multiyear contract, providing the overall savings meet one of the aforestated requirements.

II. Arguments of the Parties

A. The Department

According to the Department, the Contract is justified as a cost savings agreement pursuant to the provisions of Section 19130(a). More specifically, the Department asserts that MSD's wage rates are at or above industry level wage rates, and do not significantly undercut State wage rates. The Department provided the following calculations in support of its argument:

VHC-B

<u>Classification</u>	<u>State</u> <u>Rate p/hr</u>	<u>MSD</u> <u>Rate p/hr⁵</u>	<u>Industry</u> <u>Rate p/hr</u>
Food Manager	\$25.60	\$24.68	\$22.18
Food Service Supervisor I	\$14.97	\$12.13	\$11.91
Food Service Technician I	\$12.51	\$10.13	\$ 9.24
Cook Specialist I	\$14.41	\$12.29	\$12.29
Cook Specialist II	\$16.11	\$13.58	\$12.29
Dietetic Technician	N/A	N/A	N/A
Office Technician	N/A	N/A	N/A

⁴ The per year savings required for contracts executed during 2009 is \$93,498.00 (See SPB Policy Memorandum, "Justification of Cost-Savings Based Contracts," dated January 13, 2009).

⁵ MSD has factored a five percent annual cost increase for wages and benefits. The numbers set forth in the Table represent the wages for the first year of the Contract.

VHC–CV

<u>Classification</u>	<u>State</u> <u>Rate p/hr</u>	<u>MSD</u> <u>Rate p/hr</u>	<u>Industry</u> <u>Rate p/hr</u>
Food Manager	\$25.60	\$24.68	\$22.18
Food Service Supervisor I	N/A	N/A	N/A
Food Service Technician I	\$12.51	\$10.13	\$ 9.24
Cook Specialist I	\$14.41	\$12.29	\$12.29
Cook Specialist II	\$16.11	\$13.58	\$12.29
Dietetic Technician	\$16.64	14.68	\$11.25
Office Technician	N/A	N/A	N/A

B. SEIU

SEIU maintains that MSD wage rates impermissibly undercut State wage rates by more than 15 percent during the first year of the Contract for at least three classifications: Food Service Manager I, Food Service Technician I, and Cook Specialist II. As a result, SEIU maintains the Contract is facially defective and must be disapproved.

III. Analysis

The Department asserts that the proper starting point for determining whether MSD's wage rates are at or above industry level wage rates and do not significantly undercut State wage rates is during the second year of the Contract. More specifically, the Department asserts:

Since the Food Services Contract is for more than two (2) years duration, a detailed comparison in the Cost Analysis was provided to the second step of the salary range of the designated classifications as required by Title 2, California Code of Regulations, section 547.72, subdivision (a)(3). Contrary to SEIU's assertion, detailed presentation of Year 1 and Year 3 through 5 wages is not required.

Although the Department is correct that the State wage rate comparison for a contract exceeding two years duration – such as the instant Contract – is at the second step of the salary range for each designated classification, the Department must still prove that the applicable State wage rate is not significantly undercut for each year of the Contract.

Here, it appears that MSD's wage rates are at or above industry level wage rates for all designated classifications. It also appears that for years two through five of the Contract, MSD's wage rates are within 15 percent of the second step of the salary range for each designated classification. However, during the first year of the Contract, MSD's wage rates are not within 15 percent of the second step of the salary range for the following classifications:

- Food Service Supervisor I (MSD wage rate is 81 percent of State wage rate)
- Food Service Technician I (MSD wage rate is 81 percent of State wage rate)
- Cook Specialist II (MSD wage rate is 84 percent of State wage rate)

Moreover, assuming both VHC-B and VHC-CV are located in nonmetropolitan areas of the State, the MSD wage rates for the above-listed classifications are not closer to the State wage rate than they are to the Industry wage rate:

- Food Service Supervisor I (MSD wage rate is \$0.22 higher than the Industry wage rate, but \$2.84 less than the State wage rate)
- Food Service Technician I (MSD wage rate is \$0.89 higher than the Industry wage rate, but \$2.38 less than the State wage rate)
- Cook Specialist II (MSD wage rate is \$1.29 higher than the Industry wage rate, but \$2.53 less than the State wage rate)

Because MSD wage rates impermissibly undercut State wage rates for three designated classifications during the first year of the Contract, the Contract does not comply with the requirements of Gov. Code § 19130(a)(2) and 2 Cal. Code Regs., § 547.72. The Contract must, therefore, be disapproved and no further analysis need be conducted as to whether the Contract otherwise comports with the requirements of Gov. Code § 19130(a).

IV. Conclusion

Although it appears that MSD wage rates meet or exceed Industry level wage rates for all five years of the Contract, and do not significantly undercut State wage rates during years two through five of the Contract, MSD wage rates do significantly undercut State wage rates for three designated classifications during the first year of the Contract. Because MSD wage rates must meet or exceed Industry level wage rates, and must not significantly undercut State wage rates, during the entire Contract term, the Contract does not comply with the provisions of Gov. Code § 19130(a)(2) and must be disapproved.

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 Title 2, Cal. Code Regs., § 547.66. Any appeal must 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