

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

APPEARANCES: Harry J. Gibbons, Attorney, on behalf of the California State Employees Association; Pamela Nataloni, Attorney, on behalf of the California Public Utilities Commission.

BEFORE: Ron Alvarado, President; William Elkins, Vice President; Florence Bos, Richard Carpenter, and Sean Harrigan, Members.

DECISION

The California State Employees Association (CSEA) has appealed to the State Personnel Board (Board or SPB) from the Executive Officer's September 20, 2000 decision, which approved Contract No. 98PS5045 between the California Public Utilities Commission (CPUC or Commission) and Larkin & Associates, and Contract No. 98PS5044 between CPUC and Overland Consulting. In this decision, the Board finds that CPUC has shown that the Contracts are justified under Government Code § 19130(b)(10). The Board, therefore, sustains the Executive Officer's decision approving the Contracts.

BACKGROUND

CPUC entered into the Contracts to obtain the services of private contractors to conduct New Regulatory Framework (NRF) compliance audits (Audits) of Pacific Bell and GTE California, Inc. (GTEC). CSEA asserts that this work should have been performed by civil service employees.

PROCEDURAL HISTORY

By letter dated December 30, 1999, pursuant to Government Code § 19132, CSEA asked SPB to review the Contracts for compliance with Government Code §§ 19130(b).

On February 11, 2000, CPUC submitted its response to CSEA's request and its justifications for the Contracts, which asserted that the Contracts were authorized under Government Code §§ 19130(b)(3) and (10). On March 3, 2000, CSEA submitted its opposition to CPUC's justification.

The Executive Officer issued his decision on September 20, 2000, which approved the Contracts under Government Code § 19130(b)(10). CSEA appealed that decision to the Board.

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

ISSUE

Are the Contracts justified under Government Code § 19130(b)(10)?¹

DISCUSSION

Government Code § 19130(b)(10) authorizes a state agency to contract with a private entity 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.

In order to comply with Government Code § 19130(b)(10), a contract must meet both of its conditions: (1) the contracted services must be either urgent, temporary or occasional; and (2) it must be shown that the purpose of those services would be frustrated by the delay in hiring civil service employees to perform them.

CPUC contends that the Contracts meet the first condition of Government Code § 19130(b)(10) because the contracted services were both temporary and occasional. According to CPUC, because of their expanded scope, breadth and complexity, NRF Audits are distinguishable from other types of regulatory audits, which can be planned for on a more routine basis. Typical regulatory audits are relatively limited, generally considering either financial, management or operational issues. In contrast, NRF Audits are hybrid audits that encompass a more complex range of issues and objectives to be evaluated, and are far less frequent than typical audits, as evidenced by the fact that it has been almost 10 years since such comprehensive audits were conducted for Pacific

¹ During oral argument, CPUC clarified that it was requesting that the Contracts be approved only under Government Code § 19130(b)(10), and that it was no longer arguing that the Contracts should also be approved under Government Code § 19130(b)(3).

Bell and GTEC. CPUC contends that the NRF Audits were also temporary, as indicated by the confined term of the simultaneous audits from July 1, 1999 to December 31, 2000.

CSEA argues that CPUC has not met its burden of proving the NRF Audits were both temporary and occasional because it did not provide sufficient evidence to show how often CPUC audits other utilities or the scope and magnitude of those other audits. According to CSEA, in the absence of that information, it is impossible to say that the frequency, scope and magnitude of the NRF Audits differed from other audits. In addition, CSEA argues that, because CPUC often conducts “hybrid” audits that encompass a complex range of issues and objectives, CPUC has failed to distinguish the NRF Audits from the other audits it often conducts.

The Board finds that CPUC has submitted sufficient information to show that the NRF Audits of Pacific Bell and GTEC presented temporary and occasional workload demands that were significantly greater than the ongoing auditing that CPUC regularly conducts. Given the size and nature of those two utilities and the scope of the audits that were required by the Commission, the Board finds that CPUC has adequately shown that the Contracts complied with the first condition set forth in Government Code § 19130(b)(10).

CPUC also asserts that the contracted services were of such a nature that the delay incumbent in their implementation under civil service would have frustrated their very purpose. CPUC, consistent with its charge to regulate California’s investor-owned utilities, determined that it had to audit Pacific Bell’s and GTEC’s performance under the New Regulatory Framework as expeditiously as possible. CPUC states that it did not

employ sufficient expert auditing staff to conduct the audits as expeditiously as the Commission had ordered.

CSEA argues that the exemption in Government Code § 19130(b)(10) applies only to services that need to be promptly performed and thus cannot be delayed while civil servants are hired or reassigned. According to CSEA, CPUC's need for auditing services was not unanticipated and did not require immediate attention: CPUC itself, and not an outside force, decided that the NRF Audits needed to be completed, and set its own timetable for the work. CSEA contends further that CPUC decided that the NRF Audits needed to be conducted in March 1996, but delayed the work for another three years and that three years provided ample time to hire civil servants.

Although CPUC concedes that there was a 3-year delay between the Commission's initial order to perform the NRF Audits and their actual inception, it has adequately explained that immediate implementation of the Commission's order was not possible because of the time it took to finally resolve the various petitions challenging that order. CPUC has also adequately explained that, despite its recruitment efforts, it could not hire a sufficient number of trained auditors with the expertise required to conduct the NRF Audits within the timelines established by the Commission and for the limited period that they would be needed to perform the short-term auditing services. In addition, CPUC's explanation of the regulatory environment for telecommunication services provides adequate justification for CPUC's need to conduct the NRF Audits as expeditiously as possible.

CSEA also contends that CPUC's lack of sufficient expert civil service auditors to conduct the NRF Audits was the direct result of an intentional twenty-year policy not to

hire auditors. CPUC straightforwardly explained its historical use of auditors, as well as several factors that caused its auditing staff to be reduced in the past, including agency reorganization, the transition of utility regulation from significant auditing functions to increased technical/analytical functions, the choice of many auditors to transfer to other agency positions, and hiring freezes that impeded full staffing levels in all areas. CPUC recognized its staffing shortages in the Financial Examiner position and undertook an effort to recruit additional Financial Examiner civil service staff. There is no evidence to show that CPUC refused to hire sufficient auditors or exhibited a deliberate intent to ignore its regulatory responsibilities by understaffing its auditing ranks. Although CPUC may have made some staffing decisions in the past that may have contributed to its not having sufficient civil service employees to conduct the Pacific Bell and GTEC audits, there is no information to support that those past staffing decisions were made in a deliberate effort to justify future contracting. And while it appears that CPUC could have made a more concerted earlier effort to hire sufficient staff to perform the contracted work, there is no evidence to show that CPUC's efforts to retain sufficient staff were insincere. Instead, it appears that CPUC was faced with an unusual, short-term surge in workload that it could not staff adequately with civil service personnel.

The Board, therefore, finds that, while CPUC's civil service auditors should ordinarily perform any auditing work that the Commission may require, under the unique circumstances presented in this case as described above, CPUC has adequately shown that the delay that would have been caused by having to hire civil service employees to conduct the NRF Audits would have frustrated the purpose of those audits.

CONCLUSION

The Board finds that CPUC has adequately justified the Contracts under Government Code § 19130(b)(10). The Board, therefore, sustains the Executive Officer's decision approving the Contracts.

STATE PERSONNEL BOARD

Ron Alvarado, President
William Elkins, Vice President
Florence Bos, Member
Richard Carpenter, Member
Sean Harrigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on March 6, 2001.

Walter Vaughn
Executive Officer
State Personnel Board