

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
 CALIFORNIA DEPARTMENT OF)
 FORESTRY AND FIRE PROTECTION)
)
 from the Executive Officer's June 6, 2001)
 Disapproval of 25 Contracts with various)
 medical providers)
)
 _____)

BOARD DECISION

PSC NO. 01-04

December 18, 2001

APPEARANCES: Harry J. Gibbons, Attorney, on behalf of the California State Employees Association; Paul Crane, Attorney, on behalf of the California Department of Forestry and Fire Protection.¹

BEFORE: William Elkins, Vice President; Florence Bos, Richard Carpenter, Members.

DECISION

The California Department of Forestry and Fire Protection (CDF) has appealed to the State Personnel Board (Board or SPB) from the Executive Officer's June 6, 2001 decision, which disapproved 25 contracts (collectively, the Contracts) that CDF entered into with various medical providers (collectively, the Contractors) to examine firefighters who sometimes must wear respirators while working. In this decision, the Board finds that CDF has not provided sufficient proof to show that all 25 Contracts are justified under Government Code § 19130(b). The Board, therefore, sustains the Executive Officer's decision disapproving the Contracts.

¹ During oral argument, Ronald Yank, counsel for Bargaining Unit 8, CDF Firefighters, and Thomas Ferguson, M.D., Ph.D., Medical Consultant, CDF, also addressed the Board in support of the Contracts.

BACKGROUND

Pursuant to amended regulations that became effective May 1999, Cal-OSHA required that employers must medically evaluate any employees who may use respirators during the course of their work. In response to the Cal-OSHA regulations, CDF established a Respiratory Protection Program (RPP) under which all CDF employees who might wear respirators while performing their firefighting duties receive initial medical examinations and periodic subsequent examinations. CDF entered into the 25 Contracts with various private medical providers to conduct these examinations.

The California State Employees Association (CSEA) asked SPB to review these contracts for compliance with Government Code § 19130(b), contending that civil service Nurse Practitioners can adequately and competently perform these examinations.

PROCEDURAL HISTORY

By letter dated April 27, 2000, pursuant to Government Code § 19132, CSEA asked SPB to review the Contracts for compliance with Government Code § 19130(b). By letter dated June 2, 2000, CDF responded to CSEA's review request. On June 15, 2000, CSEA submitted its reply to CDF's response. CDF submitted a memorandum dated July 7, 2000 in response to CSEA's reply.

On October 6, 2000, the Executive Officer requested additional information from CDF. By memorandum dated October 24, 2000, CDF submitted its response to the Executive Officer's request for additional information. By letter dated November 9, 2000, CSEA submitted its reply to CDF's October 24, 2000 memorandum.

The Executive Officer issued his decision on June 6, 2001, disapproving the Contracts.

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.

ISSUES

Are the Contracts justified under Government Code §§ 19130(b)(2), (3), (5), (8) and/or (10)?

DISCUSSION

In Professional Engineers in California Government v. Department of Transportation (PECG v. Caltrans),² the California Supreme Court recognized 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 state civil service employees have historically and customarily performed and can perform adequately and competently. Government Code § 19130 codifies the exceptions to the civil service mandate that various court decisions have recognized. Before a state agency may legally enter into a personal services contract with a private contractor, it must show that the contract is justified under one of the exceptions included in Government Code § 19130.

CDF has raised a number of arguments in support of the Contracts, including: (1) the medical evaluations for respirator users constitute a new state function; (2) the Contractors conducting the evaluations are widely dispersed throughout the state; (3)

² (1997) 15 Cal.4th 543, 547.

civil service Nurse Practitioners have never conducted this type of evaluation; and (4) no other state agencies provide medical care to their own employees. In order to justify the Contracts, CDF must show that these arguments meet the criteria of one or more of the exceptions set forth in Government Code § 19130.

Government Code § 19130(b)(2)

Government Code § 19130(b)(2) authorizes a state agency to enter into a personal services contract with a private entity when:

The contract is for a new state function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors.

Government Code § 19130(b)(2) permits contracting only for “a new state function not previously conducted by any state agency and performed by contract under legislative direction and authority.”³ In order to meet the requirements of Government Code § 19130(b)(2), CDF must show that the Contracts satisfy both of the subdivision’s two conditions: (1) the Contracts were for a “new state function” at the time they were executed; and (2) the Legislature specifically mandated or authorized the performance of the work by independent contractors.⁴

CDF asserts that the medical examinations the Contractors are performing constitute a new state function because they are being conducted in accordance with the new Cal-OSHA regulations, CDF has not previously performed medical evaluations on all its respirator users, and CDF Nurse Practitioners have never performed the type of medical evaluations for respirator users that must now be conducted. CDF also

³ California State Employees Association v. Williams (1970) 7 Cal.App.3d 390, 401 (Williams).

⁴ Department of Transportation v. Chavez (1992) 7 Cal.App.4th 407, 416 (Chavez).

asserts that, in the past, employees could be employed for 20 years without having to submit to any medical evaluations, and that the nature and frequency of the newly mandated medical evaluations for respirator users constitutes a significant change in both philosophy and practice when compared to CDF's past procedures.

The documents submitted by both CDF and CSEA indicate, however, that CDF has historically performed medical evaluations of employees when they are first appointed as limited term fire apparatus engineers, when they turn 40, and when they turn 55. In addition, the duties listed in the class specification for Nurse Practitioners call for them to conduct physical examinations. Thus, from the information CDF has provided, it appears that, under the new Cal-OSHA regulations, CDF was not required to perform a new state function, but, instead, was compelled to expand upon an existing state function. The expansion of an already existing state function does not constitute a new state function under the first condition of Government Code § 19130(b)(2).⁵

With respect to the second condition set forth in Government Code § 19130(b)(2), CDF asserts that the Legislature authorized contracting of the medical evaluations when it approved CDF's Budget Change Proposal (BCP) in the Budget Act of 1999, AB 1740, Chapter 52, Statutes of 1999. CDF asserts that the Legislature's approval of its BCP in the Budget Act constitutes sufficient authority under Government Code § 19130(b)(2) because the BCP clearly explained CDF's reasons for contracting.

In order to meet the requirements of Government Code § 19130(b)(2)'s second condition, the Legislature must explicitly authorize the performance of the services by

⁵ See, PECG v. Caltrans, *supra*, 15 Cal.4th at p. 571.

an independent contractor.⁶ CDF has not submitted to the Board any legislation that explicitly mandates or authorizes CDF to enter into the Contracts. A general legislative approval of a BCP in a Budget Act does not constitute the specific mandate or authorization for contracting required under the second condition of Government Code § 19130(b)(2). CDF has, therefore, failed to show that the Contracts are justified under Government Code § 19130(b)(2).

Government Code § 19130(b)(3)

Government Code § 19130(b)(3) 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.

CDF argues that the contracted services cannot be performed satisfactorily by CDF's civil service employees because CDF does not currently have employed sufficient medical personnel to conduct the approximately 3,000 annual medical examinations that will have to be conducted under the RPP. CDF asserts that both it and other state agencies are having difficulty recruiting sufficient numbers of qualified nurses.⁷ In addition, CDF asserts that the law provides that only four Nurse Practitioners may practice under the license of one doctor and CDF's medical

⁶ See, e.g., Williams, 7 Cal.App.3d at p. 400; Chavez, 7 Cal.App.4th at p. 414; Professional Engineers in California Government v. Department of Transportation, 13 Cal.App.4th at p.594 (“We note that the Legislature specifically authorized Caltrans to ‘solicit proposals and enter into agreements with private entities’ to construct the demonstration projects.”)

⁷ CDF states that it has been trying to fill a vacant Nurse Practitioner position in its Santa Rosa Region Office for almost a year without success.

consultant cannot be on-site to supervise all of the medical examinations that would have to be conducted by its Nurse Practitioners.

In order for a contract to be justified under Government Code § 19130(b)(3), it must be shown that the services contracted are not available through the civil service system; i.e., there are no existing civil service job classifications through which a state agency could either appoint, or obtain through other agencies, 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.

CDF also asserts that its Nurse Practitioners have not traditionally performed the types of medical evaluations required by the RPP. While it may be true that CDF's Nurse Practitioners have not conducted the specific types of medical evaluations CDF is now requiring for its employees who use respirators, CDF admits that its Nurse Practitioners have performed other types of medical evaluations in the past. Moreover, the Contracts authorize the Contractors to utilize Nurse Practitioners to perform the contracted evaluations. The class specification for Nurse Practitioners requires that an individual employed in that classification must possess a valid license to practice as a professional registered nurse in the State of California and have completed the requirements for Nurse Practitioner as specified in the regulations of the Board of Registered Nurses, California Administrative Code, Title 16, Chapter 14, Article 8, Section 1482. CDF has not provided any information to show that its Nurse Practitioners, who must possess these minimum qualifications, would be any less able

to perform the evaluations than the Nurse Practitioners who are currently performing the evaluations under contract. Thus, CDF has not presented sufficient information to show that Nurse Practitioners retained through the civil service system would not have the requisite knowledge, skills, expertise, experience or ability to perform the contracted examinations.

Finally, CDF asserts that it would simply be too costly for CDF to retain through the civil service system the number of Nurse Practitioners and supervising physicians it would need to perform all the medical evaluations of respirator users that the RPP requires. In making this argument, CDF misconstrues the scope of Government Code § 19130(b)(3).

If CDF wished to assert that the state will save money by retaining contractors, rather than civil service employees, to perform the medical evaluations, it should have followed the procedures set forth in Government Code § 19131 and Public Contract Code § 10337(b) and sought to justify the Contracts as a cost-savings contracts under Government Code § 19130(a). Because CDF did not comply with the procedures for invoking Government Code § 19130(a) as justification for the Contracts, it cannot now claim that the Contracts are cost-savings contracts.⁸

In sum, CDF has not presented sufficient information to show that the evaluations are so highly specialized or technical in nature that the necessary expert knowledge, experience or ability are not available through the civil service system.

⁸ Furthermore, CDF has not submitted any information that shows that the amount of money it will pay to the Contractors for their services is any less than it would pay if it retained civil service employees to perform the work.

CDF has, therefore, failed to show that the Contracts are justified under Government Code § 19130(b)(3).

Government Code § 19130(b)(5)

Government Code § 19130(b)(5) authorizes a state agency to enter into a personal services contract with a private entity when:

The legislative, administrative, or legal goals and purposes cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system. Contracts are permissible under this criterion to protect against a conflict of interest or to insure independent and unbiased findings in cases where there is a clear need for a different, outside perspective.

CDF asserts that, during the implementation phase of the RPP, CDF management discussed program implementation with Bargaining Unit 8, CDF Firefighters. The Bargaining Unit expressed concern that CDF Nurse Practitioners would not be able to issue “independent and unbiased findings” because of the influence that CDF management could or would have over the Nurse Practitioners’ decisions. CDF contends that, although there is no factual evidence that CDF management has exerted undue influence on Nurse Practitioners to falsify medical findings, some Nurse Practitioners have, in the past, perceived that that such pressure had been exerted upon them. CDF argues that this shows a “clear need” for an “outside perspective.” CDF asserts that the existing contract process provides an appropriate and necessary level of separation between CDF hiring managers and the medical staff performing the RPP exams.

No information has been presented to the Board to show that CDF management has or would pressure Nurse Practitioners to falsify the results of any medical examinations they might conduct or that CDF Nurse Practitioners would succumb to

such pressure. The fact that CDF Firefighters might not trust that Nurse Practitioners would always be truthful in their findings does not mean that those Nurse Practitioners would not perform their duties ethically and honestly. Government Code § 19130(b)(5) does not authorize a state agency to contract with a private entity based solely upon conjecture unsupported by substantiating facts.

CDF also contends that state agencies generally do not provide medical services to their state employees in order to avoid medical malpractice issues. In other words, CDF does not want to provide medical services to its employees because it does not want to be subject to liability if an employee is injured as a result of an inadequate or improper evaluation. Pursuant to the Contracts, the Contractors assume all liability for any injuries or damages that may occur as a result of the Contractors' performance of the contracted services.

Government Code § 19130(b)(5) permits a department to contract with a private entity to protect against a conflict of interest or to insure independent and unbiased findings in cases where there is a clear need for a different, outside perspective. The effort to avoid potential malpractice liability is not one of the reasons specifically listed in Government Code § 19130(b)(5) to justify contracting, nor can the exceptions listed in Government Code § 19130(b)(5) be interpreted to include such a justification for contracting.

CDF has, therefore, failed to show that the Contracts are justified under Government Code § 19130(b)(5).

Government Code § 19130(b)(8)

Government Code § 19130(b)(8) authorizes a state agency to enter into a personal services contract with a private entity when:

The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

According to CDF, the CDF employees who are subject to the medical evaluations are located all over California, from the Oregon border to San Diego. CDF asserts that it does not have Nurse Practitioners, medical examination facilities, equipment or materials to perform the necessary evaluations in all these locations. In addition, CDF states that the Contractors are conveniently distributed throughout the state so that its widely dispersed firefighters do not have to travel far to be tested.

According to CDF, having Contractors conveniently located throughout the state means that its firefighters lose much less time away from work while they are being tested and there is also much less time during which CDF facilities may not be adequately staffed or when CDF has to juggle staffing to ensure adequate coverage. CDF argues that it could not feasibly staff all its facilities throughout the state with Nurse Practitioners and doctors to provide the same convenience for firefighting staff that the Contractors now provide.

CSEA contends that, in the past, CDF's Nurse Practitioners have transported the necessary medical supplies and equipment to various CDF buildings throughout the state and have performed the evaluations on CDF premises. CSEA also asserts that CDF owns a mobile trailer equipped to perform medical examinations, and CDF's Nurse

Practitioners have driven the trailer to various CDF work sites and performed these examinations in the trailer.

According to CDF, a Nurse Practitioner did travel to various CDF locations on a one-time basis as part of a CDF study to evaluate off-the-shelf, full-face air purifying respirators for wildland firefighting. Approximately 60 CDF firefighters participated in that study. The medical evaluations conducted by the Nurse Practitioner at that time were for the sole purpose of that limited study. In addition, CDF states that it has a mobile trailer that is assigned to its Sierra-South Region. CDF has primarily used this trailer during fire season to provide urgent first aid treatment. CDF has also used the trailer to perform respiratory examinations on CDF employees in order to meet Cal-OSHA's time deadlines for the RPP, and to provide medical examinations for POST candidates at the CDF Academy.

CDF asserts that all the Contracts, as a whole, are justified under Government Code § 19130(b)(8). Because CDF has sought to justify the Contracts as a whole, the question for Board determination is whether it is not feasible for CDF to obtain the necessary equipment and civil service staffing in all the locations where it has entered into Contracts. From the information both CDF and CSEA have provided, it appears that CDF has been able to conduct at least some of the examinations required by the RPP utilizing its existing staff and equipment. In addition, as CSEA has pointed out, while some of the Contractors are located in more remote regions of the state, most of them are located in the state's major metropolitan areas. CDF has not shown that it is not feasible to provide the necessary staffing and equipment to perform evaluations in all the locations where it has entered into Contracts.

Additionally, relying upon the Board's decision in California State Employees Association, PSC No. 98-04, CDF has provided a cost-benefit analysis to argue that, given the significant number of examinations CDF will have to conduct to comply with Cal-OSHA's new respiratory regulations, it is not economically feasible for CDF to obtain the necessary equipment and staffing to perform all the examinations.

In our decision in California State Employees Association, the Board allowed the Department of Veterans Affairs (DVA) to rely upon Government Code § 19130(b)(8) to justify a contract for laundry services by showing that it would have been prohibitively expensive to build laundry facilities at the Barstow Veterans Home to provide the services because the Home was designed and built without such facilities. Given the enormous building expenses that DVA would have had to incur to build a new laundry facility, the lack of space for a new laundry facility on the Home's existing site, and the relatively small cost of the laundry contract, the Board determined that it was not feasible for DVA to provide the laundry services utilizing civil service employees at the Barstow Veterans Home.

The facts of this case are very different from those presented in PSC No. 98-04. There has been no evidence presented to the Board that shows that, in order for CDF to perform the type of evaluations mandated by the RPP, it would have to build expensive new medical facilities that it does not currently have. Instead, the information presented indicates that CDF was able to transport in mobile units all the equipment that it needed to perform at least some of the evaluations.

CDF has not provided sufficient information to show that it could not feasibly provide the equipment, materials, facilities, and/or support services that the Contractors

are providing in each of the locations where the services are to be performed.

Although it may have been possible for CDF to show that, for certain of the Contracts in more remote locations, it is not feasible to provide the necessary staffing and equipment to perform evaluations utilizing civil service staff, CDF has not provided sufficient specific information about those Contracts to permit the Board to approve them separately.

CDF has, therefore, failed to show that the Contracts comply with Government Code § 19130(b)(8).

Government Code § 19130(b)(10)

Government Code § 19130(b)(10) authorizes a state agency to enter into a personal services 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.

Instead of justifying each of the Contracts separately, CDF asserts that all the Contracts, as a whole, are authorized by Government Code § 19130(b)(10). In order to comply with Government Code § 19130(b)(10), CDF must, therefore, show that all the Contracts, as a whole, meet both of its conditions: (1) the contracted services are either urgent, temporary or occasional; and (2) the purpose of those services would be frustrated by the delay in hiring civil service employees to perform them.

CDF argues that it has an urgent, temporary and occasional need for the contracted medical services and implementation by any other method would not only “frustrate” their very purpose, it would compromise the safety of their firefighters.

CDF must be prepared at all times with its firefighting personnel to protect life and

property. A significant portion of the outside medical services are used for brief periods of intense activity on very short notice. During the months of April and May, CDF hires approximately 2,200 seasonal firefighters. This seasonal staffing makes up the bulk of California's wildland firefighting resources. Often firefighters must be evaluated and cleared for work on an immediate basis. With numerous contract medical providers throughout the state, CDF has been able to put seasonal firefighters on the line overnight. CDF argues that, in order to maintain this level of necessary service, given the unpredictability of the fire season and the associated resource needs, CDF would be required to have a cadre of limited-term Nurse Practitioners and physicians who would be on-call to conduct physical examinations as the occasion arises. CDF asserts that, given the complexity of the civil service hiring process, the limited number of Nurse Practitioners in the civil service system and the clear and evident recruitment difficulties for medical personnel, conducting the necessary medical screenings under the civil service would frustrate their very purpose. In addition, CDF argues that, given the significant fluctuations in annual physical examination activity, it is unrealistic to attempt to have continuously trained and professionally excellent civil service staffing available under such fluctuating, seasonal and temporary conditions.

As CSEA correctly points out, CDF has not addressed the respiratory examinations for its 3000 permanent firefighters, almost 60% of its workforce. CDF has not explained why these permanent employees could not be scheduled for regular and predictable examinations conducted by civil service employees during the non-fire season. In addition, as CSEA argues, to the extent that CDF experiences an increase in medical testing at the beginning of fire season each spring, that increase is not

temporary, occasional or urgent, but predictable and, therefore, manageable. Because CDF can predict with virtual certainty that, once April arrives, it will need to activate about 2,200 seasonal firefighters, many of whom have worked for CDF for many fire seasons, with a little advanced planning, civil service Nurse Practitioners could perform some of the required examinations in March, with the understanding that CDF would not call those seasonal employees into work until needed.

As CSEA also points out, every spring, CDF very efficiently and effectively manages to retain, in accordance with the civil service laws, almost 2,200 limited term firefighters to fight the wildfires that erupt in California during fire season. CDF has not presented any evidence to show that, before it entered into the Contracts, it made any effort to determine whether it might be able to retain, as efficiently and effectively, a sufficient number of limited term Nurse Practitioners to conduct the respiratory evaluations on some, if not necessarily all, of its firefighters.

There is no doubt that it is extremely important for the firefighters' health and safety that CDF have readily available adequate medical staff who can competently evaluate firefighters' ability to use respirators. CDF, however, has not provided sufficient information to show that all the contracted work is so temporary, occasional or urgent that the delay incumbent in retaining the necessary staff pursuant to the civil service laws would frustrate the very purpose of the evaluations. Although it may have been possible for CDF to show that certain specific Contracts are urgently needed to evaluate seasonal firefighters who cannot be evaluated timely by civil service employees, CDF did not provide sufficient specific information about those Contracts to permit the Board to approve them separately. CDF, instead, chose to justify the

Contracts as an indivisible whole. Because CDF has failed to show that all the Contracts, as a whole, are justified under Government Code § 19130(b)(10), the Board cannot approve them.

CONCLUSION

The Board finds that CDF has not presented sufficient information to show that all the Contracts are justified under Government Code § 19130(b). The Board, therefore, sustains the Executive Officer's decision disapproving the Contracts. Because of the need to assure that there are no disruptions in either the quantity or quality of medical evaluation services provided to firefighters, the Board will permit CDF to gradually phase out the Contracts over a 6-month period while it seeks to retain additional Nurse Practitioners and other medical staff to perform the evaluations.

The Board's decision in this matter is without prejudice to CDF's seeking to justify under Government Code § 19130 any future contracts that it may enter into in the event that its recruitment efforts do not succeed in providing sufficient staff for all its evaluation needs.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The Contracts are disapproved.
2. The Contracts shall be terminated within six (6) months of the date of this decision.

STATE PERSONNEL BOARD⁹

William Elkins, Vice President
Florence Bos, Member
Richard Carpenter, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision at its meeting on December 18, 2001.

Walter Vaughn
Executive Officer
State Personnel Board

⁹ President Alvarado and member Sean Harrigan did not take part in this decision.