

THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
 DEPARTMENT OF)
 PESTICIDE REGULATION)
)
 from the Executive Officer's November 8,)
 2001 Disapproval of Personal Services)
 Contracts with PTRL West, Inc., Agricultural)
 and Priority Pollutants Laboratories, Inc.,)
 and Battelle Memorial Institute, in response)
 to the request for review submitted by the)
 California Association of Professional)
 Scientists)

BOARD DECISION

PSC NO. 01-09

April 17, 2002

APPEARANCES: Steven Bassoff, Attorney, on behalf of the California Association of Professional Scientists; Gary Knutilla, Staff Counsel, on behalf of the Department of Pesticide Regulation.

BEFORE: Ron Alvarado, President; William Elkins, Vice President; and Florence Bos, Member.

DECISION

The Department of Pesticide Regulation (DPR) has appealed from the Executive Officer's November 8, 2001 decision disapproving certain contracts (collectively, the Contracts) that DPR entered into with PTRL West, Inc. (PTRL), Agricultural and Priority Pollutants Laboratories, Inc. (APPL), and Battelle Memorial Institute (Battelle) (collectively, the Contractors). Because DPR has not established that, prior to contracting, it explored other options and exhausted all reasonable avenues for procuring the contracted services through the civil service system, the Board finds that DPR has failed to show that the Contracts are justified under Government

Code § 19130(b). The Board, therefore, sustains the Executive Officer's decision disapproving the Contracts.

BACKGROUND

DPR entered into the Contracts to obtain from the Contractors scientific analyses of environmental samples (air, water and soil) for concentrations of pesticides and their breakdown products. DPR contends that the state does not have the necessary equipment or personnel to perform the required analyses. The California Association of Professional Scientists (CAPS) challenged the Contracts, asserting that the contracted services can be provided adequately and competently by civil service employees.

PROCEDURAL HISTORY

By letter dated May 11, 2001, pursuant to Government Code § 19132, CAPS asked SPB to review the Contracts for compliance with Government Code § 19130(b) (Review Request). By memorandum dated June 13, 2001, DPR submitted its response (Response) to CAPS' Review Request. By letter dated June 19, 2001, CAPS submitted its reply (Reply) to DPR's Response. DPR submitted a memorandum dated July 18, 2001 in response to CAPS' Reply. In response to a request from SPB staff for additional information, DPR submitted a memorandum dated September 27, 2001.

The Executive Officer issued his decision disapproving the Contracts on November 8, 2001.

By memorandum dated December 6, 2001, DPR filed an appeal (Appeal) from the Executive Officer's disapproval of the Contracts. DPR filed its written argument (Appeal Brief) on January 11, 2002. CAPS filed its response on February 4, 2002 (Appeal Response). DPR filed its reply (Appeal Reply) on February 11, 2002.

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

The following issues are before the Board for consideration:

(1) Should the Board review the Contracts to determine if they meet all the justifications for contracting state services under the subdivisions of Government Code § 19130(b) that DPR has asserted on appeal if DPR did not raise some of those subdivisions as its authority for contracting in earlier submissions to either the Department of General Services (DGS) or SPB?

(2) Does SPB's earlier approval of contracts similar to the Contracts at issue compel the Board to approve the Contracts?

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

DISCUSSION

Subdivisions of Government Code § 19130(b) Relied Upon by DPR

In its contract transmittals (STD 215) to DGS seeking DGS's approval of the Contracts, DPR relied upon Government Code § 19130(b)(8)¹ as its authority for

¹ Government Code § 19130(b)(8) permits a state agency to enter into a personal services contract with a private contractor 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.

contracting. In its Response, DPR raised both Government Code § 19130(b)(8) and Government Code § 19130(b)(3)² as its authority for contracting.

In its December 6, 2001 Appeal, DPR asserted that all the Contracts were authorized under Government Code §§ 19130(b)(8) and 19130(b)(10).³ In addition, it argued that the PTRL and the APPL Contracts were authorized under Government Code § 19130(b)(5).⁴ In its Appeal Brief, DPR asserted that all the Contracts were authorized under Government Code §§ 19130(b)(3), the APPL and PTRL Contracts were authorized under Government Code § 19130(b)(8), and the Battelle Contract was authorized under Government Code §§ 19130(b)(5) and 19130(b)(10). In its Appeal Reply, DPR asserted that all the Contracts were authorized under Government Code §§ 19130(b)(3), (5), (8) and (10).

In its written and oral arguments before the Board on appeal from the Executive Officer's disapproval of the Contracts, CAPS argued that, in accordance with the

² Government Code § 19130(b)(3) authorizes a state department 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.

³ Government Code §19130(b)(10) authorizes a state department to enter into a personal services contract 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.

⁴ Government Code §19130(b)(5) authorizes a state department to enter into a personal services contract 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. These contracts shall include, but not be limited to, obtaining expert witnesses in litigation.

Board's regulations, DPR was required to include in its contract transmittals to DGS all the subdivisions of Government Code § 19130(b) upon which it relied for its authority to enter into the Contracts and could not thereafter assert that the Contracts were authorized by subdivisions of Government Code § 19130(b) not included in those contract transmittals. In addition, CAPS argued that DPR could not assert on appeal to the Board that any of the Contracts were authorized by subdivisions of Government Code § 19130(b) that were not included in DPR's submissions to SPB before the Executive Officer issued his decision disapproving the Contracts.

(Contract Justification in DPR's Contract Transmittals)

In Professional Engineers in California Government v. Department of Transportation (PECG v. Caltrans),⁵ 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 the state has 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. Employee organizations, such as CAPS, may ask SPB to review departments' personal services contracts to determine whether they are authorized under Government Code § 19130.

The statutory scheme governing SPB's review of personal services contracts sets up two different review processes depending upon the nature of the contract. Government Code § 19131 provides that a state agency that proposes to enter into a

⁵ (1997) 15 Cal.4th 543, 547.

cost-savings contract pursuant to the provisions of Government Code § 19130(a) must notify SPB of its intention to enter into that contract and SPB, in turn, must notify affected employee organizations of the agency's intention, before the contract becomes effective.⁶

The process that the statutory scheme provides for SPB's review of a contract entered into under one of the exceptions set forth in Government Code § 19130(b) (an exceptions contract) is very different. A department does not have to provide SPB prior notice of its intention to enter into an exceptions contract before executing that contract. A department must usually, however, obtain DGS's prior approval before entering into an exceptions contract. If an employee organization discovers that a department has entered into an exceptions contract, pursuant to Government Code § 19132,⁷ the

⁶ Government Code § 19131 provides:

Any state agency proposing to execute a contract pursuant to subdivision (a) of Section 19130 shall notify the State Personnel Board of its intention. All organizations that represent state employees who perform the type of work to be contracted, and any person or organization which has filed with the board a request for notice, shall be contacted immediately by the State Personnel Board upon receipt of this notice so that they may be given a reasonable opportunity to comment on the proposed contract. Departments or agencies submitting proposed contracts shall retain and provide all data and other information relevant to the contracts and necessary for a specific application of the standards set forth in subdivision (a) of Section 19130. Any employee organization may request, within 10 days of notification, the State Personnel Board to review any contract proposed or executed pursuant to subdivision (a) of Section 19130. The review shall be conducted in accordance with subdivision (b) of Section 10337 of the Public Contract Code. Upon such a request, the State Personnel Board shall review the contract for compliance with the standards specified in subdivision (a) of Section 19130.

⁷ Government Code § 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.

employee organization may ask SPB to review that contract to determine whether it complies with Government Code § 19130(b).

Effective May 3, 1999, the Board adopted regulations governing SPB's review of personal services contracts.⁸ Because neither SPB nor affected employee organizations are notified of exceptions contracts before they are executed, SPB adopted Board Rule 547.60⁹ to require that, when an agency seeks DGS's approval of an exceptions contract, in its contract transmittal, it must clearly inform DGS of the subdivisions of Government Code § 19130(b) upon which it is relying as its authority for contracting. The agency must also include specific information that demonstrates how the contract meets those subdivisions so that DGS may consider that information when determining whether to approve the contract.

⁸ Title 2, California Code of Regulations, §§ 547.60-547.68.

⁹ Board Rule 547.60, Title 2, California Code of Regulations, § 547.60, provides:

Standard and Control for Approval of Contracts. When a state agency requests approval from the Department of General Services for a contract let under Government Code Section 19130(b), the agency shall include with its contract transmittal a written justification that includes specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code Section 19130(b).

Pursuant to Board Rule 547.61,¹⁰ an employee organization may request that SPB review an exceptions contract by filing a written request for review. In its review request, the employee organization must show why the contract fails to meet any of the conditions specified in Government Code Section 19130(b). When determining whether to seek SPB review of an exceptions contract, an employee organization usually reviews a copy of the contract and the contract transmittal, which it may obtain from the contracting department pursuant to a public records request.

Thus, the contract transmittal serves not only as notice to DGS of the subdivisions of Government Code § 19130(b) that the department is relying upon as authority for contracting, it also serves as the information upon which the employee organization relies when deciding whether to challenge the contract before SPB. In order for DGS to determine whether to approve an exceptions contract and for an employee organization to decide whether to challenge that contract before SPB, it is incumbent upon the state agency to comply with Board Rule 547.60 and include in its

¹⁰ Board Rule 547.61, Title 2, California Code of Regulations, § 547.61, provides:

Employee Organization's Request for Review.

(a) Any employee organization that represents state employees may request that the board review a contract proposed or executed by a state agency pursuant to Government Code Section 19130(b) by filing with the board and serving upon the state agency a written request for review. The employee organization's request for review shall identify the contract to be reviewed and include the following:

(1) specific and detailed factual information that demonstrates how the contract fails to meet the conditions specified in Government Code Section 19130(b); and
(2) documentary evidence and/or declarations in support of the employee organization's position.

(b) The employee organization shall file a proof of service with the board that states when and how it served a copy of its request for review upon the state agency.

contract transmittal all the subdivisions of Government Code § 19130(b) upon which it relies and a detailed summary of why those subdivisions are applicable.

If, in response to a review request submitted by an employee organization,¹¹ a department seeks to rely upon additional subdivisions of Government Code § 19130(b) that were not included in the department's contract transmittal to DGS, the employee organization may raise an objection. That objection must be included in the employee organization's reply¹² so that the Executive Officer may rule upon it in his decision.¹³

In this case, in its contract transmittals for the APPL and PTRL Contracts, DPR cited to Government Code § 19130(b)(8) as its authority for entering into the Contracts, asserting that the California Department of Food and Agriculture's Center for Analytical Chemistry did "not have the capacity or equipment to analyze all of the samples collected by" DPR and that "additional laboratory services are needed." In its contract transmittal for the Battelle Contract, DPR stated that, "Expertise required to meet the Department's objectives is not available with the Department and also, we could not feasibly provide such facility," and cited to Government Code § 19130(b)(8) as its authority for contracting.

In its Response to CAPS' Review Request, DPR asserted both Government Code § 19130(b)(3) and 19130(b)(8) as its authority for all three Contracts. In its Reply, CAPS did not object to DPR's inclusion of Government Code § 19130(b)(3) as additional authority for the Contracts when that subdivision was not included in any of the contract transmittals. By failing to raise that objection in its Reply to the Executive

¹¹ See, Board Rule 547.62, Title 2, Code of California Regulations, § 547.62.

¹² See, Board Rule 547.63, Title 2, Code of California Regulations, § 547.63.

Officer so that he could have addressed it in his November 8, 2001 decision, CAPS waived that objection and could not thereafter raise it on appeal before the Board.¹⁴

(DPR's Additional Justifications on Appeal)

In addition to Government Code §§ 19130(b)(3) and 19130(b)(8), in its appeal to the Board from the Executive Officer's disapproval of the Contracts, DPR also asserted Government Code §§ 19130(b)(5) and 19130(b)(10) as its authority for contracting. CAPS timely objected to the inclusion of those two new subdivisions in its Appeal Response and in its oral argument before the Board.

As set forth above, it was incumbent upon DPR to include in its contract transmittal all the subdivisions of Government Code § 19130(b) upon which it was relying to justify the Contracts. It was also incumbent upon DPR to include in its Response all those subdivisions.¹⁵ By failing to include Government Code § 19130(b)(5) and 19130(b)(10) as its authority for contracting in either its contract transmittals or its Response, DPR deprived CAPS of the opportunity to respond to those assertions in its Reply. DPR also deprived the Executive Officer of the opportunity to make findings on those assertions in his November 8, 2001 decision. It would be unduly

¹³ See Board Rule 547.64, Title 2, Code of California Regulations, § 547.64.

¹⁴ See, Andrew Ingersoll (2000) SPB Dec. No. 00-01, p. 15.

¹⁵ See, Board Rule 547.66, Title 2, Section 547.66 of the California Code of Regulations, which provides.

Appeal from an Executive Officer's Decision. Any party may appeal the executive officer's decision to the board by filing a written request with the board within 30 days after issuance of the executive officer's decision. (See Section 547.64(b).) Upon receipt of a timely appeal, the executive officer shall schedule the matter for briefing and oral arguments before the board. 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.

prejudicial to CAPS to allow DPR to raise those subdivisions as additional authority for contracting for the first time on appeal. The Board, therefore, finds, that by failing to assert Government Code §§ 19130(b)(5) and 19130(b)(10) as its authority for contracting before the Executive Officer issued his decision, DPR waived the right to assert those subdivisions on appeal before the Board.¹⁶ The Board, therefore, sustains CAPS' objection as to those subdivisions.

Approval of DPR's Prior Contracts

DPR argues that, in December 1999, the Executive Officer approved prior versions of the Contracts under all the same subdivisions of Government Code § 19130(b) that DPR now asserts on appeal and that CAPS did not appeal from that approval. DPR contends that the Board should follow that prior Executive Officer decision and approve the Contracts.

Just because the Executive Officer may have approved similar contracts more than three years ago does not bind the Board to approving the current Contracts today. The Contracts are different contracts, notwithstanding how similar they may be. In addition, the response that DPR filed in support of those earlier contracts was very different from the Response that DPR filed with respect to the current Contracts.

Moreover, while DPR may have convinced the Executive Officer that the earlier contracts were necessary because the contractors then had the expertise that the state did not possess and those contracts were occasional, temporary and urgent, during the more than three years that have passed since those earlier contracts were approved,

¹⁶ See, State Compensation Insurance Fund (2001) PSC No. 00-03, pp. 9-11. See also, Andrew Ingersoll (2000) SPB Dec. No. 00-01, p. 15.

the state has had additional time to retain civil service personnel to perform the needed services. In reviewing the Contracts currently before it, the Board is not bound by the earlier Executive Officer decision with respect to different contracts.

Government Code § 19130(b)(3)

DPR asserts that the Contracts are justified under Government Code § 19130(b)(3), which authorizes a state department 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.

DPR asserts that it does not have a laboratory facility, and, therefore, must contract with either state or private laboratories to perform the analyses of the pesticides that DPR is legally required to monitor. DPR contracts almost all its laboratory work to state laboratories, primarily the California Department of Food and Agriculture (CDFA) laboratory. DPR only contracts with private laboratories when state laboratories do not have either enough chemists, sufficient equipment, or sufficient space in which to locate additional chemists or equipment to perform all the chemical analyses that DPR requires. DPR contends that the Contracts are justified under Government Code § 19130(b) because DPR only contracts with private contractors when CDFA and other state agencies cannot perform adequately, satisfactorily or competently all the chemical analyses DPR needs.

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 retain 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. 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.

DPR does not assert that the state does not have civil service job classifications through which civil service employees with the knowledge, skills, expertise, experience or ability needed to perform the required work could be retained. The fact that more than 90% of the laboratory analyses DPR needs are performed by civil service employees shows that the state has the necessary civil service job classifications through which the state could hire employees capable of performing the contracted services. Instead, DPR argues that it cannot hire the necessary personnel to perform the contracted services, but must rely upon other agencies, particularly CDFA, to do so, and DPR does not have any control over those other agencies' budgets or hiring policies. According to DPR, when those other agencies do not have enough staff available to perform the analyses DPR needs, DPR is compelled to obtain that work from outside contractors.

The Board disagrees. As noted above, the services DPR seeks to procure are available within the civil service. CDFA regularly provides laboratory services to DPR. The fact that CDFA may not currently have on staff enough personnel to perform the services needed by DPR is insufficient to meet DPR's burden of showing that such personnel could not have been procured. DPR has not shown that it exhausted all

reasonable avenues for procuring the necessary services through the civil service. While DPR asserts that it has no control over CDFA's hiring, it has not shown that it made any effort to determine whether this work could be performed through the use of civil service employees, either hired by DPR or CDFA. Instead, it appears that DPR merely assumed that SPB would summarily approve the Contracts because it had approved similar contracts in the past. Because DPR has not established that it made any effort to review options other than contracting for meeting its needs through the civil service system, the Board cannot approve the Contracts under Government Code § 19130(b)(3).

The civil service mandate applies to the state as a whole and provides that the state, as a whole, must use civil service employees whenever those employees can perform the state's work adequately and competently. The state cannot avoid its obligations to comply with the civil service mandate by assigning responsibilities to one agency and the means of carrying out those responsibilities to another, and then forcing the former agency to contract out by understaffing the latter organization.¹⁷ Just because DPR may not be able to dictate CDFA's hiring practices or budget does not relieve the state of its obligation to provide an adequately staffed civil service to perform all the state's legislatively mandated services that civil service employees can perform adequately and competently. DPR has therefore, failed to prove that the Contracts are authorized by Government Code § 19130(b)(3).

¹⁷ See, PECG v. Caltrans, supra, 15 Cal.4th at p. 571-572.

Government Code § 19130(b)(8)

DPR asserts that the Contracts are justified under Government Code § 19130(b)(8), which permits a state agency to enter into a personal services contract with a private contractor 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.

DPR asserts that the APPL and PTRL Contracts are justified under Government Code § 19130(b)(8) because APPL and PTRL provide equipment, laboratories, chemists, and chemical analytical services that cannot feasibly be provided by the state in the locations where the services are performed. PTRL's lab facility is in Hercules. APPL's lab facility is in Fresno. DPR has three environmental research scientists working on water quality research at the California State University, Fresno. DPR contracted with APPL to analyze water samples collected in the Fresno area by these three scientists. APPL has the necessary instrumentation, facilities, and chemists in the Fresno area to analyze water samples for nitrates. CDFA's small facility in Fresno does not have adequate staff, instrumentation or space to do this testing. Chemical analyses for nitrates in water must be performed within 24 hours of sample collection due to sample degradation. According to DPR, it is not feasible to transport the samples to CDFA's facility in Sacramento to have them tested timely; utilizing APPL's services in Fresno assures that the samples can be tested within 24 hours of collection.

DPR asserts that the Battelle Contract is also justified under Government Code § 19130(b)(8) because Battelle has two specialized instruments that were necessary to

perform the analytical services that DPR required and no state departments have those instruments.

Government Code § 19130(b)(8) sets a higher standard than merely showing that the state does not now have the personnel or equipment to perform the contracted services in the locations in which they are currently being performed. The subdivision requires that DPR must show that the state could not “feasibly” provide the services, in other words, that the state is not capable of providing the equipment or personnel to perform the contracted services in the locations where the Contractors are working.¹⁸ DPR has not provided sufficient information to support that either it or CDFA “could not feasibly” provide the necessary equipment and services in the locations where its contracts with PTRL, APPL and Battelle are being performed. The fact that it or CDFA may not currently have sufficient equipment or personnel to perform the services in those locations is not adequate to meet the burden imposed under this subdivision if that equipment and staff could “feasibly” be provided. Because DPR has not shown that the necessary equipment and personnel “could not feasibly” be provided, DPR has not shown that the Contracts are authorized by Government Code § 19130(b)(8).

CONCLUSION

The Board finds that DPR has not adequately shown that the Contracts are justified under either Government Code § 19130(b)(3) or § 19130(b)(8). The Board, therefore, sustains that Executive Officer’s decision disapproving the Contracts.

¹⁸ See the Merriam-Webster Collegiate Dictionary at <http://www.m-w.com/cgi-bin/dictionary?feasibly>, which defines “feasible” to mean “capable of being done or carried out.”

STATE PERSONNEL BOARD¹⁹

Ron Alvarado, President
William Elkins, Vice President
Florence Bos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision at its meeting on April 17, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[DPR-CAPS-01-09-dec]

¹⁹ Member Harrigan did not take part in this decision.