

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
THE CALIFORNIA REGIONAL WATER)
QUALITY BOARD, LOS ANGELES)
REGION)
)
From the Executive Officer's October 27,)
2004 Disapproval of a Contract with the)
City of Glendale Reviewed at the)
Request of the California Association of)
Professional Scientists)

BOARD DECISION

PSC No. 04-06

June 7, 2005

APPEARANCES: Jonathan Bishop, Executive Officer, on behalf of the California Regional Quality Control Board, Los Angeles Region; Gerald James, attorney, on behalf of the California Association of Professional Scientists.

BEFORE: William Elkins, President; Maeley Tom, Vice President; Ron Alvarado, Sean Harrigan, and Anne Sheehan, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the California Regional Water Quality Control Board, Los Angeles Region (Regional Board), appealed from the Executive Officer's October 27, 2004 decision disapproving a contract between the Regional Board and the City of Glendale. The contract provides for the use of an employee of CH2MHill, a private entity, to perform services for the Regional Board related to the investigation, monitoring and remediation of soil and/or groundwater contamination within the San Fernando Valley Superfund Program.

SPB reviewed the Contract at the request of the California Association of Professional Scientists (CAPS). In this Decision, a majority of the Board finds that it has jurisdiction to review the contract for compliance with Government Code section 19130 and that the contract is not justified under Government Code section 19130, subdivision

(b). The Board, therefore, sustains the Executive Officer's decision disapproving the contract.

Members Alvarado and Sheehan dissent, and would find that the Board lacks jurisdiction to review this contract; even if it had such jurisdiction, the dissenting members would find the contract justified under Government Code section 19130, subdivision (b)(10).

BACKGROUND

The Regional Board provides regulatory oversight and direction for the investigation, monitoring and remediation of soil and/or groundwater contamination in connection with the San Fernando Valley Superfund Program. During the period from late 2003 to early 2004, the Regional Board determined that it needed additional staff support to perform this work. At the time, the Regional Board was faced with the state's hiring freeze and budget reductions. Lacking sufficient staff of its own to perform the necessary work, the Regional Board entered into a memorandum of understanding (Contract) with the City of Glendale, on behalf of the Cities of Burbank, Glendale and Los Angeles (Cities). Under the Contract, the Cities agreed to provide the Regional Board with an employee of a private contractor, CH2MHill, to perform technical and administrative support to the Regional Board related to soil and groundwater assessments, monitoring and cleanup at the San Fernando Valley Sites for the identification and evaluation of suspected hexavalent chromium sites in the area. Under the terms of the Contract, the Regional Board does not pay any money to the Cities or to CH2MHill for the services of the contract employee, but provides the employee with office space, equipment and supplies reasonably necessary to complete

the work. The Contract further provides that all services are performed at the direction of the Regional Board, and all work becomes the joint property of the Regional Board and the Cities.

PROCEDURAL HISTORY

By letter dated July 14, 2004, CAPS asked SPB to review the Contract for compliance with Government Code section 19130(b). The Regional Board submitted its response to CAPS's request on September 8, 2004. By letter dated September 17, 2004, CSEA submitted its reply to the Regional Board's response.

The Executive Officer issued his decision disapproving the Contract on October 27, 2004.

On December 1, 2004, the Regional Board appealed to the Board from the Executive Officer's October 27, 2004 decision disapproving the Contract. The Regional Board filed its opening brief dated January 14, 2005. CAPS filed its response dated January 31, 2005. The Regional Board filed its reply dated February 7, 2005.

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

ISSUES

The following issues are before the Board for consideration:

1. Does the Board have jurisdiction to review a contract between three cities and a state agency for the provision of personal services by a private entity at no cost to the state?

2. If so, is the Contract authorized under Government Code section 19130(a), 19130(b), or any other statute?

DISCUSSION

Jurisdiction

In Professional Engineers in California Government v. Department of Transportation (PECG v. Caltrans),¹ 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 section 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 section 19130. Government Code section 19132 requires that, upon the timely requests of employee organizations, SPB must review state personal services contracts that have been entered into under the authority of Government Code section 19130(b) to determine whether they fall within one of the codified exceptions to the civil service mandate.

¹ (1997) 15 Cal.4th 543, 547.

The Regional Board asserts that the constitutional and statutory prohibitions against contracting out do not apply where the state is essentially a third-party beneficiary to a contract between the Cities and a private firm. We disagree that this characterization accurately describes the situation in this case.

As set forth by the California Supreme Court,

[State Compensation Insurance Fund v. Riley (1937) 9 Cal.2d 126] rejected the argument that the services independent contractors perform are beyond the civil service mandate's reach, stating that "[a]ny other construction of the constitutional provision would have the effect of weakening, if not destroying, the purpose and effect of the [civil service] provision."²

Pursuant to 2 Cal. Code Reg. section 547.59, subdivision (a), a personal services contract is defined as:

any contract, requisition, purchase order, etc. (except public works contracts) under which labor or personal services is a significant, separately identifiable element. The business or person performing these contractual services must be an independent contractor that does not have status as an employee of the State.

The essential nature of the Contract is to provide personal services to the Regional Board. The Contract provides for a staff person to work at the direction of, and using office space, equipment and supplies provided by, the Regional Board. The staff person's work product is the property of the Regional Board.

Nothing in the constitutional or statutory provisions or the case law cited by the Regional Board exempts third-party personal services contracts for the performance of work on behalf of the state from SPB review under Government Code section 19132 for compliance with Government Code section 19130. Rather, the law supports CAPS's

² PECG v. Caltrans, 15 Cal.4th at p. 549.

position that the Contract in this case is a personal services contract subject to the Board's jurisdiction under Government Code sections 19130 and 19132. SPB, therefore, has the authority to review the Contract for compliance with Government Code section 19130(b).

Neither does the source of funding for the performance of state work preclude the SPB from reviewing a personal services contract for compliance with Government Code section 19130, subdivision (b). In Department of Parks and Recreation,³ the Board concluded that a personal services contract for the performance of work paid for by private donations was not justified under Government Code section 19130(b)(10), where the work was the type of work that state civil service employees have historically and customarily performed and can perform adequately and competently.⁴ Similarly, the Board concludes here that the fact that the personal services contract at issue here is funded by the Cities, rather than by the state, does not preclude the Board from exercising its constitutional and statutory jurisdiction under Government Code section 19130(b).

We disagree with the dissent's characterization of the Contract as an interagency agreement under Government Code section 6514.5. This is not a case of one public agency providing services to another public agency. Rather, the contract between the Cities and the Regional Board serves only as a means of enabling the Regional Board to obtain the services of a private contractor. As noted by the Executive Officer in his

³ (2002) PSC No. 02-01.

⁴ *Id.* at p. 6. The parties did not challenge the determination of the Executive Officer that a state department must use any private donations it receives in a manner that is consistent with the state's civil service mandate and Government Code section 19130.

decision, the Regional Board cannot use the unique contracting arrangements it has entered into to circumvent the requirements of Government Code section 19130 and the state's civil service mandate.

New Grounds Raised on Appeal

Generally, a department must include in its submissions to the Executive Officer all the subdivisions of Government Code section 19130 upon which it relies to support its position that a personal services contract is exempt from the civil service mandate. Upon timely objection, the Board will not review a contract for compliance with a subdivision of Government Code section 19130 when that subdivision is raised as justification for the contract for the first time on appeal to the Board and was not cited as justification for the Contract when the challenge was pending before the Executive Officer.⁵ The reason for this rule is to avoid prejudice to the challenging party by depriving it of the opportunity to respond to those assertions and by depriving the Executive Officer of the opportunity to make findings on those issues.⁶

In its submissions to the Executive Officer, the Regional Board asserted only that the Contract was justified under Government Code section 19130, subdivisions (a)(3) and (b)(8), but did not raise any other subdivisions of Government Code section 19130(b) as supportive of its position. CAPS, however, has not objected to the Regional Board raising subdivisions (b)(2) and (10) on appeal to the Board, and has responded to the Regional Board's arguments. Therefore, in addition to the grounds

⁵ See Department of Pesticide Regulation (2002) PSC No. 01-09, pp. 10-11.

⁶ Id.

asserted before the Executive Officer, the Board will consider the merits of the Regional Board's arguments under Government Code section 19130, subdivisions (b)(2) and (10).

Water Code Section 13304(b)(2) and (4)

The Regional Board asserts that the Contract is authorized under Water Code section 13304, subdivisions (b)(2) and (4), which authorize the Regional Board to enter into contracts with other water agencies to perform urgent cleanup, abatement, or remedial work without approval of the contracts by the Department of General Services (DGS).⁷ As set forth in Government Code sections 19131⁸ and 19132⁹ and Public

⁷ Water Code section 13304, subdivisions (b) (1), (2) and (4) provide:

(b) (1) The regional board may expend available money to perform any cleanup, abatement, or remedial work required under the circumstances set forth in subdivision (a), including, but not limited to, supervision of cleanup and abatement activities that, in its judgment, is required by the magnitude of the endeavor or the urgency for prompt action to prevent substantial pollution, nuisance, or injury to any waters of the state. The action may be taken in default of, or in addition to, remedial work by the waste discharger or other persons, and regardless of whether injunctive relief is being sought.

(2) The regional board may perform the work itself, or with the cooperation of any other governmental agency, and may use rented tools or equipment, either with operators furnished or unoperated. Notwithstanding any other provisions of law, the regional board may enter into oral contracts for the work, and the contracts, whether written or oral, may include provisions for equipment rental and in addition the furnishing of labor and materials necessary to accomplish the work. The contracts are not subject to approval by the Department of General Services.

* * *

(4) The regional board may contract with a water agency to perform, under the direction of the regional board, investigations of existing or threatened groundwater pollution or nuisance. The agency's cost of performing the contracted services shall be reimbursed by the regional board from the first available funds obtained from cost recovery actions for the specific site. The authority of a regional board to contract with a water agency is limited to a water agency that draws groundwater from the affected aquifer, a metropolitan water district, or a local public agency responsible for water supply or water quality in a groundwater basin.

⁸ Government Code § 19131, in relevant part, provides:

...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.

Contract Code section, when evaluating a personal services contract, SPB's review is restricted to determining solely whether a challenged contract is authorized by Government Code section 19130; SPB does not review whether a contract may be authorized by other constitutional or statutory provisions outside the State Civil Service Act.¹⁰ Thus, SPB will not review whether the Contract may be authorized by Water Code section 13304(b)(2) and (4). The Board notes, however, that nothing in the cited Water Code sections exempts contracts entered into under the authority of those sections from the Board's review of personal services contracts.

Public Contract Code Section 10335(a)

The Regional Board also asserts that Public Contract Code section 10335(a) exempts the Contract from SPB review. Public Contract Code section 10335(a) exempts, among others, contracts between a state agency and a local agency from review by the DGS.¹¹ Thus, the Regional Board contends, because Public Contract

⁹ Government Code § 19132, in relevant part, 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. ...

¹⁰ Government Code § 18500 et seq.

¹¹ Public Contract Code § 10335, in relevant part, provides:

(a) This article shall apply to all contracts, including amendments, entered into by any state agency for services to be rendered to the state, whether or not the services involve the furnishing or use of equipment, materials, or supplies or are performed by an independent contractor. Except as provided in Section 10351, all contracts subject to this article are of no effect unless and until approved by the department. Each contract shall be transmitted with all papers, estimates, and recommendations concerning it to the department and, if approved by the department, shall be effective from the date of approval. This article shall apply to any state agency that by general or specific statute is expressly or impliedly authorized to enter into the transactions referred to in this section. This article shall not apply to ... contracts between state agencies, or contracts between a state agency and local agency or federal agency....

Code section 10337, which authorizes the SPB to establish standards for the approval of contracts by DGS and references the SPB's review under Government Code section 19130(b),¹² is within the same article as section 10335(a), SPB review is not applicable to the Contract.

The Regional Board's position is misplaced. As set forth by the Board in State Compensation Insurance Fund,¹³ the SPB's authority to review personal services contracts for compliance with Government Code section 19130 does not derive from Public Contract Code section 10337, but derives instead from the California Constitution and the State Civil Service Act. Thus, the mere fact that the Contract may be exempt from approval by DGS does not exempt it from review by the SPB under Government Code section 19132 for compliance with Government Code section 19130(b). Government Code section 19132 mandates that SPB must review contracts for compliance with Section 19130(b) when an employee organization, such as CAPS, requests review. Because CAPS submitted timely and proper requests for review in this case, SPB is required to review the Contract for compliance with Government Code section 19130(b).

¹² Public Contract Code § 10337, in relevant part, provides:

(a) The State Personnel Board may establish such standards and controls over approval of contracts by the Department of General Services as are necessary to assure that the approval is consistent with the merit employment principles and requirements contained in Article VII of the California Constitution. The substantive provisions of the standards shall be established at the discretion of the State Personnel Board. The specific procedures for contract review pursuant to such standards shall be established jointly by the board and the department....

(c) A contract proposed or executed pursuant to subdivision (b) of Section 19130 of the Government Code shall be reviewed by the State Personnel Board if the board receives a request to conduct such a review from an employee organization representing state employees. Any such review shall be restricted to the question as to whether the contract complies with the provisions of subdivision (b) of Section 19130 of the Government Code....

¹³ (2003) PSC Nos. 03-06, 03-07 and 03-08.

Government Code Section 19130(a)

Government Code section 19130, subdivision (a), authorizes personal service contracting to achieve cost savings when all of the statutorily enumerated conditions are met. Pursuant to Government Code section 19131, any state agency proposing to execute a contract pursuant to subdivision (a) of section 19130 must notify the SPB of its intention. Section 19131 further provides that all organizations that represent state employees who perform the type of work to be contracted, and any person or organization that has filed with the Board a request for notice, must be contacted immediately by the Board upon receipt of this notice so that they may be given a reasonable opportunity to comment on the proposed contract.

The Regional Board did not follow the procedure set forth in Government Code section 19131 required to justify a cost-savings contract under Government Code section 19130, subdivision (a). Had it done so, CAPS and other interested parties would have had the opportunity to comment on the contract and request SPB review prior to its execution. Therefore, the SPB will not review the Contract under Government Code section 19130, subdivision (a).

Government Code Section 19130(b)(2)

On appeal, the Regional Board asserts that the Contract is justified under Government Code section 19130(b)(2) as a “new state function” in that the Contract is a demonstration project by the Regional Board with three cities whose domestic drinking water systems are under assault by potentially deadly contaminants.

Government Code section 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.”¹⁴ In order to meet the requirements of Government Code § 19130(b)(2), the Regional Board must show that the Contract satisfies both of the subdivision’s two conditions: (1) the Contract was for a “new state function” at the time it was executed; and (2) the Legislature specifically mandated or authorized the performance of the work by independent contractors.¹⁵

To qualify as a “new state function” under Government Code section 19130(b)(2), a contracted service must constitute a new program or activity not previously performed by any existing agency of state government to ensure that no civil service employees will be displaced.¹⁶ In order to be a “new state function,” the contracted service must truly comprise a new governmental activity; it cannot merely be “a new technique for performing an existing function.”¹⁷

The evidence submitted by the Regional Board indicates that the Contract is not for a “new state function” as defined by the courts. The investigation, monitoring and remediation of soil and/or groundwater contamination is an existing function that is currently performed by Regional Board employees. Nor does the Contract meet the

¹⁴ See California Department of Forestry and Fire Protection (2001) PSC No. 01-04 and Department of Personnel Administration (2000) PSC No. 00-01, citing California State Employees Association v. Williams (1970) 7 Cal.App.3d 390, 401.

¹⁵ *Id.*, citing Department of Transportation v. Chavez (1992) 7 Cal.App.4th 407, 416.

¹⁶ Department of Personnel Administration, at p. 15, citing Chavez, 7 Cal.App.4th at pp. 414-415 and Williams, 7 Cal.App.3d at pp. 399-400. See also Williams, 7 Cal.App.3d at p. 397 (“if the services cannot be adequately rendered by an existing agency of the public entity or if they do not duplicate functions of an existing agency, the contract is permissible”) and Professional Engineers in California Government v. Department of Transportation (1993) 13 Cal.App.4th 585, 593. (“Under the ‘new state function’ test, courts will ask whether the contracted services displace existing state civil service functions or, instead, embrace a new state activity or function.”)

¹⁷ Department of Personnel Administration, at p. 16, citing PECG v. Caltrans, 15 Cal.4th at p. 571.

second requirement that the contracting must be specifically authorized by the Legislature.

While Water Code section 13304(b) may authorize the Regional Board to contract with local water agencies to perform urgent remediation work without approval by DGS, nothing in that section reflects an intent by the Legislature to contract that work out to private entities.

Professional Engineers v. Department of Transportation (“Professional Engineers”)¹⁸ does not support the Regional Board’s position. In that case, the Legislature adopted an emergency measure authorizing Caltrans to contract with private firms to construct and operate tollways under state leases, where public financing was inadequate. As noted by CAPS, this case involved the total withdrawal of a state function on an experimental basis. As explained by the Supreme Court in PECG v. Caltrans, the Court of Appeal held that, “on an experimental basis, the state might properly release a former function in favor of ‘privatization’ without offending civil service principles.”¹⁹ Thus, although the design and construction of roads were neither new functions nor ones that state workers could not satisfactorily perform, the court held that the method of financing and administering that work through a legislatively-authorized experimental privatization program was a new state function that qualified as an exception to the private contracting restriction.

¹⁸ (1993) 13 Cal.App.4th 585.

¹⁹ PECG v. Caltrans, *supra*, 15 Cal.4th at p. 550, citing Professional Engineers, 13 Cal.App.4th at pp. 593-594, and fn. 4.

Here, the state has not released a function on an experimental basis pursuant to specific legislative authorization, but has simply contracted out work that would normally have been performed by civil service employees. There is no legislative authorization to release the function of investigating and administering the remediation of groundwater contamination to private entities.

Government Code Section 19130(b)(8)

The Regional Board asserts that the Contract is authorized under Government Code section 19130(b)(8) because the cities' contractor is providing services that cannot feasibly be provided by the Regional Board due to hiring freeze and budget restraints.

In State Compensation Insurance Fund,²⁰ the Board rejected a similar contention that the state's hiring freeze can be used to justify contracting out of personal services that would otherwise be performed by state civil service employees. Relying on PECG v. Caltrans, the Board noted:

... a state agency cannot create an artificial need for private contractors by refusing to hire sufficient civil service employees to perform the agency's work, and then rely upon the workforce shortage it has created to justify the hiring of private contractors.²¹

The Board further explained that, although an individual state agency may not be responsible for the hiring freeze, and thus may not be engaging in intentional violations of the civil service mandate, the Board considers whether the policies of the state, when

²⁰ (2003) PSC Nos. 03-06, 03-07, 03-08.

²¹ Id., at p. 11.

viewed as a whole, may be improperly impeding the hiring of sufficient civil service employees to conduct the state's business.²² Otherwise, the Board noted,

If the state could manufacture authorization for private contracting simply by imposing a hiring freeze that prohibits its agencies from retaining sufficient civil service employees to perform the agencies' public duties and responsibilities, the civil service mandate implied in the California Constitution and recognized by the California Supreme Court in PECG v. Caltrans would become a nullity.²³

Thus, in State Compensation Insurance Fund, the Board held that, where it was clear that the state would have been able to hire sufficient personnel if it were not precluded from doing so by the hiring freeze, the hiring freeze could not be used to justify contracting out. The Regional Board has failed to show that factors other than the hiring freeze and budget restrictions impeded its ability to hire sufficient civil service staff to perform the work it has contracted out. Therefore, the Regional Board has failed to establish that the Contract is authorized under Government Code section 19130(b)(8).

Government Code Section 19130(b)(10)

Finally, the Regional Board contends that the Contract is justified under Government Code section 19130(b)(10), which authorizes a state agency to enter into a personal services contract with a private contractor 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.

²² Id.

²³ Id., at p. 12.

The Regional Board asserts that its need for the contracted services is urgent because of the impending threat of contamination of the cities' drinking water systems and the resultant adverse health effects on their residents. The Regional Board also refers to its arguments in support of its position that the Contract is justified under Government Code section 19130(b)(8), given the state hiring freeze and budget restrictions.

As the Board stated in California State Employees Association,²⁴ in order to justify a personal services contract under Government Code § 19130(b)(10), a state agency must provide sufficient information to show: (1) the urgent, temporary, or occasional nature of the services; and (2) the reasons why a delay in implementation under the civil service would frustrate the very purpose of those services. Thus, in California State Employees Association, the Board approved the contracting out of nursing services where the department established an urgent need for those services and demonstrated a diligent, but unsuccessful, effort to obtain those services through the civil service system. In contrast, in State Compensation Insurance Fund, supra, the Board disapproved the contracting out of payroll auditing, clerical and claims adjustment services where the sole justification asserted was the state's hiring freeze.

Although the Regional Board asserts that the services are of an "urgent" nature, it has provided no specific information to demonstrate such urgency, such as when the need arose, the time frame for completion, or any other information that would enable the Board to determine whether the services are of an urgent nature within the meaning

²⁴ (2003) PSC No. 03-02 at p. 3.

of Government Code section 19130(b)(10). Moreover, even if the Board were to conclude that the contracted services are urgent, the Regional Board has not shown that it was a delay in implementation under the civil service system that would cause the Regional Board to be unable to provide the contracted services in a timely fashion. The Regional Board has failed to demonstrate that it made any effort to obtain the necessary services through the civil service system, such as, for example, by requesting a budgetary augmentation in order to hire the additional staff necessary to perform the work it has contracted out. The Regional Board has, therefore, failed to meet the requirements of Government Code section 19130(b)(10) to justify its contracting out under that subdivision.

CONCLUSION

The Board recognizes that the clean drinking water is of vital public importance to the health and safety of the citizens of California. The Regional Board is charged with overseeing the cleanup of possible groundwater contamination. In doing so, however, the Regional Board cannot ignore the constitutional mandate that work the state has historically and customarily performed, and can perform adequately and competently, be performed by state civil service employees. The Regional Board has failed to demonstrate that the work is a new state function or that it was unable to obtain the necessary labor through the civil service.

ORDER

The Board sustains the Executive Officer's decision disapproving the Contract.

STATE PERSONNEL BOARD

William Elkins, President
Maeley Tom, Vice President
Sean Harrigan, Member

* * * * *

Ron Alvarado and Anne Sheehan, Members, dissenting.

We respectfully dissent from the majority's decision. We would find that the Board lacks jurisdiction over the contract for services between the Regional Board and the City of Glendale for services provided by employees of CH2MHill. In addition, even assuming the Board has jurisdiction to review the Contract, we would find that the Contract is justified as an urgency contract under Government Code section 19130(b)(10).

Jurisdiction

Government Code section 19130 codifies the exceptions to the state's civil service mandate that various court decisions have recognized and authorizes state agencies to enter into personal services contracts that meet any one or more of the statute's criteria. As the California Supreme Court stated in the first sentence of Professional Engineers in California Government v. Department of Transportation (PECG v. Caltrans),²⁵ the state's civil service mandate limits "the state's authority to

²⁵ (1997) 15 Cal.4th 543, 547.

contract with private entities to perform services the state has historically or customarily performed." (Underlining added.)

In this case, there is no contract between the Regional Board and any private entity. Instead, the Contract is between the Regional Board and the Cities. The City of Glendale and the other cities, on whose behalf it entered into the Contract, are not private entities. Because the Cities are not private entities, the Contract is not a personal services contract subject to SPB review under Government Code section 19130. Instead, the Cities are "public agencies" as defined in Government Code section 6500.²⁶ Therefore, pursuant to Government Code section 6514.5,²⁷ the Contract is an interagency agreement subject to approval under Government Code section 11256.²⁸

Moreover, the courts have recognized that the constitution does not discourage experimentation with alternative financing methods to solve state needs that cannot be

²⁶ Government Code section 6500 provides: "As used in this article, "public agency" includes, but is not limited to, the federal government or any federal department or agency, this state, another state or any state department or agency, a county, county board of education, county superintendent of schools, city, public corporation, public district, regional transportation commission of this state or another state, or any joint powers authority formed pursuant to this article by any of these agencies." (Emphasis added.)

²⁷ Government Code section 6514.5 provides: "Any public agency may enter into agreements with other state agencies pursuant to the provisions of Section 11256."

²⁸ Government Code section 11256 provides: "Subject to approval of the Director of General Services, state agencies may furnish services, materials or equipment to, or perform work for, other state agencies upon such terms and conditions and for such considerations as they may determine and, subject to such approval, may enter into agreements for such purpose. The state agency furnishing or performing said work, services, materials or equipment shall include in its charges therefor such direct and indirect costs to the state in furnishing or performing said work, services, materials or equipment as may be approved by the Director of General Services, and such state agency shall compute said charges in a manner approved by the Director of Finance. The Director of General Services, upon such terms and conditions as he may prescribe, may except from his approval, or grant blanket approval for, the performance of any work, the furnishing of any services, materials or equipment, the entering into of any agreements, the computation of any charges, or the inclusion of any costs provided for herein."

met with available state revenue. As the court in Professional Engineers v. Department of Transportation²⁹ noted:

No case has ever suggested that article 7, section 1 restricts the use of private funds, or prohibits the State from transferring what theretofore had been a state function to private hands if public funds are not used to pay for the project. Such a restriction would be inconsistent with one of the objectives underlying the constitutional provision-to promote efficiency and economy in state government...³⁰

Likewise, the Supreme Court on PECG v. Caltrans³¹ recognized that, while Professional Engineers involved the total withdrawal of a state function on an experimental basis, requiring no expenditure of state funds, “[s]imilar experimentation may be permissible under article VII, if justified by considerations of economy and efficiency and if otherwise consistent with applicable civil service requirements, despite the use of state funding.”³²

In this case, we would find that the purposes of the Constitution are not infringed by permitting a public entity to donate labor to the state. Therefore, we would find that the constitutional and statutory limitations on the authority of the state to enter into personal services contracts does not apply to the Contract between the Regional Board and the Cities in this case.

²⁹ (1993) 13 Cal.App.4th 585.

³⁰ Id. at note 4.

³¹ (1997) 15 Cal.4th 543.

³² Id. at p. 568, citing California State Employees Association v. State of California (1988) 199 Cal.App.3d 840, 844-846.

Government Code Section 19130(b)(10)

Even assuming the Board has jurisdiction over this case, we would find that the Regional Board established that it met the requirements to justify the Contract as an “urgency” contract under Government Code section 19130, subdivision (b)(10). The preservation of clean drinking water is of the utmost importance to the health and well-being of the citizens of this state. While the state’s hiring freeze would not normally justify contracting out of personal services that could be performed competently by existing civil service employees,³³ the facts of this case establish (1) the urgent nature of the services; and (2) the reasons why a delay in implementation under the civil service would frustrate the very purpose of those services.

By its very nature, the investigation, monitoring and remediation of soil and groundwater contamination is an urgent function that should be performed without delay. Even if the Regional Board were able to obtain a budget augmentation to perform this work, the continued harm to public health that would occur while additional funding and staffing were being sought would frustrate the very purpose of the vital services performed by the Regional Board. The Regional Board has established that it would have performed these functions itself but for staffing and budget constraints over which it had no control. Due to the extreme urgency of the nature of the work, we would find that the Contract is justified under Government Code section 19130, subdivision (b)(10).

* * * * *

³³ See State Compensation Insurance Fund (2003) PSC Nos. 03-06, 03-07, 03-08.

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 7, 2005.

Laura M. Aguilera
Assistant Executive Officer
State Personnel Board

[PSC 04-06-dec]