

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
California Air Resources Board)	
)	PSC No. 06-04
from the Executive Officer's August 15, 2006)	
Disapproval of a Personal Services Contract)	
for Hearing Reporter Transcription Services.)	March 2, 2007
)	
)	
)	

APPEARANCES: Anne M. Giese, Attorney, on behalf of Service Employees International Union, Local 1000 (California State Employees' Association); Alexander Wang, Senior Staff Counsel, on behalf of the California Air Resources Board.

BEFORE: Sean Harrigan, President, Anne Sheehan, Vice President; Patricia Clarey and Maeley Tom, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the California Air Resources Board (ARB) appealed from the Executive Officer's August 15, 2006, decision disapproving Invitation for Bid (IFB) No. 05-103 (hereinafter "Contract") promulgated by the ARB for hearing reporter transcription services. The matter was initially brought to the SPB after the Service Employees International Union (SEIU), Local 1000 (CSEA), requested that the SPB review the Contract for compliance with the provisions of Government Code section 19130(b).

In this decision, the Board finds that the Contract is not justified pursuant to the provisions of Government Code section 19130(b)(3), because the ARB failed to establish that existing civil service classifications are inadequate to employ civil service employees to provide those services to be rendered under the Contract, and

because ARB failed to establish that it made reasonable, good faith efforts to hire civil service hearing reporters/transcribers prior to entering into the Contract.

BACKGROUND

The ARB is the state agency charged with protecting air quality in California, conducting research regarding the causes and solutions to air pollution, and enforcing the State's laws for the control of air pollution emissions from motor vehicles.¹ The ARB is also charged with adopting standards, rules and regulations consistent with "the state goal of providing a decent home and suitable living environment for every Californian,² and with implementing standards and regulations applicable to various sources of air pollution, including motor vehicles, vehicular fuels, greenhouse gas emissions, and other carcinogenic, teratogenic, mutagenic, or otherwise toxic air contaminants.³ The ARB is further charged with developing and adopting chemical, engineering, and other scientific test procedures in support of its regulations.⁴

In accordance with the above-cited directives, the ARB has promulgated, and continues to promulgate a significant number of regulations. The ARB's rulemaking process typically involves highly scientific and technical issues, including toxicological data, health risk assessments, estimates of environmental benefits and economic costs associated with proposed regulations, and projected availabilities and performance characteristics of further technologies. Consequently, a significant

¹ Health and Safety Code sections 39002, 39003 and 39500.

² Health and Safety Code section 39601.

³ Health and Safety Code sections 39656, 43013, 43018, 43018.5 and 43101-43104.

⁴ Health and Safety Code sections 39607, 41962, 43006, 43104, 43824 and 44011.6.

portion of the testimony arising during ARB rulemaking hearings involves highly scientific and technical terminology.

On October 28, 2005, the ARB promulgated the Contract at issue here, soliciting bids from interested vendors for the provision of the following services:

Services shall consist of reporting public hearings and meetings and providing transcript of proceedings as requested by the [ARB]. ARB and Scientific Review Panel (SRP) hearings and meetings may be held at any location within California counties, continue for several consecutive days, and require long daily sessions, with interruptions only for changing Stenotype paper and recording tapes. SRP meetings will generally be limited to one day.

The Contract also contained a certification component that required, in pertinent part, "Bidder shall provide evidence that each Court Reporter identified on the list is a California Certified Shorthand Reporter (CCSR), certified in the use of the Stenotype process for court reporting."

The ARB did not submit the proposed Contract to the Board for review as a cost-savings contract subject to the provisions of Government Code section 19130, subdivision (a). Instead the ARB promulgated the Contract on the grounds that it was justified under one or more of the personal services contracting-out exceptions set forth in Government Code section 19130, subdivision (b). **As discussed *infra*, nothing in the record indicates that, prior to promulgating the Contract, the ARB made reasonable, good faith efforts to recruit civil service employees to perform the Contract duties prior to promulgating the Contract.**

PROCEDURAL HISTORY

By letter dated December 22, 2005, SEIU asked the SPB to review for compliance with Government Code section 19130, subdivision (b), a personal services IFB promulgated by the ARB for hearing reporter transcription services. By letter dated January 5, 2006, the SPB directed the ARB to file with a response with the SPB and SEIU concerning the Contract. By letter dated January 11, 2006, the ARB notified the SPB that the parties stipulated to a continuance, pursuant to the provisions of Title 2, California Code of Regulations (2 CCR), section 547.67(a), and requested an extension from SPB to file their written response to SEIU's request for review. By letter dated January 13, 2006, the SPB notified the ARB and SEIU that ARB's written response was due on or before February 9, 2006. By letter dated February 9, 2006, the ARB filed its written response with the SPB. By letter dated February 14, 2006, SEIU requested an extension of time until March 6, 2006 to file a reply to the ARB's written response. The request for a continuance was granted, and SEIU subsequently filed its written reply with the SPB on March 6, 2006, after which the matter was deemed submitted for review by the Executive Officer.

On August 15, 2006, the Executive Officer issued his decision disapproving the Contract, on the grounds that the ARB failed to establish that existing civil service classifications are inadequate to employ civil service employees to provide those services to be rendered under the Contract, and because ARB failed to present sufficient information that it made reasonable, good faith efforts to hire civil service hearing reporters.

On August 31, 2006, the ARB requested and received from the SPB a one-week extension in which to file its appeal of the Executive Officer's decision with the five-member Board. On September 22, 2005, the ARB filed its request for review of the Executive Officer's August 15, 2006, decision. By letter dated September 25, 2006, Board staff notified the parties that ARB's request for review had been granted, and that the matter would be scheduled for the Board's December 5, 2006, meeting. By letter dated September 29, 2006, SEIU requested a continuance of the hearing until the Board's January 9, 2007, meeting. SEIU's unopposed request for a continuance was subsequently granted. On October 11, 2006, the Board received the ARB's opening brief. SEIU's responsive brief was filed with the Board on November 1, 2006. A reply brief was filed by the ARB on November 14, 2006.

Oral argument was conducted before the Board during its January 9, 2007, meeting, after which the matter was submitted for decision by the Board.

ISSUE

The following issue is before the Board for review:

Is the Contract justified under Government Code section 19130, subdivision (b)?

LEGAL PRINCIPLES

In *Professional Engineers in California Government v. Department of Transportation*,⁵ the California Supreme Court recognized that, emanating from Article VII of the California Constitution, is an implied "civil service mandate" that prohibits state agencies from contracting with private entities to perform work that

⁵ (1997) 15 Cal.4th 543, 547.

the state has historically and customarily performed and can perform adequately and competently. Government Code section 19130 codifies the exceptions to the civil service mandate recognized in various court decisions. The purpose of SPB's review of contracts under Government Code section 19130 is to determine whether, consistent with Article VII and its implied civil service mandate, state work may legally be contracted to private entities or whether it must be performed by state employees.

Government Code section 19130, subdivision (b)(3), authorizes a state agency to enter into a personal services contract when:

[t]he 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.

The Board's decision, *In the Matter of the Appeal by SEIU*, made clear that, in asserting the exemption contained in Section 19130(b)(3), the burden is on the department to establish either: (1) that there are no civil service job classifications to which it could appoint employees with the requisite expertise needed to perform the required work; or (2) that it was unable to successfully hire suitable candidates for any of the applicable classifications.⁶

DISCUSSION

The ARB argues that there are no existing civil service classifications to which it could appoint employees with the requisite experience needed to perform the required work. In support of its position that there are no existing civil service

⁶ PSC No. 05-03, at p. 8.

classifications to which it could appoint civil service employees to perform those duties required under the Contract, the ARB asserts that only California Certified Shorthand Reporters are qualified to serve as ARB hearing reporters, due to the highly technical and unusual terminology utilized during ARB hearings. According to the ARB, because the minimum qualifications for the only two existing civil service hearing reporter classifications that might be able to perform the duties contemplated under the Contract – Hearing Reporter and Hearing Transcriber (Typist) –⁷ do not require the employee to be a California Certified Shorthand Reporter, existing civil service classifications are inadequate to support the ARB’s hearing reporter needs.

The ARB further maintains that, even if existing civil service classifications are adequate to employ appropriate civil service employees to perform those services to be rendered under the Contract, it has been unsuccessful in its efforts to hire civil service employees to perform those duties. Consequently, the ARB maintains that the Contract is authorized pursuant to the provisions of Section 19130(b)(3).

In support of its position that it has made reasonable, good faith efforts, to hire civil service employees to perform those duties contemplated under the Contract, the ARB submitted a memorandum, dated December 1, 2006, to the Executive Officer, and a letter, dated January 11, 2007, to the Board, wherein the ARB detailed the efforts it has undertaken to hire civil service employees to meet its hearing reporter/transcriber needs. Those efforts

⁷ A third Hearing Reporter classification also exists, Hearing Reporter (Public Utilities Commission). That classification includes as a minimum qualification that the employee possess a State of California license as a Certified Shorthand Reporter. The classification, however, is exclusive to the California Public Utilities Commission (CPUC).

included verifying on October 4, 2006, that of the four existing Hearing Reporter or Transcriber Typist civil service eligibility lists, only four eligible candidates were interested in working in the Sacramento area, and of those four, only one responded to the ARB's employment inquiry. Although that individual was offered the position on December 4, 2006, she remains undecided as to whether to accept the employment offer. In addition, during oral argument before the Board, the ARB made a general, non-specific assertion that it has attempted to hire civil service employees to perform the Contract services.

Because, however, the information regarding the ARB's asserted good faith hiring efforts was not submitted by the ARB for review by the Executive Officer prior to the issuance of his decision, in accordance with the provisions of Title 2, California Code of Regulations, section 547.66, that information will not be considered by the Board in this Decision. Moreover, the Board notes that although the Contract was promulgated by the ARB on October 28, 2005, by the ARB's own admission, it did not begin to make inquiries as to the availability of civil service employees to perform the Contract duties until October 4, 2006, a year after the Contract was signed. That does not constitute a reasonable, good faith effort to recruit civil service employees prior to promulgating the Contract.

Although the ARB is correct that the minimum qualifications for both the Hearing Reporter and the Hearing Transcriber (Typist) classifications do not require an individual to possess a California license as a Certified Shorthand Reporter in

order to qualify for appointment within either classification, neither are individuals who possess such certification barred from appointment to those classifications. The minimum qualifications for the classifications are just that – minimum qualifications. As such, they serve to establish a base level of experience, education and/or competence that must be met prior to an applicant being considered for appointment to a classification. Nothing in the minimum qualifications, however, precludes applicants with higher than base level experience, education and/or competence from being considered for appointment.

Moreover, simply because an applicant meets the minimum qualifications for a particular classification does not mean that an appointing authority is required to appoint that applicant to a vacant position. Instead, the competitive examination process traditionally utilized when making appointments to the state civil service can be viewed as occurring in two, or even three, distinct phases, the first two of which are relevant for purposes of this discussion.

Phase I consists of the eligibility phase, wherein a competitive examination is used to determine both who is interested in, and possesses the minimum qualifications for, appointment to the classification in question, and who should be considered for appointment in the second phase of the competitive selection process. The successful candidates are placed on a ranked eligible list and, if the candidates are “reachable” on the list according to the “rule of three ranks,”⁸ they may continue to compete for appointment to a particular position within the classification during the hiring phase of the selection process.

⁸ Gov't Code § 19057.1.

The second, or hiring, phase of the competitive selection process permits the appointing power to assess the relative qualifications and fitness of the candidates for the particular position by reviewing employment backgrounds in detail, including checking references; comparing verbal, written, and analytical abilities; assessing work habits and interpersonal skills; and comparing candidates' suitability to perform the specific job duties of a particular position. It is only after such criteria have been analyzed that the appointing power will be able to accurately ascertain who among the eligible candidates, if any, would be the better candidates and, ultimately, which candidate, if any, is the best fit for appointment to that particular position.⁹

Given the foregoing, it is axiomatic that no appointing power is required to hire any candidate from an eligible list simply because the candidate meets the minimum qualifications for such appointment. If, after fully evaluating each eligible candidate, the appointing power determines that no candidate can successfully perform the duties of the position in question, the appointing power can simply decline to hire any eligible candidate from the list. **Here, however, the ARB made no such inquiries prior to promulgating the Contract.**

In addition, if the appointing power is able to establish that existing classifications are inadequate to attract sufficiently skilled applicants for a particular position, the appointing power can seek permission from the Board to create a new classification that includes higher minimum qualification requirements, much as CPUC did in establishing the Hearing Reporter (Public Utilities Commission) classification.

⁹ See *Professional Engineers in Cal. Gov't v. State Personnel Board* (2001) 90 Cal.App.4th 678, 696.

In short, the ARB was not excused from seeking to hire civil service employees to perform the duties in question simply because it believed that individuals who were licensed as certified short hand reporters would not apply for such a vacancy. Indeed, it is incongruous to believe that an individual would be dissuaded from applying for a vacant civil service position because he or she possessed skills or qualifications in excess of the minimum qualifications for the position.¹⁰

Although it *might* be that, despite having made good faith efforts to recruit civil service employees to perform its hearing reporter duties, the ARB will ultimately be unsuccessful in its efforts to hire sufficiently skilled individuals to perform those duties to be rendered under the Contract, the ARB is nonetheless required to first make a good faith effort to hire civil service employees to perform those job duties. Here, however, the ARB presented no evidence to establish either that the existing Hearing Reporter or Hearing Transcriber (Typist) classifications are inadequate to support its hearing reporter/transcriber needs, or that it made reasonable, good faith efforts to recruit civil service employees to perform such duties prior to promulgating the Contract. Because the Contract does not meet the requirements set forth in Government Code section 19130(b)(3), the Board cannot approve the Contract.

CONCLUSION

The ARB failed to present sufficient evidence to establish that existing civil service classifications are inadequate to meet its hearing reporter/transcriber needs. In addition, the record reflects that ARB did not even attempt to hire civil service employees until a year had passed after having entered into the contract. As a

¹⁰ That presumption is borne out by the fact that the ARB was able to identify at least one sufficiently-skilled individual on existing civil service eligibility lists who could perform the

result, the ARB failed to present sufficient evidence to establish that, despite having made reasonable, good faith efforts to hire civil service employees to perform those duties to be rendered under the Contract, it was unsuccessful in its efforts to recruit sufficiently skilled individuals. As a result, the Contract must be disapproved for failure to satisfy the requirements of Government Code section 19130(b)(3).

ORDER

The Board hereby disapproves the Contract promulgated by the ARB for hearing reporter and transcriber services, on the grounds that the Contract is not justified as under Government Code section 19130, subdivision (b)(3).

STATE PERSONNEL BOARD¹¹

Sean Harrigan, President
Anne Sheehan, Vice President
Patricia Clarey, Member
Maeley Tom, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 2, 2007.

Floyd Shimomura
Executive Officer
State Personnel Board

[PSC 06 04-dec-ARB-SEIU]

Contract job duties.

¹¹ Member Richard Costigan did not participate in this Decision.