

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
DEPARTMENT OF MOTOR VEHICLES)	PSC No. 08-11
)	[SPB File No. 08-004(b)]
From the Executive Officer's August 11, 2008)	
Disapproval of a Personal Services Contract)	January 14, 2009
for Information Technology Services)	
)	

APPEARANCES: Francis Coats, Senior Staff Counsel, on behalf of California Department of Motor Vehicles; Patricia Cano, Attorney, on behalf of Service Employees International Union, Local 1000 (California State Employees' Association)

BEFORE: Anne Sheehan, President; Richard Costigan, Vice President; Maeley Tom and Patricia Clarey, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the Department of Motor Vehicles (DMV or Department) appealed from the Executive Officer's August 11, 2008 decision disapproving a personal services contract (Contract) entered into by DMV for information technology services.

In this Decision, having considered the written and oral arguments presented by the parties, the Board denies the Department's request for consideration of new evidence pursuant to Board Rule 547.66. The Board further adopts the Executive Officer's Decision disapproving the Contract.

DISCUSSION

On appeal before the Board, DMV requested that the Board consider new evidence that was not previously submitted to the Executive Officer, pursuant to Board Rule 547.66. That evidence consisted of two declarations describing events

that occurred in 2006 and 2007 as a result of DMV's failure to comply with federal regulations promulgated to implement the Motor Carrier Safety Improvement Act (MCSIA). DMV contended that this evidence established the existence of an emergency justifying approval of the Contract under Government Code section 19130(b)(10).¹

Title 2, California Code of Regulations, section 547.66 provides, in relevant part:

... 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.

Upon the objection of a party, SPB Rule 547.66 prohibits the Board from considering additional factual information, documentary evidence, or declarations that were not previously filed with the Executive Officer, if to do so would be unduly prejudicial to the objecting party.

In this case, SEIU has objected to the Board's consideration of additional factual information that was not previously filed with the Executive Officer. There is no showing that this evidence was unavailable when DMV submitted its information to the Executive Officer in April 2008. By failing to include that evidence in its submission to the Executive Officer, DMV deprived SEIU of the opportunity to

¹ On appeal, DMV did not assert, as it had before the Executive Officer, that the Contract was also justified under Government Code section 19130(b)(3).

respond to those assertions in its reply to the Executive Officer. DMV also deprived the Executive Officer of the opportunity to make findings on those assertions in her August 11, 2008 decision. It would be unduly prejudicial to SEIU to allow DMV to rely on that evidence for the first time on appeal as additional justification for contracting out. The Board, therefore, finds that by failing to provide the evidence to the Executive Officer, DMV waived the right to rely on that evidence on appeal before the Board, and sustains SEIU's objection to the consideration of that evidence.²

Even if the Board were to consider the evidence proffered by DMV, however, such evidence is insufficient to establish that DMV made reasonable, good faith efforts to hire civil service employees prior to contracting out, or that the Contract was of such an urgent nature as to require an exception from the civil service mandate. Instead, the evidence confirms the Executive Officer's findings that DMV's "urgency" resulting from its noncompliance with federal law was of its own making.

² See *Department of Pesticide Regulation* (2002) PSC No. 01-09 (failure to assert statutory justification before Executive Officer was unduly prejudicial to challenging organization and deprived Executive Officer of opportunity to make findings on that issue).

ORDER

The Board adopts the attached Executive Officer's August 11, 2008 Decision disapproving Contract No. 80068 (LH Software Consulting) entered into by the Department of Motor Vehicles for the provision of information technology services.

STATE PERSONNEL BOARD

Anne Sheehan, President
Richard Costigan, Vice President
Maeley Tom, Member
Patricia Clarey, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 14, 2009.

/s/ SUZANNE M. AMBROSE

Suzanne M. Ambrose
Executive Officer
State Personnel Board



CALIFORNIA STATE PERSONNEL BOARD

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August 11, 2008

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Re: Request for Review of Proposed or Executed Contracts for Informational Technology Services at the Department of Motor Vehicles, Contract Nos.:
TA-70448 (PairPoint Group, Inc.); TA-70429 (Eskel Porter Consulting, Inc.); TA-70495 (JK Corporate Services, Inc.); TA-80075 (Sumrall Solutions LLC); TA-80068 (LH Software Consulting); TA-70416 (Information Technology Software Professionals); TA-70010 (Sabot Technologies, Inc.); TA-70034 (Shooting Star Solutions, LLC); TA-70058 (Sabot Technologies, Inc.); TA-70170 (Wright On-line Systems, Inc.)
[SPB File No. 08-004(b)]

Dear Ms. Giese and Mr. Coats:

By letter dated March 4, 2008, Service Employees International Union (SEIU), Local 1000 (SEIU) asked, pursuant to Gov. Code § 19132 and Title 2, Cal. Code Regs., § 547.59 *et seq.*, the State Personnel Board (SPB) to review for compliance with Gov. Code § 19130(b), ten 10 contracts, referenced above (hereinafter "Contracts"), proposed or entered into by the Department of Motor Vehicles (Department) for Information Technology (IT) services.

On March 10, 2008, the SPB notified the Department that SEIU had requested that SPB review the Contracts. Subsequently, the parties agreed to extensions of the timeframes. On April 29, 2008, the Department filed its response. The SPB received SEIU's reply on May 28, 2008, after which the matter was deemed submitted for review by the Executive Officer.

For those reasons set forth below, I find that Contract No. TA-70429 is exempt from review, as that contract expired prior to SEIU seeking review. I further find that Contract No. TA-80075 is exempt from review, as it was never executed. I further find that Contract Nos. TA-70448, TA-70170, TA-70495, TA-70010 and TA-70034 are permissible under one or more of the provisions of Gov. Code § 19130(b) and, as a result, those Contracts are approved. However, Contract Nos. TA-70058, TA-80068 and TA-70416 are not permissible under Gov. Code § 19130(b)(3), (b)(5), or (b)(10) and therefore, those Contracts are disapproved.

Legal Standard

In *Professional Engineers in California Government v. Department of Transportation*,¹ 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 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(b)(3)

Government Code section 19130(b)(3) authorizes a state agency to enter into a personal services contract 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.

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.²

Government Code section 19130(b)(5)

Gov. Code § 19130(b)(5) authorizes a state agency to enter into a personal services contract when:

¹ (1997) 15 Cal.4th 543, 547.

² PSC No. 05-03, at p. 8.

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.

Government Code section 19130(b)(10)

Government Code section 19130(b)(10) authorizes a state agency 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.

In order to justify a personal services contract under Section 19130(b)(10), the Department 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.³

Analysis

This case involves the review of 10 separate contracts for a wide variety of IT services. Accordingly, the positions of the respective parties, and the analysis concerning each Contract, will be conducted separately.

Contract No. TA-70429 (Eskel Porter Consulting, Inc.)

The Department asserts that because Contract No. TA-70429 expired prior to SEIU seeking review on March 4, 2008, the SPB does not possess the requisite jurisdiction to review that Contract for compliance with the requirements of Gov. Code § 19130(b). SEIU has not disputed the Department's assertion.

Because SEIU did not seek review of Contract No. TA-70429 prior to its expiration, it is found that the SPB does not possess the requisite authority to review that Contract for compliance with the provisions of Section 19130(b).⁴ As a result, it is dismissed from the instant case.

³ PSC No. 05-04, at p. 7.

⁴ See PSC 04-01, 04-02, (*CSEA / Dept. of Health Services*) (finding that the SPB has no jurisdiction to review contracts for compliance with the provisions of Gov. Code § 19130 in those cases where the contract had expired prior to an employee organization seeking review of the contract).

Contract No. TA-80075 (Sumrall Solutions, LLC)

The Department asserts that because Contract No. TA-80075 was never executed, the SPB does not possess the requisite jurisdiction to review that Contract for compliance with the requirements of Gov. Code § 19130(b). SEIU has not disputed the Department's assertion.

Because Contract No. TA-80075 was never executed by the Department, it is found that the SPB does not possess the requisite authority to review that Contract for compliance with the provisions of Section 19130(b). As a result, it is dismissed from the instant case.

Contract No. TA-70448 (PairPoint Group, Inc.)

Department Position:

The Contract was to update and re-establish the Department's Enterprise Architecture ("EA") process, office and documentation. At the time of the Contract, the Department had a small EA staff and an EA system that had not been well-received by Department management, was not supported by staff, and lacked enforcement ability. At this same time, the Department was experiencing and anticipating an influx of seven (7) major information technology initiatives, each of which presented a need for an effective EA program to assure that technology choices made in the course of implementing the initiatives were consistent with the enterprise-wide needs of the Department. A delay would leave the Department moving ahead with major information technology initiatives without the EA controls.

The Contract is permissible under subdivision (b)(10) of section 19130, because the services are of an urgent, and temporary or occasional nature; the delay incumbent in their implementation under civil service would frustrate the very purpose of obtaining the services; and, because the contract does not present a threat of harm to the civil service system because the Department continues to recruit, hire and employ qualified staff.

The Department made serious and successful attempts to hire within civil service in 2007. Also, the Contract only calls for the 're-establishment' of the program, a need that arises only occasionally and for a limited period of time. Consequently, the Contract is permissible under the provisions of Gov. Code § 19130(b)(10).

SEIU Position:

SEIU asserts it is "inconceivable" that the six major IT projects cited by the Department would have been approved if the underlying technical infrastructure was either unknown, unaccepted within the department, or less than robust. Also, because the Department "lent out" its Chief Architect at the same time as outsourcing its IT architecture work, one can only conclude that the current 'urgency' is one of its own making. SEIU also asserts that there are highly skilled staff at the appropriate level to perform this and similar work.

Analysis

With respect to its recruitment efforts, the Department asserts that it “made serious and successful attempts to hire” within civil service in 2007, but still needed to contract with an outside vendor. The Department, however, presented no information demonstrating how or when a job announcement was made; consequently, it cannot be determined whether only an intra-departmental job announcement was made, whether the job announcement was placed on the Department’s website, whether the job announcement was placed on the SPB’s VPOS website, or whether other reasonable advertising efforts were made for the position, such as advertising the job vacancy in a newspaper or IT-related publications. Nor does it appear that the Department made any effort to reach out to any university, college, or technical school campus in an effort to recruit for its vacant IT position. In short, the Department demonstrated that it has made minimal efforts, at best, to recruit for its vacant IT position. As such, the Department failed to prove that it engaged in legitimate, good faith recruitment efforts prior to entering into the instant Contract for IT services. The Department, therefore, failed to present sufficient information to establish that the Contract is authorized pursuant to the provisions of Gov. Code § 19130(b)(3).

Further, the Department also failed to establish that existing civil service classifications are inadequate for purposes of hiring civil service employees who could perform the requisite Contract functions. Indeed, the fact that the Department made successful efforts to recruit Systems Software Specialist (“SSS”) candidates during the Contract period demonstrates the Department’s belief that existing civil service classifications are adequate for purposes of performing the Contract duties. Therefore, I find the Contract is not authorized under the provisions of Gov. Code § 19130 (b)(3).

However, the Contract was only for a period of twelve (12) months. The Department contends that civil service employees hired since the beginning of the contract will be able to perform these EA functions in the future. Therefore, given the limited duration and nature of this Contract, I find that the Contract is authorized pursuant to Gov. Code § 19130 (b)(10).

Contract No. TA-70495 (JK Corporate Services, Inc.)

Department Position:

The Contract is for the services of a single consultant to independently evaluate, recommend and improve the Department’s IT environments.

This Contract requires the services of a consultant with an extraordinarily broad level of experience at a high level in both private and public sectors. The only way this experience and knowledge could be acquired is for the person to have worked for a large IT integrator. This experience is not available within civil service employment. The Contract also incorporated a need for independent and unbiased advice reflecting an outside perspective based on broad experience in the private sector as well as within state service.

Furthermore, the Contract only requires one such contractor, which will not present a significant risk of competition to perform services that otherwise might be performed by staff within civil service.

Given the foregoing, the Contract is permissible pursuant to the provisions of Gov. Code § 19130(b)(3) and (b)(5).

SEIU Position:

SEIU concedes that the position requires an individual with a broad base of knowledge and experience. However, SEIU contends that almost all of the skills specified in the Statement of Work could be found within civil service, with the exception of “managing large scale information systems projects involving system integrations, multiple vendors and a variety of technologies.”

Further, there is no evidence that the Department made a good faith effort to locate an individual within civil service that might possess these skills.

Analysis:

The Department failed to present sufficient facts to establish that, despite having made reasonable, good faith efforts to recruit civil service IT employees, it has been unable to find suitable candidates to perform the Contract functions. Indeed, the Department presented no information as to those recruitment efforts it made prior to entering into the Contract.

However, the Statement of Work specifies that the successful candidate will have a minimum of eight (8) years “managing large scale information systems projects involving system integrations, multiple vendors and a variety of technologies,” the very skill SEIU concedes cannot be found within state civil service. The declaration of Steven Westerman confirms “there is no IT classification within state service” that covers all of the skills required by the Contract.

As a result, I find that the Contract is authorized under the provisions of Section 19130(b)(3).

Contract No. TA-80068 (LH Software Consulting)

Department Position:

The services outlined in the Contract were necessary to implement elements of the Motor Carrier Safety Improvement Act (MSCIA) program on a timely basis as the state would otherwise lose large amounts of federal highway matching funds.

The purpose of the Contract was to obtain services to design and code complex programs written in IBM z/OS Assembler languages. These skills are essentially obsolete and no longer taught in

schools. Persons with these skills have largely retired from the civil service. Nevertheless, the Department made a good faith effort to locate and use civil service employees.

Also, the Contract is of short duration (one year), the Department anticipates it will stop using this language in the foreseeable future, and the purpose of obtaining the services (timely compliance with MSCIA requirements) would be frustrated by the delay inherent in waiting for civil service resources to become available.

As a result, the Contract is authorized under the provisions of Gov. Code § 19130(b)(3) and (10).

SEIU Position:

The Union maintains that there are many state employees with the skills required. Also, there is no indication that the Department advertised on the SPB's Vacant Position Database, sent contact letters to eligible list candidates, placed ads in newspapers or made any other attempts to recruit or train staff.

This need has existed since 2004 by the Department's own admission and will continue until 2013. This time period far exceeds the definition of temporary.

For these reasons, the Department's attempts to justify this contract under section 19130(b)(3) and (10) must fail.

Analysis:

The Department failed to present sufficient facts to establish that there were no civil service job classifications to which it could appoint employees with the requisite expertise needed to perform the required work. Nor did the Department present sufficient facts to establish that, despite having made reasonable, good faith efforts to recruit civil service IT employees, it has been unable to find suitable candidates to perform the Contract functions. In fact, there appears to have been some confusion regarding the posted job description. The declaration of Steven J. Westerman offered in support of the Department's position states that experience with the COBOL language was not a requirement, but the job bulletins attached to the declaration all include experience with "Assembler and COBOL" as a necessary and/or preferred job skill. These job bulletins were posted from June 2004 until November 2007, with little or no change in the job description.

In addition, aside from two phone calls placed to the Department of Technology Services in November 2006, the Department failed to produce evidence of any other good faith efforts to hire. Mr. Westerman contends that the Assembler language is obsolete and no longer taught in schools. He also states, "Past experience has shown that DMV has had trouble hiring staff with Assembler language experience to fill vacancies that require this skill set, most hires have been internal staff from within DMV." Perhaps this is why the job bulletins submitted are all internal, DMV Job Opportunity bulletins. There is no indication that the position was posted on the

SPB's VPOS database, or that the Department attempted to recruit candidates through job fairs, contact letters, or other means. In short, the Department demonstrated that it has made, at best, minimal efforts to recruit for this position. As a result, the Department failed to establish that the Contract is justified under Gov. Code § 19130(b)(3).

With respect to the Department's assertion that the Contract is authorized under the provisions of Section 19130(b)(10), it is noted that the deadline for the Department to comply with the federal MSCIA requirements is October 1, 2008. If this deadline is not met, the Department faces losing significant federal highway funds. However, a review of the documents submitted by the Department show that the original deadline for implementation of the MSCIA requirements was September 2005. Also, the Department was twice notified of its substantial noncompliance – in March 2006 and again in August 2007. Still, no significant changes were made to the job postings, and no additional, good faith efforts at recruiting appear to have been made. Therefore, it appears the "urgent need" is of the Department's own making. Consequently, I find that the Contract is not justified under Section 19130(b)(10).

Contract No. TA-70416 (Information Technology Software Professionals)

Department Position:

The purpose of this Contract is to obtain Assembler language programming services to assist the Department in continuing support of existing systems.

The Contract is permissible under subdivisions (b)(3) and (b)(10) because the Department was unable to obtain the services through civil service despite a good faith effort, and because the requirement for services was only temporary and occasional.

The Department advertised through Job Bulletins and made inquiries with the State Technology Center and Franchise Tax Board. However, the skills are essentially obsolete and are no longer taught in schools. The Department is the only state department still using this "legacy" technology. Therefore, because the Department made a diligent good faith effort to obtain the services through civil service and was unsuccessful, the Contract is permissible under subsection (b)(3) of section 19130.

In addition, the Contract is permissible under subdivision (b)(10) of section 19130 because of the urgent need to meet the requirements of the Federal Motor Carrier Safety Improvement Act and avoid the loss of \$150 million dollars. Also, the services were only for so long as the Department continues to rely on the obsolete Assembler language programming.

Given the foregoing, the Contract is justified under the provisions of Section 19130(b)(3) and (10).

SEIU Position:

SEIU contends that the tasks described in the Statement of Work are typical tasks performed by state employees in the Programmer Analyst, Systems Software Specialist and Information Systems Analyst civil service classifications. Many departments utilize Assembler, COBOL, JCL, TSO/ISPF, Endeavor and IBM WebSphere for their systems. There are also many state employees with the skills required.

In addition, there is no indication that the Department advertised on the SPB's Vacant Position Database, sent contact letters to eligible list candidates, placed ads in newspapers or made any other attempts to recruit or train staff.

Furthermore, the Contract is for 24 months which exceeds the definition of temporary and the need for these services is expected to last until 2013.

For these reasons, the Department's attempts to justify this contract under section 19130(b)(3) and (10) must fail.

Analysis:

The Department failed to present sufficient facts to establish that there were no civil service job classifications to which it could appoint employees with the requisite expertise needed to perform the required work. Nor did the Department present sufficient facts to establish that, despite having made reasonable, good faith efforts to recruit civil service IT employees, it has been unable to find suitable candidates to perform the Contract functions. In fact, there appears to have been some confusion regarding the posted job description. The declaration of Steven J. Westerman offered in support of the Department's position states that experience with the COBOL language was not a requirement, but the job bulletins attached to the declaration all include experience with "Assembler and COBOL" as a necessary and/or preferred job skill. These job bulletins were posted from June 2004 until November 2007, with little or no change in the job description.

As with the previous contract, aside from two phone calls placed to the Franchise Tax Board and Department of Technology Services in March 2007, the Department failed to produce evidence of any other good faith efforts to hire. Mr. Westerman contends that the Assembler language is obsolete and no longer taught in schools. He also states, "Past experience has shown that DMV has had trouble hiring staff with Assembler language experience to fill vacancies that require this skill set, most hires have been internal staff from within DMV." Perhaps this is why the job bulletins submitted are all internal, DMV Job Opportunity bulletins. There is no indication that the position was posted on the SPB's VPOS database, or that the Department attempted to recruit candidates through job fairs, contact letters, or other means. In short, the Department demonstrated that it has made, at best, minimal efforts to recruit for this position. As a result, the Department failed to establish that the Contract is justified under Gov. Code § 19130(b)(3).

With respect to the Department's assertion that the Contract is authorized under the provisions of Section 19130(b)(10), it is noted that the deadline for the Department to comply with the federal MSCIA requirements is October 1, 2008. If this deadline is not met, the Department faces losing significant federal highway funds. However, a review of the documents submitted by the Department show that the original deadline for implementation of the MSCIA requirements was September 2005. Also, the Department was twice notified of its substantial noncompliance – in March 2006 and again in August 2007. Still, no significant changes were made to the job postings, and no additional, good faith efforts at recruiting appear to have been made. Therefore, it appears the “urgent need” is of the Department's own making. Consequently, I find that the Contract is not justified under Section 19130(b)(10).

Contract No. TA-70010 (Sabot Technologies, Inc.)

Department Position:

The purpose of the Contract is to obtain independent project oversight and independent verification and validation services for the Telephone Service Center Equipment Replacement project.

The Contract is permissible under subdivision (b)(5) of section 19130 because contracting out substantially mitigated the risk of inadequate oversight because of bias or conflict of interest in a highly critical and highly visible project.

The Department of Finance's *Framework* required the Department to employ independent project oversight services outside of civil service. This project was rated “high criticality” and deference should be given to determinations of the Department of Finance in performing its role of providing oversight over information technology procurements.

A contract is permissible under subdivision (b)(5) of section 19130 to protect against a conflict of interest or to insure independent and unbiased findings where there is a clear need for an independent outside perspective.

For these reasons, the Contract is justified under the provisions of Section 19130(b)(5).

SEIU Position:

The Department does not treat the work as requiring an outside perspective, because the contractor is reporting within the Department's management structure. Further, there is no indication in any of the contract documents that the reports prepared by the contractor are being provided outside the direct line of command, as is often required if independent verification and validation is a condition of project approval.

Section 19130(b) does not include a provision that allows the Department of Finance or the Office of the State Chief Information Officer to declare an exemption to the provisions listed and

thereby bypass constitutional limitations on the authority to departments to contract for consultant services.

Vendors have an interest in pleasing the Department in order to be considered for future contracting opportunities. The only way to ensure an independent analysis of a situation is through the use of state employees who report up through a different management chain. Also, throughout DMV, there are highly-skilled staff at appropriate levels to perform this and similar work.

Lastly, section F of the Statement of Work states that, "It shall be the DMV's sole determination as to whether the deliverable has been successfully completed and is acceptable to the DMV." It is obvious that the IPO and IV&V reports must reflect the view of the DMV, not the vendor, and are therefore not independent views.

Analysis:

A contract is permissible under subdivision (b)(5) of section 19130 to protect against a conflict of interest or to insure independent and unbiased findings where there is a clear need for an independent outside perspective.

A review of the Department of Finance's project approval letter and *Framework* show that for projects rated "high criticality" the Department was required to employ independent project oversight services outside of civil service. In addition, the Contract indicates that monthly progress reports are to be submitted to both the DMV and the Department of Finance, underscoring the independent nature of the oversight function. Therefore, I find the Contract is permissible under Gov. Code § 19130(b)(5).

Contract No. TA-70034 (Shooting Star Solutions, LLC)

Department Position:

The purpose of the Contract is to obtain independent project oversight and independent verification and validation services for the Telephone Service Center Equipment Replacement project.

The Contract is permissible under subdivision (b)(5) of section 19130 because contracting out substantially mitigated the risk of inadequate oversight because of bias or conflict of interest in a highly critical and highly visible project.

As with Contract No. TA-70010, the Department of Finance's *Framework* required the Department to employ independent project oversight services outside of civil service. This project was rated "high criticality" and deference should be given to determinations of the Department of Finance in performing its role of providing oversight over information technology procurements.

A contract is permissible under subdivision (b)(5) of section 19130 to protect against a conflict of interest or to insure independent and unbiased findings where there is a clear need for an independent outside perspective. For these reasons, the Contract is justified under the provisions of Section 19130(b)(5).

SEIU Position:

The Department does not treat the work as requiring an outside perspective, because the contractor is reporting within the Department's management structure. Further, there is no indication in any of the contract documents that the reports prepared by the contractor are being provided outside the direct line of command, as is often required if independent verification and validation is a condition of project approval.

Section 19130(b) does not include a provision that allows the Department of Finance or the Office of the State Chief Information Officer to declare an exemption to the provisions listed and thereby bypass constitutional limitations on the authority to departments to contract for consultant services.

Vendors have an interest in pleasing the Department in order to be considered for future contracting opportunities. The only way to ensure an independent analysis of a situation is through the use of state employees who report up through a different management chain. Also, throughout the Department, there are highly-skilled staff at appropriate levels to perform this and similar work.

Lastly, section F of the Statement of Work states that, "It shall be the DMV's sole determination as to whether the deliverable has been successfully completed and is acceptable to the DMV." It is obvious that the IPO and IV&V reports must reflect the view of the Department, not the vendor, and are therefore not independent views.

Analysis:

A contract is permissible under subdivision (b)(5) of section 19130 to protect against a conflict of interest or to insure independent and unbiased findings where there is a clear need for an independent outside perspective.

A review of the Department of Finance's project approval letter and *Framework* shows that for projects rated "high criticality" the Department was required to employ independent project oversight services outside of civil service. In addition, the Contract indicates that monthly progress reports are to be submitted to both the Department and the Department of Finance, underscoring the independent nature of the oversight function. Therefore, I find the Contract is permissible under Gov. Code § 19130(b)(5).

Contract No. TA-70058 (Sabot Technologies, Inc.)

Department Position:

The purpose of the Contract is to obtain independent project oversight and independent verification and validation services for the Telephone Service Center Equipment Replacement project.

The Contract was permissible under subdivision (b)(5) of section 19130 because contracting out substantially mitigated the risk of inadequate oversight because of bias or conflict of interest in a highly critical and highly visible project.

Similar to Contract Nos. TA-70010 and TA-70034, the Department of Finance's *Framework* allowed the Department to employ independent project oversight services outside of civil service for this project. This project was rated "medium criticality" and deference should be given to determinations of the Department of Finance in performing its role of providing oversight over information technology procurements.

A contract is permissible under subdivision (b)(5) of section 19130 to protect against a conflict of interest or to insure independent and unbiased findings where there is a clear need for an independent outside perspective. For these reasons, the Contract is justified under the provisions of Section 19130(b)(5).

SEIU Position:

Section 19130(b) does not include a provision that allows the Department of Finance or the Office of the State Chief Information Officer to declare an exemption to the provisions listed and thereby bypass constitutional limitations on the authority to departments to contract for consultant services.

Vendors have an interest in pleasing the Department in order to be considered for future contracting opportunities. The only way to ensure an independent analysis of a situation is through the use of state employees who report up through a different management chain. Also, throughout the Department, there are highly-skilled staff at appropriate levels to perform this and similar work.

Lastly, section F of the Statement of Work states that, "It shall be the DMV's sole determination as to whether the deliverable has been successfully completed and is acceptable to the DMV." It is obvious that the IPO and IV&V reports must reflect the view of the Department, not the vendor, and are therefore not independent views.

Analysis:

A contract is permissible under subdivision (b)(5) of section 19130 to protect against a conflict of interest or to insure independent and unbiased findings where there is a clear need for an independent outside perspective. A review of the Department of Finance's *Framework* shows that for projects rated "medium criticality" the Department was encouraged, though not required, to employ independent project oversight services outside of civil service.

The Department attempts to justify the Contract by stating that the individual who will provide oversight "must have a minimum of three (3) years experience in performing Independent Verification and Validation services, a Project Management Professional (PMP) certification from the Project Management Institute (PMI) and should have a Bachelor's Degree in Information Technology. There is currently no Civil Service classification for IV&V, nor do the IV&V specialized qualifications fall under any known civil service job description." In essence, the Department is arguing both a (b)(3) and a (b)(5) exception for this Contract.

As an initial matter, while it may be that existing Department IT staff do not possess the requisite skills to perform the contract functions, the initial inquiry is whether there are existing civil service classifications that can perform the contract functions. The Department failed to present sufficient information to demonstrate that the civil service IT classifications are inadequate to perform the Contract functions.⁵

Moreover, it is evident that the Department made absolutely no good faith effort to attempt to recruit and hire qualified IT employees to perform the contract functions. The Department merely makes the bare assertion that "there is no [state] civil service classification for IV&V." Such an assertion is simply insufficient to justify not at least attempting to hire civil service employees prior to resorting to outside contractors. The Department did not present any actual evidence that it attempted to hire anyone, that it reviewed applications, or that it ever advertised to fill positions with qualified individuals. Therefore, the Department cannot reasonably argue that no individuals were available under the existing civil service classifications to perform the duties of the contracts in question. Because the Department has failed to meet its burden of establishing there are no civil service job classifications to which it could appoint employees with the requisite expertise needed to perform the required work of the contract in question, or that, despite reasonable, good-faith efforts, it was unable to successfully recruit highly skilled and experienced employees to perform the IT functions it contracted out, I conclude that the challenged contract is not justified under Government Code section 19130, subdivision (b)(3).

Aside from this minimum-qualifications argument, the Department has failed to submit any other information to establish that the work product created under the contract requires an independent,

⁵ See PSC No. 06-04 at pp. 6-11 (finding that the minimum qualification requirements for a particular classification are just that, minimum qualifications, and do not preclude a department from recruiting or appointing individuals who possess more than the minimum qualifications, such as a bachelors degree in IT and PMP certification, into the classification).

outside evaluator. Instead, the Department merely states the project was rated “medium criticality.” Although the Department asserts that work product created under the contract requires an independent, outside evaluator, the Department failed to submit sufficient information to establish that such a requirement is actually necessary. The Department cited to no statutory or regulatory requirement mandating that an outside evaluator be utilized under the contract. In addition, because the Department retains the sole determination as to whether the deliverable has been successfully completed and is acceptable to the Department, it is apparent that the project will reflect the view of the Department, not the vendor. As a result, the contract does not require that the contractor’s independent views be implemented. Because the Department has complete control over the work product produced by the contractor, it is difficult to see why such work could not just as easily have been performed by Department IT staff. It is concluded, therefore, that the Contract is not authorized under the provisions of Section 19130(b)(5).

Contract No. TA-70170 (Wright On-line Systems, Inc.)

Department Position:

The purpose of the Contract is to services: to create a web-based inquiry solution to provide field staff the ability to toggle from the AIX to mainframe environment without cancelling a transaction; provide support for programs written in JAVA; establish a secure environment using Tivoli Access Manager and security certificates; rewrite programs from Event Driven Language (EDL) to JAVA; develop file manage utility and screen scraper applications.

The Contract is permissible under subdivision (b)(3) of section 19130 because the skills were not available within civil service and the Department made a reasonable good faith effort to obtain these services without success.

The project required extensive skills in Event Driven Language (EDL) and the emulator software. DMV is the only state department using an RS6000 server running EDX emulator with applications running in EDL. The Department made several attempts to recruit through opportunity bulletins, but the only two staff who approached the required skills were existing DMV employees. The Department released two job opportunity bulletins on December 8, 2006, and the only two responses received were from current DMV employees. The Department also contacted California Highway Patrol, the Department of Pesticide Regulations and the Franchise Tax Board inquiring as to the availability of these skills, and was advised that these skills did not exist at those agencies. The Department also advertised by a number of Job Bulletins, without success.

For these reasons, the Contract was permissible under subdivision (b)(3) of section 19130.

SEIU Position:

The Department does not present evidence that job announcements were placed on the SPB VPOS to reach a wider audience, whether testing was done, whether contact letters were sent out, etc. Therefore, the premise that the skills were not available is clearly not met.

If the Department intends to continue using consultants until the system is replaced, such use would violate the definition of temporary and the provisions of section 19130(b)(10). The term of this contract (24 months) exceeds the definition of temporary.

Any justification of this Contract under section 19130(b)(3) or (b)(10) must fail.

Analysis:

The Department advertised through Job Bulletins and made inquiries with various other state agencies. However, the skills are essentially obsolete and are no longer taught in schools. The DMV is the only state department still using this “legacy” technology. Therefore, because the Department made a good faith effort to obtain the services through civil service and was unsuccessful, the Contract is permissible under subsection (b)(3) of section 19130.

Conclusion

Contract No. TA-70429 is exempt from review, as this contract had expired prior to SEIU seeking review of it. Contract No. TA-80075 is exempt from review, as it was never executed. Consequently, those Contracts are dismissed from this decision. The Department presented sufficient information to establish that Contract No. TA-70448 is justified as a temporary contract under Section 19130(b)(10), and that Contract is approved. The Department also presented sufficient information to establish that Contract No. TA-70170 is justified under Section 19130(b)(3), in that the Department made reasonable, good faith efforts to recruit a civil service employee to perform the Contract duties prior to executing the Contract, and that Contract is also approved. The Department also presented sufficient information to establish that Contract Nos. TA-70495, TA-70010 and TA-70034 are justified under Section 19130(b)(5), in that there was a need to insure independent and unbiased oversight for these projects, and those Contracts are also approved.

The Department did not, however, present sufficient evidence to establish that Contract No. TA-70058 is justified under Section 19130(b)(3) or (b)(5), and that Contract is disapproved. Nor did the Department present sufficient evidence to establish that Contract Nos. TA-80068 and TA-70416 are justified under Section 19130(b)(10), and those Contracts are disapproved.

This letter constitutes my decision to dismiss Contract Nos. TA-70429 and TA-80075 from this decision, to approve Contract Nos. TA-70448, TA-70170, TA-70495, TA-70010 and TA-70034, and to disapprove Contract Nos. TA-70058, TA-80068 and TA-70416. Any party has the right to appeal this decision to the five-member State Personnel Board pursuant to SPB Rule 547.66.

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Any appeal should be filed no later than 30 days following receipt of this letter in order to be considered by the Board.

Sincerely,

/s/ SUZANNE M. AMBROSE

SUZANNE M. AMBROSE
Executive Officer