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Governor Edmund G. Brown Jr.

In the Matter of the Appeal

PSC No. 12-01

**CALIFORNIA DEPARTMENT  
OF CORRECTIONS AND REHABILITATION**

**RESOLUTION**

From the Executive Officer's December 29, 2011,  
Decision Disapproving the Personal Services  
Contract for Pest Control Services (SPB File No.  
11-008(b))

The State Personnel Board (the SPB or Board) has carefully considered the Decision issued by the Executive Officer in SPB File No. 11-008(b) on December 29, 2011, disapproving the Pelican Bay State Prison (PBSP), California Department of Corrections and Rehabilitation (CDCR)'s personal services contract for pest control services at PBSP, as well as the written and oral arguments presented by CDCR and the International Union of Operating Engineers, AF-CIO, State Unit 12, Locals 3, 12, 39, and 501 (IUOE)<sup>1</sup> during the Board's June 5, 2012, meeting.

**IT IS RESOLVED AND ORDERED THAT:**

1. The Board recognizes the fiscal restraints CDCR currently experiences and the unfortunate impact these hardships have on its employees and infrastructure. Nonetheless, a department may not outsource work to private entities to perform work that the state has historically and customarily performed and can perform adequately and competently without legal exemption under Government Code section 19132, et seq. (*Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547.) In this instance, the Pest Control Technician (PCT)

<sup>1</sup> It should be noted that neither party submitted additional briefing for the Board to review. Instead, both parties relied upon the written statements they originally submitted to the Executive Officer.

position at PBSP was reclassified to an Electronic Technician (ET) after the employee holding the PCT position retired. As such, CDCR asserts that it does not currently have a PCT position to fill. CDCR thus reasons that the contracted services are permitted under Government Code section 19130, subdivision (b)(10) as urgent and temporary. The Board concurs with the findings of the Executive Officer that CDCR has not shown that the contracted services are urgent, temporary, or occasional. As explained in the Executive Officer's decision, which is worth emphasis here, "Contracting out is not justified under Government Code section 19130(b)(10) where the urgency is self-created and arises as a result of a lack of planning on the Department's part. (*In the Matter of the Appeal by SEIU (2008) PC No. 08-10.*)" Thus, for those reasons stated in the Executive Officer's decision, the Board agrees that CDCR has failed to demonstrate that the contracted services are permitted under subdivision (b)(10).

2. The Board declines to grant CDCR's request to allow the personal services contract for pest control at PBSP to remain in place. In its September 30, 2011, written statement to the Executive Officer, CDCR requested that the contract with Big Time Pest Control continue while CDCR attempted to obtain an exemption from the state's hiring freeze to create a PCT position, advertise, schedule interviews, and hire a suitable candidate. As noted in the Executive Officer's September 29, 2011, decision, the state hiring freeze was not, in itself, a sufficient justification for CDCR to enter into a personal services contract. Further, CDCR did not demonstrate it had attempted to get an exemption to the hiring freeze *before* it entered into the contract with Big Time Pest Control. CDCR also had ample time between September 2011 and the June 5, 2012, oral argument to take, at a minimum, reasonable and good faith steps to re-obtain a

PCT position. Yet, CDCR failed to show it had made any serious efforts to do so. Instead, CDCR made the same request for an extension of time for the pest control contract that it had made before the Executive Officer. Consequently, without more, the Board is left to draw the conclusion that CDCR has unnecessarily delayed compliance with the civil service mandate. To allow the contract to remain in effect under these circumstances would wrongly suggest that the statutory provisions governing state personal service contracts may be abused. Consequently, CDCR's request is denied.

3. The attached Executive Officer's decision is hereby adopted by the Board as its Decision in the case on the date set forth below;

4. A true copy of the Executive Officer's decision shall be attached to this Resolution for delivery to the parties in accordance with the law; and

5. Adoption of this Resolution shall be reflected in the record of the meeting and the Board's minutes.

6. Consistent with Government Code section 19135, subdivision (b), CDCR shall submit a notice to of discontinuation of the contract to the vendor within 15 days from the date of the issuance of this Resolution. A copy of the notice shall also be served on the Board and counsel for IUOE.

\* \* \* \* \*

The foregoing Resolution was made and adopted by the State Personnel Board during its meeting on June 21, 2012, as reflected in the record of the meeting and Board minutes.

  
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SUZANNE M. AMBROSE  
Executive Officer



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December 29, 2011

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Mr. Adam N. Stern  
Attorney for IUOE  
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Re: Request for Review of Proposed or Executed Personal Services Contract for  
Pest Control Services Promulgated by California Department of Corrections and  
Rehabilitation  
**[SPB File No. 11-008(b)]**

Dear Ms. Mateo and Mr. Stern:

The International Union of Operating Engineers, AFL-CIO, State Unit 12, Locals 3, 12, 39 and 501 (IUOE) requested that the State Personnel Board (SPB or Board) review for compliance with Government Code section 19130, a contract (Contract) between Big Time Pest Control and the California Department of Corrections and Rehabilitation (CDCR) for pest control services at Pelican Bay State Prison (PBSP). The request for review is made under Government Code section 19132 and California Code of Regulations, title 2, section 547.59 et seq.

The contract in question is identified as Contract 5600002442. The Contract calls for Big Time Pest Control to provide pest control services for PBSP on a monthly basis for 24 months. The term of the Contract is from July 1, 2011, through June 30, 2013.

SPB notified CDCR of IUOE's request on September 13, 2011. CDCR provided the contracts and its response to IUOE's request for review and IUOE submitted a reply.

For the reasons set forth below, it is concluded that the Contract is disapproved under Government Code section 19130, subdivision (b)(10).

### **Position of CDCR**

CDCR asserts that the Contract is justified under Government Code section 19130, subdivision (b)(10). Specifically, CDCR asserts that the Pest Control Technician position at PBSP was reclassified to an Electronic Technician position "based on operational needs," and as a result, PBSP has no Pest Control Technician position available to fill.

CDCR requests that the Contract remain in place while CDCR attempts to obtain an exemption to the state's hiring freeze and hire a suitable candidate, or while it demonstrates that it is unable to hire a replacement for the position. CDCR asserts that it will then cancel the Contract with Big Time Pest Control. CDCR contends that PBSP requires pest control services once a month on an urgent, temporary and occasional basis, and that such services are imperative to the health, safety, and welfare of all inmates and state employees.

### **Position of IUOE**

IUOE asserts that the Contract is not justified under Government Code section 19130, subdivision (b)(10). Specifically, IUOE contends that the state hiring freeze cannot serve as a justification to contract out for personal services, and that there is no legal support for CDCR's request that the Contract remain in place while CDCR attempts to comply with the civil service mandate.

IUOE also contends that this Contract is factually analogous to a contract that was the subject of PSC No. 10-025(b), an unpublished decision, where the State Personnel Board disapproved of a contract between CDCR and American Pest Control calling for pest control services once a week at Central California Women's Facility and Valley State Prison for Women.

### **Analysis**

1. Whether the Contract promulgated by CDCR is permitted under Government Code section 19130, subdivision (b)(10)?

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. (*Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547.) 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)(10), provides that a personal services contract is permissible when:

[T]he 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 subdivision (b)(10), the contracting 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. (*In the Matter of the Appeal by California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (Case) (2005) PSC No. 05-04.*)

CDCR does little more than to simply assert that the Contract is justified under Government Code section 19130(b)(10) because it is urgent, temporary, or occasional in nature. The Contract, however, is not urgent within the meaning of Government Code 19130(b)(10). CDCR does not provide specific information on when the need arose, the timeframe for completion, or any other information that would allow the Board to determine whether the services are of an urgent nature. (*In the Matter of the Appeal by the California Regional Water Quality Board, Los Angeles Region (2005) PSC No. 04-06.*) Nor is the position temporary or occasional within the meaning of Government Code section 19130(b)(10). The fact that the Contract is for a 24 month period and was entered into after the previous Pest Control Technician retired from state service, suggests that the need for pest control services is not temporary or occasional but, rather, is predictable and ongoing.

CDCR's assertion that it cannot fill the position because PBSP does not have a Pest Control Technician position since it reclassified that position to an Electronic Technician position must also fail. Contracting out is not justified under Government Code section 19130(b)(10) where the urgency is self-created and arises as a result of a lack of planning on the Department's part. (*In the Matter of the Appeal by SEIU (2008) PSC No. 08-10.*) PBSP had a Pest Control Technician position, but reclassified it after that employee retired. At the time, PBSP must have been aware that they had a need for pest control services, and that they would be unable to hire a replacement if they reclassified the position. Furthermore, while CDCR contends that a delay would frustrate CDCR's goal in providing health, safety, and security to all inmates and state employees, the Department fails to demonstrate that this urgency was not created by its own actions in reclassifying the position, failing to seek an exemption, or failing to recruit

for the position. The urgency was created by the Department's own lack of planning. Accordingly, the reclassification cannot serve as a justification under 19130(b)(10).

As to the state hiring freeze, the Board has said that when reviewing personal service contracts the Board does not confine its review to whether a single agency is violating the civil service mandate, but instead considers the policies of the state as a whole. (*In the Matter of the Appeal by State Compensation Insurance Fund (2003) PSC No. 03-06, 03-07, 03-08.*) The review of personal service contracts must be broad so that the statute implementing the hiring freeze does not swallow the constitutional rule. (*Id.*) The state hiring freeze is not in itself a sufficient justification for contracting out. CDCR does not demonstrate that it attempted to get an exemption to the hiring freeze before it entered into the Contract with Big Time Pest Control, and the Contract cannot now remain in place while CDCR seeks such an exemption. Any possible exemption should have been sought prior to contracting out for the pest control services. Accordingly, the state hiring freeze does not justify the Contract under Government Code section 19130, subdivision (b)(10).

### Conclusion

CDCR has not demonstrated that the services contracted for are urgent, temporary, or occasional under Government Code section 19130, subdivision (b)(10). Accordingly, the Contracts are disapproved.

The parties have a right to appeal this decision to the five-member State Personnel Board under California Code of Regulations, title 2, section 547.66. Any appeal should be filed no later than 30 days following receipt of this letter in order to be considered by the Board.

Absent an appeal, CDCR must serve notice of discontinuation of the contract to the vendor within 15 days of the Board's final action. A copy of the notice must be served on the Board and SEIU as required by Government Code section 19135, subdivision (b).

Sincerely,



SUZANNE M. AMBROSE  
Executive Officer

for