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| In the Matter of the Appeal by the<br><br>California Department of Corrections and Rehabilitation from the Executive Officer's September 4, 2014, Decision Disapproving the Personal Services Contract with Orkin Pest Control | Case No. 14-0015(b)<br><br>PSC No. 15-01<br><br>**BOARD DECISION AND ORDER** |

**APPEARANCES**: Matthew Pinkerton, Attorney, appeared on behalf of the California Department of Corrections and Rehabilitation; Adam Stern, Attorney, The Myers Law Group, appeared on behalf of International Union of Operating Engineers, State Bargaining Unit 12.

**BEFORE**: Kimiko Burton, President; Lauri Shanahan, Vice President; Maeley Tom, and Richard Costigan, Members.

## DECISION

The California Department of Corrections and Rehabilitation (CDCR) appeals from the September 4, 2014, decision of the Executive Officer disapproving a personal services contract (Contract) for pest control services with Orkin Pest Control. The Contract, which runs from January 24, 2014, through June 30, 2015, provides for the contractor to provide pest control services on an "as-needed" basis at 14 institutions when civil service employees are unavailable. For the reasons set forth below, the Executive Officer's decision is affirmed.

## PROCEDURAL AND FACTUAL BACKGROUND

On June 23, 2014, the International Union of Operating Engineers, State Bargaining Unit 12 (IUOE), requested that the SPB review a personal services contract for pest control services entered into by CDCR for compliance with Government Code section 19130, subdivision (b).

On July 18, 2014, CDCR submitted a response to IUOE's request. IUOE submitted a reply on August 6, 2014.

On September 4, 2014, the Executive Officer determined that CDCR had failed to provide sufficient evidence to establish that the work performed under the Contract was urgent, temporary, or occasional within the meaning of subdivision (b)(10), noting that CDCR had failed to provide specific information on when the service needs arose, the anticipated lengths of the absences, the specific services to be performed during those absences, or any efforts to cover the absences using civil service employees. Thus, the Executive Officer concluded that CDCR failed to demonstrate that its asserted need involved anything other than routine absences for illness, vacations or vacancies that any employer should reasonably anticipate and plan for accordingly. Regarding subdivision (b)(3), the Executive Officer further found that CDCR had failed to provide sufficient evidence to demonstrate that the services are not available through the civil service or that it made reasonable, good faith efforts to hire civil employees to perform those services.

CDCR appeals from the Executive Officer's determination.

## ISSUES

1. Whether the Board should consider new evidence on appeal.

2. Whether the Contract is justified under Government Code section 19130, subdivision (b)(3) or (10).

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## POSITIONS OF THE PARTIES

On appeal, CDCR seeks to present 14 new declarations, not previously submitted to the Executive Officer, describing its use of Contract services at each of the 14 institutions covered by the Contract. CDCR argues that the Board should consider this evidence in support of its position that the Contract should be approved.

CDCR further argues that the Contract is justified under subdivision (b)(10) because the Contract is only used to cover urgent, temporary, and/or occasional gaps when CDCR's pest control operators are unavailable. The new declarations provide some additional details on the availability of civil service employees, CDCR's efforts to use employees from other institutions, and its attempts to fill vacant positions. CDCR further argues that the Contract is justified under subdivision (b)(3) for certain pest control services that require a specialized license that is not required under the civil service class specification of Pest Control Technician.

IUOE objects to the Board's consideration of the new evidence presented by CDCR on appeal. IUOE contends that consideration of the new evidence would be prejudicial to it in that it would allow CDCR to bypass the regulatory procedure by submitting only limited evidence to the Executive Officer and then filling the gaps once it learns the basis for the Executive Officer's decision. IUOE further argues that such a process is prejudicial because it required IUOE to expend resources unnecessarily and because CDCR seeks to appeal an entirely different case than it made below.

IUOE further contends that, even considering the new evidence, CDCR has failed to meet its burden of proving that the Contract is justified by either Government

Code section 19130, subdivision (b)(3) or (b)(10). IUOE asserts that CDCR's new declarations establish that many institutions are able to handle their pest control needs without utilizing contracted services, thus establishing that the services are available through the civil service. In addition, IUOE asserts that CDCR has failed to adequately establish its asserted special license needs or its efforts to hire sufficient pest control technicians within the civil service.

## DISCUSSION

Additional Evidence Submitted on Appeal

The Board's regulations set forth a clear and comprehensive process for reviewing personal services for compliance with Government Code section 19130, subdivision (b). Initially, when it submits the contract for approval by the Department of General Services, the contracting agency is required to submit written justification including specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code section 19130, subdivision (b). (2 Cal. Code Reg., § 547.60.) In this case, CDCR cited only Government Code section 19130, subdivision (b)(10) to DGS as its justification for contracting out.[1] An employee organization that wishes to challenge the contract must file a request for review with the Board that contains specific and detailed factual information on how the contract fails to meet the conditions specified in Government Code section 19130, subdivision (b), along with documentary evidence and/or declarations in support of its position. (2 Cal. Code Reg., § 547.61.) The contracting

[1] As determined by the Executive Officer, in the absence of an objection by IUOE, the Board is not precluded from considering CDCR's additional asserted justification under subdivision (b)(3). (*In the Matter of the Appeal by Department of Pesticide Regulation* (2002) PSC No. 01-09.)

agency is then required to submit a written response that includes documentary evidence and/or declarations in support of its position. (2 Cal. Code Reg., § 547.62.) The contracting agency bears the burden of establishing applicability of the exception. (*State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 134-135.) Finally, the employee organization may submit a written reply to the agency's response. (2 Cal. Code Reg., § 547.63.) Once the parties' submissions are received, the Executive Officer must then either refer the matter to an evidentiary hearing, based upon a showing of good cause, or issue a written decision either approving or disapproving the contract and explaining the reasons for the decision. (2 Cal. Code Reg., § 547.64.)

Either party may appeal the decision of the Executive Officer to the five-member Board. (2 Cal. Code Reg., § 547.66.) In reviewing the Executive Officer's decision:

> 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.

In its submissions to the Executive Officer, CDCR asserted that the Contract was justified under the following provisions of Government Code section 19130: subdivisions (b)(10) [services are of such an urgent, temporary or occasional nature that the delay incumbent in their implementation under the civil service would frustrate their very purpose] and (b)(3) [services are not available within the civil service, cannot be performed satisfactorily by civil service employees, or of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not

available through the civil service system]. In support of its position, CDCR submitted declarations from employees at seven of the fourteen institutions in which the Contract has been used. The Executive Officer determined this evidence was insufficient to demonstrate that the Contract was justified under either Government Code section 19130, subdivision (b)(3) or (b)(10).

On appeal before the Board, CDCR seeks to introduce 14 entirely new declarations that were not previously submitted to the Executive Officer. IUOE has objected to consideration of this new evidence. At oral argument before the Board, counsel for CDCR admitted that CDCR erred in not submitting this evidence to the Executive Officer.

By failing to submit all evidence in support of its position to the Executive Officer, without good cause, CDCR violated the requirements set forth in SPB Rule 547.62. CDCR's actions prejudiced IUOE's ability to respond to the factual bases relied upon by CDCR to justify the Contract. More significantly, CDCR's actions have interfered with the regulatory process designed to enable the Board to review the Contract in an efficient manner. By submitting an entirely new body of evidence in support of its decision to contract out, CDCR has effectively eliminated the role of the Executive Officer in reviewing of the Contract and transformed the appellate process before the Board into a *de novo* review of the Contract itself. For these reasons, CDCR's request to consider the late submission is denied.

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Justification for Contract

Having reviewed the Executive Officer's decision and the parties' submissions, excluding the newly-submitted evidence, the Board agrees that IUOE has failed to provide sufficient evidence to establish that the Contract is justified under either subdivision (b)(3) or (b)(10) of Government Code section 19130. Accordingly, the Contract is disapproved.

## CONCLUSION

The Board's rules and regulations are not perfunctory hurdles that may be avoided or disregarded. These rules and regulations serve the purpose of allowing the parties to be thoroughly informed and educated on all material information pertaining to a challenge so that the parties may determine whether there is a genuine dispute to resolve. If such a dispute remains, the parties' timely compliance with SPB's rules in identifying all justifications and materials supporting its case will enable the parties to present cogent and concise arguments for the Executive Officer to consider. In effect, the rules promote thoroughness and economy in resolving a contract challenge. The Board will not tolerate the abuse of its processes in this manner.

The Board finds that the evidence properly submitted to the Executive Officer is inadequate to justify the contracted work under either Government Code section 19130, subdivisions (b)(3) or (b)(10). Therefore, the Board hereby orders that CDCR cease utilizing the services under the Contract within 60 days of this order. Furthermore, notwithstanding the provisions of Government Code section 19135, subdivision (a), the Board's disapproval in this case shall be without prejudice to CDCR's ability to enter into

a new contract for pest control services based upon adequate factual and legal justification provided to IUOE in advance of execution of such a contract.

## ORDER

Based upon the entire record in this matter, the foregoing findings of fact, and conclusions of law, it is hereby ORDERED that:

1. The Board adopts the Executive Officer's decision disapproving the Contract, as supplemented by the discussion herein.
2. CDCR must terminate the Contract within 60 days of this Decision.
3. The disapproval of the Contract will be without prejudice to CDCR's right to enter into a new contract for pest control services based upon adequate factual and legal justification, provided that any such justification shall be provided to IUOE at least 10 days prior to execution of any such contract.

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**STATE PERSONNEL BOARD**[2]

Kimiko Burton, President
Lauri Shanahan, Vice President
Maeley Tom, Member
Richard Costigan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Board Decision and Order at its meeting on February 5, 2015.

SUZANNE M. AMBROSE
Executive Officer

[2] Member Clarey did not participate in this decision.

## DECLARATION OF SERVICE

Case Name: Request for Review of Personal Service Contracts between California Department of Corrections and Rehabilitation with Orkin Pest Control Service of California

Case No.: 14-0015(b)

PSC No.: 15-01

I am a citizen of the United States and employed in the County of Sacramento. I am over the age of eighteen years and I am not a party to the within action. My business address is California State Personnel Board, Chief Counsel's Office, 801 Capitol Mall – MS-53, Sacramento, CA 95814.

On February 23, 2015, I served the attached **BOARD DECISION AND ORDER**, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, by mail delivery at Sacramento, California, addressed as follows:

Matthew Pinkerton, Attorney
California Department of Corrections and Rehabilitation
Office of Legal Affairs
10111 Old Placerville Road
Sacramento, CA 95827

Adam N. Stern, Esq.
The Myers Law Group
9327 Fairway View Place, Suite 100
Rancho Cucamonga, CA 91730

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on February 23, 2015.

C. RUBIO
Declarant

C. Rubio
Signature