

BACKGROUND

The Contractor has been acting as co-counsel with the Office of the Attorney General (OAG) on two cases pending in federal court: Hillside Dairies, et al. v. Lyons, et al. and Ponderosa Dairies, et al. v. Lyons, et al. These cases were filed in 1997 and involve constitutional challenges to CDFA's milk pooling program.

Pursuant to Government Code § 11040,¹ the OAG granted consent to CDFA to employ the Contractor as counsel when the Contract was first executed in 1997, and has annually consented to the Contract each time it has been renewed since 1997.²

CASE has challenged the extension of the Contract approved by the OAG on March 19, 2002, asserting that the contracted services can be performed adequately and competently by civil service attorneys within the OAG.

¹ Government Code § 11040 provides:

(a) This article does not affect the right of any state agency or employee to employ counsel in any matter of the state, after first having obtained the written consent of the Attorney General.

(b) It is the intent of the Legislature that overall efficiency and economy in state government be enhanced by employment of the Attorney General as counsel for the representation of state agencies and employees in judicial and other proceedings. The Legislature finds that it is in the best interests of the people of the State of California that the Attorney General be provided with the resources needed to develop and maintain the Attorney General's capability to provide competent legal representation of state agencies and employees in any judicial proceeding.

(c) Except with respect to employment by the state officers and agencies specified by title or name in Section 11041 or when specifically waived by statute other than Section 11041, the written consent of the Attorney General is required prior to employment of counsel for representation of any state agency or employee in any judicial proceeding.

² The OAG's consent to use counsel under Government Code § 11040 does not constitute authorization for contracting under Government Code § 19130.

PROCEDURAL HISTORY

By letter dated April 26, 2002, pursuant to Government Code § 19132 and SPB Rule 547.59 et seq., CASE asked SPB to review the Contract for compliance with Government Code § 19130(b). CDFA submitted its response to CASE's request on May 28, 2002. By letter dated May 29, 2002, CASE submitted its reply to CDFA's response.

In response to a request from SPB staff, the OAG submitted a letter dated August 30, 2002. On September 9, 2002, CASE filed a reply to the OAG's response. CDFA submitted a reply dated September 13, 2002 to the OAG's response.

The Executive Officer issued his decision approving the Contract on December 24, 2002.

On January 18, 2003, CASE appealed to the Board from the Executive Officer's December 24, 2002 approval. CASE filed its written argument dated February 18, 2003. CDFA filed its response dated March 21, 2003. CASE filed its reply dated March 28, 2003.

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

ISSUES

The following issue is before the Board for consideration:

Is the Contract authorized by Government Code § 19130(b)(3)?

DISCUSSION

Government Code § 19130(b)(3)

CDFA asserts that the Contract is justified under Government Code § 19130(b)(3), which authorizes a state department to enter into a personal services contract with a private contractor 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.

With the consent of the OAG, since 1997, the Contractor has provided assistance to the OAG in litigating the complex legal issues underlying the Hillside and Ponderosa lawsuits. These cases seek to prohibit CDFA from implementing amendments to the California Milk Pooling Plan. The plaintiffs assert that CDFA has violated the U. S. Constitution's Commerce Clause, Equal Protection Clause, and Privileges and Immunities Clause. These cases have been reviewed by the federal district and appeals courts, and are currently pending before the United States Supreme Court.³

By letter dated April 6, 2001, CASE notified CDFA that it had completed its review of this matter and concluded:

... based on the facts and circumstances presented, ... that the use of outside counsel is justified for the purpose described in the contract. A change in facts and circumstances, however, may alter our conclusion that the use of private legal counsel in this instance is consistent with the civil service laws.

³ The United States Supreme Court heard oral argument in these cases on April 22, 2003.

CASE asserts that the circumstances changed after this letter was sent, as evidenced by the OAG's July 23, 2001 consent letter. In that letter, the OAG, pursuant to Government Code § 11040, consented to CDFA's renewal of the Contract, but stated:

Please be advised, however, that this is likely to be the last renewal that we will approve. The litigation appears to be winding down and attorneys within our office who have worked on this case have acquired a great deal of experience and knowledge about these issues.⁴

Although the OAG stated that its July 23, 2001 consent would be its last Contract renewal approval, by letter dated March 19, 2002, the OAG consented to CDFA's continued retention of the Contractor to assist the OAG with respect to the petitions for writ of certiorari that had been filed in the U.S. Supreme Court, stating that:

[The Contractor] has represented the Department, with our Office's consent, in the above cases involving constitutional challenges to various portions of the Department's Milk Stabilization and Marketing Plan. [The Contractor] has acquired substantial experience and knowledge of the issues involving milk law and regulation. We therefore will authorize the Department to continue to use [the Contractor] for the sole purpose of the current litigation before the United States Supreme Court. Consent to the employment of counsel other than the Attorney General, for the above purpose only, is granted pursuant to Government Code section 11040.

CASE asserts that the OAG's March 19, 2002 consent does not show that the Contract is authorized by Government Code § 19130(b)(3) because the OAG's July 23, 2001 clearly shows that civil service attorneys within the OAG have acquired a great deal of knowledge and experience about the issues involved in the milk pooling litigation from working on them since 1997 and have the skills and knowledge necessary to handle the cases before the U.S. Supreme Court.

⁴ On January 29, 2003, the OAG consented to the extension of the Contract in light of the U.S. Supreme Court's grant of the petition for certiorari. That extension is not before the Board for review.

CASE also asserts that the OAG's August 30, 2002 response in this case is not sufficient to show that the Contract is authorized under Government Code § 19130(b)(3). In its response, the OAG stated:

In recognition of the specialized nature of the regulatory scheme for milk pooling, our office approved use of outside counsel by the Department when the cases were first filed in 1997. By working with Steefel, Levitt and Weiss on these cases, our office has gained the experience and knowledge in this specialized area of the law. When the petitions for review were filed before the United State Supreme Court, we agreed with the Department that, in light of the complexity and procedural history of these cases, it would be useful to retain Steefel, Levitt and Weiss as co-counsel, with the firm understanding that the Attorney General's Office act as lead counsel for the next stage of the litigation.

CASE asserts that the fact that the Contractor might be "useful" to have as co-counsel does not meet the standards set forth in Government Code § 19130(b)(3) that the contracted work cannot be performed satisfactorily by civil service employees or is of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system. According to CASE, the OAG's statement that, in working with the Contractor since 1997, its attorneys have acquired experience and knowledge in this specialized area of the law, precludes a finding that the Contract is justified under Government Code § 19130(b)(3).

While we agree with CASE that the OAG's recent consent letters and its August 30, 2002 response do not set forth an unequivocal endorsement for the Contract, we believe that, when read together with CDFA's arguments, they provide sufficient justification for the Contract to support its approval.

The materials submitted by the CDFA show that the Milk Pooling Program that is being challenged in the lawsuits is a complex system, about which counsel must have specialized expert knowledge in order to litigate effectively. The Contractor has a

thorough understanding of the milk industry, the milk pooling system and the applicable laws and regulations necessary to understand and refute the allegations made by the plaintiffs and to litigate these cases competently. The subject matter of this litigation is so specialized that the cases could not be effectively litigated by an attorney unfamiliar with the complex matters relating to the regulation of milk marketing and the pooling of milk sales revenue. From the information that has been submitted to the Board, it appears that the Contractor has provided expert assistance to the OAG on very complex legal and regulatory matters that was not available to the OAG through the civil service system.

After years of litigation, these matters are currently pending before the U.S. Supreme Court. If the OAG believes that the Contractor offers expert knowledge, experience, and ability that are “useful” to the OAG in order for it to effectively and thoroughly prosecute the ongoing, highly technical and complex litigation before the U.S. Supreme Court, the Board, at this late stage in the litigation, will not second guess the OAG’s determination. Such an OAG determination is sufficient to show that the Contract is justified under Government Code § 19130(b)(3).

CONCLUSION

The Board finds that CDFA has submitted sufficient information to establish that the Contract is authorized by Government Code § 19130(b)(3). The Board, therefore, sustains the Executive Officer’s decision approving the Contract.

STATE PERSONNEL BOARD⁵

William Elkins, President
Ron Alvarado, Vice President
Maeley Tom, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision at its meeting on July 22, 2003.

Walter Vaughn
Executive Officer
State Personnel Board

[CASE-CDFA-03-01-dec]

⁵ Member Sean Harrigan did not participate in this decision.

DECLARATION OF SERVICE

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 801 Capitol Mall, P. O. Box 944201, Sacramento, California 94244-2010.

On July 28, 2003, I mailed the attached

**APPEAL
California Attorneys, Administrative Law Judges
and Hearing Officers in State Employment
PSC No. 03-01**

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Steven B. Bassoff, Esq.
2000 O Street, Suite 250
Sacramento, CA 95814-5286

Michael P. Krug
Senior Staff Counsel
Department of Food and Agriculture
1220 N Street, Room 409
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on July 28, 2003.

ELLA B. COWDEN