

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
STATE COMPENSATION)	PSC Nos. 03-06, 03-07 and 03-08
INSURANCE FUND)	
)	
From the Executive Officer's June 13,)	December 2, 2003
2003 Disapproval of SCIF's Contracts for)	
Payroll Auditing, Clerical and Claims)	
Adjusting Services)	
)	

APPEARANCES: Harry J. Gibbons, Attorney, on behalf of California State Employees Association; Judith D. Sapper, Senior Staff Counsel, on behalf of State Compensation Insurance Fund.

BEFORE: William Elkins, President; Sean Harrigan and Maeley Tom, Members.

DECISION

The State Compensation Insurance Fund (SCIF) has appealed to the State Personnel Board (SPB or Board) from the Executive Officer's June 13, 2003 decision disapproving contracts (Contracts) that SCIF had entered into for payroll auditing, clerical and adjusting services. The Executive Officer reviewed the Contracts at the request of the California State Employees Association (CSEA). In this decision, the Board finds that it has jurisdiction to review the Contracts for compliance with Government Code § 19130 and that SCIF has failed to show that the state's hiring freeze provides sufficient justification to authorize the Contracts under Government Code § 19130(b)(3), (8) or (10). The Board, therefore, sustains the Executive Officer's decision disapproving the Contracts.

BACKGROUND

The facts in this case are not in dispute. Over the past few years, SCIF has experienced a significant increase in its workload. In response to this significant increase, in order to continue to provide in a timely fashion all its legally mandated insurance functions, SCIF determined that it required additional payroll auditing, claims adjusting and claims clerical support services staff. SCIF began the process under the civil service system of recruiting, examining and hiring the additional civil service employees it needed. Despite its diligent efforts, SCIF was prevented by the state's hiring freeze from hiring sufficient civil service employees to perform the required services. SCIF's requests for hiring freeze exemptions were denied.

In order to obtain the payroll auditing, clerical and claims adjusting services it needed, SCIF entered into the Contracts. CSEA asserts that all the contracted services can be performed adequately and competently by civil service employees.

PROCEDURAL HISTORY

By letter dated June 6, 2002, CSEA asked SPB to review for compliance with Government Code § 19130 contracts¹ for payroll auditing services proposed or executed by SCIF.²

By letter dated December 9, 2002, CSEA asked SPB to review for compliance with Government Code § 19130 contracts for clerical services proposed or executed by

¹ Choicepoint Inc. – Contract No. 54972; Morrison Ins Services Co. – Contract No. 54994; Professional Casualty Services – Contract No. 54925; Indata Svcs – Contract No. 54932; Golden Coast Management Services Inc. – Contact No. 54939.

² On August 14, 2002, CSEA asked that SPB indefinitely extend SCIF's deadline for filing a response to CSEA's review request while the parties were discussing settlement. On November 18, 2002, CSEA asked SPB to put this matter back on its review calendar. On December 6, 2002, SCIF asked SPB for an extension on answering CSEA's review request while the parties again reviewed whether settlement was possible.

SCIF. By letter dated December 24, 2002,³ CSEA asked SPB to review four contracts⁴ that SCIF had entered into for clerical services. CSEA's December 9, 2002 and December 24, 2002 requests were combined in a single SPB file.

By letter dated December 24, 2002, CSEA asked SPB to review for compliance with Government Code § 19130 two contracts⁵ for claims adjusting services executed by SCIF.⁶

SCIF submitted responses to CSEA's review requests and CSEA submitted replies to SCIF's responses. SPB's files with respect to CSEA's review requests were consolidated for decision.

The Executive Officer issued his decision disapproving the Contracts on June 13, 2003. On July 10, 2003, SCIF appealed to the Board from the Executive Officer's decision.

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.

³ CSEA's December 24, 2002 letter also asked SPB to review two auditing contracts. Those contracts were addressed in the Executive Officer's decision.

⁴ First Call Staffing Services – Contract No. 58756; Kelly Temporary Services – Contract No. 61671; Office Team - Contract No. 61711 and the amendment to that contract.

⁵ Claim Net. – Contract No. 61441 and Apple One Employment Svcs – Contract No. 61431.

⁶ CSEA's December 24, 2002 letter also asked SPB to review four contracts for clerical services. Those contracts were addressed in the Executive Officer's decision.

ISSUES

The following issues are before the Board for review:

- 1) Does the Board have jurisdiction to review the Contracts for compliance with Government Code § 19130?
- 2) If so, are the Contracts justified under Government Code § 19130(b)(3), (8) or (10)?

DISCUSSION

SPB's Jurisdiction

SCIF asserts that the special statutory conditions and exemptions that allow SCIF to operate like a private insurer preclude SPB's review of SCIF's personal services contracts for compliance with Government Code § 19130. As explained below, SCIF's assertions are not well-taken.

SCIF states that Article 14, § 4 of the California Constitution grants the Legislature "plenary power," unlimited by any other provision of the Constitution, to create and enforce a complete system of workers' compensation, including the establishment and management of a state compensation insurance fund. According to SCIF, the Legislature exercised its plenary power and conferred upon SCIF the broadest possible powers to act autonomously, by, among other things, enacting Insurance Code § 11783(b) and Public Contract Code §§ 10295 and 10335, which grant SCIF the power to enter into "any" contract, without review by the Department of General Services (DGS), the Department of Finance (DOF), or SPB.

As the Board explained in State Compensation Insurance Fund (2001) PSC No. 00-03, a review of the statutory scheme that the Legislature enacted under the authority

granted to it in Article 14, § 4 of the California Constitution shows that SCIF's assertion that its personal services contracts are exempt from SPB review is without merit.

First, the Legislature did not grant SCIF the authority to enter into "any" contract. In Insurance Code § 11783(b), the Legislature authorized SCIF to enter into only those contracts that "are authorized or permitted by law."

Second, nothing in the statutory scheme governing SCIF expressly exempts SCIF's personal service contracts from SPB's review for compliance with Government Code § 19130.

Public Contract Code § 10295 provides that every contract for services entered into by a state agency is "void unless and until approved by" DGS.⁷ That statute expressly excludes from DGS review contracts executed under Chapter 4, Part 3, Division 2 of the Insurance Code, i.e., SCIF's contracts.

Public Contract Code § 10335 is the first statutory provision of an article in the Public Contract Code that applies to state contracts for services.⁸ Section 10335

⁷ Public Contract Code § 10295, in relevant part, provides:

(a) All contracts entered into by any state agency for ... (2) services, whether or not the services involve the furnishing or use of goods or are performed by an independent contractor ... are void unless and until approved by the department.

...

(c) This section does not apply to the following:

...

(6) Any contract entered into under the authority of Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code.

⁸ Public Contract Code § 10335, in relevant part, provides:

(a) This article shall apply to all contracts, including amendments, entered into by any state agency for services to be rendered to the state, whether or not the services involve the furnishing or use of equipment, materials, or supplies or are performed by an independent contractor. Except as provided in Section 10351, all contracts subject to this article are of no effect unless and until approved by the department. Each contract shall be transmitted with all papers, estimates, and recommendations concerning it to the department and, if approved by the department, shall be effective from the date of approval. This article shall apply to any state agency that by general or specific statute is

provides that the article applies to all state contracts for services, which must be submitted to DGS for prior review and approval. Public Contract Code § 10335 provides, however, that the article does not apply to any contracts that are listed as exceptions in Public Contract Code § 10295.

One of the statutory provisions that is included in the Public Contract Code article relating to state contracts for services is Public Contract Code § 10337.⁹ Section 10337 provides that SPB may establish standards and controls over DGS's approval of state contracts for services to ensure that DGS's approval of such contracts is consistent with the merit employment principles and requirements contained in Article VII of the California Constitution. Section 10337 also includes some of the procedures that SPB must follow when it reviews contracts for compliance with Government Code § 19130. SCIF asserts that, because Section 10337 is included in the Public Contract Code article from which SCIF's contracts are excluded, SPB is precluded from

expressly or impliedly authorized to enter into the transactions referred to in this section. This article shall not apply to ... contracts that are listed as exceptions in Section 10295...

⁹ Public Contract Code § 10337, in relevant part, provides:

(a) The State Personnel Board may establish such standards and controls over approval of contracts by the Department of General Services as are necessary to assure that the approval is consistent with the merit employment principles and requirements contained in Article VII of the California Constitution. The substantive provisions of the standards shall be established at the discretion of the State Personnel Board. The specific procedures for contract review pursuant to such standards shall be established jointly by the board and the department.

...

(c) A contract proposed or executed pursuant to subdivision (b) of Section 19130 of the Government Code shall be reviewed by the State Personnel Board if the board receives a request to conduct such a review from an employee organization representing state employees. Any such review shall be restricted to the question as to whether the contract complies with the provisions of subdivision (b) of Section 19130 of the Government Code....

reviewing SCIF's contracts for compliance with Government Code § 19130. SCIF's reasoning is flawed.

SPB's authority to review personal services contracts for compliance with Government Code § 19130 does not derive from Public Contract Code § 10337. Instead, it derives from the California Constitution and the State Civil Service Act. Article VII, § 3(a) of the California Constitution provides that SPB "shall enforce the civil service statutes." The civil service statutes are contained in the State Civil Service Act.¹⁰ Government Code § 19130 is a civil service statute that SPB is required to enforce under the California Constitution. SPB's obligations to review contracts for compliance with Government Code § 19130 are set forth in Government Code § 19131 and 19132, both of which are civil service statutes. Because SCIF asserts that the Contracts are authorized under Government Code § 19130(b), the procedures set forth in Government Code § 19132 apply.¹¹ Section 19132 mandates that SPB must review contracts for compliance with Section 19130(b) when an employee organization, such as CSEA, requests review. Because CSEA submitted timely and proper requests for review in this case, SPB is required to review the Contracts for compliance with Government Code § 19130(b).

¹⁰ The State Civil Service Act begins at Government Code § 18500.

¹¹ Government Code § 19132 provides:

The State Personnel Board, at the request of an employee organization that represents state employees, shall review the adequacy of any proposed or executed contract which is of a type enumerated in subdivision (b) of Section 19130. The review shall be conducted in accordance with subdivision (c) of Section 10337 of the Public Contract Code. However, a contract that was reviewed at the request of an employee organization when it was proposed need not be reviewed again after its execution.

There is nothing in the Insurance Code that exempts SCIF's contracts from SPB review under Government Code § 19132 for compliance with Government Code § 19130(b). To the contrary, Insurance Code § 11873(b) expressly subjects SCIF to the State Civil Service Act, which includes Government Code §§ 19130 and 19132.¹²

In State Compensation Insurance Fund v. Riley (1937) 9 Cal.2d 126 (Riley), and Burum v. State Compensation Insurance Fund (1947) 30 Cal.2d 575, the California Supreme Court found that SCIF's personal services contracts are subject to the state's civil service mandate. In Professional Engineers in California Government v. Department of Transportation (PECG v. Caltrans),¹³ the California Supreme Court reaffirmed its holding in Riley that an implied "civil service mandate" emanates from Article VII of the California Constitution, which 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 § 19130 codifies the exceptions to the civil service mandate that various court decisions have recognized. Government Code § 19132 requires that, upon the timely requests of

¹² Insurance Code § 11873(b) provides:

- (b) The fund shall be subject to the provisions of Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of, and Division 5 (commencing with Section 18000) of Title 2 of, the Government Code, with the exception of all of the following:
 - (1) Article 1 (commencing with Section 19820) and Article 2 (commencing with Section 19823) of Chapter 2 of Part 2.6 of Division 5 of Title 2 of the Government Code.
 - (2) Sections 19849.2, 19849.3, 19849.4, and 19849.5 of the Government Code.
 - (3) Chapter 4.5 (commencing with Section 19993.1) of Part 2.6 of Division 5 of Title 2 of the Government Code.

Government Code §§ 19130 and 19132 are within Title 2, Division 5 of the Government Code and are not included in any of the listed exceptions. Title 2, Division 5, Part 2 of the Government Code is the State Civil Service Act.

¹³ (1997) 15 Cal.4th 543, 547.

employee organizations, SPB must review state personal services contracts that have been entered into under the authority of Government Code § 19130(b) to determine whether they fall within one of the codified exceptions to the civil service mandate. Pursuant to Insurance Code § 11873(b), SCIF's personal services contracts are subject to Government Code §§ 19130 and 19132. There is nothing in any of the constitutional or statutory provisions that SCIF has cited that exempts its personal services contracts from SPB review under Government Code § 19132 for compliance with Government Code § 19130. SPB, therefore, has the authority to review the Contracts for compliance with Government Code § 19130(b).¹⁴

Government Code § 19130(b)

Government Code § 19130(b)(3)

SCIF asserts that the Contracts are justified under Government Code § 19130(b)(3), which authorizes a state agency to enter into a personal services contract with a private entity 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.

SCIF asserts that, as a result of its increased workload, it had a legitimate lack of personnel; it, therefore, acquired authorization for additional positions and diligently

¹⁴ In its most recent written arguments submitted to the Board, SCIF asserts that it did not execute the Contracts pursuant to the authority set forth in Government Code § 19130(b); instead, it relied upon the authority set forth in Article 14, § 4 of the California Constitution and Insurance Code §§ 11781 and 11783. The Board takes no position on whether these constitutional and statutory provisions may provide independent authorization to SCIF to contract apart from Government Code § 19130(b). The Board's review of the Contracts in this matter is confined exclusively to whether the Contracts comply with the subdivisions of Government Code § 19130(b) that SCIF, in its submissions, has asserted authorize the Contracts. See, Public Contract Code § 10337(c) which states, in relevant part, that the Board's "review shall be restricted to the question as to whether the contract complies with the provisions of subdivision (b) of Section 19130 of the Government Code."

followed civil service procedures for examination and hiring, but, through no fault of its own, was prevented by the state's hiring freeze from appointing sufficient civil service personnel to perform its increased workload. According to SCIF, the imposition of the hiring freeze and DOF's refusal to grant SCIF an exemption to fill its numerous vacant positions effectively meant that the auditing, claims adjusting and claims clerical services, which the law mandates that SCIF perform, were not available within the civil service and could not be performed satisfactorily by the existing restricted number of SCIF employees.

As the Board stated in Department of Pesticide Regulation,¹⁵ in order to justify a contract under Government Code § 19130(b)(3), a state agency must show that the contracted services are not available through the civil service system; i.e., there are no existing civil service job classifications through which the state agency could appoint or retain employees with the knowledge, skills, expertise, experience or ability needed to perform the required work. Government Code § 19130(b)(3) does not apply when the services could be performed through the civil service system, but not enough civil service employees are currently employed to perform those services.

There is no dispute in this case that the payroll auditing, clerical and claims adjusting services for which SCIF has contracted are the types of services that civil service employees have historically and customarily performed, and are currently performing adequately and competently for SCIF. By all indications from the submissions of the parties, but for the hiring freeze, SCIF would have been able to retain through the civil service system sufficient civil service personnel to perform

¹⁵ (2002) PSC No. 01-09 at pp. 12-13.

adequately and competently all the services that are being contracted. It is only because of the state's policy to freeze the hiring of civil service employees that SCIF was unable to retain sufficient civil service staff to perform the needed payroll auditing, clerical and claims adjusting services.

The facts of this case are similar to those found in PECG v. Caltrans. In that case, the California Supreme Court found that a state agency cannot create an artificial need for private contractors by refusing to hire sufficient civil service employees to perform the agency's work, and then rely upon the workforce shortage it has created to justify the hiring of private contractors.¹⁶

SCIF asserts that it did not artificially create its need for private contractors; that need was imposed upon it by the state's hiring freeze, despite its best efforts to follow the mandates of the civil service system. While the Board recognizes that SCIF was not responsible for the predicament in which it found itself, when the Board reviews personal service contracts, it does not confine its review to whether a single agency may be engaging in intentional violations of the civil service mandate. Instead, the Board considers whether the policies of the state, when viewed as a whole, may be improperly impeding the hiring of sufficient civil service employees to conduct the state's business. As the Board stated in Department of Pesticide Regulation,¹⁷

The civil service mandate applies to the state as a whole and provides that the state, as a whole, must use civil service employees whenever those employees can perform the state's work adequately and competently.

¹⁶ (1997) 15 Cal. 4th 543, 571-572. (The Court noted that "the trial court found Caltrans created an artificial "need" for private contracting that resulted from its practice of maintaining an inadequate level of civil service staff, rather than from any legitimate lack of available or obtainable qualified personnel.")

¹⁷ (2002) PSC No. 01-09 at p. 14.

As CSEA aptly argues in its submissions, if the Board were to accept SCIF's assertion that the exception to the civil service mandate set forth in Government Code § 19130(b)(3) authorizes contracting whenever a state agency is unable to hire sufficient civil service employees because of a state-imposed hiring freeze, the statutory exception would swallow the constitutional rule. If the state could manufacture authorization for private contracting simply by imposing a hiring freeze that prohibits its agencies from retaining sufficient civil service employees to perform the agencies' public duties and responsibilities, the civil service mandate implied in the California Constitution and recognized by the California Supreme Court in PECG v. Caltrans would become a nullity.

The clear implication of SCIF's assertions is that it would be able to hire sufficient civil service staff to perform all its payroll auditing, clerical, and claims adjusting work adequately and competently if it were not precluded from doing so by the state's hiring freeze. The hiring freeze cannot be relied upon to justify contracting under Government Code § 19130(b)(3) when SCIF could otherwise hire qualified civil service personnel to perform the contracted services.

Government Code § 19130(b)(8)

SCIF contends that the Contracts are justified under Government Code § 19130(b)(8), which authorizes a state agency to enter into a personal services contract with a private contractor when:

The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

SCIF asserts that the payroll auditing, clerical and claims adjusting services that the contractors are providing are support services that SCIF could not feasibly provide in the locations where the services are being performed in light of the significant surge in its business and the hiring freeze that the state has imposed upon it. According to SCIF, it was not feasible for SCIF's current employees in some of its locations to handle all the auditing, clerical and adjusting work that the increase in its workload caused, and, due to the state's hiring freeze, SCIF could not feasibly have hired sufficient civil service employees to manage SCIF's growing workload.

The arguments that SCIF is making under Government Code § 19130(b)(8) are essentially the same arguments SCIF proffers under Government Code § 19130(b)(3). SCIF has not provided any information to support a finding that civil service employees with adequate auditing, clerical, and adjusting skills could not feasibly be hired in the areas where SCIF needs the services to be performed. Instead, SCIF's submissions indicate that, if not for the hiring freeze, it would be able to hire sufficient civil service auditing, clerical, and adjusting staff in its various locations throughout the state to perform the insurance work that it conducts at those locations. Because SCIF could feasibly hire sufficient civil service staff in each of its locations if not for the state's hiring freeze, SCIF has failed to show that the Contracts comply with Government Code § 19130(b)(8).

Government Code § 19130(b)(10)

Finally, SCIF contends that the Contracts are justified under Government Code § 19130(b)(10), which authorizes a state agency to enter into a personal services contract with a private contractor 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.

SCIF asserts that its need for the contracted services is urgent because SCIF's constitutional, statutory and contractual obligations dictate that SCIF continue to perform all the functions associated with transacting workers' compensation insurance. According to SCIF, the state's freeze on hiring civil service auditors, claims adjustors and claims clerical support employees has frustrated the purpose of SCIF's essential payroll audit and claims functions.

As the Board stated in California State Employees Association,¹⁸ in order to justify a personal services contract under Government Code § 19130(b)(10), a state agency 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.

While the contracted services may be urgent and temporary, SCIF has not shown that it was the delay incumbent in hiring sufficient employees through the civil service system that caused SCIF to be unable to provide the contracted services in a timely fashion. From the information that SCIF and CSEA have presented, it appears that SCIF was most of the way through the civil service hiring process when the state's hiring freeze prevented it from making any civil service appointments. Thus, as CSEA correctly points out, it was not the delay incumbent in the civil service hiring process that prevented SCIF from providing the contracted services when they were needed, it was the state's hiring freeze that stopped the civil service hiring process from being

¹⁸ (2003) PSC No. 03-02 at p. 3.

completed in a timely fashion. SCIF has, therefore, failed to show that Government Code § 19130(b)(10) applies.

CONCLUSION

SCIF has not submitted sufficient information to show that the Contracts are authorized under Government Code § 19130(b)(3), (8) or (10). SCIF cannot rely upon the state's hiring freeze as its justification for contracting with private contractors when the contracted services could otherwise be performed adequately and competently by civil service employees.

ORDER

The Board sustains the Executive Officer's decision disapproving the Contracts.

STATE PERSONNEL BOARD¹⁹

William Elkins, President
Sean Harrigan, Member
Maeley Tom, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 2, 2003.

Walter Vaughn
Executive Officer
State Personnel Board

[SCIF-CSEA-03-06-7-08-dec]

¹⁹ Vice President Ron Alvarado and Member Anne Sheehan did not participate in this decision.