

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)

**CALIFORNIA STATE)
EMPLOYEES ASSOCIATION)**

from the Executive Officer's November 20, 2003)
Denial of Jurisdiction over Department of Health)
Services' Contracts with Hubbert Systems)
Consulting, Inc. and IBM Corporation)

BOARD DECISION

PSC NO. 04-01 and 04-02

June 8, 2004

APPEARANCES: Harry J. Gibbons, Attorney, on behalf of the California State Employees Association; Timothy E. Ford, Senior Counsel, on behalf of the Department of Health Services.

BEFORE: Sean Harrigan, Maeley Tom and Anne Sheehan, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the California State Employees Association (CSEA) appealed from the November 20, 2003 decision of the Executive Officer denying SPB jurisdiction over CSEA's request that SPB review contracts (Contracts) between the Department of Health Services (DHS) and Hubbert Systems Consulting, Inc. (Hubbert) and IBM Corporation (IBM) (collectively, the Contractors). In this Decision, the Board finds that it does not have jurisdiction to review contracts that had already expired before CSEA requested SPB review. The Board, therefore, sustains the Executive Officer's decision.

BACKGROUND

The Contractors are vendors listed with the Department of General Services (DGS) under the California Multiple Award Schedule (CMAS). Vendors included in CMAS are authorized to take purchase orders from state agencies for the purchase of their products and services under the CMAS system. The Contracts in this case are a series of purchase orders that DHS submitted to the Contractors under the CMAS system beginning in or about March 2001. All of the purchases of products and services made under these Contracts were completed before CSEA submitted its requests for review to SPB in July 2003. In other words, the terms of the Contracts had already expired and the Contracts were no longer in effect when CSEA asked SPB to review them.

PROCEDURAL HISTORY

By two separate letters dated July 17, 2003, CSEA asked SPB to review the Contracts for compliance with Government Code section 19130. On September 2, 2003, DHS submitted its responses to CSEA's review requests. On September 15, 2003, CSEA submitted its replies. CSEA's two review requests were consolidated for review and decision. On November 20, 2003, the Executive Officer issued his decision finding that SPB did not have jurisdiction to review the Contracts.

On December 24, 2003, CSEA appealed to the Board from the Executive Officer's decision. CSEA filed its opening brief dated February 10, 2004. DHS filed its response dated March 11, 2004. CSEA filed its reply dated March 19, 2004.

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.

ISSUE

The following issue is before the Board for consideration:

Does SPB have jurisdiction to review for compliance with Government Code section 19130, subdivision (b) personal services contracts that expired before CSEA requested SPB review?

DISCUSSION

The Legislature has created two very different processes for SPB review of personal services contracts depending on whether those contracts are cost savings contracts entered into under Government Code section 19130, subdivision (a), or exceptions contracts entered into under subdivision (b). For cost savings contracts, the Legislature has explicitly provided in Government Code section 19131 that a department must give SPB prior notice of its intention to enter into the contract.¹ When SPB receives notice of a proposed cost savings contract, it must immediately notify the

¹ Government Code section 19131, in relevant part, provides:

Any state agency proposing to execute a contract pursuant to subdivision (a) of Section 19130 shall notify the State Personnel Board of its intention. All organizations that represent state employees who perform the type of work to be contracted, and any person or organization which has filed with the board a request for notice, shall be contacted immediately by the State Personnel Board upon receipt of this notice so that they may be given a reasonable opportunity to comment on the proposed contract. ... Any employee organization may request, within 10 days of notification, the State Personnel Board to review any contract proposed or executed pursuant to subdivision (a) of Section 19130. The review shall be conducted in accordance with subdivision (b) of Section 10337 of the Public Contract Code. Upon such a request, the State Personnel Board shall review the contract for compliance with the standards specified in subdivision (a) of Section 19130.

affected employee union of that contract, and the union has 10 days to submit a request for review.

The procedures SPB must follow when reviewing exceptions contracts, including the Contracts challenged in this case, are set forth in Government Code section 19132, which 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.²

Under Government Code section 19132, a department may enter into an exceptions contract without first giving prior notice to either SPB or affected employee unions. Because no prior notice is required, affected employee unions may not learn of the existence of an exceptions contract until well after the contract has been entered into and the contracted work has begun.

While Government Code section 19132 does not contain a specific time deadline by when a union must request SPB review, it does provide that an employee union may ask SPB to review an exceptions contract that has been "proposed or executed."

² Public Contract Code section 10337, subdivision (c), in relevant part, provides:

(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...

Government Code section 19132 does not include definitions of the terms "proposed" or "executed" and SPB has not found any legislative history that might explain the legislature's intent when it included these terms in the statute. SPB must, therefore, discern the legislative intent from the plain meaning of these terms and their statutory context.³

For the definition of the term "executed," CSEA asks the Board to look to Civil Code section 1661, which provides:

An executed contract is one, the object of which is fully performed. All others are executory.

The definition of "executed" set forth in Civil Code section 1661 does not make sense in the context of Government Code section 19132. It is not logical that the Legislature would require that SPB review exceptions contracts only when they are first proposed and then after they are completed, but not while they are in existence and being performed.

Instead, given the language in Government Code section 19131 that provides that state agencies must give SPB notice of any cost savings contracts that they are "proposing to execute" and the language in Government Code section 19132 that provides that if SPB reviews a contract "when it was proposed," it does not need to review it "again after its execution," it appears that, as used in Government Code

³ See Dyna-Med v. Fair Employment And Housing Commission (1987) 43 Cal.3d 1379, 1387 ("The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.")

section 19132, a "proposed" contract is one that a department intends sign and an "executed" contract is one that has already been signed and is in effect.⁴

The question for Board determination is whether the terms "proposed" and "executed," as used in Government Code section 19132, include contracts that have already expired before SPB review is requested.⁵ In order to determine whether Government Code section 19132 requires SPB to review expired contracts, the Board must look to the purpose of the law.

In Professional Engineers in California Government v. Department of Transportation,⁶ the California Supreme Court recognized that, emanating from Article VII of the California Constitution, is an implied "civil service mandate," 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 section 19130 codifies the exceptions to the civil service mandate that various court decisions have recognized. The purpose of SPB's review of contracts under Government Code section 19130 is, therefore, to determine whether state work may be legally contracted to private entities or whether it must be performed by state employees.⁷

⁴ See Poag v. Winston (1988) 195 Cal.App.3d 1161, 1175 (The court rejected the definition of "executed contract" set forth in Civil Code section 1661 and, instead, applied the more logical legal meaning of "executed" as "'carried into full effect, taking effect immediately,' i.e., the *signing* of a written agreement." (Italics in original.))

⁵ As used by the Board in this decision, a contract "expires" when the contract's term ends, and is not extended or renewed, and no further work is conducted or contemplated under the contract.

⁶ (1997) 15 Cal.4th 543, 547.

⁷ In its brief, CSEA asserts that the Board's sole purpose for reviewing personal services contracts is to eliminate the "spoils system of political patronage." If the only purpose of the Board's review were to prevent spoils, then all personal services contracts would be valid once it was determined that they were properly awarded in accordance with a competitive bidding or other applicable process and were not

Under Government Code section 19132, SPB is required to review personal services contracts at the request of employee unions to determine whether those contracts are authorized under one or more of the exceptions to the civil service mandate included in Government Code section 19130, subdivision (b). If SPB determines that an exception applies, SPB will "approve" the contract. If SPB determines that the contract is not justified under any of the subdivision (b) exceptions asserted by the department and the contracted work can be performed adequately and competently by civil service employees, SPB will "disapprove" the contract.⁸

In order to best effectuate the purpose of the law, Government Code section 19132 must be interpreted to apply only to those contracts that have a current impact on the conduct of the state's on-going workload. The Board, therefore, finds that the term "executed" as it is used in Government Code section 19132 must be interpreted to mean a contract that has been entered into and is ongoing, but has not yet expired as of the date the employee union requests SPB review.

While contracts that are ongoing at the time SPB's review is requested may expire before that review is completed, such contracts are very different from contracts that have already expired before SPB review is requested. As DHS points out, if a state agency is given notice that an existing contract is being challenged, that agency can

granted for political reasons. Clearly, the Board's review role is not confined solely to determining whether a personal services contract was awarded for political reasons but, instead, encompasses ensuring that civil service employees perform the state's work when they can do so adequately and competently.

⁸ See Public Contract Code section 10337, subdivision (c), which, in relevant part, provides:

The executive officer shall approve or disapprove the contract or refer it to the board for a hearing within 30 days of its receipt. The reasons for the decision by the executive officer, or the board, approving or disapproving the contract shall be stated in writing.

notify the contractor and take action to address any valid civil service issues that the union may raise by, among other things, terminating the contract and redirecting the contracted work to civil service employees, or negotiating with the union for a solution that is acceptable to all parties. If the contract has already expired before SPB review is requested, the state agency has no opportunity to redirect any state work to the civil service employees who could otherwise perform it adequately and competently.

If CSEA's position were adopted and SPB were required to review expired contracts, in addition to proposed and existing contracts, both SPB and state agencies would be saddled with an unreasonable burden; employee unions could reach back in time and invoke SPB's review of contracts that no longer have any current impact upon the performance of the state's ongoing work. It, therefore, serves no purpose for the Board to review contracts that have already expired before the union requests review.

CSEA asserts that, by refusing to review expired contracts, SPB is imposing a limitations period on union review requests that does not appear in the statute. CSEA also asserts that if a limitations period can be legally imposed, SPB should apply the limitations period set forth in Code of Civil Procedure section 337, subdivision (1), which provides for a 4-year limitations period for a party to bring an action based upon a written contract.⁹ CSEA's assertions are not well-taken.

⁹ Code of Civil Procedure section 337, subdivision (1) provides:

Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage.

First, SPB is not applying a statute of limitations period where none exists in Government Code section 19132. Instead, SPB is merely interpreting the language of the statute. Moreover, a union's request that SPB review a personal services contract between a state agency and a private contractor for compliance with Government Code section 19130 is fundamentally different from a lawsuit brought by one party to a written contract against another party for failure to perform. Code of Civil Procedure 337, subdivision (1) has no relevance to the contracting out issues raised in SPB reviews.

While a union's ability to timely challenge exceptions contracts may, at times, be frustrated by Government Code section 19132, which does not require prior notice to either SPB or affected employee unions before an exceptions contract may be executed, the union's remedy lies with the Legislature. The Board has no authority to change the review process that the Legislature has imposed for exceptions contracts.

CONCLUSION

The Board finds that it has no jurisdiction to review personal services contracts that have already expired before an employee union requests SPB review. The Board, therefore, sustains the Executive Officer's decision denying jurisdiction in these consolidated cases.

STATE PERSONNEL BOARD¹⁰

Sean Harrigan, Member
Maeley Tom, Member
Anne Sheehan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision at its meeting on June 8, 2004.

Laura Aguilera
Interim Executive Officer
State Personnel Board

¹⁰ President William Elkins and Vice President Ron Alvarado 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 June 23, 2004, I mailed the attached

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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:

Harry J. Gibbons, Attorney
California State Employees Association
1108 "O" Street
Sacramento, CA 95814

Timothy E. Ford, Senior Counsel
Department of Health Services
Office of Legal Services MS 0010
P.O. Box 942732
Sacramento, CA 94234-7320

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on June 23, 2004.

TAMARA LACEY