

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

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| In the Matter of the Request by |) | BOARD DECISION |
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| International Union of Operating Engineers, |) | |
| Unit 12, Locals 3, 12, 39 and 501 |) | PSC No. 04-0813A |
| |) | |
| from review of personal services contract for |) | |
| maintenance and grounds keeping services at |) | October 3, 2005 |
| the California Science Center in Los Angeles. |) | |
| |) | |

APPEARANCES: David P. Myers, attorney, Levy, Stern & Ford, on behalf of International Union of Operating Engineers, Locals 3, 12, 39 and 501; Barrett W. McInerney, Labor Relations Counsel, Department of Personnel Administration, on behalf of California Science Center.

BEFORE: Maeley Tom, Vice President; Ron Alvarado, Sean Harrigan and Anne Sheehan, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the International Union of Operating Engineers, Unit 12, Locals 3, 12, 39 and 501 (IUOE), requested that the Executive Officer review several personal services contracts entered into between the California Science Center (CSC) and the Los Angeles Memorial Coliseum Commission (Commission), a Joint Powers Authority (JPA), for the provision of grounds maintenance services at the CSC. In this decision, the Board finds that, given the unique facts of this case, it possesses the requisite jurisdiction to review the contracts for conformance with the provisions of Government Code section 19130, and remands the matter to the Chief Administrative Law Judge (CALJ), or his designee, with instructions to conduct a further hearing on the issue of whether the Contracts are justified under the provisions of Government Code section 19130, subdivision (a).

BACKGROUND

The CSC is located in Exposition Park (Park) near downtown Los Angeles, and is comprised of several buildings and surrounding grounds, including the Air and Space Gallery, the Weingarten Exhibit Gallery, the Science Court and Plaza, and the IMAX theatre. The Park itself is a 160-acre urban park, and the CSC is charged with oversight of the area. Also located within the Park is the Los Angeles Memorial Coliseum (Coliseum), the Los Angeles Sports Arena (Arena), the Los Angeles City Recreation Center/Swim Stadium and Rose Garden. The Park also has promenades, playing fields, picnic areas, children's play equipment, and acres of green space.

Although the State of California (State) is the principal landowner in the Park, there are parcels of land within the Park that are owned by the City of Los Angeles (City). There are also leases between and among the State, the City, and other entities, including the Commission. The Commission is a JPA created pursuant to the provisions of Government Code section 6500, and has oversight of the Coliseum and Arena. The JPA consists of a joint agreement between the State, the City, and the County of Los Angeles, for the joint operation of the Coliseum and the Arena.

Prior to 1984, the State, the City, and The Commission, each maintained their own sections of the Park. At the time of the 1984 Olympics, however, the three entities entered into an agreement that provided that each of the entities would contribute a share of funds for maintenance of the Park, and that maintenance of the Park would be overseen by the Commission. The Commission subsequently opted to use a private contractor to perform those maintenance services.

In 1996, the State determined that funding levels were inadequate to protect its investment in the Park, and authorized an increase in the 1999 funding levels that enabled the CSC to assume responsibility for the payment and oversight of grounds maintenance in the Park. Thereafter, the CSC attempted to directly contract with a private contractor for grounds maintenance services at the Park.

On September 13, 1999, in accordance with Government Code section 19131, the CSC notified the SPB of its intention to enter into a cost savings contract, under Government Code section 19130(a), for grounds maintenance services at the Park. Swayzer's, Incorporated (Swayzer's) was the proposed contractor, and bid the job at an annual cost of \$568,070.00.

As provided in Section 19130(a), IUOE requested that the SPB review the contract and, during its meeting of November 1-2, 2000, the Board adopted a proposed decision from an SPB ALJ that disapproved the contract on the grounds that it did not meet the requirements for a cost savings contract. The Board subsequently denied the CSC's petition for rehearing.¹

The CSC thereafter entered into an "interim emergency" contract with Swayzer's that it claimed was justified under Section 19130(b)(10), and that was designed to remain in place until the CSC could generate a new cost-savings contract for SPB review and approval. IUOE requested that the SPB review the interim emergency contract for compliance with Government Code section 19130(b)(10) and, on August 23, 2001, the Executive Officer issued a decision disapproving the contract, on the grounds that the services to be performed under the contract were not of such an

¹ SPB Case No. 00-2290; PSC No. 00-02.

urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose. The CSC appealed the Executive Officer's decision and, on March 5, 2002, the Board issued its decision disapproving the contract, finding that the contract was not justified under Section 19130(b).²

(The Disputed Contracts)

After the Board disapproved the CSC's interim emergency contract with Swayzer's, the CSC and the Commission entered into a Memorandum of Understanding (MOU) commencing on April 15, 2002 and ending on April 14, 2003. Under this MOU, the Commission agreed to resume providing grounds maintenance services for the Park that it had performed between 1984 and 1998, and to hire its former contractor, Swayzer's, to perform those services. Pursuant to the terms of the MOU, the Commission also agreed to: (1) pay Swayzer's, rather than the CSC, the sum of \$40,728.65 "in arrears"; (2) pay Swayzer's for the months of May and June 2002, in satisfaction of the Commission's financial obligations to the CSC under an undisclosed license agreement; and (3) to invoice the CSC for \$6,457.30 for the balance of Swayzer's services.

While the 2002/2003 MOU was in effect, the CSC and the Commission entered into a License Agreement, commencing on July 1, 2002 and ending on June 30, 2003, by which the CSC, as the owner in fee of certain real property in the Park, granted the Commission a license to use North and South Coliseum Drives for parking during events held at the Coliseum and the Arena. In the License Agreement, the Commission agreed to, among other things, contribute annual funding for Park maintenance in an

² PSC No. 01-08.

amount not less than \$140,804.00 per year for the 2002/2003 fiscal year, by providing grounds maintenance services for the Park in accordance with the 2002/2003 MOU. The Commission also agreed that rather than paying the CSC its contribution directly, it would pay the first \$140,804.00 in Park maintenance fees directly to Swayzer's, and would then invoice the CSC for any payments due Swayzer's that exceeded \$140.804.00.

On July 18, 2002, the CSC notified the SPB of its intention to enter into a one-year contract for grounds maintenance services with Swayzer's, with two one-year options to renew. The CSC asserted that the proposed contract was justified as a cost savings contract under Section 19130(a).

Commencing July 1, 2003, the CSC and the Commission entered into a License Agreement, effective through June 30, 2004, that included the previous parking arrangement contained in the 2002/2003 License Agreement. In accordance with the 2003/2004 License Agreement, the Commission agreed to provide regular physical overview of activities within the Park, parking lots, and landscaping assistance to the CSC during the terms of the Agreement. The Commission also agreed to, among other things, contribute \$140,804.00 per year for maintenance of its area of the Park and to provide grounds maintenance services for the Park in accordance with the 2002/2003 MOU. As before, the Commission also agreed that, rather than paying its grounds maintenance contribution share directly to the CSC, it would pay the first \$140,804.00 in Park maintenance fees directly to Swayzer's, and that it would invoice the CSC for any payments owed to Swayzer's that exceeded that amount.

On December 2, 2003, while its application for approval of its cost savings contract with Swayzer's was pending before an SPB ALJ,³ the CSC withdrew its request to contract with Swayzer's. In a December 2, 2003 letter to the assigned ALJ, the CSC asserted that landscaping services at the Park were under the jurisdiction of the Commission, and would remain with the Commission until the CSC elected to initiate a new request for approval of a cost savings personal services contract with the SPB.

Commencing on July 1, 2004, the Commission entered into a subsequent Licensing Agreement with the CSC, effective through June 30, 2005 (unless terminated earlier by the parties), that again included the parking agreement from the previous License Agreements.⁴ The 2004/2005 License Agreement obligates the Commission to provide all grounds maintenance services for the Park, in accordance with a detailed "scope of services." The Agreement further provides that upon "receipt of notice of termination from the Licensee [the Commission], Commission shall terminate its agreement with its contractor."⁵

In addition, the 2004/2005 Agreement provides that, upon expiration of the Agreement, the Commission shall continue to provide grounds maintenance services on

³ SPB Case No. 03-2474.

⁴ The Agreement also recited a series of reasons for the Agreement. Those asserted reasons are: (1) That the State, County and City are each stakeholders in the Park and each has specific areas of use; (2) The Commission, as a JPA, is in an excellent position to coordinate the overall financing and supervision of landscaping and maintenance responsibilities at the Park; (3) The type of events sponsored by the Commission at the Coliseum and Arena are significant in attendance and impact throughout the Park; (4) The Commission is responsible for preparing for the events and remediating any impact caused by events it sponsors; and (5) The physical condition and appearance of the entire Park is essential to the efforts of the Commission to maintain current tenants and attract new major tenants to the Coliseum and Arena, culminating in the Commission having a significant stake in landscaping and maintenance at the Park.

⁵ Because it appears illogical to require the Commission to terminate its agreement with its contractor upon receipt of notice of termination from itself (as the Licensee), it appears that the reference to the "Licensee" in the termination clause is a typographical error, and that the notice of termination provision probably is intended to refer to receipt of notice of termination from the "Licensor" (the CSC).

a month-to-month basis, under the same terms and conditions as set forth in the Agreement. It also sets forth the same financial arrangements for payment of the grounds maintenance services to the private contractor hired by the Commission, as are contained in the 2002/2003 and 2003/2004 License Agreements. Unlike the prior License Agreements, however, the 2004/2005 Agreement does not identify the contractor selected by the Commission to provide grounds maintenance services at the Park.

PROCEDURAL HISTORY

By letter dated January 20, 2004, IUOE requested that the SPB review the 2002/2003 MOU, and the 2002/2003 and 2003/2004 License Agreements (hereinafter the "Contracts") for compliance with Government Code section 19130.⁶ On April 9, 2004, after reviewing the briefs and documentary evidence submitted by the parties, the Interim Executive Officer notified the parties that the case raised many complex issues of fact and law that could not be resolved solely on the information and documentation submitted, and referred the matter to an evidentiary hearing before an ALJ. One of the primary issues to be addressed during the hearing was whether the SPB had jurisdiction to review the disputed contracts.

The ALJ issued his proposed decision disapproving the Contract on June 13, 2005, finding that the SPB did possess the requisite jurisdiction to review the Contracts. The ALJ further concluded that the Contracts were not justified pursuant to the provisions of Government Code section 19130(a). The Board rejected the proposed decision to decide the matter itself.

ISSUE

The following issue is before the Board for review:

Does the Board possess the requisite jurisdiction to review the Contracts?⁷

DISCUSSION

In *Professional Engineers in California Government v. Department of Transportation*,⁸ 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. 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.

The CSC asserts that the Board does not possess jurisdiction to review the Contracts at issue here, because the Contracts are between two public agencies – the CSC and the Commission. Government Code section 6500 specifically provides that

⁶ At the time of IUOE's request for review, the 2004/2005 License Agreement did not exist. That Agreement was subsequently included for review after the matter was referred to an evidentiary hearing before an ALJ.

⁷ The Board originally requested that the parties brief the issue of whether there is any justification for the contracts other than to serve as a conduit for the provision of personal services by a private contractor to the CSC. During the hearing before the ALJ, however, the parties stipulated that the only issue that would be addressed by the ALJ would be whether the Board possessed the requisite jurisdiction to review the Contracts. Because no evidence was introduced concerning whether the contracts were justified under the provisions of Government Code sections 19130(a), the Board will not address that issue in this Decision. Instead, as discussed *infra*, the case will be remanded to the CALJ, or his designee, so that additional evidence may be presented concerning the validity of the Contracts.

⁸ (1997) 15 Cal.4th 543, 547.

JPAs, such as the Commission, are public agencies. Government Code section 6514.5 provides that, “Any public agency may enter into agreements with other state agencies pursuant to the provisions of Section 11256.” Government Code section 11256, in turn, provides that the Director of the Department of General Services possesses the authority to approve or disapprove contracts entered into between the state and public agencies. The provisions of that section do not mention review by the Board for compliance with the civil service mandate.

On its face, the CSC’s argument that the Board does not possess jurisdiction to review the disputed Contracts, appears to have merit. There is no dispute that the Commission is a public agency, and that the CSC contracted with the Commission, not a private contractor. Nevertheless, we disagree with the CSC’s characterization of the Contracts as bona fide interagency agreements permissible under the provisions of Government Code section 6514.5.

This is not a case of one public agency merely providing services to another public agency. Rather, as plainly set forth within the four corners of the Contracts, the parties clearly contemplated that the Commission would subcontract the maintenance work out to Swayzers.⁹ The Contracts further specified that the Commission would no longer pay the CSC for the Commission’s pro rata share of the maintenance work to be performed in the Park as it did when the CSC was carrying the responsibility of Park maintenance, but instead would pay its pro rata share directly to Swayzers. The CSC would thereafter provide sufficient funds to the Commission for any work performed by

⁹ Although, unlike the 2002/2003 MOU and the 2002/2003 and 2003/2004 License Agreements, the 2004/2005 License Agreement did not specify the Commission would contract the maintenance work to Swayzers, given Swayzers long-standing relationship with the Commission, it is reasonable to assume that Swayzers will continue to perform the maintenance work under the 2004/2005 License Agreement.

Swayzers in excess of the monies initially paid by the Commission. The Commission would then, in turn, channel those funds to Swayzers. Thus, the express language of the Contracts clearly contemplates that the Commission serves as a conduit through which the CSC can indirectly retain the Park maintenance services from a private contractor.

The rather tortured history regarding the CSC's attempts to enter into contracts with Swayzers to perform maintenance work in the Park further supports a conclusion that the interagency agreements serve the purpose of allowing the CSC to do indirectly what it cannot do directly under the civil service mandate – retain the services of a private contractor to do work previously performed by civil service employees. In prior contracts submitted to the Board for review, the CSC was unable to establish that the proposed contract terms would result in cognizable cost savings to the State. Through the interagency agreement mechanism, the CSC hoped to be relieved of the burden of having to justify the employment of a private contractor on a cost savings basis.

Because the plain language of the Contracts makes clear that the CSC's agreements with the Commission are nothing more than very thinly disguised attempts to circumvent civil service contracting out provisions by permitting one public agency – the Commission – to serve as a conduit for the CSC to indirectly contract with a private contractor, the Board finds that it has jurisdiction to review the disputed Contracts.

In so finding, the Board does not mean to suggest that it possesses *per se* jurisdiction to review every contract entered into between a state agency and another public agency or JPA. Here, however, given the unique history of multiple unsuccessful attempts of the CSC to contract with Swayzers, and the express contractual terms that

establish the “pass through” nature of the arrangement, the Board finds that it possesses the requisite jurisdiction to review the disputed Contracts.

CSC’s assertion that, should the Board decide that it does have jurisdiction in this case, the matter must be remanded to an ALJ so that further evidence can be presented as to the issue of whether the Contracts are justified as cost savings contracts pursuant to Government Code section 19130(a) is, however, well taken. A review of the hearing transcript before the ALJ unmistakably demonstrates that the prior hearing focused only on the issue of the Board’s jurisdiction to review the Contracts, and that the parties specifically reserved the right to present additional evidence regarding whether the Contracts are justified as cost savings contracts under Section 19130(a).

Given the foregoing, the Board remands the case to the CALJ, or his designee,¹⁰ with instructions to permit the parties to introduce evidence regarding whether the Contracts are authorized pursuant to the provisions of Government Code section 19130(a). The assigned ALJ shall thereafter prepare a proposed decision for the Board’s review that addresses the issue of whether the disputed Contracts constitute permissible cost savings agreements.

CONCLUSION

Ordinarily, the Board would not concern itself with reviewing a contract entered into between a state agency and another public agency or JPA for compliance with the civil service mandates. The Board does, however, have the option, upon the request of an affected employee organization, to investigate the contractual relationship between

¹⁰ In no event shall the case be remanded to the ALJ who issued the proposed decision that the Board rejected during its meeting of June 21, 2005.

the parties to ensure that the civil service mandate is not being improperly circumvented through the mechanism of an interagency agreement.

In this instance, the Board finds that it does have jurisdiction to review the Contracts based on both the express language of the disputed Contracts and the underlying history of those Contracts. Clearly frustrated by its prior unsuccessful attempts to justify its prior direct contracts with Swayzers as cost savings contracts, the CSC has attempted to circumvent the civil service mandate by securing the personal services of a private vendor through a contractual relationship with another public entity. The Board cannot turn a blind eye to the CSC's attempt to do indirectly that which it could not do directly – contract for personal services in violation of the civil service mandate.

If the CSC is able to enter into a contract with a private contractor that truly benefits the people of the State of California as a legitimate, cost savings contract, it need merely present that information for review by the Board. If, after review, the Board concludes that the monetary amounts reflected in the contract are accurate and would result in recognized cost savings to the State, and that other statutory and regulatory criteria for cost savings contracts are satisfied, the Board will approve the contract. Unfortunately, the CSC's prior attempts to justify its contracts with a private contractor for Park maintenance services on a cost savings basis have not been successful. Nevertheless, the CSC now has yet another opportunity to present evidence during a hearing before an SPB ALJ to establish that the disputed Contracts are justified pursuant to the provisions of Government Code section 19130(a).

ORDER

(1) The Board finds that it possesses jurisdiction to review the Contracts for compliance with the requirements of Government Code section 19130(a); and

(2) The case is remanded to the CALJ with instructions to hear the case or assign it to a different ALJ to conduct an evidentiary hearing as to the issue of whether the Contracts are permissible as cost savings contracts pursuant to the provisions of Government Code section 19130(a). At the conclusion of the hearing, the CALJ, or his designee, shall prepare a proposed decision for review by the Board.

STATE PERSONNEL BOARD¹¹

Maeley Tom, Vice President
Ron Alvarado, Member
Sean Harrigan, Member
Anne Sheehan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on October 3, 2005.

Floyd Shimomura
Executive Officer
State Personnel Board

[PSC 04 0813A-IUOE-CSC]

¹¹ President Elkins did not participate in the vote on this Decision