

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
INTERNATIONAL UNION OF)	
OPERATING ENGINEERS)	PSC No. 05-02
)	
from the Executive Officer's January 5, 2005)	
Decision Denying Review of Contracts for)	July 13, 2005
Drilling Services between the California)	
Department of Transportation and URS)	
Corporation and Geocon Consultants, Inc.)	
)	
)	

APPEARANCES: David P. Myers, Attorney, on behalf of International Union of Operating Engineers; Todd Van Santen, Deputy Attorney, on behalf of Department of Transportation.

BEFORE: William Elkins, President; 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 (IUOE) appealed from the Executive Officer's January 5, 2005 decision, which found that, pursuant to Article XXII of the California Constitution and Government Code section 4529.10 et seq., SPB does not have jurisdiction to review contracts (Contracts) for drilling services that the California Department of Transportation (DOT) entered into with URS Corporation and Geocon Consultants, Inc. (Contractors). In this decision, the Board finds that it does not have jurisdiction to review the Contracts and, therefore, sustains the Executive Officer's decision.

BACKGROUND

Under the Contracts, the Contractors have agreed to "perform geotechnical¹ site investigations and/or provide reports with recommendations" as described in the Contracts or as directed through the issuance of a Task Order. The Contracts describe the scope of work for site investigations to include "work plans, safety plans, utility clearance, obtaining permits, traffic control, drilling, sampling, field testing, working at contaminated sites, disposal of drilling waste, surveying, and performing laboratory tests and scope of final reports." The types of reports that the Contractors may be asked to prepare under the Contracts include: (1) Preliminary Foundation Reports (provide a summary of all existing geotechnical information at a proposed project site and recommendations regarding the most suitable foundation types of the proposed structure); (2) Final Foundation Recommendation Reports (provide a summary of the site specific geotechnical investigation, and recommendations for construction and design of the specific foundation type selected for design of the proposed structure); (3) Borehole Geophysical Test reports (provide data and interpretation of downhole geophysical logging performed at the site); (4) Preliminary Roadway Geotechnical Design Reports (document the results of a literature study, local experience and a geotechnical reconnaissance, and provide preliminary recommendations for project design); (5) Roadway Geotechnical Design Reports (document site subsurface geotechnical conditions, analyze those conditions as they relate to the project, assess

¹ The Merriam-Webster Online Dictionary defines "geotechnical" to mean "of or relating to geotechnical engineering." It defines "geotechnical engineering" to mean "a science that deals with the application of geology to engineering."

impacts of the geotechnical conditions on the construction of the project, and provide recommendations for both designing and constructing the roadway portions of the projects); and (6) Log of Test Boring Reports (prepared for all geotechnical boring logs performed for a project). The Contracts provide that all the geotechnical reports produced by the Contractors must be signed by a California licensed professional engineer or geologist with at least 5 years experience in the field of expertise related to the reports' subject matter.

According to IUOE, under the Contracts, the Contractors have conducted drilling work and have provided soil and rock samples directly to state employees for analysis. IUOE asserts that if state employees conduct the analysis of soil and rock samples, then state employee in Bargaining Unit 12 must perform the drilling work needed to obtain those samples.

PROCEDURAL HISTORY

By letter dated August 2, 2004, IUOE asked SPB to review the Contracts for compliance with Government Code section 19130. On August 26, 2004, DOT asserted that the Contracts were exempt from SPB review pursuant to Article XXII of the California Constitution and Government Code section 4529.10 et seq.

On September 10, 2004, IUOE responded that DOT had not provided sufficient information to determine whether the Contracts were exempt from SPB review and requested that SPB direct DOT to provide specific and factual information regarding the type of work that is being performed under the Contracts.

In response to IUOE's request, on October 6, 2004, SPB asked that DOT provide specific and detailed information that demonstrated either that: (1) the Contracts were exempt from SPB review under Article XXII of the California Constitution and Government Code section 4529.10 et seq.; or (2) the Contracts complied with Government Code section 19130. On November 3, 2004, DOT submitted its response to SPB's request. On November 18, 2004, IUOE submitted its reply.

On January 5, 2005, the Executive Officer issued his decision, which concluded that the Contracts were not subject to SPB review.

IUOE timely 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.

ISSUE

The following issue is before the Board for review:

Are the Contracts exempt from SPB review pursuant to Article XXII of the California Constitution and Government Code section 4529.10 et seq.?

DISCUSSION

Proposition 35

In *Professional Engineers in California Government v. Department of Transportation*,² the California Supreme Court recognized 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

² (1997) 15 Cal.4th 543, 547.

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 to determine whether, consistent with Article VII and its implied civil service mandate, state work legally may be contracted to private entities or whether state employees must perform it.

On November 7, 2000, the People of California adopted Proposition 35, an initiative entitled "Public Works Projects. Use of Private Contractors for Engineering and Architectural Services." Proposition 35 added Article XXII to the California Constitution. In relevant part, Article XXII provides:

SECTION 1. The State of California ... shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement. The choice and authority to contract shall extend to all phases of project development including permitting and environmental studies, rights-of-way services, design phase services and construction phase services. ...

SECTION. 2. Nothing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State ... from contracting with private entities for the performance of architectural and engineering services.

In addition to Article XXII, Proposition 35 also added Chapter 10.1 (commencing with Section 4529.10) to Division 5 of Title 1 of the Government Code. Government Code section 4529.10 provides:

For purposes of Article XXII of the California Constitution and this act, the term "architectural and engineering services" shall include all architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services.

Also included in Chapter 10.1 are Government Code section 4529.18, which provides, "If any act of the Legislature conflicts with the provisions of this act, this act shall prevail" and Government Code section 4529.19, which provides, "This act shall be liberally construed to accomplish its purposes."

Proposition 35 added Chapter 10.1 to already existing Government Code provisions governing state contracts for private architectural and engineering services, including Government Code section 4525, subdivision (d), which provides:

"Architectural, landscape architectural, engineering, environmental, and land surveying services" includes those professional services of an architectural, landscape architectural, engineering, environmental, or land surveying nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.

As a result of Proposition 35, contracts for "architectural and engineering services" as defined in Article XXII, Government Code section 4529.10, and Government Code section 4525, subdivision (d) are exempt from SPB review for compliance with Article VII and Government Code section 19130.

The Challenged Contracts

IUOE argues that the Contracts are not exempt from SPB review under Article XXII and the relevant statutes because the Contracts call solely for drilling services that are not part of a qualifying architectural and engineering service contract. According to IUOE, the Contractors are procuring soil and rock samples that are analyzed by state employees, who provide the final engineering and architectural survey reports. IUOE contends that, if state employees are performing the ultimate architectural and engineering services, then the drilling work that is incidental to those services must be performed by state employees in Bargaining Unit 12, who have traditionally performed

state drilling services. In other words, it is IUOE's position that, while DOT, pursuant to Article XXII, may contract with a private contractor to perform all the architectural and engineering services needed for a project, including incidental drilling work, DOT may not contract for only incidental drilling work if the ultimate architectural and engineering services for a project will be performed by state employees. IUOE's assertions are not well-taken.

First, under the express terms of the Contracts, the Contractors are not performing only drilling services. Instead, as DOT argues in its submissions, the Contractors are also providing geotechnical testing, reports, site investigations, and recommendations to DOT in connection with future design/construction projects.

Moreover, even if the contracted work were deemed to be only drilling and other incidental geotechnical services, nothing in Article XXII or the implementing statutes provides that the constitutional exemption applies only if all the architectural and engineering services required for a project are contracted. Section 1 of Article XXII explicitly states that, "The choice and authority to contract shall extend to all phases of project development including permitting and environmental studies, rights-of-way services, design phase services and construction phase services." From this language, it appears clear that the exemption set forth in Article XXII applies to contracts for any architectural and engineering services that may be provided, including incidental geotechnical services like the ones described in the Contracts, even though they may constitute only a single phase of an overall project.

In addition, Government Code section 4525, subdivision (d) provides that architectural and engineering services include "incidental services" that architects and

engineers and "those in their employ may logically or justifiably perform." The contracted drilling services are incidental services that may logically and justifiably be performed by the Contractors, even if state employees may analyze soil and rock samples generated from those services.

IUOE has not submitted or cited to any authority to compel a different interpretation of Article XXII and the relevant Government Code provisions.

CONCLUSION

The drilling services provided under the Contracts fall within the scope of "architectural and engineering services" that are exempt from SPB review under Article XXII of the California Constitution. The Board agrees with the Executive Officer that SPB does not have jurisdiction to review the Contracts for compliance with Government Code section 19130.

ORDER

The Board hereby sustains the Executive Officer's decision finding that, pursuant to Article XXII of the California Constitution and Government Code section 4529.10 et seq., SPB does not have jurisdiction to review the challenged Contracts.

STATE PERSONNEL BOARD

William Elkins, President
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 July 13, 2005.

Floyd Shimomura
Executive Officer
State Personnel Board

[PSC 05-02-IUOE-DOT]