

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
CALIFORNIA HIGHWAY PATROL)	PSC No. 07-01
)	
From the Executive Officer's February 22, 2007 Disapproval of Ten Contracts for Custodial Services Proposed or Executed by the California Highway Patrol)	September 4, 2007
)	
)	

APPEARANCES: Anne M. Giese, Attorney, on behalf of Service Employees International Union, Local 1000 (California State Employees' Association); Barrett W. McInerney, Labor Relations Counsel, Department of Personnel Administration, on behalf of California Department of the Highway Patrol.

BEFORE: Sean Harrigan, President, Anne Sheehan, Vice President; Patricia Clarey, Maeley Tom and Richard Costigan, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the California Highway Patrol (CHP) appealed from the Executive Officer's February 22, 2007, decision disapproving ten contracts (Contracts) proposed or executed by the CHP with various contractors for the provision of custodial services at for the CHP at Area Offices throughout the state.

In this decision, the Board finds that the Contracts are not justified pursuant to the provisions of Government Code section 19130(b), and that the Executive Officer's Decision disapproving the Contracts should be sustained.

BACKGROUND

CHP began contracting for custodial services at several Area Offices after numerous vacant maintenance positions at the CHP's ten Area Offices were

permanently eliminated by the Department of Finance due to the State's budget crisis, leaving the CHP unable to fill the vacancies with new hires. Service Employees International Union (SEIU), Local 1000, asserts that this work can be done adequately and competently by civil service employees, and that the State's failure to allocate sufficient staff positions to perform the required function does not justify contracting out, as set forth in *Professional Engineers in California Government v. Department of Transportation*.¹

PROCEDURAL HISTORY

By letter dated December 20, 2006, pursuant to Government Code section 19132 and SPB Rule 547.59 et seq., SEIU requested SPB to review the Contracts² for compliance with Government Code section 19130, subdivision (b). Thereafter, the SPB notified CHP of the request to review the contracts and informed CHP that it had until January 19, 2007, to submit its response to the SPB. SPB informed CHP that failure to comply with the specified deadlines may result in a decision being rendered without CHP's input. CHP subsequently requested and was granted a

¹ (1997) 15 C.4th 543, 571-572.

² The terms of the specific contracts, as set forth in the Invitation for Bids, are as follows:

RFP 078CP6200I—Fleet Ops Section, South (Torrance): January 1, 2007 through December 31, 2009.

RFP 078CP6141—San Onofre (Oceanside): January 1, 2007 through December 31, 2008, with a possible one-year extension at the sole discretion of CHP.

RFP 078CP5905R—Santa Ana January 1, 2007 through December 31, 2008.

RFP 078CP5634R—Burney: February 1, 2007 through December 31, 2008.

RFP 078CP6143I—Redwood City: January 1, 2007 through September 30, 2008.

RFP 078CP6171—Peralta Platform Scales (Anaheim): January 1, 2007 through December 31, 2009.

RFP 078CP6139—Blythe Platform Scales: January 1, 2007 through December 31, 2008.

RFP 078CP6170—Monterey Park: January 1, 2007 through December 31, 2008.

RFP 078CP6167—Newhall Area Office/Castaic Inspection Facility (Los Angeles): January 1, 2007 through December 31, 2008.

RFP 078CP6159—Academy, West Sacramento (Yolo): January 1, 2007 through December 31, 2008.

two-week extension of time to respond, to February 2, 2007. Nonetheless, CHP neither filed a response nor requested any further extension of time to respond. Because CHP failed to provide a response to SEIU's challenge of the Contracts, the matter was deemed submitted for review by the Executive Officer³ based solely upon information provided by SEIU.

The Executive Officer issued a decision dated February 22, 2007, disapproving the Contracts on the ground that CHP had failed to provide sufficient information to demonstrate that the Contracts were justified under any of the exceptions set forth in Government Code section 19130, subdivision (b).

By letter dated March 23, 2007, CHP appealed to the Board from the Executive Officer's decision. CHP filed its opening brief on April 17, 2007. SEIU filed its response on May 4, 2007.

The Board has reviewed the entire record for this case, including the oral and written arguments submitted by the parties, and now issues the following decision.

ISSUE

The following issue is before the Board for review:

Are the Contracts justified under Government Code section 19130, subdivisions (b)(3) or (8)?

³ Floyd Shimomura was the Executive Officer at the time this matter was submitted for initial review and issued the decision that is the subject of this appeal. On April 30, 2007, Suzanne M. Ambrose was appointed as the SPB's Executive Officer.

POSITIONS OF THE PARTIES

In his February 22, 2007 Decision, the Executive Officer disapproved the Contracts because the CHP had failed to provide sufficient information to demonstrate that the Contracts were justified pursuant to the provisions of Government Code section 19130, subdivision (b). The Executive Officer determined that, under *Professional Engineers*, in the absence of the CHP seeking prior approval of the Contracts as “cost-savings” contracts under Government Code section 19130, subdivision (a), the burden is on the department to establish that the Contracts fall within one of the exceptions contained in Government Code section 19130(b). Because CHP failed to provide any justification for the Contracts under Government Code section 19130, subdivision (b) and did not seek prior approval of the Contracts under Government Code section 19130 subdivision (a), the Executive Officer recommended that the Contracts be disapproved.

CHP asserted in its’ brief⁴ that the decision of the Executive Officer should be reversed because the CHP’s inability to staff the necessary positions through the civil service is based not on any fault of its own, but solely upon the failure of the Department of Finance and the Legislature to authorize funding for the positions that were eliminated due to the state’s budget crisis. CHP’s brief further asserted that it attempted to secure civil service employees from other state departments but was unable to do so. CHP also argues that the Board has improperly expanded the holding of *Professional Engineers* beyond the facts of that case, and that CHP has

⁴ At oral argument, CHP submitted the matter, and conceded that, because the facts in this case are nearly identical to those recently decided by the Board in PSC 06-05, oral arguments were unnecessary.

met the criteria for contracting out under Government Code sections 19130(b)(3) and (8).

SEIU contends that, pursuant to the decision of the California Supreme Court in *Professional Engineers* and the Board's decisions in *In the Matter of the Appeal by SEIU*,⁵ *CAPS/Department of Pesticide Regulation*,⁶ and *State Compensation Insurance Fund*,⁷ the Executive Officer correctly determined that the Contracts cannot be approved based upon the state's failure to adequately fund the positions. SEIU asserts that civil service employees are available to perform the work. SEIU further asserts that neither vacancies, staffing shortages, nor hiring freezes justify contracting out and that CHP has failed to demonstrate that it sought to have its lost funding restored. SEIU also asserts that CHP made no effort to recruit new employees and that the offices in question are not so remote as to render hiring civil servants impossible. Finally, SEIU asserts that, because CHP offered no evidence justifying the contracts, it failed to meet its burden of proof.

LEGAL PRINCIPLES

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

⁵ (2005) PSC No. 05-03.

⁶ (2002) PSC No. 01-09.

⁷ (2003) PSC Nos. 03-06, 03-07, 03-08.

⁸ *Supra*, 15 Cal.4th at p. 547.

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.

Government Code section 19130, subdivision (b)(3), authorizes a state agency 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.

Government Code section 19130, subdivision (b)(8), 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.

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.⁹ 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

⁹ *Department of Pesticide Regulation*, PSC No. 01-09, at p. 13.

employed to perform those services.¹⁰ As the Board stated In *Department of Pesticide Regulation*,

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.¹¹

The failure of the state to employ sufficient civil service personnel to perform the state's business cannot be used to create an exemption to the civil service mandate. As determined by the Board in *State Compensation Insurance Fund*, even the imposition by the state of a hiring freeze and the refusal of the Department of Finance to approve an exemption to the freeze is insufficient to justify contracting out under Government Code section 19130(b)(3) or (8).¹²

DISCUSSION

CHP asserts that, because the elimination by the Department of Finance of several custodial positions in its various Area Offices was beyond CHP's control, it should be allowed to contract out the positions. As in *State Compensation Insurance Fund*, the fact that CHP was unable to fill its positions due to restraints placed upon it by the Department of Finance does not relieve CHP from the constitutional mandate that civil service work be performed by civil service employees. Moreover, CHP has failed to establish that it took any steps to restore the funding it lost for the positions. At a minimum, CHP could have sought to regain funding through the budget change proposal (BCP) process prior to contracting out. Instead, the record reflects that CHP made only a modest attempt to obtain civil

¹⁰ *Id.*

¹¹ *Id.*, at p. 14.

¹² PSC Nos. 03-06, 03-07, 03-08 at p. 12.

service employees from other departments and defaulted to its practice of contracting out for custodial services when those modest efforts failed.

The parties do not dispute that the custodial services CHP sought to contract out are services that have historically been performed adequately and competently by civil service employees. Moreover, CHP has not disputed the information provided by SEIU establishing that many civil service custodians live and work in the localities surrounding the various Area Offices in question. The only issue is whether the elimination of positions from CHP's budget creates the necessary justification for contracting out. While the Board is mindful of the challenges state agencies face in performing their statutory duties in the face of shrinking budgets, the state cannot create an artificial need for private contractors by refusing to hire sufficient numbers of civil service employees to perform its work, and then relying upon the workforce shortage it has created to justify the hiring of private contractors.¹³

CONCLUSION

CHP has failed to establish that its need for contracting out the positions in its Area Offices throughout the state arises from anything other than the elimination of funding for those positions through the state budget process and CHP's failure to seek restoration of the funding for that position. The Executive Officer's decision disapproving the Contracts was correct and is affirmed.

¹³ *State Compensation Insurance Fund*, at p. 11, citing *Professional Engineers v. CalTrans*, *supra*.

ORDER

The Board finds that the contracts proposed or executed by the California Highway Patrol for the provision of custodial services at various CHP Area Offices are not justified under either Government Code section 19130, subdivisions (b)(3) or (8). Accordingly, the Contracts are hereby disapproved.

STATE PERSONNEL BOARD

Sean Harrigan, President
Anne Sheehan, Vice President
Patricia Clarey, Member
Richard Costigan, Member
Maeley Tom, 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 September 4, 2007.

Suzanne M. Ambrose
Executive Officer
State Personnel Board

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