

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by	)	<b>BOARD DECISION</b>
	)	
<b>DEPARTMENT OF HEALTH SERVICES</b>	)	<b>PSC No. 07-02</b>
	)	
From the Executive Officer's April 19, 2007	)	
Disapproval in Part of a Contract for Janitorial	)	March 4, 2008
Services by the Department of Health Services	)	
	)	

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**APPEARANCES:** Anne M. Giese, Attorney, on behalf of Service Employees International Union, Local 1000 (California State Employees' Association); Timothy Ford, Senior Staff Counsel, Department of Public Health, on behalf of California Department of Health Services.<sup>1</sup>

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

**DECISION**

This matter is before the State Personnel Board (SPB or Board) after the Department of Health Services (DHS) appealed from the Executive Officer's April 19, 2007 decision disapproving in part a proposed "emergency" personal services contract (Contract) between DHS and a private firm for janitorial services to be performed at DHS's Richmond office. The term of the Contract was from January 1, 2007 through June 30, 2007.

In this decision, the Board sustains the Executive Officer's Decision approving the Contract for a limited period of three months.

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<sup>1</sup> Effective July 1, 2007, the Department of Health Services was reorganized and the Department of Public Health created. The contract at issue in this case is within the authority of the newly-created Department of Public Health. Because the contract was entered into by the then-existing DHS, this decision will continue to refer to that entity.

## BACKGROUND

DHS asserts that it has been contracting for janitorial services at its Richmond office for over 20 years. On December 4, 2006, pursuant to Government Code section 19130, subdivision (a), DHS submitted to SPB a proposed “cost-savings” contract for janitorial services at its Richmond office. That contract was to commence on January 1, 2007. After the SPB notified the affected labor organization of the proposed contract pursuant to Government Code section 19131,<sup>2</sup> on January 8, 2007, the Service Employees International Union, Local 1000 (SEIU), filed a challenge to that contract with SPB, thus initiating SPB’s review of the proposed cost-savings contract under Government Code section 19132.<sup>3</sup> While the proposed cost-savings contract was pending review by before the Executive Officer as SPB Case No. 06-007(a), on or about December 22, 2006, DHS entered into an “exceptions” contract under Government Code section 19130(b) for the same facility for the period January 1, 2007 through June 30, 2007. On March 19, 2007, the

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<sup>2</sup> Government Code section 19131 provides: “19131. 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. Departments or agencies submitting proposed contracts shall retain and provide all data and other information relevant to the contracts and necessary for a specific application of the standards set forth in subdivision (a) of Section 19130. 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.”

<sup>3</sup> Government Code section 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.”

Executive Officer disapproved the original proposed cost-savings contract in Case No. 06-007(a). DHS did not appeal the Executive Officer's decision in that case.<sup>4</sup>

In this proceeding, DHS asserts that it needed to enter into the Contract at issue in this case on an "emergency" basis due to SEIU's challenge to the proposed cost-savings contract in Case No. 06-007(a). In essence, DHS asserts that SEIU's challenge in SPB Case No. 06-007(a) resulted in a delay in the implementation of that contract while it remained under review by the Board, and that the 6-month Contract in this case was necessary to avoid a disruption in services. In response, SEIU asserts that the work to be performed under the Contract can be done adequately and competently by civil service employees, and that the fact that it filed a challenge to a related proposed cost-savings does not justify contracting out beyond the three-month period approved by the Executive Officer.

### **PROCEDURAL HISTORY**

By letter dated February 14, 2007, pursuant to Government Code section 19132 and SPB Rule 547.59 et seq., SEIU requested SPB to review the Contract for compliance with Government Code section 19130, subdivision (b). After receiving the submissions of the parties, the Executive Officer issued a decision dated April 19, 2007, finding that DHS had failed to establish good cause for approval of the Contract under any of the exceptions set forth in Government Code section 19130, subdivision (b), but nonetheless approving the Contract for a period not to exceed three months in order to afford DHS the opportunity to recruit and hire civil service custodians at the facility.

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<sup>4</sup> In addition, the Board's official records reflect that, on August 31, 2007, the Executive Officer disapproved another proposed cost-savings contract for janitorial services in the same location. (SPB

By letter dated May 29, 2007, DHS appealed to the Board from the Executive Officer's decision. DHS filed its opening brief on June 29, 2007. SEIU filed its response on July 19, 2007. DHS filed its reply on July 26, 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:

Has DHS provided sufficient justification to show that the Contract is justified under Government Code section 19130, subdivisions (b)(8) or (10)?

### **POSITIONS OF THE PARTIES**

In the April 19, 2007 Decision, the Executive Officer determined that DHS had not established that good cause existed to approve the Contract pursuant to Government Code section 19130, subdivisions (b)(3), (8) or (10). Moreover, the Executive Officer determined that, although the "urgent" need to contract out the janitorial services in question was occasioned solely by the Department's failure to seek timely review by the SPB under Government Code section 19131 of the proposed cost-savings contract, great harm to the public as a whole would result from a lack of janitorial services at the Richmond campus, which houses laboratories and programs that form the mainstay of California's public health defense system. Therefore, the Executive Officer authorized DHS to contract for janitorial services at the Richmond Campus for a period not to exceed three months. The Executive Officer expressly placed DHS on notice that it needed to take all reasonable steps to

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Case No. 07-002(a.) DHS did not appeal that decision.

ensure that janitorial services are provided through the civil service in an expeditious manner.

DHS asserts that the decision of the Executive Officer should be reversed and the Contract should be approved for its full 6-month term due to the pendency of proceedings involving SEIU's challenge to the cost-savings contract in SPB Case No. 06-007(a). DHS asserts that it has been contracting out for janitorial services for 20 years without challenge, and that the sudden and unexpected challenge by SEIU generated the need for an emergency contract to provide janitorial services at the Richmond campus pending the outcome of the challenge to the cost-savings contract. DHS further asserts that, since it has been contracting out the work for 20 years, it does not have the necessary civil service positions, equipment, supplies or infrastructure in place to suddenly begin providing janitorial services with civil service employees. Therefore, DHS, asserts, the circumstances under which the contract was let satisfy the criteria for contracting out under Government Code sections 19130(b)(8) and (10).<sup>5</sup>

SEIU did not appeal the Executive Officer's decision to approve the Contract for a period of three months. SEIU contends that, by failing to appeal the Executive Officer's decision in Case No. 06-007(a), DHS waived any objection that its rights under Government Code section 19130(a) were impaired. SEIU further contends that the Executive Officer correctly determined that the Contract is not justified under either subsection (b)(8) or (b)(10) of Government Code section 19130.

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<sup>5</sup> On appeal, DHS conceded that subdivision (b)(3), upon which it relied before the Executive Officer, is not a viable basis for justifying the Contract.

## LEGAL PRINCIPLES

In *Professional Engineers in California Government v. Department of Transportation*,<sup>6</sup> 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.

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.

Government Code section 19130, subdivision (b)(10), 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.

In order to justify a contract under Government Code section 19130(b)(8), a state agency must show that the state could not “feasibly” provide the services, in

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<sup>6</sup> (1997) 15 C.4th 543, 547.

other words, that the state is not capable of providing the equipment or personnel to perform the contracted services in the locations where the contractors are working.<sup>7</sup>

In order to justify a contract under Government Code section 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.<sup>8</sup> 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.<sup>9</sup>

## **DISCUSSION**

DHS does not assert that the state is incapable of providing the equipment and personnel necessary to perform janitorial services at its Richmond office, but only that DHS was unprepared to do so at the time SEIU filed its challenge. Nor does it assert that there is an urgent, temporary or occasional need for such services, and that a delay in implementation under the civil service would frustrate the very purpose of those services. Instead, it asserts that the fact that SEIU chose to exercise its legal right to challenge the purported cost-savings contract at issue in Case No. 06-007(a), where similar contracts had not been challenged previously, established a justification for contracting out under Government Code section 19130(b). DHS has offered no explanation for its failure to timely submit its proposed cost-savings contract so that any review could be completed prior to the

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<sup>7</sup> *Department of Pesticide Regulation* (2002) PSC No. 01-09 at p. 16.

<sup>8</sup> *California State Employees Association* (2003) PSC No. 03-02 at p. 3; *State Compensation Insurance Fund* (2003) PSC No. 03-02 at p. 14.

expiration of the previous contract, but relied instead on the fact that its prior contracts had not been challenged. DHS has offered no explanation as to why the three-month period granted by the Executive Officer for DHS to hire civil service janitors was insufficient, nor has it offered any evidence of any steps it may have taken to obtain civil service janitors after the Executive Officer disapproved the contract in Case No. 06-007(a) in March 2007.

There is no dispute that the custodial services DHS sought to contract out are services that have historically been performed adequately and competently by civil service employees, and that civil service custodians live and are available for work in the Richmond area. We agree with the Executive Officer that DHS has failed to establish justification under Government Code section 19130(b) for contracting out janitorial services at its Richmond office.

We also agree with the Executive Officer that DHS's failure to timely seek approval of its proposed cost-savings contract—which has now been disapproved—precipitated its need for the “emergency” Contract at issue in this case.<sup>10</sup>

The only issue before the Board is whether the Department justified its failure to hire civil servants within the three months specified by the Executive Officer and/or need to extend the Contract an additional three months. DHS has not

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<sup>9</sup> *California Highway Patrol* (2007) PSC No. 06-05 at p. 6.

<sup>10</sup> DHS did not seek approval of the Contract as an “emergency” contract under Government Code section 19130(b)(6). That section authorizes a state agency to enter into a personal services contract when: “The nature of the work is such that the Government Code standards for emergency appointments apply. These contracts shall conform with Article 8 (commencing with Section 19888) of Chapter 2.5 of Part 2.6.” Government Code section 19888 authorizes an appointing power to make emergency appointments not to exceed working days to prevent the stoppage of public business when an actual emergency arises.

established that the three month period allowed by the Executive Officer for transitioning to the use of civil service janitors was inadequate.

**CONCLUSION**

DHS has failed to establish that its need for contracting out janitorial services at its Richmond office arises from anything other than its failure to timely seek approval of its proposed cost-savings contract and/or its failure to take appropriate steps to ensure the hiring of civil service janitors within the three-month approval period granted by the Executive Order. The Executive Officer's decision disapproving the Contract but giving DHS a three-month period to wind down the Contract was correct.

**ORDER**

The Board finds that Contract No. 06-55711 entered into by the Department of Health Services for the provision of custodial services at DHS's Richmond office is not justified under either Government Code section 19130, subdivisions (b)(8) or (10). Accordingly, the Contract is hereby disapproved. The Board further finds that the three-month limited authorization period granted by the Executive Officer shall not be extended.

**STATE PERSONNEL BOARD**

Sean Harrigan, President  
Richard Costigan, Vice President  
Maeley Tom, Member  
Anne Sheehan, Member  
Patricia Clarey, 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 March 4, 2008.

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Suzanne M. Ambrose  
Executive Officer  
State Personnel Board

[PSC 07-02 DHS-SEIU]