



CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall • Sacramento, CA 95814

In the Matter of the Appeal by the)

**DEPARTMENT OF
TRANSPORTATION (CALTRANS)**)

From the Executive Officer's October)
25, 2007, Disapproval of CalTrans')
Personal Services Contracts for)
Janitorial Services at Department)
Offices in: District 3, Marysville District)
Office (03A1131); District 4, Oakland)
Construction Field Office (04A2198);)
District 4, San Rafael Construction)
Field Office (04A2270); District 4, San)
Bruno Materials Lab (04A2475); District)
4, Oakland Construction Field Office)
and Toll Bridge (04A2537); District 8,)
Shop 8 (08A1412); District 9,)
Headquarters (09A0322); District 1,)
District Office Complex (01A0828);)
District 7, Lincoln Training Center)
(07A2034); and District 8, Fontana)
Rehabilitation Workshop (08A1423))

Case No. PSC No. 07-05

**RESOLUTION
ADOPTING IN PART AND VACATING IN
PART THE OCTOBER 25, 2007,
DECISION OF EXECUTIVE OFFICER**

WHEREAS, the Department of Transportation (CalTrans) entered into ten (10) personal services contracts for the provision of custodial services (Contracts) at various office locations throughout the state;

WHEREAS, by letter dated June 15, 2007, pursuant to Government Code section 19131, the Service Employees International Union, Local 1000 (California State Employees' Association) (SEIU) filed a request with the State Personnel Board (SPB) to review the Contracts for compliance with Government Code section 19130, subdivision (b);

WHEREAS, by letter dated August 9, 2007, CalTrans submitted its justification for entering the Contracts;

WHEREAS, by letter dated September 7, 2007, SEIU submitted a reply brief wherein it withdrew, without prejudice, its challenges to Contract numbers 04A2198, 04A2270, 04A2537, 07A2034, and 08A1423, reducing the number of challenged contracts to four (4): 01A0828, 04A2475, 08A1412, and 09A0322;

WHEREAS, on October 25, 2007, after receiving and reviewing the briefs and evidence submitted by CalTrans and SEIU, the Executive Officer issued her decision finding the challenge to Contract number 03A1131 moot and disapproving all remaining nine (9) Contracts;

WHEREAS, CalTrans timely appealed the Executive Officer's decision to the five-member Board;

WHEREAS, on April 7, 2008, CalTrans and SEIU presented oral argument before the Board;

WHEREAS, after reviewing the parties' written submissions and hearing the parties' oral arguments, the Board finds that, consistent with the Board's decision in PSC 01-09, the evidence presented by CalTrans on appeal that it failed to present to the Executive Officer when the matter was pending before her, has not been considered by the Board on appeal;

WHEREAS, the evidence clearly reveals that SEIU withdrew, without prejudice, its challenges to Contracts 04A2198, 04A2270, 04A2537, 07A2034, and 08A1423 prior to the Executive Officer issuing her decision; and

WHEREAS, the Executive Officer's ruling with respect to the withdrawn contracts was inadvertent;

THEREFORE, BE IT RESOLVED AND ORDERED that:

1. Except as to those portions relating to Contract numbers 04A2198, 04A2270, 04A2537, 07A2034, and 08A1423, the Board adopts the Decision of the Executive Officer dated October 25, 2007, as its decision in this case, thereby finding moot the

challenge to Contract number 03A1131 and disapproving Contract numbers 01A0828, 04A2475, 08A1412, and 09A0322.

2. Those portions of the Executive Officer's October 25, 2007, Decision relating to Contract numbers 04A2198, 04A2270, 04A2537, 07A2034, and 08A1423 are hereby vacated.

* * * * *

The foregoing resolution was made and adopted by the State Personnel Board in Case No. PSC No. 07-05 at its meeting on April 7, 2008, as reflected in the record of the meeting and Board minutes.



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October 25, 2007

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Re: Request For Review Of Proposed Or Executed Contracts For Custodial Services at Department of Transportation Offices at: District 3, Marysville District Office (03A1131); District 4, Oakland Construction Field Office (04A2198); District 4 (San Rafael Construction Field Office (04A2270); District 4 San Bruno Materials Lab (04A2475); District 4, Oakland Construction Field Office and Toll Bridge (04A2537); District 8, Shop 8 (08A1412); District 9, Headquarters (09A0322); District 1, District Office Complex (01A0828); District 7, Lincoln Training Center (07A2034); and District 8, Fontana Rehabilitation Workshop (08A1423)
[SPB File No. 07-011(b)]

Dear Ms. Giese and Ms. Epstein-Terris:

By letter dated June 15, 2007, Service Employees International Union (SEIU), Local 1000 (SEIU) asked, pursuant to Gov. Code § 19132 and Title 2, Cal. Code Regs., § 547.59 *et seq.*, the State Personnel Board (SPB) to review for compliance with Gov. Code § 19130(b), ten contracts (hereinafter “Contracts”) proposed or entered into by the Department of Transportation (Department) for custodial services at the following Department District offices: District 3, Marysville District Office (03A1131); District 4, Oakland Construction Field Office (04A2198); District 4 (San Rafael Construction Field Office (04A2270); District 4 San Bruno Materials Lab (04A2475); District 4, Oakland Construction Field Office and Toll Bridge (04A2537); District 8, Shop 8 (08A1412); District 9, Headquarters (09A0322); District 1, District Office Complex (01A0828); District 7, Lincoln Training Center (07A2034); and District 8, Fontana Rehabilitation Workshop (08A1423).

On June 19, 2007, the SPB notified the Department that SEIU had requested that SPB review the Contracts, and informed the Department that it had until July 9, 2007, to

submit its response to the SPB. On July 3, 2007, the SPB granted the Department's request for an extension of time until August 10, 2007, to file its response. The SPB received the Department's response on August 10, 2007. On August 21, 2007, the SPB granted SEIU's request for an extension of time until September 7, 2007, to file its reply. The SPB received SEIU's reply on September 7, 2007, after which the matter was deemed submitted for review by the Executive Officer.

For those reasons set forth below, I find that the Department has not provided sufficient information to demonstrate that the Contracts are justified pursuant to the provisions of Government Code section 19130(b)(8) or (10). I am, therefore, disapproving the Contracts.¹

Position of the Department

As an initial matter, the Department generally asserts that it is currently seeking budgetary augmentation for custodial positions and is in the process of administering an examination for custodial employees, and a Budget Change Proposal (BCP) for fiscal year 2007/08 was approved for six full-time custodial positions in District 3. In addition, the Department is currently exploring the possibility of securing budget authority for fiscal year 2008/09 for custodial positions in Districts 1 and 9, both of which are small Districts with limited resources. Furthermore, the Department anticipates issuing an eligibility list for custodians during October/November 2007, which will enable the Districts to hire additional custodians.

With respect to Contract No. 03A1131, the Department maintains that the SPB previously disapproved that Contract in SPB File No. 05-024(b) and, as a result, the Contract was terminated during November 2006. Accordingly, the Department asserts that SEIU's challenge to the Contract is moot.

The Department further maintains that all of the Contracts are justified under Gov. Code § 19130(b)(10), as the services are "urgent" due to general health and safety issues that will arise if working areas are not maintained in a clean and safe manner, as required by the California Occupational Safety and Health Act of 1973 (CalOSHA) (Lab. Code § 6300 *et seq.*), as well as by Section 10.1 of Memoranda of Understanding (MOU) for Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20 and 21.

The Department provided the following justification for each specific Contract:

Contract No. 01A0828 (District 1)

The Contract is due to expire on October 31, 2007, and the Department plans to re-bid the Contract for one-year in order to provide essential services while the Department is in the process of hiring civil service custodians. District 1 is "hoping to receive funding

¹ As discussed, *infra*, because I find that Contract No. 03A1131 has already been disapproved by the SPB in File No. 05-024(b), I am dismissing SEIU's challenge to that Contract.

for approximately six custodial positions that it would like to fill,” when the new eligibility list is released and budgetary resources are approved. Consequently, the Contract is “temporary” under Gov. Code § 19130(b)(10).

Contract Nos. 04A2198 and 04A2537 (District 4)

The above Contracts provide for custodial services for leased trailers serving as toll bridge construction offices. The leases for both trailers expire on December 31, 2007, after which they will be renewed for another five to six years. Each trailer requires two hours of cleaning, three days per week, and the Department of General Services (DGS) declined to provide cleaning services for the trailers. The Department anticipates the trailers will no longer be needed after the construction projects are completed in 2012 and 2013. In addition, any re-bid for Contract No. 04A2198 will specify that the contract will be terminated when the custodian hiring list is released “and the appropriate funding category is allocated.” As a result, the Contracts are “temporary” under Section 19130(b)(10).

Contract No. 04A2270 (District 4)

The Contract is for custodial services at a leased facility for which DGS declined to provide cleaning and maintenance services. The building requires two hours of cleaning, three days per week. The Contract expired on July 14, 2007, and the replacement Contract specifies that the Contract will be terminated when the custodian hiring list is released “and the appropriate funding category is allocated.” The replacement Contract has a short term in anticipation of District 4’s plan to hire civil service employees. As a result, the Contract is “temporary” under Section 19130(b)(10).

Contract No. 04A2475 (District 4)

The Contract is for custodial services for the 11,000 square foot San Bruno materials testing lab, and cleaning services must be performed Monday through Saturday between 7:00 p.m. and 5:00 a.m., as material testing is both time and temperature sensitive and cannot be interrupted. DGS declined District 4’s request for cleaning services. Because of the difficulty in obtaining cleaning services at night, the Contract “provides services that are not feasibly provided by the State in the location where the services are performed,” and, as such, the Contract is justified under Section 19130(b)(8).

Contract No. 07A2034 (District 7)

The Contract is for custodial services at five separate maintenance buildings totaling 31,800 square feet, and requires three hours of cleaning, five days per week. The contractor is a “sheltered workshop” under Welfare and Institutions Code § 19400 *et seq.*, which promotes work opportunities for businesses that employ persons with disabilities. Cleaning services must be performed on a daily basis and during times of

day that will not interfere with the work of the maintenance crews. This leaves only a small window of time each day during which cleaning services can be provided. Moreover, the work must be performed during the same rotating schedule for a variable three hour period that the maintenance crews work, and it is difficult to hire permanent civil service custodial staff willing to work that schedule. In addition, District 7 has no budget augmentation to hire civil service custodians. As a result, the Department maintains that the Contract is justified under Section 19130(b)(8), because the services cannot feasibly be provided by the State at the times and in the location where the services are performed.

Contract No. 08A1412 (District 8)

The Contract is for custodial services for a 5,555 square foot equipment shop, which requires four hours of cleaning, five days per week. The Contract expires on June 15, 2008, at which time District 8 plans to hire three janitors from the janitorial hiring list once it is released "if District 8 receives the resources for these positions." As a result, the Contract is "temporary" under Section 19130(b)(10).

Contract No. 08A1423 (District 8)

The Contract is for custodial services for a 8,910 square feet of maintenance office buildings that require five hours of cleaning, two days per week. Every third month, the floors and rugs need to be waxed and shampooed respectively, which requires approximately 18 additional after-work hours. The contractor is a "sheltered workshop" under Welfare and Institutions Code § 19400 *et seq.*, which promotes work opportunities for businesses that employ persons with disabilities. Because the Contract expired on September 30, 2007, it is "temporary" under Section 19130(b)(10).

Contract No. 09A0322 (District 9)

The Contract is for custodial services for the 45,712 square foot District 9 Headquarters office in Bishop, which requires approximately 40-45 hours of cleaning services per week. Bishop is located in a remote location, and all other state agencies in the area, with the exception of the Department of the California Highway Patrol (CHP), contract for custodial services. Neither DGS nor CHP was able to provide custodial services for the Department. District 9 "anticipates receiving budget authority and resources for 2-3 custodial positions" during fiscal year 2008/09, and anticipates hiring civil service employees to perform the Contract functions when the custodial hiring list is released "and funding for the custodial positions is available." As a result, of the foregoing, the Contract is authorized under Section 19130(b)(8) because of the remote location where the services are to be performed, and due to the unavailability of civil service staff in the area that can be loaned to the Department. The Contract is also "temporary" under Section 19130(b)(10) because it expired on August 31, 2007, and the new Contract will be terminated as soon as the custodial hiring list is released.

Analysis

In *Professional Engineers in California Government v. Department of Transportation*,² 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(b)(8)

Government Code section 19130(b)(8) authorizes a state agency to enter into a personal services contract 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 analyzing Section 19130(b)(8), the SPB has previously concluded:

Government Code section 19130(b)(8) sets a higher standard than merely showing that the state does not now have the personnel or equipment to perform the contracted services in the locations in which they are currently being performed. The subdivision requires that [the Department] must show that the state could not “feasibly” provide the services, in other words, that the state is not capable of providing the equipment or personnel to perform the contracted services where the contractors are working.³

Here, the Department asserts that Contract No. 07A2034 is authorized under Section 19130(b)(8) because it is “difficult” to hire permanent civil service employees willing to work the requisite rotating shift when the cleaning services are to be provided, and because District 7 does not have the requisite budget augmentation to hire civil service custodians. Likewise, the Department asserts that Contract No. 04A2475 is authorized under Section 19130(b)(8) because it is “difficult” to obtain cleaning services at night.

² (1997) 15 Cal.4th 543, 547.

³ *Dept. of Pesticide Regulation PSC No. 01-09*, p. 16.

The Department, however, failed to present any specific evidence demonstrating what efforts it has made to hire civil service employees to work such “difficult” shifts, and the simple fact is that some individuals residing in the geographic area are obviously willing to work those shifts, as evidenced by the fact that the work is being performed under the Contract.

With respect to the Department’s assertion that the Contract is justified because District 7 does not possess the requisite budget allocation to hire civil service custodians, that fact cannot be used to justify the Contract under Section 19130(b)(8). The California Supreme Court has previously determined that contracting out is not permitted under Section 19130(b) in those instances where the State has failed to hire or failed to authorize the hiring of a sufficient number of civil service employees to perform those duties contemplated under the Contract.⁴

The Department also asserts that Contract 09A0322 is authorized under Section 19130(b)(8) because the location where the work is to be performed is in a remote geographic location, and all other state agencies in the area, except for the CHP, also contract out for custodial services.

No evidence was provided by the Department, however, concerning what specific recruitment efforts it has made to hire civil service custodians in the Bishop area. Absent evidence of good faith efforts to recruit employees in a particular geographic region, the Department cannot establish that it is not feasible to hire civil service custodians to perform those duties contemplated under the Contract.

Given the foregoing, I find that Contract Nos. 04A2475, 07A2034, and 09A0322 are not justified under Section 19130(b)(8).

Government Code section 19130(b)(10)

Government Code section 19130(b)(10) authorizes a state agency to enter into a personal services contract 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.

(“Temporary Contracts”)

The Department asserts that Contract Nos. 01A0828, 04A2198, 04A2270, 08A1423, and 09A0322 are justified as “temporary” Contracts under Section 19130(b)(10)

⁴ See *Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal. 4th 543, 571-572. (finding that Caltrans created an artificial “need” for private contracting that resulted from its practice of maintaining an inadequate level of civil service staff, rather than from any legitimate lack of available or obtainable qualified personnel).

because the Contracts have already either expired, or have expired but were renewed with an additional provision that the Contract will terminate when the Department's custodian eligibility list is released and appropriate funding is allocated for the custodian positions.

Although the Department may very well intend to hire civil service custodians to perform those duties contemplated under the Contracts, the fact remains that it has not yet done so, and has failed to present sufficient evidence to demonstrate why it was not feasible for the Department to hire civil service custodians prior to contracting out for those same services. Moreover, it also appears that, save for District 3 being authorized additional custodian positions, the Department has received no actual funding for any of the other District custodial positions in question. It is purely speculative, therefore, as to whether the Department will be able to actually hire any additional civil service custodians. Consequently, the Department failed to establish that the Contracts are "temporary" in nature.

The Department's further assertion that Contract Nos. 08A2270 and 09A0322 are "temporary" because they have already expired, is similarly unpersuasive. All contracts are for a specified period of time, and the Contracts cannot reasonably be considered "temporary" merely because they have a definite termination date.

With respect to the Department's assertion that Contract Nos. 04A2198 and 04A2537 are "temporary" because the construction trailers will no longer be utilized by the Department after 2012 and 2013 when the construction projects end, it is clearly evident that the Department will have utilized each trailer for well over six years prior to the Department no longer needing them. Six or more years is simply too long a period of time to be considered a "temporary" need under Section 19130(b)(10).

("Urgent" Contracts)

Finally, the Department contends that all of the Contracts are "urgent" under Section 19130(b)(10) due to general health and safety issues that will arise if working areas are not maintained in a clean and safe manner as required by CalOSHA and various MOUs.

Although I am not unsympathetic to the Department's need to have its various workplaces maintained in a clean and safe manner, the "urgent" need for those services cannot arise as the result of factors within the State's control. Indeed, because a large number of state civil service employees provide critical services, the Department's position, taken to its logical conclusion, would authorize the State to simply refuse to hire any civil service employees, and then justify its decision to contract out those services on the grounds that the services are urgently needed. Such a position has been expressly disapproved by the California Supreme Court.⁵

⁵ *Id.*

Here, the Department has presented insufficient information to establish that it has been unable to hire civil service custodians due to factors beyond the State's control. Consequently, the Department failed to establish that the Contracts are justified as "urgent" Contracts under Section 19130(b)(10).

Timeliness of Challenge to Contract No. 03A1131

The Department asserts that Contract No. 03A1131 was previously disapproved by the SPB in File No. 05-024(b), and the Department thereafter terminated the Contract during November 2006. As a result, the Department maintains that SEIU's challenge to the Contract must be dismissed as moot.

The Department's position is well taken. It is undisputed that the SPB has previously disapproved the Contract and, as a result, the Department terminated the Contract. Consequently, there is no longer any issue in dispute concerning Contract No. 03A1131, and SEIU's challenge to the Contract must be dismissed.

Conclusion

The Department failed to establish that the Contracts are authorized pursuant to those private contracting exceptions set forth in either Government Code section 19130(b)(8) or (10), particularly as the need for private contracting appears to have resulted from the State's failure to hire an adequate number of civil service employees to perform those duties contemplated under the Contracts, and not from an actual lack of available personnel who could be hired by the State. California's courts have made it clear that private contracting for work traditionally performed by civil service employees – such as custodial work – cannot be permitted if the need for private contracting is occasioned by the State failing to hire a sufficient number of civil service employees to perform the requisite work, absent a showing by the State that, despite its good faith efforts, it was unable to recruit a sufficient number of personnel into the civil service to perform the contract duties. Because insufficient information has been presented demonstrating that the Department made good faith efforts to recruit civil service employees to perform those duties under the Contracts, the Contracts cannot be justified as either "temporary" or "urgent" contracts under the provisions of Government Code section 19130(b)(8) or (10).

This letter constitutes my decision to disapprove the Contracts, with the exception of Contract No. 03A1131, which was previously disapproved in SPB File No. 05-024(b). Any party has the right to appeal this decision to the five-member State Personnel Board pursuant to SPB Rule 547.66. Any appeal should be filed no later than 30 days following receipt of this letter in order to be considered by the Board.

Sincerely,

SUZANNE M. AMBROSE
Executive Officer