

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000 (SEIU))	PSC No. 08-01
)	
From the Executive Officer's December 21, 2007 Approval of a Contract for Information Technology Services by the Department of General Services)	April 7, 2008

APPEARANCES: Anne M. Giese, Attorney, on behalf of Service Employees International Union, Local 1000 (California State Employees' Association); Deborah Yang, Staff Counsel, Department of General Services, on behalf of California Department of General Services.

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

DECISION

This matter is before the State Personnel Board (SPB or Board) after Service Employees International Union, Local 1000 (SEIU) appealed from the Executive Officer's December 21, 2007 decision approving a personal services contract (Contract) entered into by the Department of General Services (DGS) for information technology services.

Having considered the written and oral arguments presented by the parties, the Board adopts the Executive Officer's Decision approving the Contract, said approval being subject to the provisos set forth in the Executive Officer's Decision.

ORDER

The Board adopts the attached Executive Officer's December 21, 2007 Decision approving Contract No. IS-05-70-01 entered into by the Department of

General Services for the provision of information technology services, said approval being subject to the provisos set forth in the Executive Officer's Decision.

STATE PERSONNEL BOARD¹

Sean Harrigan, President
Richard Costigan, Vice President
Maeley Tom, Member
Patricia Clarey, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 7, 2008.

Suzanne M. Ambrose
Executive Officer
State Personnel Board

[PSC 08-01 DGS-SEIU]

¹ Member Anne Sheehan did not participate in this Decision.



CALIFORNIA STATE PERSONNEL BOARD

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December 21, 2007

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Re: Request for Review of Proposed or Executed Personal Services Contract for
Information Technology Services (Agreement No. 1S-05-70-01)
[SPB File No. 07-022(b)]

Dear Ms. Giese and Ms. Yang:

By letter dated October 11, 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), Agreement No. 1S-05-70-01 (hereinafter "Contract") proposed or entered into by the Department of General Services (Department) for information technology services provided to various state agencies and departments.

On October 12, 2007, the SPB notified the Department that SEIU had requested that SPB review the Contract, and informed the Department that it had until October 29, 2007, to submit its response to the SPB. The SPB received the Department's response on October 29, 2007. The SPB thereafter received SEIU's reply on November 8, 2007.

On November 16, 2007, the Department filed a "Request for Leave to Respond to SEIU's Reply," wherein the Department asserted that because SEIU raised new arguments in its Response that were not included in its original request for review, those new arguments should be dismissed by the SPB or, in the alternative, the

Department should be afforded an opportunity to present additional information for the SPB's consideration with respect to the new allegations. The Department further asserted that SEIU's response was not timely filed with the SPB and, as a result, SEIU's entire response should be rejected.

On November 20, 2007, SEIU filed an "Opposition to DGS' Reply," wherein SEIU asserted that its November 8, 2007 Response was timely filed. SEIU further stated that the Department bears the burden of proving that the Contract is justified under Government Code section 19130(b), and the fact that the Department chose not to bring forward its complete justification for the Contract when it was afforded an opportunity to do so does not create the need to grant allowances for the Department to correct its initial mistake. SEIU also requested, however, that the case be assigned to an evidentiary hearing, as there are disputed material facts that exist with respect to the case that would more properly be resolved through an evidentiary hearing process.

The Response filed by the Department indicates that it was mailed to SEIU on October 29, 2007. SEIU thereafter had five days to file its Reply, plus five additional days pursuant to the provisions of Code of Civ. Proc., § 1013. Because SEIU's Reply was required to be filed with the SPB by November 8, 2007, and because SEIU did file its Reply on that date, it is determined that SEIU's Reply was timely filed. Because no additional briefing has been authorized other than the Department's Response and SEIU's Reply, all other arguments set forth in both the Department's "Request for Leave to Respond to SEIU's Reply," and SEIU's "Opposition to DGS' Reply," are dismissed.

For the reasons set forth below, I find that the Department has provided sufficient information to demonstrate that, to the extent the Contract permits departments and agencies to purchase computers, the Contract is not a personal services contract, and the SPB has no authority to review that portion of the Contract. I also find, however, that the SPB does possess the requisite jurisdiction to review those provisions of the Contract that authorize departments and agencies to purchase computer installation and maintenance services. For the reasons set forth below, I find that the installation and maintenance provisions of the Contract are permissible under the provisions of Section 19130(b)(4), but only to the extent that any such agreement for installation and maintenance services can reasonably be construed as costs that are incidental to the overarching computer purchase. I am, therefore, approving the Contract; however, any specific purchase of computer installation and maintenance services made pursuant to the Contract may still be challenged so that a determination can be made as to whether the installation and maintenance services procured by a state agency or department under the Contract constitute more than incidental costs.

Position of the Department

The Department contends that the Contract is not a personal services contract for information technology services. Instead, the Contract is an "Information Technology Hardware-Personal Computer Goods Agreement," subcategorized under "Desktops and Workstations," and the primary purpose of the Contract is to procure computers for departments and agencies. The Contract calls for the delivery of the computers from the manufacturer, installation of the computers in applicable situations, and maintenance of the computers. In short, the Contract is essentially a contract for information technology goods, not for personal services. As a result, the Contract is not a "personal services contract"¹ subject to review by the SPB, as "[a]ny maintenance performed by the contractor is merely incidental," and "the Contract would not exist without the [information technology] goods."

The Department further asserts that, should it be determined that the Contract is a personal services contract, the Contract is justified under the provisions of Gov. Code § 19130(b)(4), as the services in question are incidental to the contract for the purchase of real or personal property.

Finally, the Department contends that the Contract is a zero-dollar contract that allows departments and agencies to order computers and/or services at the discretion of the ordering entity. No department or agency is required to order computers through the Contract, nor is any department or agency required to utilize the installation or maintenance provisions of the Contract for those computers actually purchased under the Contract. Should any department or agency choose to utilize the installation or maintenance provisions of the Contract, however, such use would be permitted pursuant to the provisions of Gov. Code § 19130(b)(10), as the services would be of such an urgent, temporary or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

Position of SEIU

SEIU maintains that the installation and deployment of new computers constitutes legitimate and existing work under State classifications that has historically been performed by the State civil service. Absent the State's failure to adequately staff State information technology positions in recent years, the installation and maintenance of computers procured under the Contract would be performed by State employees.

¹ Title 2, Cal. Code Regs., § 547.59(a) defines "personal services contract" as, "...any contract, requisition, purchase order, etc. (except public works contracts) under which labor or personal services is a significant, separately identifiable element. The business or person performing these contractual services must be an independent contractor that does not have status as an employee of the State."

SEIU further contends that the Department provided no evidence in its Response demonstrating that the deployment and installation of computers under the Contract is “merely incidental” to the Contract. In order to determine whether certain services are “incidental” to the performance of a contract, a comparison must be made of the relative costs, resources, time or investment of the “incidental” costs to the primary costs incurred under the contract. Here, the Department has provided no information establishing that any installation or maintenance costs associated with a computer purchased by means of the Contract are incidental to the cost of purchasing the computer itself.

Finally, SEIU, asserts that, in contrast to the lack of information provided by the Department, it has presented sworn declarations demonstrating the complicated needs of departments and agencies related to the deployment and installation of computers, such that, while some uses of the installation and maintenance provisions of the Contract may be permissible under certain circumstances, a blanket exception clearly is not warranted. The simple fact is that the need for the installation and maintenance provisions of the Contract has arisen because the State has steadfastly refused to fill existing information technology vacancies, or to authorize a sufficient number of information technology positions for each department and agency, thereby creating an artificial need for those services under the Contract. Consequently, the installation and maintenance provisions of the Contract are not permissible.

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)(4)

Government Code section 19130(b)(4) authorizes a state agency to enter into a personal services contract when:

The services are incidental to a contract for the purchase or lease of real or personal property. Contracts under

² (1997) 15 Cal.4th 543, 547.

this criterion, known as "service agreements," shall include, but not be limited to, agreements to service or maintain office equipment or computers that are leased or rented.

The plain language of the statute clearly demonstrates that, had the computers been leased or rented under the Contract, the installation and maintenance provisions of the Contract would be authorized under Section 19130(b)(4). It is also clear from the plain language of the statute, however, that the Legislature intended a different result in those cases where computers are purchased pursuant to a contract, as the term "purchased" was not included with the terms "leased" or "rented." Therefore, a determination must be made as to whether the optional installation and/or maintenance provisions of the Contract constitute services that are "incidental" to the purchase of computers.

A review of the Contract failed to reveal that a set price is charged by the vendor for any installation and/or maintenance services to be performed for each computer purchased. Instead, it appears that all installation/maintenance prices vary and are contingent upon the level of installation and/or maintenance services requested. Moreover, as the Department correctly points out, it does not appear that any department or agency is required to purchase installation and/or maintenance services for computers purchased under the Contract. Therefore, any installation and/or maintenance costs associated with the Contract may be non-existent or *de minimis*, at most.

On the other hand, as SEIU points out, because there are no set costs associated with computer installation and/or maintenance services under the Contract, and because the type of installation and/or maintenance services that can be purchased under the Contract could conceivably be very significant, depending upon the complexity of the services being provided, it cannot be said with any certainty that all installation and/or maintenance services associated with computers purchased under the Contract would result in merely "incidental" costs. Instead, such installation and/or maintenance costs may constitute a significant component of a computer purchase under the Contract.

The problem posed in this case is that no actual contract for the purchase of computer installation and/or maintenance services exists to be reviewed, as the instant Contract merely provides the framework under which such services can be obtained as part of a computer purchase. Although it is apparent that some installation and/or maintenance services purchased under the Contract could constitute more than a mere incidental contract for personal services, such a result is by no means guaranteed, as no purchasing department is required to obtain such services under the Contract.

I find, therefore, that the installation and maintenance provisions of the Contract are permissible under the provisions of Section 19130(b)(4), but only to the extent that

any such agreement for installation and maintenance services can reasonably be construed as costs that are incidental to the overarching computer purchase. In those situations where the installation and maintenance services constitute costs that are more than incidental to the computer purchase, the agreement for installation and maintenance services is not permissible under the provisions of Section 19130(b)(4). Any such determination will necessarily have to be made on a case by case basis, after a comparison has been made of the actual cost of the computer purchase, as compared to the cost of any installation and/or maintenance services being provided.

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.

The Contract permits the installation and maintenance of services on a continual, on-going basis. As a result, a department or agency can have all of its computer installation and maintenance services met under the contract during the entire time that the Contract is valid. That is not the type of "urgent, temporary, or occasional" services contemplated under Section 19130(b)(10). Instead, it is clear that the needed services are predictable and permanent. Consequently, I find that the installation and maintenance provisions of the Contract are not justified under the provisions of Section 19130(b)(10).

Conclusion

To the extent that the Contract permits State departments and agencies to purchase computers, the Contract constitutes a contract for goods that is not subject to review by the SPB. With respect to the optional computer installation and maintenance provisions of the Contract, the determination of whether any specific purchase of computer installation and maintenance services under the Contract constitutes an incidental provision of such services must be made on a case by case basis. Consequently, the computer installation and maintenance provisions of the Contract are neither *per se* permissible under the provisions of Section 19130(b)(4), nor *per se* violative of that Section. As a result, the computer installation and maintenance provisions of the Contract are approved, with the proviso that the purchase of any computer installation and maintenance services made pursuant to the Contract is subject to review, on a case by case basis, for a determination as to whether the procured services constitute permissible incidental costs under Section 19130(b)(4).

This letter constitutes my decision to approve the optional computer installation and maintenance provisions of the Contract. 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