

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
DEPARTMENT OF)
DEVELOPMENTAL SERVICES)
)
from the Executive Officer's February 27,)
2008, Disapproval of Personal Services)
Contracts for Janitorial Services at the)
Agnews, Fairview, Lanterman,)
Porterville, and Sonoma Developmental)
Centers)

PSC No. 08-07

RESOLUTION

July 8, 2008

WHEREAS, the State Personnel Board (Board) has considered carefully the findings of fact and Decision issued by the Executive Officer in SPB File No. 07-024(b) on February 27, 2008, concerning the above-entitled matter, as well as the written and oral arguments presented by the Department of Developmental Services (Department) and Service Employees International Union, Local 1000 (SEIU), during the Board's June 10, 2008, meeting; and

WHEREAS, by said Decision the personal services contracts for Janitorial services proposed or executed by the Department were disapproved;

IT IS RESOLVED AND ORDERED that:

1. The findings of fact and conclusions of law of the Executive Officer in said matter are hereby adopted by the State Personnel Board as its Decision in the case on the date set forth below;
2. A true copy of the Executive Officer's Decision shall be attached to this Resolution for delivery to the parties in accordance with the law; and

3. Adoption of this Resolution shall be reflected in the record of the meeting and the Board's minutes.

STATE PERSONNEL BOARD¹

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

* * * * *

The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 08-07 at its meeting on July 8, 2008, as reflected in the record of the meeting and Board minutes.

¹ Member Anne Sheehan did not participate in this Decision.



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February 27, 2008

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Re: Request For Review Of Proposed or Executed Personal Services Contracts
Promulgated by the Department of Developmental Services for Janitorial Services
[SPB File No.07-024(b)]

Dear Counsel:

By letter dated October 18, 2007, Service Employees International Union (SEIU) asked the State Personnel Board (SPB) to review for compliance with Government Code section 19130, subdivision (b), several contracts between the California Department of Developmental Services (DDS) and unspecified vendors for custodial services at DDS' Agnews, Fairview, Lanterman, Porterville, and Sonoma facilities.

By letter dated October 23, 2007, the SPB advised DDS that it would review the contracts to determine whether they could be justified under any of the provisions of Government Code section 19130, subdivision (b). In its correspondence to DDS, the SPB informed DDS that, pursuant to Title 2, California Code of Regulations (2 CCR) § 547.62 and by no later than November 7, 2007, DDS was "required to file with the SPB and serve on SEIU a copy of the proposed or executed contracts(s) (including the STD. 15 Contract Transmittal or STD. 215 Agreement Summary forms)" and DDS' "written response to SEIU's request for review, which shall include: [s]pecific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code § 19130(b)" and "[d]ocumentary evidence and/or declarations in support of Caltrans' position." SPB also informed DDS that failure to comply with the November 7, 2007, deadline for responding might result in a decision being rendered without DDS' input, and provided specific instructions for obtaining any extension of time.

SPB received no request from DDS for an extension of time.² Nonetheless, on November 30, 2007, DDS filed and served a letter opposing SEIU's challenge on the ground that the "contract extensions were not submitted for approval under Government Code section 19130" and were, instead, submitted as "emergency contracts" pursuant to Public Contract Code § 1102,³ as the services are "necessary to protect the health and safety of [DDS] consumers." DDS' response alludes to the contract extensions having been "approved" as temporary solutions to provide DDS with enough time to procure *another contractor* to provide the custodial services. DDS further adds that, if it is unable to justify its next contract under Government Code § 19130(a)⁴ and cannot justify the contracts under 19130(b), it will "*thereafter* move to fill these positions with regular State personnel" (emphasis added). DDS did not submit copies of the contracts or the amendments extending the contract terms and provided no other evidence of any kind to justify its position.

By letter dated December 7, 2007, SEIU submitted its reply brief contending that DDS failed to meet its burden of establishing any justification for contracting out the custodial services in question.

Analysis

In *Professional Engineers in California Government v. Department of Transportation*,⁵ the California Supreme Court recognized that, emanating from Article VII of the California Constitution, there 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. In order to obtain approval of a proposed contract as a "cost savings" contract under Government Code section 19130, subdivision (a), the contracting agency must submit the contract to the SPB for approval prior to its execution. In order to justify a contract pursuant to Government Code section 19130, subdivision (b),

² The record contains a December 3, 2007, letter from SEIU opposing DDS' request for extension, but no written record of such a request to SPB is contained in SPB files relating to this matter.

³ Public Contract Code section 1102 reads as follows: "1102. "Emergency," as used in this code, means a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services."

⁴ On August 13, 2007, the SPB disapproved DDS' request to approve these exact same contracts on the basis that the state would realize cost-savings if a contractor was used in lieu of civil servants. Because the contracts failed to comply with the requirement that the contractor's wages meet industry rates, the Executive Officer disapproved the proposed cost-savings contracts. DDS did not appeal that decision, but nonetheless extended the contracts through December, 31, 2008.

⁵ (1997) 15 Cal.4th 543, 547.

a department must provide specific and detailed factual information that demonstrates that the state is not capable of providing the custodial services pursuant to one of the exceptions to the prohibition against contracting out enumerated in paragraphs (1) through (10).

DDS has already failed in its bid for approval under Government Code § 19130(a) and does not claim that the contracts fall within any exception contained in Government Code § 19130(b). Instead, DDS is claiming that an unspecified and undocumented “emergency” situation, as defined in section 1102 of the Public Contract Code, exempts it from complying with the Constitutional civil service mandate.⁶ DDS has provided no evidence to support its position. Furthermore, DDS concedes it does not intend to comply with its Constitutional mandate to hire civil servants unless and until its efforts to avoid that mandate are unsuccessful.

Because DDS has failed to provide specific, detailed information establishing the reasons why the state is not capable of performing the janitorial services in question, I conclude that the contract is not justified under Government Code section 19130, subdivision (b).

Conclusion

DDS has failed to establish that the Contracts are authorized pursuant to Government Code section 19130(b). Accordingly, the Contracts are hereby disapproved.

This letter constitutes my decision to disapprove the Contracts. 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

⁶ DDS has provided no evidence to justify its position that there exists an “emergency” pursuant to Public Contract Code section 1102. DDS has also not explained how the unsupported claim of an emergency pursuant to the definition contained in section 1102, which, by its express terms is limited only to the use of the term “emergency” in the Public Contract Code, is relevant to an analysis pursuant to Government Code section 19130. Although paragraph (6) of subdivision (b) of section 19130 contains an emergency exception from the civil service mandate, that provision refers to section 19888.1 of the Government Code. The SPB regulation relating to emergency appointments pursuant to section 19888.1 of the Government Code is contained in section 302.1 of Title 2 of the California Code of Regulations and permits such appointments “to prevent the stoppage of the public business in the case of fire, flood or other extreme emergency . . .” Therefore, and particularly in the absence of supporting evidence and legal justification, DDS’ reliance on Public Contract Code section 1102 is misplaced.