

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1000)	PSC No. 08-10
)	
From the Executive Officer's May 19, 2008 Disapproval of a Personal Services Contract for Information Technology Services)	December 2, 2008
)	
)	
)	

APPEARANCES: Anne M. Giese, attorney, Service Employees International Union, Local 1000, on behalf of Service Employees International Union, Local 1000; Shari T. Miura, Staff Counsel, Department of General Services, on behalf of Department of General Services

BEFORE: Richard Costigan, Vice President; Anne Sheehan and Patricia Clarey, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the Department of General Services (DGS) appealed from the Executive Officer's May 19, 2008 decision disapproving a personal services contract (Contract) entered into between the DGS Office of Risk and Insurance Management (ORIM) and Valley Oak Systems, Inc., for information technology services.

In this decision, the Board adopts the attached Executive Officer's Decision disapproving the Contract. The Department's arguments that the services to be performed under the Contract are "proprietary" such that they cannot be performed by civil service employees are not supported by the evidence presented to the Executive Officer or to the Board. The Contract fails to clearly specify which parts of the Contract can only be performed by employees of the contractor, and which can be and are to be performed by civil service employees. Instead, the Contract refers in general terms to user support duties that are regularly and customarily performed by civil service employees. In order to establish that information technology services related to the use and operation of "proprietary" software fall within the exception set forth in Government Code section 19130(b)(3), the Contract must

clearly identify those services that, based upon the terms of a license held by the company that owns or developed the software, can only be performed by employees of that company.

ORDER

The Board finds that Contract No. 61625 entered into between the Department of General Services and Valley Oak Systems, Inc., for the provision of information technology services is not justified under Government Code section 19130, subdivision (b)(3). Accordingly, the Contract is hereby disapproved.

STATE PERSONNEL BOARD¹

Richard Costigan, Vice President
Anne Sheehan, Member
Patricia Clarey, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 2, 2008.

Suzanne M. Ambrose
Executive Officer
State Personnel Board

¹ President Harrigan and Member Tom did not participate in this decision.



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May 19, 2008

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Re: Request for Review of Proposed or Executed Personal Services Contracts for Information Technology Services (Contract Nos. 61625 (Valley Oak Systems, Inc.); 3112256 (Solbourne Computer, Inc.); 3112389 (VPN Technologies); 3108484 (Technical Consultants International); and 3112242 (Arsenal Information Security, Inc.))
[SPB File No. 08-001(b)]

Dear Ms. Giese and Ms. Miura:

By letter dated February 14, 2008, 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), five contracts (hereinafter "Contracts") proposed or entered into by the Department of General Services (Department) for Information Technology (IT) services (Contract Nos. 61625 (Valley Oaks); 3112256 (Solbourne); 3113289 (VPN Technologies); 3108484 (Technical Consultants); and 3112242 (Arsenal Information Security)).

On February 19, 2008, the SPB notified the Department that SEIU had requested that SPB review the Contracts, and informed the Department that it had until March 10, 2008, to submit its response to the SPB. The SPB received the Department's response on March 10, 2008. The SPB received SEIU's reply on March 20, 2008, after which the matter was deemed submitted for review by the Executive Officer.¹

¹ On March 28, 2008, The Department submitted a request to respond to SEIU's reply, asserting that SEIU's reply contained arguments outside of SEIU's original request for review, and also contained new evidence not previously provided to the SPB. By letter dated April 1, 2008, the Department's

For those reasons set forth below, I find that Contract Nos. 61625, 3112389, 3108484 and 3112242 are not authorized under the provisions of Gov. Code § 19130(b)(3) or (10). As a result, those Contracts are disapproved. I also find, however, that Contract No. 3113289 is authorized under the provisions of Gov. Code § 19130(b)(10) and, on that basis, that Contract is approved.

Legal Standard

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)(3)

Government Code section 19130(b)(3) authorizes a state agency to enter into a personal services contract 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.

The Board's decision, *In the Matter of the Appeal by SEIU*, made clear that, in asserting the exemption contained in Section 19130(b)(3), the burden is on the department to establish either: (1) that there are no civil service job classifications to which it could appoint employees with the requisite expertise needed to perform the required work; or (2) that it was unable to successfully hire suitable candidates for any of the applicable classifications.³

request was denied. To the extent that SEIU's reply brief contained impermissible arguments or evidence, any such argument or evidence will be discussed, *infra*.

² (1997) 15 Cal.4th 543, 547.

³ PSC No. 05-03, at p. 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.

In order to justify a personal services contract under Section 19130(b)(10), the Department 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.⁴

Position of the Parties

This case involves the review of five separate contracts for IT services. Accordingly, the positions of the respective parties will be conducted separately. The Department has, however, set forth the following arguments as applicable to each Contract:

- SEIU failed to comply with the requirements of Title 2, Cal. Code Regs., § 547.61, by failing to include “specific and detailed factual information that demonstrates how the contract fails to meet the conditions specified in Government Code section 19130(b),” in that SEIU “merely makes sweeping allegations and then provides a partial list of the services included in the Contracts.”
- SEIU is mistaken in its assertion that the Contracts are for IT services that are available within the state civil service. Instead, each Contract “involves either maintaining, upgrading, or safeguarding for security reasons complex, mission-critical database administration programs, or servicing and providing support for the Department’s statewide data communications directory services.” None of the contracted-for services are available within the state civil service, and cannot be performed satisfactorily by civil service employees. The contracts are for services of a highly specialized or technical nature, such that the necessary expert knowledge, experience, and ability are not available through the civil service system.
- To the extent that SEIU’s reply brief contained arguments outside of SEIU’s original request for review, and contained new evidence not previously provided to the SPB, such additional arguments and/or new evidence must be stricken from consideration by the Executive Officer.

⁴ PSC No. 05-04, at p. 7.

Contract No. 61625

(Valley Oak Systems, Inc.)

Department Position:

The Department's Office of Risk and Insurance Management (ORIM) provides risk management and insurance services to state and other public entities on an ongoing and project-specific basis, including insurance procurement, claims adjusting, health and safety training, contract management, consulting on insurance requirements in contracts, and other risk management related services. Contract No. 61625 was entered into in 2003 to create the iVOS database, designed to manage all data related to the investigation, evaluation and settlement of multiple lines of insurance claims, including general liability, property, vehicle, disability, and workers' compensation. All such claims are entered and tracked through iVOS, which is mission critical. iVOS runs on custom proprietary software. The maintenance and support of iVOS includes response to problem calls, software upgrades, acceptance testing, and security upgrades. The current Contract also includes upgrading, enhancements, data conversions, and support.

The Department's Office of Technology Resources (OTR) provides technology support to all Department offices, divisions and branches. OTR's abilities do not include the development of complex custom, business-critical solutions such as iVOS. OTR staff do not have the specific skills or knowledge to support or upgrade complex, custom proprietary software, particularly as Valley Oaks Systems, Inc., maintains ownership of iVOS and must provide the necessary support for the database. Because, the contracted-for services are not available within the state civil service, the Contract is permissible under Gov. Code § 19130(b)(3).

SEIU Position:

This Contract no longer concerns the development of the iVOS program, as the program was developed in 2003; instead, the Contract relates to two items – maintenance and support. The Department provided no information about the supposed proprietary nature of either maintenance or support services. Consequently, it is difficult to discern how the alleged “proprietary protection” can legitimately create a permanent exception from the civil service mandate. Moreover, the fact that the program is allegedly proprietary does not mean that state workers cannot be sophisticated users and technicians as it relates to the use and support of the program. Indeed, computer programs and software are frequently proprietary, but that does not preclude state IT workers from acting in a role that assists and supports users of such programs, software, or services.

With respect to the Department's assertion that the iVOS program is proprietary, the Contract itself contains no such information. Without being able to view in detail the nature of the proprietary terms of the agreement, it is impossible to assess the true nature of its scope and breadth. The fact that the installed software is allegedly “proprietary” does not end the inquiry as to whether at least some, if not all, of the services performed after installation could be performed by civil servants.

Moreover, even if the Department paid the vendor to develop the application as proprietary, the Department owns the application, not the vendor. Other tasks included within the Contract with respect to maintenance and operational functions can and should be performed by state IT staff. The Department, however, failed to provide any meaningful breakdown between where the proprietary services start and end, and where typical state IT functions start and end.

As concerns the Department's assertion that OTR staff do not have the requisite skills or experience to develop, support, or upgrade complex, business-critical solutions such as iVOS, the Department ignores its own directive given to departments regarding looking for the needed skills beyond their own department (www.pd.dgs.ca.gov/masters/GC19130Justification.htm). What is critical here is that the skills identified in the Statement of Work are available within various IT classifications within the state civil service. The tasks and responsibilities listed in the Statement of Work as maintenance and support services are similar, if not the same as, those provided by state employees in many departments from many programs and functions, proprietary or not. Information Systems Analyst (ISA) and System Software Specialist (SSS) classifications can perform all of the services described in the Contract. The Department provided no information indicating that it made any attempt to recruit or hire state civil service staff to perform the necessary Contract functions. In addition, the Contract exceeds the definition of "temporary" provided by the Department itself (i.e., more than nine months in any twelve consecutive months). Finally, it would have been prudent for the Department to prepare a plan for maintaining and operating the system when it was developed. Instead, four years down the road, the Department is attempting to justify it with an "urgency" argument.

Contract No. 3112256 (Solbourne Computer, Inc.)

Department Position:

The Department utilizes the Activity Based Management System (ABMS), an application of which runs the Financial and Human Resources systems utilizing a customized version of Oracle E-Business Suite Software. ABMS allows the Department to consolidate and maintain essential human resources, financial, and accounting data into one application using a combination of standard and customized forms and reports. The data available from ABMS is critical to the mission of the Department, since the Department is a reimbursable department. It is essential for the operations of the Department that a fail-safe system for personnel, financial and accounting information be maintained at all times.

The last major application upgrade to ABMS was completed in 2002. An upgrade to version 12i was necessary to bring the system up-to-date. Upgrading the system required extensive knowledge and technical skills in new Oracle technology beyond that of OTR staff capabilities. The Oracle training and experience required to upgrade an application the size of ABMS includes knowledge of highly technical issues in the current production environment of version 11i, as well as the ability to orchestrate the complex version upgrade to version 12i. No civil service

classification exists which encompasses the expertise and specialization in proprietary Oracle technology which was necessary for the upgrading of this system. Additionally, the immensity and complexity of the tasks to be performed under the Contract are not normally, in industry standards, expected to be within in-house staffing capabilities.

Moreover, the version upgrade is on a strict timeframe necessary because of the Department's year-end fiscal processing. The pressing need to complete the upgrade within the tight timeframe required hiring consultants possessing the requisite expertise for this urgent and temporary service, as it was not feasible to train OTR staff at the level of Solbourne experts within the time frames necessary to complete the project. Consequently, the Contract is permissible under Gov. Code § 19130(b)(10).

SEIU Position:

Based upon the Statement of Work, the Contract is to assess current server configuration and production system, and recommend changes for a major overhaul of the current system, including upgrading the Oracle database. It also is to recommend any hardware needed and support the procurement of that hardware. The skills needed for all such tasks fall within the specifications for the SSS series.

Although the Department asserts that OTR staff do not possess the requisite skills or abilities to perform the Contract functions, there are staff in the Programmer Analyst (PA) and SSS classifications that have extensive experience with Oracle technology. This includes assessing server configurations and recommending changes, including upgrades. The Department gave no indication that prior planning was done for this essential upgrade, that any efforts were made to train OTR staff, to contact Oracle experts at the Department of Technology Services (DTS), or that efforts were made to recruit staff to perform the Contract functions. Instead, this appears to be an "urgent" situation of the Department's own making. The work assessing server configurations and recommending changes, including upgrades, is the type of work done by state IT workers in connection with on-going projects, IT service, and strategic planning, as all servers need assessments and appropriate configurations, changes, and upgrades from time to time.

In short, state IT workers can perform the Contract functions on an on-going basis. Thus, the work to be performed cannot properly be characterized as a one-time function. The skills necessary to perform the functions are the types of skills that are performed multiple times for the Department and other departments, being essential to the operations of a functional IT program in today's business environment. Finally, as the "purchaser" for the State, the Department must certainly have the staff with the needed skills to support the procurement of the hardware, especially since the Department has set the standards for hardware purchases that all departments must follow.

Contract No. 3112389 (VPN Technologies)

Department Position:

The Department's network (DGSNet) is based on Microsoft Server products and applications, and utilizes multi-vendor routers, switches and firewalls that connect all statewide locations to the Department's headquarters in West Sacramento. DGSNet is mission-critical because it is required to be operational at all times, 24 hours per day, 365 days per year, and the consultant for the Contract is on-call. DGSNet runs off of proprietary software developed by Cisco Systems, Inc. (Cisco).

Cisco is the manufacturer of the majority of the Department's networking equipment and certifies specialists in three levels: Associate, Professional, and Expert. Each level requires specialized classroom training at a minimum of two weeks (Associate), and months of on-the-job training. Due to the complex and technical issues involved, Cisco recommends staff at the Professional level be used for support for a network of DGSNet's size, while Cisco's recommendation is for Expert level staff to address issues of network security. Cisco's training and certification is proprietary because only Cisco certifies training in its product line. There is no civil service classification which encompasses Cisco certification. Although OTR is encouraging its IT employees to move towards Cisco certification, current staff lack the requisite level of training and on-the-job experience to meet the Professional and/or Expert certification levels.

In addition, the manufacturer of DGSNet's infrastructure is Microsoft. Microsoft recommends staff at the Microsoft Certified Systems Administrator (MCSA) and/or Microsoft Certified Systems Engineer (MCSE) level for infrastructure support, and staff is recommended to be the level of an MCSE for the design, testing, and introduction of enhancements to the infrastructure. The nature of Microsoft's training and certification is proprietary because only Microsoft certifies training in its product line. There is no civil service classification which includes Microsoft certification. Although OTR is encouraging its IT employees to move towards MCSA and MCSE certification, current staff lack the requisite level of training and on-the-job experience to meet those certification levels.

SEIU Position:

The Department incorrectly assumes that no state employees or eligible candidates for appointment in the PA or SSS classification series have Cisco and/or MCSA certification. This is not true. A number of civil service IT staff are so certified. Also, although the certifications are recommended by the manufacturer, they are not required. The tasks detailed in the Statement of Work can be performed by state civil service IT staff, and are within the specifications for the PA and SSS classifications. The Department provided no information indicating that planning was done for this essential work, that any efforts were made to train OTR staff to perform the work, or that efforts were made to recruit state staff to perform the work.

The Department “spun off” the networking branch of STND, which was made part of the DTS when the two major data centers were consolidated. SEIU questions why the Department needs to have another network when DTS handles most of the State’s networks, including the Departments. Contrary to the Department’s assertions, the State, through DTS, utilizes state civil service workers in the SSS classification for Cisco equipment. DTS has three statewide networks which are maintained by state civil service IT employees. While the current classification does not specifically include Cisco, DTS already uses the classification for that purpose.

Additionally, the State, through DTS, also utilizes state IT workers in the SSS classification for Microsoft Server and services. DTS has three units that install, configure and maintain these servers and other units (Web, Database) for the administration and operation of the services. While the current classification does not specifically include Microsoft, DTS does use the classification for such purposes. The Department somehow hopes to convince the SPB to not delve into the specific services that are being performed, or hopes that the SPB will not understand the nature of the work that civil service IT staff perform on a daily basis, such as meeting 24/7 service requirements by having civil service IT staff on-call for emergencies.

Finally, the repetitive use of the “proprietary” label has no bearing on the instant argument. DTS has many state employees who are certified in many areas, including Microsoft, Cisco, Novell, and others. It is simply a measurement of technical skill and knowledge in the sophisticated functions of what might allegedly be an underlying piece of proprietary software.

Contract No. 3108484 (Technical Consultants International)

Department Position:

The Division of the State Architect (DSA) provides plan review and construction oversight for approximately 5,000 public school construction and modernization projects per year. In doing so, DSA utilizes a program called “e-Tracker,” which was first developed in 1997. By operating on the Department’s intranet, e-Tracker provides a visual web interface to DSA clients and tracks project scheduling and information regarding the fiscal status and expected completion dates of projects. The development of a major application such as e-Tracker required programming skills that depended upon advanced knowledge, extensive experience and technical skills with database design and administration, and object-oriented technology, as well as upon advanced knowledge of various programs and applications.

The Contract requires tasks such as altering and upgrading e-Tracker’s data structure and data flow, providing system integration with other applications, and developing Internet as well as Intranet applications. OTR staff do not presently have the requisite skills or abilities to perform the Contract duties. As a result, the Contract is permissible under Gov. Code § 19130(b)(3).

SEIU Position:

It is clear from the Statement of Work that the Contract services are for one consultant to provide programming support for the DSA to assist with application development and modification, as required. The skills identified as needed to develop the enhancements needed for the e-Tracker system are readily available in the state civil service PA and SSS classifications. The Department concedes the program was created and implemented in 1997, and has been operational since then. Unlike the other Contracts, the Department does not contend that this program is “proprietary.” Instead, the Department asserts that OTR staff do not possess the requisite skills to perform the Contract functions. The Department, however, provided no information indicating that prior planning was done for this essential work, that any efforts were made to train OTR staff to perform the work, or that efforts were made to recruit state civil service staff to perform the tasks.

Moreover, many state IT workers have skills in advanced database design. They use and are familiar with Object Oriented approach, Advanced Database administration, and advanced programs such as visualBasic.net, ASP.net, Java, JavaScript, XML, HTML, MS SQL server, etc. Since the e-Tracker program is not proprietary, there should be no supposed barrier to state IT workers taking over its function, maintenance, servicing and upgrading. Additionally, many state IT workers have the technical skills to be both sophisticated users, technicians, and programmers as it relates to the use of various programs and databases. The fact that the program was created by someone else does not preclude state IT workers from modifying programs, upgrading them, or otherwise acting in a role that assists and supports the users of the program, software, or services.

The Department, however, failed to explain these distinctions as they apply to the e-Tracker program. Instead, the Department hopes that claiming that the Contract involves “programming” will cause the SPB to overlook any of the nuances of distinguishing between the development of the program ten years ago and the ongoing support, function, and use of the program.

Contract No. 3112242 **(Arsenal Information Security, Inc.)**

Department Position:

At the time the Contract was entered into, the Department required an experienced and skilled Security Consultant to analyze and augment its Information Security Policy and Procedures (ISPP) to meet the short-term urgent need for the Department to apply highly specialized skills to develop a strong business security strategy. (The reason for the Contract stemmed from a security breach perpetrated by an IT civil servant.) The project included creation of access management, mission continuity, security education, and security management procedures. The complexity of the DGSNet and its combined systems and operations warranted a specialist with six or more years of related ISP development, security assessment and risk management strategies, and knowledge and experience with information security laws, access, release of information and release of control technologies, at

the level of Certified Information Systems Security Professional. The Certified Information Systems Security Professional's training and experience requires a minimum of four years of experience in the information security field and passing a difficult certification examination.

The Department had a pressing need to address its ISPP analysis and augmentation, which required hiring consultants possessing the requisite expertise for this urgent and temporary service. Therefore, the Contract is permissible under Gov. Code § 19130(b)(10).

SEIU Position:

According to the Statement of Work, the Contractor is to develop an Information Security Policy and an Information Security Plan for the Department. All departments are required to have such policies and plans. In fact, all departments have been required to have a business security strategy and an Information Security Office for a number of years. The requirement is not new. Many state civil service employees in the ISA and SSS classifications have achieved certification as Certified Information Systems Security Professionals. As such, state civil service employees are capable and have the skills to develop such plans for state departments.

The Department provided no information demonstrating that prior planning was done for this essential work, that any efforts were made to train OTR staff, or that efforts were made to recruit state staff to perform the Contract tasks. Nor did the Department indicate that it attempted to contact DTS or any other department to have the services performed. For such an essential service, it is apparent that little or no planning whatsoever went into the decision to contract the work. Instead, it appears that for this Contract, like many others, the decision to outsource the services was a *fait accompli* from the outset, with the justification for such outsourcing provided as a mere afterthought.

Although the Department alludes to a "security breach" by a state employee as the impetus for the Contract, no details were provided concerning the purported breach. Moreover, the Statement of Work does not reflect the alleged need to address a recent security breach. Instead, the services reflect a more typical requirement to develop a security plan. A security and vulnerability contract by the Department of Health Care Services from the same vendor, and for similar justifications, was recently disapproved by the Executive Officer in SPB File No. 07-025(b).⁵

While the Department asserts that the Contract requires specialized skills not available within the state civil service, the skills needed are, in fact, readily available within the SSS classification series. For both policy and practical reasons it does not make sense for the Department's security to be dependent upon consultant staff who may change at the next bid. Instead, it is in the public's interest for the State

⁵ SPB File No. 07-025(b) is currently under review by the five-member State Personnel Board (Board) in PSC. No. 08-07.

government's information security to be built on a dependable foundation of state civil service employees who have a vested interest in the Department's infrastructure.

Analysis

Request to Strike Reply Brief

I find that SEIU's reply brief did not contain impermissible new arguments or evidence. While SEIU's initial challenge to the Contracts was rather generic in nature, SEIU did set forth the basis for its belief that all of the work to be performed under the Contracts could be performed by state civil service IT employees. Because SEIU did not have access to the Department's stated detailed reasons as to why the Contracts were justified under one or more of the provisions of Gov. Code § 19130(b), it was not unreasonable for SEIU's reply brief to contain much more detailed information than was originally set forth in its initial challenge to the Contracts. As a result, the Department's request to strike portions of the reply brief is denied.

Contract Nos. 61625 (Valley Oak Systems), 3112389 (VPN Technologies), 3108484 (Technical Consultants International), and 3112242 (Arsenal Information Security, Inc.)

In order for the Department to be able to justify the Contracts under Gov. Code § 19130(b)(3), it must establish that existing civil service classifications are inadequate to perform the Contract functions, or that it has been unable to recruit or retain sufficient civil service IT staff to perform the required duties. Here, it appears from the Statement of Work for all of the Contracts that most, if not all, of the services contemplated under the Contracts can be performed by and through existing civil service classifications, particularly as the Contracts do not call for the creation of an entirely new computer program. While it may be that existing OTR staff do not possess the requisite skills to perform the Contract functions, the initial inquiry is whether there are existing civil service classifications that can perform the Contract functions. The Department failed to present sufficient information to demonstrate that the civil service IT classifications are inadequate to perform the Contract functions.⁶

With respect to the second point of inquiry, the Department presented no information concerning what recruitment efforts, if any, it has made to hire civil service IT staff to perform those duties contemplated under the Contracts. Instead, the Department simply asserts that existing OTR staff do not possess the requisite skills to perform the contemplated duties. The Department did not, however, provide any explanation as to why OTR staff did not receive requisite training so as to enable them to

⁶ See PSC No. 06-04 at pp. 6-11 (finding that the minimum qualification requirements for a particular classification are just that, minimum qualifications, and do not preclude a department from recruiting or appointing individuals who possess more than the minimum qualifications, such as Oracle, Cisco, or Microsoft certification, into the classification).

perform the requisite duties.⁷ That point is particularly troubling as it is evident that the Department has known for several years that at some point in time the duties identified under the respective Statements of Work would be needed. It is also equally clear that, for whatever reason, over the course of those several years the Department did not adequately train its IT staff to perform those duties it knew would be needed in the future. Why the Department failed to do so is unknown. What is clear, however, is that the Department cannot choose to fail to train its IT staff to perform known, anticipated duties, or to attempt to recruit sufficiently qualified staff to perform those duties, and thereafter state that it does not have sufficiently skilled IT personnel in order to justify contracting out for IT services under Section 19130(b)(3).

The Department also asserts that most of the Contracts are also justified because they involve maintenance, support, or upgrades for proprietary programs. It is evident to me, however, that such a “proprietary” designation does not preclude state civil service IT staff from providing maintenance, support, and upgrade services for such programs, as nearly all computer software can be considered “proprietary” in some form or fashion. Indeed, a contrary decision would result in all state agencies being required to contract for nearly all software contract maintenance, support, or upgrade services. Therefore, SEIU is correct that the maintenance, support, and upgrade provisions of the Contracts can be performed through the state civil service IT classification series, regardless of the fact that the programs are proprietary.

Likewise, it does not appear that the Contracts are justified under Section 19130(b)(10). As an initial matter, the maintenance and service provisions of the Contracts are not temporary or occasional services. Instead, it is evident that the need for such services will recur on a regular basis. Moreover, although I do not doubt that the services are urgently needed, the urgency appears to have resulted from a lack of planning on the Department’s part. As set forth above, the Department has known for several years that the Contract services would be needed, yet it made no plans to either train its existing IT staff to perform those duties, or to recruit sufficiently skilled IT staff to perform those duties. In short, the “urgency” appears to be a creature of the Department’s own creation. Such circumstances do not justify the contracting-out exception set forth in Section 19130(b)(10).

Contract No. 3112256 (Solbourne Computer, Inc.)

For those reasons set forth, *supra*, I find that Contract No. 3112256 is not justified under Section 19130(b)(3), because the Department presented insufficient information to prove that existing civil service classifications are inadequate to perform the Contract functions, or that the Department has made reasonable, good

⁷ Although the Department asserts with respect to Contract No. 3112389 that it has “encouraged” OTR staff to become certified in Cisco and Microsoft systems, it did not explain what form of “encouragement” has been provided, nor did the Department provide information demonstrating that getting OTR staff so certified was a priority of any sort for the Department.

faith efforts to recruit civil service IT employees to perform the contract duties. It does, however, appear that the Contract calls for the provision of urgently needed services that exceed the scope of additional duties that in-house staff might ordinarily otherwise be able and expected to provide. As such, the Contract appears designed to temporarily augment, as opposed to supplant, civil service IT staff to perform urgently needed services. Accordingly, I find that the Contract is justified under Section 19130(b)(10).

Conclusion

As correctly noted by SEIU, the Department bears the burden of proving that the Contracts are exempt from the civil service mandate. Here, all of the Contracts involve IT duties that the Department has known for years would be needed to be performed. Despite such knowledge, however, the Department appears to have made no effort to either train its existing IT staff to perform those duties, or to hire adequately skilled civil service employees to do so. By acting in such a manner, the Department has essentially abrogated its responsibility to first attempt to have its IT work performed in-house, and to rely upon the contracting out exceptions set forth in Section 19130(b) when it was unfeasible for civil service staff to perform those duties. Consequently, I find that Contract Nos. 61625, 3112389, 3108484 and 3112242 are not justified under the provisions of Gov. Code § 19130(b)(3) or (10). I further find that because Contract No. 3112256 concerns services that are urgently needed, and because it appears that the Contract is for purposes of temporarily augmenting, as opposed to supplanting, civil service IT staff, the Contract is justified under the provisions of Gov. Code § 19130(b)(10).

This letter constitutes my decision to disapprove Contract Nos. 61625 (Valley Oak Systems, Inc.); 3112389 (VPN Technologies); 3108484 (Technical Consultants International); and 3112242 (Arsenal Information Security, Inc.), and to approve Contract No. 3112256 (Solbourne Computer, Inc.). 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