

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

**CALIFORNIA STATE EMPLOYEES
ASSOCIATION**

From the Executive Officer's Approval of the
Agreement between the Governor's Office of
Emergency Services and EQE International,
Inc.

BOARD DECISION

PSC NO. 97-03

December 2, 1997

APPEARANCES: Harry Gibbons, Attorney, on behalf of California State Employees Association. Ramon DeLaGuardia, Deputy Attorney General, and Nancy Ward, Chief, Disaster Assistance Program Branch, on behalf of the Governor's Office of Emergency Services.

BEFORE: Lorrie Ward, President; Floss Bos, Vice President; and Richard Carpenter, Member.

DECISION

Pursuant to Government Code §§ 19131 and 19132, the California State Employees Association ("CSEA") requested that the State Personnel Board (the "Board") review Contract No. 6058-6 (the "Agreement") that had been entered into between the Governor's Office of Emergency Services ("OES") and EQE International, Inc. ("EQE") to determine whether the Agreement was permissible under any exceptions listed in Government Code §19130.

In accordance with Public Contract Code § 10337(c), the review of the Agreement was delegated to the Executive Officer of the Board. By letter dated July 29, 1997, the Executive Officer set forth his decision that the Agreement met the requirements of Government Code § 19130(b)(10) in that the services provided were of such an urgent

nature that sole reliance upon the civil service system to accomplish them would have resulted in delays which would have thwarted their very purpose.

CSEA has appealed the Executive Officer's decision to the Board.

In this decision, the Board concurs with the Executive Officer's decision and finds that the Agreement is justified under Government Code § 19130(b)(10).

BACKGROUND¹

OES was established by the 1970 Emergency Services Act and is responsible for ensuring that California is ready to respond to natural, technological and man-made disasters. As part of its functions, OES acts as the official intermediary among the Federal Emergency Management Agency ("FEMA"), citizens and local governments for the processing of disaster assistance claims. Applicants submit applications to FEMA to obtain emergency relief funding for the restoration of facilities structurally damaged by a disaster.

The Northridge earthquake occurred on January 17, 1994. On March 3, 1994, OES and FEMA entered into a Memorandum of Understanding ("MOU") regarding the functions OES would perform to assist FEMA in processing disaster relief applications. Pursuant to the MOU, among other things, OES for the first time agreed to review architectural and engineering ("A&E") reports accompanying disaster relief applications

¹ At the hearing before the Board on November 4, 1997, OES sought to have admitted two additional exhibits: (1) a chart which graphs OES's staffing levels from 1989-1996; and (2) a chart which tracks works orders under the Agreement. CSEA objected to the submission of these two proposed exhibits. Having taken the objection under submission the Board now sustains the objection because: (1) Each party was given the opportunity to submit further argument in advance of the hearing. The arguments were provided to the Board members and the opposing party prior to the hearing. OES did not include the proposed exhibits in the documents it submitted; and (2) CSEA did not have an opportunity to review these proposed exhibits before the hearing. The facts set forth herein were gleaned from the file as it existed prior to the hearing.

before such applications were submitted to FEMA to ensure compliance with applicable building and safety codes and federal program eligibility requirements. OES's agreement to perform the pre-submission review of A&E reports constituted a significant increase in OES's workload.

Towards the end of fiscal year 1995/96, a potential backlog of FEMA applications began to develop. In November 1996, FEMA declared that March 30, 1997 was the final deadline for applicants to submit their A&E reports and that June 30, 1997 was the final deadline for OES to complete all of its review work for these reports.

OES began the preliminary A&E report review work using civil service employees hired under the Disaster Worker Specialty Services ("DWSS") classification, a duration classification. At some point, OES began the process of creating a new classification, the Disaster Assistance Program Specialist ("DAPS") to replace the DWSS classification. The DAPS classification was established on May 6, 1997. According to OES, given the length of time it took to create the DAPS classification, OES could not have hired, trained and performed the work required by FEMA in time to satisfy the FEMA-imposed deadline for A&E report reviews.

OES, therefore, decided to implement an expedited ten-week process to contract out some of the A&E report review services by competitive bid. Pursuant to the Agreement, OES retained EQE for the initial term of October 7, 1996 through June 30, 1997 to assist OES in reviewing A&E reports in accordance with the MOU.

DISCUSSION

THE AGREEMENT IS JUSTIFIED UNDER GOVERNMENT CODE § 19130(b)(10).

Under Government Code § 19130(b)(10), a personal services contract is permissible 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 services were urgently needed. CSEA claims that the following facts show that the services to be provided under the Agreement were not of such an urgent nature that the delay incumbent in their implementation under civil service would have frustrated their very purpose: (a) OES's failed to hire the necessary staff in the existing classification in a timely fashion; (b) OES conducted a five-month competitive bidding process for an outside contractor, instead of seeking to avoid such a time-consuming process through a Department of General Service's waiver; and (c) FEMA's June 30, 1997 deadline was instituted only as a means to pressure OES to confront OES's backlog problem, and was not intended to be a hard deadline.

The responses that OES has given to these allegations effectively counter all of CSEA's claims.

According to OES, although the need for A&E review services was identified immediately following the Northridge earthquake and documented in the MOU, the review work turned out to be more pervasive and technically more complex than either OES or FEMA anticipated at the beginning of the disaster. At the outset, OES could only estimate the number of A&E reports that would need to be reviewed and the level

of technical complexity of each review and thereafter adjust its estimates as more information became available.

Although OES originally underestimated its workload and staffing requirements, it later projected more realistic increases in the workload and staffing requirements. According to OES, these increased workload and staffing requirements might have been sufficient if FEMA had not continuously changed the process to require increasingly superior technical information.

In early 1996, OES realized that it did not have the appropriate civil service classifications requiring the experience and expertise necessary to perform the full-range of A&E report review work required by FEMA. The DWSS classification was a duration classification and the emergency and limited term appointments made under that classification would begin to expire. The DAPS classification which was created on May 6, 1997 did not permit OES to hire at the technical level subsequently required by FEMA for certain types of A&E review work

Therefore, OES decided to implement an expedited 10-week process to contract out for A&E services by competitive bid because, hypothetically, it would have taken just as long to seek a waiver of the standard state contracting rules as it did to expedite the standard contract request for proposal, bid and award; and the expedited contract process served the State's public policy requirement for open and competitive bidding of State contracts.

OES created a unique unit to deal with the extensive structural damage problems presented by the Northridge earthquake. OES used a limited number of civil service, emergency and limited term employees to do some of the A&E report review work,

supplemented by EQE assistance when requested. According to OES, EQE did not function in lieu of OES employees, but, instead, assisted OES staff in specific technical areas where EQE possessed additional expertise and extensive experience in the local construction industry which OES staff did not possess but needed in order to fulfill the FEMA requirements and deadlines.

According to OES, FEMA's deadlines were intended to be true deadlines and OES's failure to complete its review work on time would have adversely affected the financial ability of public entities and certain non-profits to effectively repair their earthquake damaged facilities. OES states that the final FEMA deadlines were met and that the Agreement has terminated.

From this evidence it appears that OES did not artificially create an urgent situation by unreasonably delaying the hiring of staff; instead, OES adapted to the continually changing demands of FEMA in an appropriate fashion to respond to the urgent needs created by the Northridge earthquake.

The services were also both temporary and occasional. In addition to being urgent, the services provided by EQE under the Agreement were also occasional, since they were provided only on an intermittent basis as requested by work orders issued pursuant to the Agreement, and they were temporary, since they were provided for only a short period of time to fulfill the FEMA A&E report reviews requirements for the Northridge earthquake.

In light of the foregoing, the Board determines that the services provided by EQE to OES under the Agreement meet the requirements of Government Code §19130(b)(10) since they were of such an urgent, temporary and occasional nature that

the delay that would have occurred had they been implemented under civil service would have frustrated their very purpose.

THE AGREEMENT IS ALSO JUSTIFIED UNDER GOVERNMENT CODE § 19130(b)(3).

Government Code § 19130(b)(3) permits state agencies to enter into personal services contracts 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 or ability are not available through the civil service system.

EQE was retained to assist OES staff in fulfilling the ever-increasing FEMA demands for superior technical information. EQE possessed both the necessary expertise and the extensive experience in the local construction industry that OES needed in order to perform the more complex A&E report reviews required by FEMA. OES could not obtain the required expertise and experience by hiring staff because it did not have the classifications it needed to do so at the time the A&E reviews had to be performed. The services provided by EQE under the Agreement satisfy the requirements set forth in Government Code § 19130(b)(3).

Although OES did not specifically refer to Government Code § 19130(b)(3) in the documents it submitted to the Board, throughout those documents OES argued that EQE was hired to assist OES because EQE possessed superior technical expertise and experience that OES needed to satisfy FEMA's demands. CSEA, thus, had sufficient prior notice of the substance of OES's arguments as to expertise and experience but did not provide evidence to rebut them. Although the Agreement is fully supported under

Government Code § 19130(b)(10), Government Code § 19130(b)(3) adds additional support for the Agreement.

CONCLUSION

For the foregoing reasons, the Board approves the Agreement.

STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Richard Carpenter, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on December 2, 1997.

Walter Vaughn
Acting Executive Officer
State Personnel Board

[OESEQE.DEC]