BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **DEPARTMENT OF VETERANS AFFAIRS** From the Executive Officer's February 11, 2003 Disapproval of a Contract with Communications Consulting Group at the request of the California State Employees Association	)))))))))))	**BOARD DECISION** **PSC NO. 03-03** August 5, 2003

APPEARANCES: Harry Gibbons, Attorney, on behalf of the California State Employees Association; John H. McCardle, Staff Counsel, on behalf of the Department of Veterans Affairs.

BEFORE: William Elkins, President; Sean Harrigan and Maeley Tom, Members.

DECISION

The Department of Veterans Affairs (DVA) has appealed from the Executive Officer's February 11, 2003 decision disapproving a contract (Contract) it entered into with Communications Consulting Group (Contractor). The request for review was filed by the California State Employees Association (CSEA). In this decision, the Board finds that DVA has not shown that the Contract is authorized under Government

Code § 19130(b). The Board, therefore, sustains the Executive Officer's decision disapproving the Contract.

BACKGROUND

The Contract called for the Contractor to research, develop, document and present to DVA's executive management a three-year strategic plan for the operation of its three existing and five new Veterans Homes. The Contract also called for the Contractor to research and write grant applications to obtain federal funding from the United States Department of Veterans Affairs (USDVA) to build five new Veterans Homes and to renovate the existing Veterans Home in Yountville. CSEA asserts that the contracted work could have been done adequately and competently by civil service employees.

PROCEDURAL HISTORY

By letter dated August 7, 2002, pursuant to Government Code § 19132, CSEA asked SPB to review the Contract for compliance with Government Code § 19130(b). On November 15, 2002, SPB staff received DVA's response to CSEA's review request. By letter dated November 22, 2002, CSEA submitted its reply to DVA's response.

The Executive Officer issued his decision disapproving the Contract on February 11, 2003.

On February 24, 2003, DVA appealed to the Board from the Executive Officer's February 11, 2003 disapproval. DVA filed its written argument dated March 27, 2003. CSEA filed its response dated April 25, 2003. DVA filed its reply dated May 1, 2003.

The Board has reviewed the record, including the written arguments of the parties, and has heard the oral arguments of the parties, and now issues the following decision.

ISSUES

The following issues are before the Board for consideration:

(1) Did the SPB Executive Officer lose his authority to disapprove the Contract by failing to issue his decision within 30 days after DVA submitted the Contract to SPB?

(2) Does DVA bear the burden of proving that the Contract is authorized under Government Code § 19130?

(3) Is the Contract authorized under Government Code § 19130(b)?

DISCUSSION

The Executive Officer's Authority

Public Contract Code § 10337(c), in relevant part, provides that the Board's "executive officer shall approve or disapprove the contract or refer it to the board for a hearing within 30 days of its receipt." Similarly, Title 2, California Code of Regulations, § 547.64 provides that, within 30 days after receiving a proposed or executed contract, the executive officer shall either refer the contract for evidentiary hearing or issue a decision approving or disapproving the contract.

DVA asserts that it submitted to SPB its response to CSEA's review request, together with a copy of the Contract, on August 22, 2002, but the Executive Officer did not issue his decision until February 11, 2003, well over 30 days after SPB received a

copy of the challenged Contract.[1] DVA asserts that the Executive Officer's failure to issue his decision within the statutory and regulatory 30-day time limit divested him of the authority to disapprove the Contract.

Although both Public Contract Code § 10337(c) and Board Rule 547.64 use the term "shall" when referring to the Executive's Officer's responsibility to issue a contract decision, the use of that term in those provisions is directory and not mandatory. The California Supreme Court in California Correctional Peace Officers Association v. State Personnel Board (CCPOA v. SPB)[2] explained when a time limit in a statute will be deemed to be "mandatory" or "directory" as follows:

> The word "mandatory" may be used in a statute to refer to a duty that a governmental entity is required to perform as opposed to a power that it may, but need not exercise. As a general rule, however, a " 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." … If the action is invalidated, the requirement will be termed "mandatory." If not, it is "directory" only.

The court in CCPOA v. SPB stated that a time limit will be deemed to be directory "unless a consequence or penalty is provided for the failure to do the act within the time commanded."[3] There is no consequence or penalty set forth in either Public Contract Code § 10337 or Board Rule 547.64 for the failure of the Executive Officer to

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[1] For reasons that are not clear from the record, SPB staff responsible for processing submissions relating to contract disputes did not receive a copy of the response that DVA filed on August 22, 2002. On November 8, 2002, SPB staff informed DVA that they had not received DVA's response, and asked DVA to file its response no later than November 29, 2002. DVA sent another copy of its response to SPB on November 14, 2002. SPB received that response on November 15, 2003, and the Executive Officer issued his decision 88 days thereafter.

[2] (1995) 10 Cal. 4th 1133, 1145.

[3] Id.

issue a decision within 30 days. Those provisions are, therefore, directory and not mandatory. Because those provisions are directory, the Executive Officer was not divested of his authority to issue a decision disapproving the Contract by his failure to issue that decision within 30 days after receipt of the Contract.

Burden of Proof

DVA asserts that, when the Executive Officer rendered his decision, he improperly imposed upon DVA the burden of proving that the Contract was authorized under Government Code § 19130(b). DVA contends that the Executive Officer should have imposed the burden, instead, upon CSEA to prove that the Contract did not comply with that statute.

In Professional Engineers in California Government v. Department of Transportation (PECG v. Caltrans),[4] the California Supreme Court recognized that an implied "civil service mandate" emanates from Article VII of the California Constitution, which 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. PECG v. Caltrans makes clear that, if a state agency wishes to contract with a private entity to perform state work, the state agency must show that the contract is authorized under one of the judicially recognized exceptions to the state's civil service mandate.

Government Code § 19130 codifies the exceptions to the civil service mandate that various court decisions have recognized. Before a state agency can legally enter into a personal services contract, it must show that the contract is justified under one of

the exceptions included in Government Code § 19130. This requirement is codified in Board Rule 547.60, which provides that, when an agency requests approval from the Department of General Services (DGS) to enter into a contract under Government Code § 19130, the agency must include with its contract transmittal a written justification that shows that the contract complies with Government Code § 19130. [5]

When read together, the relevant case law, statutes and regulations make clear that the burden of proving that a contract is authorized under Government Code § 19130 rests with the state agency that seeks to obtain personal services from a private contractor, rather than civil service employees.

Government Code § 19130(b)(3)

DVA asserts that the Contract is justified under Government Code § 19130(b)(3), which authorizes a state department to enter into a personal services contract with a private contractor 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.

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[4] (1997) 15 Cal.4th 543, 547.

[5] Board Rule 547.60, Title 2, California Code of Regulations, § 547.60, provides:

> When a state agency requests approval from the Department of General Services for a contract let under Government Code Section 19130(b), the agency shall include with its contract transmittal a written justification that includes specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code Section 19130(b).

The information submitted by DVA shows that, when the Contract was first entered into, DVA completed the DGS form which required it to specify the justification for the contract under Government Code § 19130.

Under Government Code § 19130(b)(3), a state agency may hire a private entity to perform state work when the contracted services meet any one of its three conditions: (1) the services are not available within civil service; (2) the services cannot be performed satisfactorily by civil service employees; or (3) the services 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.

DVA asserts that there was no single civil service employee in a single civil service classification available to DVA who was sufficiently knowledgeable about healthcare, long-term care facilities, veterans' needs and the requirements of Title 38 of the United States Code regarding the building of state veterans homes to perform all the services called for in the Contract. DVA contends that, in the absence of a single employee in a single civil service classification who could have performed all the requisite services, DVA was authorized to enter into the Contract, rather than hire multiple civil service employees, in order to obtain all the contracted services.

DVA's premise is faulty. The law does not permit a state agency to bundle multiple disparate services together in a single contract and then justify that contract as an appropriate exception to the state's civil service mandate because a single civil service employee is unable to perform all the contract's varied services. In this case, the Contract called for two seemingly different services – strategic planning and grant writing. DVA did not adequately explain why these two separate services were so interrelated that they could only be performed together by a single entity. DVA also did not adequately explain why each of these services was of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability were not

available to DVA through the civil service system. As CSEA asserted, strategic planning and grant-writing are the kinds of work that civil service planners regularly perform. DVA did not provide sufficient information to show that the contracted services could not be performed satisfactorily by civil service employees to justify the Contract under Government Code § 19130(b)(3).

Government Code § 19130(b)(10)

DVA asserts that the Contract is justified under Government Code § 19130(b)(10), which authorizes a state department to enter into a personal services contract with a private contractor 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 Government Code § 19130(b)(10), a state agency 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.

DVA argues that the services required under the Contract were urgent because it wanted to submit its grant applications to the USDVA by certain filing deadlines. DVA asserts that the urgency of the contracted services is evidenced by AB 2559, which authorized the construction of new Veterans Homes, and AB 2953, which authorized the renovation of the existing Veterans Home in Yountville. These bills were continuous

appropriation bills and were enacted as urgency statutes. AB 2559 explained the need for the urgency legislation as follows:

> In order to meet the filing date for the eligibility list to receive matching federal funds from the United States Department of Veterans Affairs for the construction of the veterans' homes at Lancaster, Saticoy, and West Los Angeles, it is necessary that this act take effect immediately.

AB 2953 contained similar language with respect to the renovation of the Veterans Home in Yountville. DVA contends that the fact that the legislature enacted these continuous appropriations bills as urgency legislation shows that DVA's need for the contracted grant-writing services was urgent.[6] The facts do not support DVA's position.

While the cited bills enacted continuous appropriations as urgency legislation, there is nothing in those bills that provides that the grant-writing services were so urgent that they could not be accomplished sufficiently expeditiously through the civil service, but, instead, had to be contracted to a private provider.

DVA issued an advertisement to bid for the contracted services in June 2002. DVA began accepting bids for the Contract in July 2002. The term of the Contract began on August 12, 2002. AB 2559 and AB 2953 became effective immediately upon chaptering on August 14, 2002.

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[6] While DVA conceded that it would not have been precluded from filing its grant applications with USDVA at a later date, it asserted that later filings would have delayed the building of the new Veterans Homes for California's veterans, many of whom are elderly and may not live much longer.

DVA has not submitted any information to show whether, before it issued its request for bids, it made any effort to determine if it could perform all or any part of the contracted services through the civil service. If DVA could have anticipated that the legislature would pass the urgency legislation sufficiently in advance to bid and execute the Contract, it is difficult to understand why DVA could not have also made efforts during that period to determine whether it could perform all or any part of the contracted services through the civil service.

DVA has failed to submit sufficient information to show that the Contract was justified under Government Code § 19130(b)(10).

CONCLUSION

The Board finds that DVA has not submitted sufficient information to establish that the Contract is authorized under Government Code § 19130(b). The Board, therefore, sustains the Executive Officer's decision disapproving the Contract.

STATE PERSONNEL BOARD[7]

William Elkins, President
Sean Harrigan, Member
Maeley Tom, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on August 5, 2003.

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Walter Vaughn
Executive Officer
State Personnel Board

[7] Vice President Ron Alvarado did not participate in this decision.

DECLARATION OF SERVICE

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 801 Capitol Mall, P. O. Box 944201, Sacramento, California 94244-2010.

On August 6, 2003, I mailed the attached

APPEAL of
DEPARTMENT OF VETERANS AFFAIRS
PSC No. 03-03

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Joseph Maguire
Deputy Secretary/Chief Counsel
John H. McCardle, Esq.
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1227 "O" Street, Room 316
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California State Employees Association
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Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on August 6, 2003.

_____
ELLA B. COWDEN

[PSC 03-03 dec]