

THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
CALIFORNIA DEPARTMENT)	PSC NO. 03-09 and 03-10
OF INSURANCE)	
)	
from the Executive Officer's August 15, 2003)	
Disapproval of Contracts with Strumwasser &)	
Woocher and Bartko, Zankel, Tarrant & Miller for)	May 4-5, 2004
Legal Services)	
)	

APPEARANCES: Steven B. Bassoff, Attorney, on behalf of the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment; Elizabeth Mohr, Staff Counsel, on behalf of the California Department of Insurance.

BEFORE: Ron Alvarado, Vice President; Maeley Tom and Anne Sheehan, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the California Department of Insurance (CDI) appealed from the August 15, 2003 decision of the Executive Officer disapproving contracts (Contracts) for legal services CDI entered into with Strumwasser & Woocher (SW) and Bartko, Zankel, Tarrant & Miller (BZTM) (collectively, the Contractors). The Executive Officer reviewed the Contracts at the request of the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE). In this Decision, the Board finds that CDI has not submitted sufficient information to show that CDI has any further need to contract out the legal services. The Board, therefore, disapproves the Contracts as of the date of this decision.

BACKGROUND

CDI retained the Contractors to provide legal services in two Proposition 103 rollback cases. Proposition 103, an initiative approved by the California voters on November 8, 1988, among other things, mandated a one-time rollback of property-casualty insurance rates for insurance policies written between November 8, 1988 and November 8, 1989 to 20% below the level prevailing on November 8, 1987. Insurers challenged in court the constitutionality of both Proposition 103 and the regulations adopted by the Insurance Commissioner to implement Proposition 103.

Because of the legal challenges to the constitutionality of both Proposition 103 and the implementing regulations, more than six years passed before the rollback hearings could proceed. When the rollback hearings finally commenced, CDI sought private counsel to represent it during those rollback hearings.

SW provided legal representation to CDI in the rollback proceedings involving Century National Insurance Company (Century National). The hearing before the Administrative Law Judge in that case began on February 26, 1996. On October 8, 1998, the Insurance Commissioner issued an order adopting the ALJ's proposed decision in part and rejecting it in part. The amount of the rollback required by the decision was \$21,572,137 plus interest. Century National challenged the Commissioner's order in court. The court remanded the matter to CDI for further hearing on two issues. CDI staff represented CDI during the remand hearing before the ALJ on September 16, 2003. That matter was pending at the time of the Board hearing.

BZTM provided legal representation to CDI in the rollback proceedings involving Sierra Pacific Insurance Company (Sierra Pacific). The matter was tried before an

Administrative Law Judge between February 16 – April 26, 1996. On September 25, 1996, the Insurance Commissioner adopted the ALJ's proposed decision, which ordered Sierra Pacific to rollback its rates by \$963,568. Sierra Pacific challenged that decision in court. The court remanded the matter to CDI for further hearing. The parties have since settled this matter.

PROCEDURAL HISTORY

By letters dated March 28, 2003, CASE asked SPB to review the Contracts for compliance with Government Code § 19130. CDI submitted responses to CASE's review requests and CASE submitted replies to CDI's responses. In addition, CDI responded to specific questions SPB staff raised with respect to the Contracts, and CASE replied to CDI's responses. SPB's files with respect to CASE's review requests were consolidated for decision. The Executive Officer issued his decision disapproving the Contracts on August 15, 2003.

On September 8, 2003, CDI appealed to the Board from the Executive Officer's decision. CDI filed its opening brief dated October 22, 2003. CASE filed its response dated November 19, 2003. CDI filed its reply dated November 25, 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.

ISSUE

The following issue is before the Board for consideration:

Are the Contracts authorized under Government Code § 19130(b)(3)?

DISCUSSION

Government Code section 19130(b)(3)

CDI asserts that the Contracts are justified under Government Code section 19130, subdivision (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.

Under Government Code section 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. As set forth below, CDI has not shown that any of these three conditions currently exist.

CDI asserts that, given the legal challenges to Proposition 103 and CDI's implementing regulations, more than 6 years passed before the Commissioner of Insurance could proceed with rollback hearings. In light of this significant delay, the Commissioner desired a quick resolution of the outstanding rollback cases. Given CDI's limited staff resources that could be devoted to prosecuting the complex and technical rollback cases, which involved complicated actuarial, economic and constitutional issues, CDI sought outside assistance. The Attorney General waived representation, in part because of the one-time and complex nature of the rollback cases. Accordingly,

CDI retained outside counsel to provide representation in the outstanding rollback cases.

CDI also asserts that, if Century National seeks judicial review of the remand decision that the Commissioner may adopt, CDI does not have any civil service counsel who have the requisite knowledge of the complex actuarial, economic and legal issues to represent the Commissioner. CDI asked the Board to follow its decision in *California Attorneys, Administrative Law Judges and Hearing Officers in State Employment* (2003) PSC No. 03-01, and find that, because private counsel has represented CDI in the Century National case for eight years, with only minimal involvement of CDI staff counsel, and because the case involves highly technical and complicated actuarial, economic and constitutional issues, the experience necessary to adequately represent CDI does not currently exist in the civil service.

This matter is distinguishable from PSC No. 03-01. In that matter, CASE asked the Board to disapprove a contract for legal services that the California Department of Food and Agriculture (CDFA) had entered into with a private law firm to assist the Office of the Attorney General (OAG) in representing CDFA in an appeal then pending before the United State Supreme Court concerning the California Milk Pooling Plan. In that case, CDFA explained in detail the complex constitutional, legal and technical matters that were at issue in the litigation. Given the complexity of the issues and the late stage at which the review request was brought, the Board decided not to second guess the determination of CDFA and the OAG that the assistance of outside counsel was needed. The Board, therefore, approved that contract.

In this case, while CDI asserts that the matters pending before the Commissioner involve highly technical and complicated actuarial, economic and constitutional issues, CDI has not provided any details to explain what it is about those matters, at this stage in the proceedings, that makes them so technical and complicated. Although CDI has had ample time to demonstrate what complicated actuarial, economic and constitutional matters are currently at issue in the rollback cases that could not be handled by civil service attorneys, it has not done so.

In addition, the information provided by CDI indicates that, while the Contractors' services may have been needed during the earlier stages of the Sierra Pacific and Century National cases when significant court challenges had to be addressed, the information presented to the Board shows that the Contractors' services have not been needed during the most recent stages of the rollback hearings. The information presented by CDI indicates that, in 1995, when the 33 rollback hearings were scheduled to commence, CDI did not have sufficient staff counsel then employed to handle all those matters. CDI did not, however, submit any information to show that in 2002, when the Contracts were amended, it still did not have adequate staffing resources to provide legal representation in either the Sierra Pacific or Century National rollback hearings. According to CDI, its own in-house counsel handled the most recent administrative proceedings involving Century National. While CDI stated that the litigation with respect to Sierra Pacific has been settled, CDI did not explain whether and to what extent the input of private counsel was required to achieve that settlement agreement.

CONCLUSION

In sum, CDI has not submitted sufficient specific information to substantiate that the contracted services are so highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system. CDI has, therefore, failed to show that the Contracts are now justified under Government Code § 19130(b)(3). Because CDI has not submitted sufficient information to show that the Contracts are now authorized under Government Code § 19130(b)(3), the Board disapproves those Contracts as of the date of this decision.

STATE PERSONNEL BOARD¹

Ron Alvarado, Vice President
Anne Sheehan, 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 May 4-5, 2004.

Laura Aguilera
Interim Executive Officer
State Personnel Board

¹ President William Elkins and Member Sean Harrigan 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 May --, 2004, I mailed the attached

**APPEAL of
CALIFORNIA DEPARTMENT
OF INSURANCE**

PSC NOs. 03-09 and 10

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:

Elizabeth Mohr
California Department of Insurance
Legal Division, Rate Enforcement Bureau
45 Fremont Street, 21st Floor
San Francisco, CA 94105

Steven B. Bassoff, Esq.
2000 "O" Street, Suite 250
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 May --, 2004.

ELLA B. COWDEN
Legal Secretary