

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	PSC No. 08-13
EMPLOYMENT DEVELOPMENT)	
DEPARTMENT)	RESOLUTION
)	
from the Executive Officer's December)	
12, 2008, Disapproval of a Personal)	
Services Contract for Information)	June 9, 2009
Technology Services Proposed or)	
Executed by the Employment)	
Development Department)	
)	

WHEREAS, the State Personnel Board (Board) has considered carefully the findings of fact and Decision issued by the Executive Officer on December 12, 2008, in the above-entitled matter, as well as the written and oral arguments presented by the Employment Development Department (Department) and Service Employees International Union, Local 1000 (SEIU), during the Board's April 14, 2009, meeting; and

WHEREAS, by said Decision the personal services contract for Information Technology Services proposed or executed by the Department was 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

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

* * * * *

The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 08-13 at its meeting on June 9, 2009, as reflected in the record of the meeting and Board minutes.

¹ Members Sean Harrigan and Maeley Tom did not participate in this Decision.



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December 12, 2008

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Re: SEIU Request to Disapprove Two Contracts for Information Technology Services Entered into Between EDD and Public Sector Consultants (#M764617) and Eclipse Solutions (#M764858)
SPB Case No. 08-008(b)

Dear Ms. Giese and Ms. Beckley:

By letter dated September 19, 2008, Service Employees International Union (SEIU), Local 1000 (SEIU) asked the State Personnel Board (SPB), pursuant to Gov. Code § 19132 and Title 2, Cal. Code Regs., § 547.59 *et seq.*, to review two personal services contracts for compliance with Gov. Code § 19130(b). The challenged contracts were entered into between the Employment Development Department (Department or EDD) and Public Sector Consultants; and (2) EDD and Eclipse Solutions.¹

On September 22, 2008, the SPB notified EDD that SEIU had requested that SPB review the contracts and established a briefing schedule. SPB informed EDD that it had until October 17, 2008 to submit its response to the SPB. After the negotiation of some deadline extensions, EDD ultimately filed its response on October 23, 2008 and SEIU filed its reply November 7, 2008, after which the matter was deemed submitted for review by the Executive Officer.

For those reasons set forth below, I find that EDD has failed to meet its burden of establishing that Contract No. M764617 meets one or more of the required criteria for a statutory exemption from the constitutional requirement that civil service work be performed by civil service employees. The contract is therefore disapproved.

¹In a letter dated November 7, 2008, SEIU withdrew, without prejudice, its challenge relating to the Eclipse Solutions contract (#M764858).

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. Gov. Code § 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)

EDD relies exclusively on Gov. Code § 19130(b)(3)³ as the applicable exemption justifying the contract. Gov. Code § 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.⁴

² (1997) 15 Cal.4th 543, 547.

³ While SEIU briefly references Gov. Code § 19130(b)(5) in its argument making a case that it would not serve as justification for the contract, EDD does not argue that the contract is justified under Gov. Code § 19130(b)(5). Gov. Code § 19130(b)(5) authorizes a state agency to enter into a personal services contract when:

The legislative, administrative, or legal goals and purposes cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system. Contracts are permissible under this criterion to protect against a conflict of interest or to insure independent and unbiased findings in cases where there is a clear need for a different, outside perspective. These contracts shall include, but not be limited to, obtaining expert witnesses in litigation.

⁴ PSC No. 05-03, at p. 8.

The Contract - Public Sector Consultants (#M764617)

This contract was a project administered through EDD's Disability Insurance (DI) branch, which provides temporary, partial wage replacement to eligible disabled workers in California who suffer a loss of wages when they are unable to work due to illness or injury. The DI program is completely funded through employee payroll deductions and covers the majority of California employees. In fiscal year 2004-2005, EDD processed approximately 700,000 initial disability claims for California workers and paid \$3.2 billion in benefits.

In order to keep up with the demands of California's growing workforce, as well as new medical privacy laws enacted under the federal Health Insurance Portability and Accountability Act (HIPAA), DI Branch determined that EDD needed to modernize its technology. On November 30, 2005, EDD submitted a Feasibility Study Report (FSR) to the Department of Finance (DOF) in order to obtain financing that would enable EDD to modernize the way it processes disability claims. The modernization project included plans for a computerized system that would enable EDD to take in DI claims over the Internet, electronically image each claim into EDD's database, and create a secure method for EDD to electronically communicate with medical providers to substantiate the medical information provided in each claim in compliance with HIPAA.

In a letter dated January 10, 2006 (Exhibit E to EDD's Opposition), DOF approved a total budget expenditure of \$35,430,397 for EDD to complete the project, but conditioned the expenditure of resources on the requirement that EDD contract with private consultants to provide oversight on the project and to verify that the ultimate contractor was fulfilling the contract requirements.

EDD cites DOF's general oversight responsibilities of all statewide IT contracts as set forth in Budget Letter 02-37, Executive Order D-59-02, and the Information Technology Project Oversight Framework⁵ as supporting an argument that it had no choice but to hire a private contractor to perform the oversight work in connection with the contract. EDD further argues that the fact that DOF conditioned funding on the hiring of private contractors to perform oversight of the contract is sufficient to meet the criteria of 19130(b)(3).

SEIU argues that EDD has failed to meet its burden of establishing that the contract falls within the 19130 (b)(3) exemption, that there are existing state classifications that could perform the duties set forth in the contract, that EDD has not shown any attempt to recruit state employees to perform these functions, and that the oversight to be provided by the contractor is not truly independent.

Analysis

EDD's entire justification for this personal services contract rests upon DOF's pronouncement that it would condition funding of the contract on a requirement that the oversight of the IT work

⁵ The ITPOF is found in section 45 of the Statewide Information Management Manual.

be contracted out to private consultants. While DOF's role in overseeing the state's IT contracts may be broad, it is not so broad as to supersede the civil service mandate within Article VII of the California Constitution.

EDD has cited no authority to support its contention that a constitutional mandate can be countermanded by an Executive Order or a Budget Letter issued by the DOF. In fact, even assuming DOF had some authority to recommend a particular course of action with regard to a particular IT contract, nothing in the Executive Order cited by EDD even purports to authorize contracting out of the oversight of IT services. In fact, the Executive Order states that:

...each agency shall prepare a report to be submitted to the Department of Finance in 30 days describing what concrete steps the agency can take to increase the agency's oversight of major information technology projectsto ensure that such projects stay on course, on time and one budget , and to identify any impediments to accomplishing that increase in oversight.....

Neither does Budget Letter 02-37 (Exhibit C, EDD's Opposition) provide support for EDD's argument. That Budget Letter states:

[The documents assigning responsibilities for IT management following the sunset of the Department of Information Technology] outline an approach that vests IT management responsibilities with each department director, and oversight responsibilities with each Agency. ...

Nothing in that Budget Letter, nor in Budget Letter 08-06, discusses contracting out of oversight functions.

While DOF's Information Technology Project Oversight Framework, Section 6 (Exhibit A to EDD's Opposition) does specify that "for high criticality projects, the oversight must be conducted by consultants (contractors)," EDD has cited no authority for the proposition that DOF can make a legally binding determination in such a document as to whether IT work can or cannot be performed within the civil service. In fact, in the same document DOF concedes that an oversight team must possess two essential attributes: "independence and expertise." (Exhibit A, p. 25). Moreover, DOF further admits that for "low and medium criticality projects" the oversight team "may consist of state staff, but they must not be staff that report to the same organization component as the project." For example, the document continues, a department may use an internal "audit unit" or its "project management office" to perform the oversight work, or may employ other solutions, on low and medium criticality projects. Neither DOF nor EDD explain anywhere why "high criticality" projects should be presumed exempt from the civil service mandate.

EDD has not established that the Contract meets the criteria of Gov. Code § 19130(b)(3). EDD has failed to present sufficient facts to establish that there were no civil service job classifications to which it could appoint employees with the requisite expertise needed to perform the required work. EDD did not even attempt to argue that it made reasonable, good faith efforts to recruit civil service IT employees and that it has been unable to find suitable candidates to perform the Contract functions. In fact, EDD does not contend that it engaged in any recruitment efforts whatsoever prior to entering into the Contract. EDD puts all its eggs in one basket-- the argument that DOF required that it contract out as a condition to funding the project. As explained above, nothing that EDD has relied upon is legally sufficient to override the civil service mandate of the California Constitution.

The Board's decision in *In the Matter of the Appeal by State Compensation Insurance Fund*, PSC Nos. 03-06; 03-07 and 03-08 is instructive. In that case, the Board refused to find that a hiring freeze imposed by the DOF was grounds for contracting out work that was of the nature normally performed by employees in existing classifications, despite the fact that the hiring freeze had artificially depressed the staffing available to perform the work. The Department in that case had argued that it had no choice but to contract out if it wanted to be able to perform its responsibilities. The Board found the argument was unavailing stating:

SCIF asserts that it did not artificially create its need for private contractors; that need was imposed upon it by the state's hiring freeze, despite its best efforts to follow the mandates of the civil service system. While the Board recognizes that SCIF was not responsible for the predicament in which it found itself, when the Board reviews personal service contracts, it does not confine its review to whether a single agency may be engaging in intentional violations of the civil service mandate. Instead, the Board considers whether the policies of the state, when viewed as a whole, may be improperly impeding the hiring of sufficient civil service employees to conduct the state's business. As the Board stated in Department of Pesticide Regulation:

“The civil service mandate applies to the state as a whole and provides that the state, as a whole, must use civil service employees whenever those employees can perform the state's work adequately and competently.”
(2002) PSC 01-09 at p.14

The superior court subsequently upheld the Board's decision. [*State Compensation Insurance Fund v. State Personnel Board/CSEA* (Sac. Sup. Ct. No. 04CS00049)]

In this case, the fact that DOF may have the legal responsibility to insure oversight of state IT contracts does not mean that DOF can relieve departments of their obligations under the civil service mandate. Unless a department can justify its use of private contractors under the

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provisions of 19130(b), the use of such contractors to oversee IT contracts is subject to challenge and the contracts subject to disapproval. In this case, EDD has failed to justify the Contract in question under 19130(b)(3). I must therefore disapprove the contract.

Sincerely,

//s// SUZANNE M. AMBROSE

Executive Officer