

THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

**CALIFORNIA HIGH SPEED RAIL
AUTHORITY**

from the Executive Officer's August 18,
2023, Disapproval of Contract Between the
California High Speed Rail Authority and
Downey Brand, LLC for Legal Services

BOARD DECISION

PSC NO. 23-03

January 11, 2024

APPEARANCES: Alicia Fowler, Chief Counsel, on behalf of the California High Speed Rail Authority; Patrick Whalen, General Counsel, on behalf of the California State Attorneys, Administrative Law Judges, and Hearing Officers in State Employment.

BEFORE: Shawnda Westly, President; Kathy Baldree, Vice President; Kimiko Burton and Dr. Gail Willis, Members.¹

DECISION

The California High Speed Rail Authority (the Authority or CHSRA) appealed from the State Personnel Board (SPB or Board) Executive Officer's August 18, 2023, decision disapproving a contract for legal services between the Authority and Downey Brand, LLC (Downey Brand) [Agreement #HSR21-35]. The five-member State Personnel Board (Board) finds that the Authority has shown that the contract is authorized under Government Code section 19130, subdivisions (b)(3) and (10).² The Board, therefore, approves the contract.

BACKGROUND

The California State Legislature and the Governor created the Authority in 1996 for the purpose of providing California with a transportation option outside of air, conventional

¹ Member Ana Matosantos did not participate in this decision.

² Hereinafter, all statutory references are to the Government Code unless otherwise indicated.

train, and roadways. The Authority's current mission is to provide California with "an electrified high-speed rail system that will carry passengers between San Francisco and Los Angeles in under three hours." To achieve its mission, the Authority must engage in "real property management," which includes obtaining real property, easements, leases, and may also involve the relocation of businesses and residences, to name a few. It also includes completing complex environmental reviews under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA).

The high-speed rail system between the two cities will cover over 500 miles. The Authority has already completed the necessary CEQA or NEPA environmental reviews for 422 miles of the project and anticipates completing the remaining environmental reviews by the end of 2025. It has also begun construction of the first 119 miles of necessary track that will provide a test site in the Central Valley, with the anticipation that the Authority will provide the first passenger service by 2030. The Authority has entered into building and design contracts and began construction before acquiring the necessary right of way property rights for the 119-mile stretch of land that the project will cover. Should the Authority not acquire the appropriate rights of way so that the builder can move forward with timely construction, the Authority may be subject to several million dollars in delay damages. The project is also in the design phase for another 52 miles of extensions into downtown Merced and downtown Bakersfield. The Authority anticipates approximately 300 eminent domain and/or inverse condemnation actions on this 52-mile extension alone. To complete the 171-mile (119 + 52) track, the Authority must "acquire over 1,000 additional properties and relocate hundreds of utilities from more than 50 utility companies."

The Authority, like many state agencies, has the general authority to hire legal counsel to handle all matters, except representing the Authority in administrative or judicial proceedings and providing official legal opinions regarding bond issues. (Gov. Code, §

11040.)³ For those matters, the Authority must seek representation by the Office of the Attorney General (OAG) or obtain the OAG's permission to represent itself or hire counsel other than the OAG. (*Ibid.*)⁴

On May 1, 2012, the Authority requested representation by the OAG in several areas. This request included providing representation in anticipated judicial proceedings, as well as providing legal services in cases involving eminent domain and inverse condemnation actions. The OAG responded that it did not have the staff to “undertake the volume of anticipated eminent domain actions....” The OAG understood the Authority would need competent representation “from attorneys with specialized knowledge....” Therefore, the OAG consented under Section 11040 for the California Department of Transportation (Caltrans) Legal Division to provide the Authority with these services. OAG further provided: “If Caltrans' Legal Division will not or cannot perform some or all of the described legal services, it the Authority must once again seek written consent to retain outside counsel other than the [OAG].”

On November 5, 2018, the Authority requested permission from the OAG to hire private outside counsel in several areas related to eminent domain and inverse condemnation actions, including providing advice concerning drafting regulations, negotiating agreements, communicating with the Federal Railroad Administration and other federal agencies, coordinating with other California state agencies, and representing the Authority in judicial proceedings. In its November 13, 2018, response, the OAG gave its

³ The Authority's legal office consists of one Chief Counsel, one Assistant Chief Counsel, six Attorney IVs, two Attorney IIIs, and one vacant Attorney IV position which the Authority is actively seeking to fill. All of the Authority's attorneys are working at full capacity with no ability to take on additional litigation duties.

⁴ Section 11041 identifies those state entities that are not required to seek legal representation from the OAG but instead are authorized to represent themselves in legal proceedings in state and federal court.

consent for the Authority to hire counsel other than the OAG and Caltrans. The letter specified the following:

Although the Tort and Condemnation Section of the OAG provides litigation services for eminent domain and inverse condemnation actions, we do not currently have sufficient staffing to undertake the volume of anticipated eminent domain and inverse condemnation actions.

The letter advised that, if the OAG grew their Tort and Condemnation sections sufficiently before the expiration of its consent on December 31, 2020, the OAG would “coordinate with [the Authority] and outside counsel to bring that work to the [OAG].”

On March 20, 2020, Alicia Fowler (Fowler), Chief Counsel at the Authority, sought renewal of six authorizations to engage outside counsel for legal services, which included representation in eminent domain and inverse condemnation cases. The OAG provided that authorization on July 24, 2020, specifying that the OAG was providing consent for outside counsel to represent the Authority “if the Caltrans Legal Division on a case-by-case basis lacks capacity for such representation.” The authorization expired on December 31, 2022. On May 18, 2022, Fowler renewed her request for authorization on behalf of the Authority from the OAG to hire outside counsel concerning several areas, such as eminent domain and inverse condemnation actions.

In the summer of 2022, Caltrans’ Chief Counsel, Erin Holbrook (Holbrook), advised the Authority that Caltrans may not be able to handle all of the anticipated eminent domain and inverse condemnation cases for the Authority based on staffing shortages. In response, Fowler emailed the OAG to determine if the OAG could take on the cases Caltrans could not. Supervising Deputy Attorney General Pamela J. Holmes (Holmes), from the OAG’s Torts and Condemnation section, responded that her team was in the same situation. They had been “hiring for months” but did not have sufficient attorneys to take on new cases. In addition, the Governor’s Office requested the Torts and Condemnation section’s assistance

with “massive tort projects,” providing that any available resources the OAG may have had were being diverted to assist with these projects. The Authority then contacted approximately 100 state organizations to determine if their legal offices would be able to assist the Authority with its eminent domain and inverse condemnation legal actions, but no organization was able to do so.

Thereafter, on September 26, 2022, the OAG granted the Authority consent for the “employment of outside counsel other than the Attorney General...” for the requested legal services, including representing the Authority in eminent domain and inverse condemnation matters. Based on the OAG’s consent, on November 15, 2022, the Authority amended a contract already in place with the Downey Brand law firm for legal services. The amendment added “Task 8” which included the following:

Work at the direction of the Authority’s legal counsel to represent the Authority in both eminent domain and inverse condemnation matters and proceedings related to the high-speed rail project; [sic] if the Caltrans Division on a case-by-case basis lacks capacity for such representation. This would include, but is not limited to, advising on strategy, filing the complaint or answer, obtaining prejudgment orders of passion [sic], filing all appropriate pleadings and motions, conduction [sic] discovery, hiring expert witnesses, participating in mediation or settlement, as appropriate, conducting jury or court trials, and filing post-trial motions, and appeals and all related and necessary work.

DGS approved the amendment on December 13, 2022. The contract end date is December 31, 2024. The contract calls for legal services in the amount of \$1,234,749.50, including Task 8 and seven other tasks not at issue here. Five Partners and one Associate Attorney are to provide legal services under the contract with hourly rates of \$291 for the Associate Attorney and \$425, \$532, \$557, and \$604 for the Partners.

PROCEDURAL HISTORY

On May 11, 2023, CASE requested under Section 19132 and California Code of Regulations (Cal. Code Regs.), title 2, section 547.64, that the Executive Officer “review

and disapprove a contract for legal services entered into by the Authority because the services contracted for can be provided by civil service employees.” CASE argued the work to be performed under the contract with respect to eminent domain and inverse condemnation cases was “not complex and should not be outsourced.”

The Authority provided its Response on June 27, 2023. As of the date of the Authority’s Response, Downey Brand had not performed any work under Task 8 of the contract. CASE provided a Reply on July 3, 2023.

On August 18, 2023, the Executive Officer found the contract was not justified under either Section 19130, subds. (b)(3) or (b)(10) and disapproved the contract.

On September 15, 2023, the Authority filed a timely notice of intent to appeal the Executive Officer’s decision, and the SPB established a briefing schedule for the parties. On October 18, 2023, the Authority timely filed its Appeal. The Authority included in its Appeal three supplemental declarations that had not been filed with the Executive Officer. Those declarations provided greater detail concerning, among other things, the efforts made by the OAG and Caltrans to fill their vacant attorney positions and to explain the process used by the OAG and Caltrans to determine if they have sufficient attorneys to assign to an eminent domain and/or inverse condemnation lawsuit on behalf of the Authority.

On November 13, 2023, CASE timely filed its Response to the Appeal.⁵ In its Response, CASE objected to the additional declarations submitted by the Authority in its Appeal. On November 20, 2023, the Authority timely filed its Reply to the Response.

Because this case concerns an appeal from the Executive Officer’s decision, the

⁵ CASE’s Response was originally scheduled to be filed on November 1, 2023, and the Authority’s Reply was scheduled to be filed on November 8, 2023. However, CASE subsequently requested an extension of time until November 13, 2023. The Authority did not object to the continuance, and CASE’s request was granted. The Authority was also given permission to file its Reply on November 20, 2023.

Executive Officer recused herself from any deliberation or discussion in this matter. The Legal Office was also recused as it assisted the Executive Officer in her decision-making process.

ISSUES

The following issues are before the Board for consideration:

- (1) Should CASE's objection to the additional information submitted by the Authority be sustained?
- (2) Was CASE's request for contract review deficient and, if so, what is the appropriate remedy?
- (3) Does the fact that the OAG gave the Authority permission to seek to enter into an outside contract for legal services, by itself, render the contract permissible under Section 19130?
- (4) Is the Authority's contract for legal services with Downey Brand authorized by Section 19130, subds (b)(3) and/or (b)(10)?

PRELIMINARY DETERMINATIONS

Prior to discussing the merits of whether the contract is justified under the provisions of Section 19130, subds. (b)(3) or (b)(10), we will first address the following issues: CASE's objection to the Authority's submission of information not provided to the Executive Officer; the Authority's objection to CASE's initial contract review request; and, whether the fact that the OAG gave the Authority permission to seek to enter into a contract for outside legal services, standing alone, renders the contract permissible under Section 19130.

A. The Authority's Submission of Additional Information.

In addition to reasserting the arguments it made to the Executive Officer, the Authority also submitted three declarations that had not been filed with the Executive Officer (Supplemental Declaration of Authority Chief Counsel Fowler, Supplemental Declaration of Caltrans Chief Counsel Holbrook, and Declaration of OAG Senior Assistant Attorney

General (Tort & Condemnation section) Jodi Cleesattle (Cleesattle)). All three declarations essentially addressed the same two issues – the efforts the OAG and Caltrans have made to recruit attorneys to fill vacancies in their respective legal offices, and the review process the OAG and Caltrans utilizes to determine whether they have adequate legal staff to represent the Authority in any given eminent domain or inverse condemnation legal action, including whether attorneys can be reassigned from their usual assignments to work on such matters.

More specifically, the supplemental declarations noted the following recruitment efforts made by the OAG's Tort and Condemnation section, and Caltrans' legal office to fill their vacancies:

- The OAG's Torts and Condemnation section has experienced a vacancy rate of 8-12 attorneys for the past several years.
- The OAG has dedicated "significant" funding to advertising its vacancies on sites such as LinkedIn, GoInHouse.com, CareersInGovernment, Attorney Jobs in the US, and has created an entire recruitment Facebook page. The OAG also posts its vacancies on Bar Association list serves and job boards.
- Several Civil Division attorneys have been assigned to recruitment efforts.
- The heads of the various OAG sections meet monthly to discuss recruitment efforts.
- The OAG has discussed with the California Department of Human Resources (CalHR) the possibility of utilizing pay differentials to recruit and retain more attorneys.⁶
- The OAG has reduced the number of years needed to qualify for promotion to the Deputy Attorney General III and IV classifications so that staff can promote more quickly.
- The OAG now allows outside attorneys to be hired at the Deputy Attorney General IV level.
- The OAG has scheduled a Deputy Attorney General V examination.
- The Torts and Condemnation section regularly considers its existing workload and priorities when assessing whether work can be reassigned so that staff can work on new cases from the Authority.
- Caltrans' legal office has been operating with a vacancy rate of approximately 16-19 percent for the past several years.
- Caltrans has dedicated "significant" funding to advertising its attorney vacancies on sites such as LinkedIn, Indeed, Handshake, CalLawyer, and Facebook.

⁶ CASE disputes the OAG's assertion that it has explored the use of pay differentials, noting that the OAG has not raised the matter during labor negotiations concerning the Agreement for Bargaining Unit 2. However, the OAG asserts that pay differentials are not the subject of bargaining and instead are only addressed between the OAG and CalHR, which is what has occurred in this case.

- Caltrans has participated in “numerous” career fairs, where its senior attorneys meet with prospective candidates to expedite the hiring process.
- Caltrans has opened a Legal office in Fresno in an effort to attract more attorneys to work in the Central Valley (where much of the Authority’s current lawsuits are brought).
- Caltrans regularly considers its existing workload and priorities when assessing whether work can be reassigned so that staff can work on new cases from the Authority.

The Authority maintains that the three supplemental declarations are permissible under the provisions of Cal. Code Regs., tit. 2, § 547.66 because the new information merely expands upon matters previously addressed by the Authority in its filing to the Executive Officer (*i.e.*, existing civil service staff is inadequate to handle the Authority’s workload due to high vacancy rates in the OAG’s Torts and Condemnation section and Caltrans’ legal office). The Authority further maintains that CASE is not unduly prejudiced by the new information because CASE is well aware of the Authority’s argument that the contract is justified due to high vacancy rates among state civil service attorneys, and because the Authority agreed to a two-week extension for CASE to file its Response to the Authority’s appeal.

For its part, CASE maintains that the additional declarations that were not submitted to the Executive Officer are not permissible under the provisions of Cal. Code Regs., tit. 2, § 547.66. Instead, CASE asserts that the Authority knew, or reasonably should have known, that the OAG’s and Caltrans’ attorney vacancies would be an issue in determining whether the contract was justified under Section 19130, subd. (b), and no good cause exists for the Authority’s failure to thoroughly address the issue in its filings with the Executive Officer. As such, the information contained within the three declarations should not be considered.

Cal. Code Regs., tit. 2, § 547.66 governs what evidence may be presented to and considered by the Board when an appeal from the Executive Officer’s decision contract decision is filed. More specifically, Section 547.66 provides, in pertinent part:

The board will decide the appeal upon the factual information, documentary evidence, and declarations submitted to the executive officer before he or she issued his or her decision. Upon the objection of a party, the board will not accept additional factual information, documentary evidence, or declarations that were not previously filed with the executive officer if the board finds that the submission of this additional factual information, documentary evidence, or declarations would be unduly prejudicial to the objecting party.

Here, the three supplemental declarations at issue were not submitted to the Executive Officer. However, the information contained within those declarations addressed matters that had previously been raised with the Executive Officer (*i.e.*, the potential lack of existing attorneys at the OAG or Caltrans to handle a high volume of eminent domain and inverse condemnation lawsuits). More particularly, the three supplemental declarations provided additional information concerning the good faith efforts the OAG and Caltrans have been making to hire additional attorney's that could be assigned to represent the Authority in its eminent domain and inverse condemnation lawsuits.

This additional information is closely related to matters previously addressed by the Authority and serve to address concerns raised by the Executive Officer. Also, CASE will not be unduly prejudiced by the admission of the new information, in that CASE is well aware of the Authority's position that existing staff within the OAG and Caltrans may be inadequate to handle the Authority's potential litigation workload. As such, the Board will permit the new information to be considered as part of the Authority's appeal.

B. CASE's Initial Request for Contract Review.

The Authority contends that CASE's initial request for contract review was deficient and should not have been accepted by the Executive Officer because it did not include specific and detailed factual information that demonstrates how the contract fails to meet the conditions specified in Section 19130, subd. (b), and because it did not include documentary evidence and/or declarations in support of its position. CASE, on the other hand, asserts its initial request for contract review was sufficient.

Cal. Code Reg., tit. 2, section 547.61 provides, in pertinent part:

(a) Any employee organization that represents state employees may request that the board review a contract proposed or executed by a state agency pursuant to Government Code § 19130(b) by filing with the board and serving upon the state agency a written request for review. The employee organization's request for review shall identify the contract to be reviewed and include the following:

(1) specific and detailed factual information that demonstrates how the contract fails to meet the conditions specified in Government Code § 19130(b); and

(2) documentary evidence and/or declarations in support of the employee organization's position.

In her decision, the Executive Officer noted that CASE had not provided a significant amount of detail in its initial request. Instead, CASE only included a one-page letter that listed the contract at issue, the involved parties, and the argument that the work to be done under the contract – representation in eminent domain and inverse condemnation matters – was not complex and could be performed by civil servants. CASE thereafter provided further arguments and evidence in its reply to the Authority's Response. In denying the Authority's request to dismiss CASE's request for contract review, the Executive Officer found that,

The Board must review a personal services contract if requested by an employee organization. (Gov. Code, § 19132; Pub. Contract Code, § 10337, subd. (c).) Moreover, the department seeking the personal services contract bears the burden of establishing that the contract is permissible under one of the exceptions listed in section 19130, subdivision (b). (*State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 134–135; Cal. Code Regs., tit. 2, § 547.60.) This includes providing a copy of the disputed contract, as well as documentary evidence or declarations, or both. (Pub. Contract Code, § 10337; Cal. Code Regs., tit.2, § 547.62.) Thus, although CASE's initial request to the Board's Executive Officer lacked the detail its reply contained, it was sufficient to trigger the Board's mandatory requirement to review the contract.

The Board finds that the Executive Officer's determinations in this regard are well reasoned. As a result, the Authority's argument that CASE's initial request for contract

review did not comply with the provisions of Cal. Code Regs., tit. 2, § 547.61, is dismissed.

C. The OAG's Authority Under Section 11040.

In both its Response to the Executive Officer and its Appeal to the Board, the Authority asserted that the contract with Downey Brand was permissible because the OAG, acting pursuant to the authority granted to it under Section 11040, authorized the Authority to seek to enter into an outside contract for legal services. In her decision, the Executive Officer found that argument unpersuasive, noting that Section 11040 provides, in pertinent part:

(a) It is the intent of the Legislature that overall efficiency and economy in state government be enhanced by employment of the Attorney General as counsel for the representation of state agencies and employees in judicial and administrative adjudicative proceedings.

The Legislature finds that it is in the best interests of the people of the State of California that the Attorney General be provided with the resources needed to develop and maintain the Attorney General's capability to provide competent legal representation of state agencies and employees in any judicial or administrative adjudicative proceeding.

(b) As used in this article:

(1) "In-house counsel" means an attorney authorized to practice law in the State of California who is a state employee, including an excluded or exempt employee, other than an employee of the Office of the Attorney General.

(2) "Outside counsel" means an attorney authorized to practice law in the State of California who is not a state employee, including an excluded or exempt employee.

(c) Except with respect to employment by the state officers and agencies specified by title or name in Section 11041 or when specifically waived by statute other than Section 11041, a state agency shall obtain the written consent of the Attorney General before doing either of the following:

(1) Employing in-house counsel to represent a state agency or employee in any judicial or administrative adjudicative proceeding.

(2) Contracting with outside counsel.

The Executive Officer specifically noted that the OAG did not make any finding that the contract was permissible under Section 19130. Instead, the OAG merely determined that it did not have sufficient resources to represent the Authority, and on that basis, consented to the Authority seeking representation by counsel other than the OAG in accordance with section 11040. Moreover, in each of the letters providing consent to use counsel other than the OAG, the OAG advised the Authority that the Authority was responsible for obtaining any other state approvals or clearances and that it did not endorse the Authority's choice of counsel.

More significantly, the Executive Officer concluded that state agencies, like the SPB and the OAG, acquire and are limited by the authority conferred on them by the Constitution or by statute. (Gov. Code, § 11000; *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 872.) In *People ex rel. Dept. of Fish & Game v. Attransco, Inc.* (1996) 50 Cal.App.4th 1926 (*Attransco*) the court explained that the OAG did, in fact, have some authority to prevent possible abuses of the use of outside counsel by granting the OAG statutory authority to maintain a check on a state agency's ability to seek to hire outside counsel under section 11040. As the Executive Officer also found, however, at least equally important to the OAG's authority is the SPB's parallel constitutionally mandated responsibility to "enforce the civil service statutes." (Cal. Const., art. VII, § 3.) Thus, while the OAG has the authority to permit state organizations to seek to employ outside legal counsel, it is the SPB, and not the OAG, that possesses the authority under Article VII of the California Constitution, and Government Code sections 19131, 19132, and 19135, to review personal services contracts to ensure compliance with the implied civil service mandate, and to ensure that the contract in question comports with one or more of the contracting out exceptions set forth in Section 19130. (Cal. Const., art. VII, § 3; *Prof. Engineers, supra*, 15 Cal.4th at p. 547.)

Again, the Board finds that the Executive Officer's determination in this regard is well reasoned. Accordingly, the Authority's argument that its contract with Downey Brand is permissible because the OAG authorized the Authority to seek to employ outside legal counsel is dismissed.

DISCUSSION

The California Supreme Court has acknowledged that Article VII of the California Constitution provides for an implied "civil service mandate" that requires work that has historically and customarily been adequately and competently performed by civil service employees to not be performed by private contractors. (*Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547.) This mandate "emanates from an implicit necessity for protecting the policy of the organic civil service mandate against dissolution and destruction." (*California State Employees Ass'n v. Williams* (1970) 7 Cal.App.3d 390, 397.)

The implied civil service mandate is not, however, without exceptions. Instead, in Section 19130, the Legislature has set forth approximately 11 exceptions to the implied civil service mandate that permit state entities to enter into personal services contracts with outside organizations. Under Section 19130, subdivision (a), personal services contracts are permissible to achieve cost savings if certain stringent criteria are satisfied. Section 19130, subdivision (b) also provides ten non-cost-savings situations where personal services contracts are permissible. The provision at issue in this matter is Section 19130, subd. (b)(3) and (10).

An employee organization may request that the Board review a personal services contract for compliance with Section 19130. (Gov. Code, § 19132; Cal. Code Regs., tit. 2 §§ 547.61, 547.70.) The Board has delegated such review to the Executive Officer, subject to appeal to the Board. (Pub. Contract Code, § 10337, subd. (c); Cal. Code Regs., tit. 2, § 547.66; *In the Matter of Dep't of Personnel Admin.* (2000) PSC No. 00-01, p. 6.) The scope of the review

of contracts under 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. (*In the Matter of Cal. Atty., Admin. Law Judges, and Hearing Officers in State Employment* (2005) PSC 05-01, p. 4.)

The agency seeking the personal services contract bears the burden of establishing the applicability of the exception. (*State Compensation Ins. Fund v. Riley, supra*, 9 Cal.2d at pp. 134–135; Cal. Code Regs., tit. 2, § 547.60.) To meet that burden, a department must provide specific and detailed factual information demonstrating that one or more of the statutory exceptions within the subdivisions of Section 19130 apply. (Cal. Code Regs., tit. 2, § 547.62, subd. (b)(1).)

Section 19130, subd. (b)(3) permits state entities to enter into personal services contracts when, “The services contracted are [1] not available within civil service, [2] cannot be performed satisfactorily by civil service employees, or [3] 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.” Section 19130, subd. (b)(10) permits state entities to enter into personal services contracts 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.”

Therefore, it must be determined whether the Authority’s contract with Downey Brand satisfies any of the above-enumerated criteria.

Section 19130, subd. (b)(3).

Here, there is no doubt that the legal services contemplated under the contract are available within the civil service and can be satisfactorily performed by civil service attorneys. Nor are the services of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil

service system. Indeed, attorneys from Caltrans have been adequately representing the Authority in eminent domain and inverse condemnation lawsuits for years.

CASE correctly points out that the Board has previously determined that Section 19130, subd. (b)(3) does not apply when the services could be performed through the civil service system, but not enough civil service employees are currently employed to perform those services. (*In Matter of the Appeal by the Department of Pesticide Regulation* (2002) State Personnel Bd. Dec. No. 01–09, pp. 12-13.) According to CASE, Section 19130, subd. (b)(3) is inapplicable here because the Authority has been aware since at least 2018 that the OAG and Caltrans might not be able to represent the Authority in one or more legal actions due to attorney staffing shortages within those organizations; yet, despite such knowledge, the Authority took virtually no steps to ensure that attorney vacancies within those organizations, or within the Authority itself, were timely filled by competent legal counsel. CASE further contends that, contrary to Cleesattle’s supplemental declaration, during labor negotiations the OAG has never explored pay differentials as a means to entice attorneys to join or remain in the state civil service, either prior to or during contract negotiations with CASE, and that such proposals must necessarily be part of a tripartite discussion between CASE, the OAG, and the California Department of Human Resources (CalHR).

CASE’s arguments notwithstanding, several years after the Board issued its decision *In Matter of the Appeal by the Department of Pesticide Regulation, supra*, the Board clarified its decision when it determined that contracting out for legal services is permissible under Section 19130, subd. (b)(3) in those instances where despite legitimate, good-faith recruitment and retention efforts, the state organization has been unable to hire a sufficient number of civil servants to perform the needed services. (*Service Employees International Union, Local 1000* (2005) PSC No 05-03. see also, *Professional Engineers in California*

Government v. Department of Transportation, 15 Cal. 4th 543, 567 and 571-572, and *California Correctional Peace Officers Assn. v. Schwarzenegger*, (2008) 163 Cal.App.4th 802, 823). Additionally, although the OAG may not have discussed pay differentials during contract negotiations with CASE, the Board has no reason to dispute Cleesattle's sworn assertion that the OAG has had such discussions with CalHR, but that those discussions have to date proven unsuccessful.

In examining the supplemental information provided by the OAG and Caltrans regarding the recruitment and retention efforts made by those organizations to fill their attorney vacancies, as well as their processes for determining whether any existing OAG or Caltrans attorneys can be reassigned to work on eminent domain or inverse condemnation actions involving the Authority, the Board is satisfied that both the OAG and Caltrans have made sufficient, good faith efforts to recruit attorney's to fill their respective vacant positions and to reassign existing attorney's to litigation involving the Authority. Indeed, to date, the Authority has yet to refer a case to Downey Brand under the terms of the contract at issue here.

In short, this is not a case where the work cannot be performed by civil service attorneys because an adequate number of attorney positions have not been created to perform the needed work. Nor is this a case where either the OAG or Caltrans have failed to engage in legitimate, good faith efforts to fill their vacant positions. The Authority also established that it has been actively recruiting to fill its one Attorney IV vacancy and that all of its attorneys are working at full capacity and are unable to absorb an additional litigation case load. The Authority similarly established that both the OAG and Caltrans routinely determine whether existing attorney resources within those organizations can be reassigned to take on cases for the Authority prior to informing the Authority that they cannot perform that additional work.

Finally, in those situations where a state organization has requested legal representation from the OAG pursuant to Section 11040 and the OAG has declined representation due to staffing shortages, the Board expects the state organization to first consult with those state organizations identified in Section 11041 to determine if they can take on that legal representation on behalf of the organization prior to entering into any contract for outside legal services. Here, the Authority went beyond that requirement and made inquiries to approximately 100 state entities to determine whether those organizations could provide the requisite legal representation to the Authority. It was only after being informed that no other state organization could perform the work on behalf of the Authority that the Authority sought to enter into the contract at issue here.

Given the foregoing, the Board is satisfied that the Authority made sufficiently reasonable, good faith efforts to attempt to keep the contemplated legal work within the state civil service prior to seeking assistance from an outside law firm. Accordingly, the Board finds that the contract between the Authority and Downey Brand is permitted under Section 19130, subd. (b)(3).

Section 19130, subd. (b)(10).

Section 19130, subd. (b)(10) authorizes personal services contracts 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 the instant case, it is readily apparent that the Authority will, in all likelihood, continue to be involved in eminent domain and inverse condemnation legal actions for a number of years. Should the OAG or Caltrans continue to experience ongoing significant attorney vacancy rates, there exists a not insignificant likelihood that Downey Brand’s services will be required under the contract at some time in the future. Indeed, if the staffing shortages within the OAG and/or Caltrans continue or increase, it is not unreasonable to conclude that Downey Brand’s services may likely be needed

on a regular basis. Under such circumstances, the services contemplated under the contract are neither temporary nor occasional.

On the other hand, the contract services will only be required in those instances where the OAG and Caltrans determine on a case-by-case basis that they are unable to provide the necessary legal services to the Authority due to attorney staffing shortages within their organizations. It cannot be predicted with any certainty when, precisely, the OAG and/or Caltrans will not be in a position to provide the Authority with the necessary legal representation to protect its interests in eminent domain and inverse condemnation proceedings due to staffing shortages. Because the Authority's need for legal representation does not commence until the Authority has determined that it needs to initiate or respond to legal proceedings in order to timely gain the appropriate rights of way for rail line completion, or when it has been named as a defendant in a newly filed eminent domain or inverse condemnation action, it can reasonably be concluded that the services in question are urgently needed. Requiring the Authority to seek to enter into a contract only after such a circumstance has occurred would indeed frustrate the very purpose of the contracted-for services.

It is important to note that the "urgency" cannot have arisen due to the state either failing to authorize an appropriate number of civil service positions to perform the services contemplated under the contract, or because the state has not made legitimate, good faith efforts to fill its staffing vacancies. Similar to the analysis concerning Section 19130, subd. (b)(3), *supra*, any such artificially created need for the required services shall not be considered an "urgent" need under Section 19130, subd. (b)(10). Because, however, that is not the situation present here, the Board finds that the contract is permissible under Section 19130, subd. (b)(10).

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CONCLUSION

The Board finds that the Authority has submitted adequate information to show that the contract entered into between the Authority and Downey Brand for legal services is authorized by Section 19130, subds. (b)(3) and (10). The Board, therefore, approves the contract.

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STATE PERSONNEL BOARD

Shawnda Westly, President
Kathy Baldree, Vice President
Kimiko Burton, Member
Dr. Gail Willis, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on January 11, 2023.



Bruce A. Monfross
Chief Administrative Law Judge
State Personnel Board

PROOF OF SERVICE BY E-MAIL

Re: *California High Speed Rail Authority v. CASE*
SPB Case No.: 23-0030(b)-PSC
Board Decision PSC No. 23-03

I, Caroline Molumby, declare:

I am over the age of 18 years and not a party to this action. I declare that I am employed by the California State Personnel Board, 801 Capitol Mall, Sacramento, California 95814.

On January 17, 2024, I caused the following document(s) to be served on the addressees:

**BOARD DECISION IN THE APPEAL OF THE EXECUTIVE OFFICERS'
DECISION FOR DISAPPROVAL OF THE CONTRACT BETWEEN THE
CALIFORNIA HIGH SPEED RAIL AUTHORITY AND THE LAW FIRM OF
DOWNEY BRAND, LLC FOR LEGAL SERVICES**

By Electronic mail I caused such document(s), in electronic format, to be sent to the e-mail addresses listed below:

Alicia Fowler
California High Speed Rail Authority
770 L Street
Sacramento, CA 95814
Email: Alicia.Fowler@hsr.ca.gov

Patrick Whalen
CASE
123 I Street, Suite 300
Sacramento, CA 95814
Email: patrick@patrickjwhalenlaw.com

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 17, 2024, at Sacramento, California.

Caroline Molumby

Caroline Molumby
Legal Analyst