BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT** from the Executive Officer's December 28, 2004 Approval of a Contract for Legal Services between the California Department of Health Services and Covington & Burling	)	**BOARD DECISION** **PSC No. 05-01** June 7, 2005

APPEARANCES: Steven B. Bassoff, Attorney, on behalf of California Attorneys, Administrative Law Judges and Hearing Officers in State Employment; Roscoe L. Barrow II, Senior Staff Counsel, on behalf of Department of Health Services.

BEFORE: William Elkins, President; Maeley Tom, Vice President; Ron Alvarado, Sean Harrigan and Anne Sheehan, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) appealed from the Executive Officer's December 28, 2004 decision approving the contract (Contract) between the California Department of Health Services (DHS) and Covington & Burling (Covington) for legal services with respect to the development and implementation of California's Redesign 1115 Medicaid Waiver. In this decision, the Board finds that DHS has submitted sufficient information to show that the Contract is justified under Government Code section 19130, subdivision (b)(3) and sustains the Executive Officer’s decision approving the Contract.

BACKGROUND

Pursuant to the Contract, Covington is assisting DHS in the development and implementation of California's Redesign 1115 Medicaid Waiver, which is intended to redesign Medi-Cal to provide for the long-term financial viability of the program and its impact on the overall state budget. The redesign effort requires changes in state law, changes to California's state plan, and approval from the federal government to operate significant portions of Medi-Cal under a demonstration waiver pursuant to Section 1115 of the Social Security Act. According to DHS, Covington is providing legal advice, based upon its expertise as to what is occurring nationally in the Medicaid programs in other states, in order to assist California in developing redesign options and drafting a waiver application that will comply with federal law. The Contract's term is from July 1, 2004 through June 30, 2005 and its total amount is $1 million.

CASE has challenged the Contract, asserting that civil service employees could perform the contracted services adequately and competently.

PROCEDURAL HISTORY

By letter dated September 13, 2004, pursuant to Government Code section 19132[1] and SPB Rule 547.59 et seq.,[2] CASE asked SPB to review the Contract for compliance with Government Code section 19130(b).

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[1] Government Code section 19132 provides:

> The State Personnel Board, at the request of an employee organization that represents state employees, shall review the adequacy of any proposed or executed contract which is of a type enumerated in subdivision (b) of Section 19130. The review shall be conducted in accordance with subdivision (c) of Section 10337 of the Public Contract Code. However, a contract that was reviewed at the request of an employee organization when it was proposed need not be reviewed again after its execution.

On November 22, 2004, DHS submitted a copy of the Contract, the Agreement Summary (Form STD 215) and the June 30, 2004 notice given to CASE pursuant to Government Code section 11045, subdivision (a)(1).[3] On November 24, 2004, DHS submitted its written response to CASE's review request. CASE submitted its reply to DHS's response on December 6, 2004. The Executive Officer issued his decision approving the Contract on December 28, 2004.

CASE timely appealed to the Board from the Executive Officer's decision.

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.

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[2] Cal. Code Regs., tit. 2, § 547.59 et seq.

[3] Government Code section 11045, subdivision (a)(1) provides:

> Whenever a state agency requests the consent of the Attorney General to employ outside counsel, as required by Section 11040, the state agency shall within five business days of the date the request is transmitted to the Attorney General provide the designated representative of State Employees Bargaining Unit 2 with written notification of the request. The notice shall include the items enumerated in subdivision (d).

Subdivision (d) provides:

> "Written notice" within the meaning of this section shall include, but not be limited to, all of the following:
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> (1) A copy of the complaint or other pleadings, if any, that gave rise to the litigation or matter for which a contract is being sought, or other identifying information.
>
> (2) The justification for the contract, pursuant to subdivision (b) of Section 19130.
>
> (3) The nature of the legal services to be performed.
>
> (4) The estimated hourly wage to be paid under the contract.
>
> (5) The estimated length of the contract.
>
> (6) The identity of the person or entity that is entering into the contract with the state.

ISSUE

The following issue is before the Board for review:

Is the Contract justified under Government Code section 19130, subdivision (b)(3)?

DISCUSSION

In *Professional Engineers in California Government v. Department of Transportation*,[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. Government Code section 19130 codifies the exceptions to the civil service mandate that various court decisions have recognized. 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 legally may be contracted to private entities or whether state employees must perform it.

DHS asserts that the Contract is justified under Government Code section 19130, subdivision (b)(3), which authorizes a state agency 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.

CASE states that, in the past, civil service attorneys have applied for and received waivers for the California Medicaid system. DHS asserts that its civil service

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

attorneys did not have sufficient knowledge, experience and ability to perform all the work to obtain the Redesign 1115 Medicaid Waiver given the significant magnitude of the current waiver request. CASE contends that DHS has not identified with sufficient specificity the expert knowledge, experience and ability that Covington is providing that is not available in the civil service. CASE asserts further that any expertise, knowledge and ability that Covington may be providing is, in fact, being obtained from Alicia Smith & Associates, the subcontractor, and that there is no reason why DHS could not contract directly with the subcontractor, and have its civil service attorneys use the information provided by the subcontractor to obtain the desired waiver.

If an employee union asks SPB to review a personal services contract, the state department that entered into that contract bears the burden of proving that the contract is authorized under one or more of the criteria set forth in Government Code 19130.[5] In order to meet this burden, in response to the union's review request, the department must submit specific and detailed factual information that demonstrates how the challenged contract meets the provisions of Government Code section 19130 relied upon by the department, together with documentary evidence and declarations to support the department's position. [6]

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[5] *Department of Veterans Affairs* (2003) PSC No. 03-03 at pp. 5-6.

[6] SPB Rule 547.62 provides:

> **State Agency's Response.** Within 7 days after the state agency receives a copy of the employee organization's request for review, the state agency shall serve a copy of that request upon the contractor(s) to the disputed contract. Within 15 days after the state agency receives a copy of the employee organization's request for review, the state agency shall file with the board and serve upon the employee organization:
>
> (a) a copy of the proposed or executed contract; and

In response to CASE's review request, DHS submitted the Declaration of Stan Rosenstein, Deputy Director of Medical Care Services, which states that, while the subcontractor is providing important expertise in the areas of Medicaid financing and policy, and assistance in data gathering, fiscal analysis, negotiation and implementation, Covington is not depending exclusively upon the subcontractor to perform the work under the Contract. Instead, Covington is playing a fundamental role, based upon its unique skills and expertise, in drafting the waiver; negotiating with the Centers for Medicare and Medicaid Services, Congressional offices and other branches, agencies and departments of the federal government; and providing reports, data files, documentation, analysis tools, legal opinions and legal advice. Covington has already developed alternative financing systems for the states of Washington, Michigan and Kentucky. This unique experience is helpful to California's development of its own waiver. In addition, Covington has shown DHS how to incorporate New York's precedent setting approach into California's waiver. DHS would not have known about this funding option without Covington's experience and expertise. Covington has also helped New Hampshire and Louisiana negotiate waiver agreements with the federal government.

According to DHS, Covington possesses the following expertise and knowledge that state employees do not have: (1) knowledge of the Medicaid rules from different

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(b) the state agency's written response to the employee organization's request for review, which shall include:

(1) specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code §19130(b); and

(2) documentary evidence and/or declarations in support of the state agency's position. (Cal. Code Regs., tit. 2, § 547.62)

states; (2) knowledge of different types of waivers submitted by other states and which of those types have been approved; (3) knowledge of how to successfully calculate an upper payment limit and a budget neutrality calculation for different types of waivers; (4) knowledge of how to present intergovernmental transfers and certified public expenditure-based waiver programs in a manner that the federal government will approve; and (5) expertise in successfully helping other states to obtain waiver approvals of the type California is seeking.

While it would have been preferable if DHS had submitted additional detailed information to more precisely describe the particular types of expert services that Covington is providing that civil services employees cannot satisfactorily perform, we find that the information submitted by DHS is adequate to show that the complexity and magnitude of the waiver that DHS is currently requesting is significantly greater than its earlier waiver requests. Drafting the current waiver to both comply with federal law and meet the policy needs of California requires expert knowledge, experience, and ability that are not currently available through the civil service system. DHS's submissions show that Covington's significant expertise in the applicable federal law and its vast experience with other states that have applied for similar waivers cannot be matched in the civil service.

CONCLUSION

The Board finds that DHS has submitted sufficient information to show that Covington is providing expert knowledge, experience, and ability that is not available through the civil service system. The Contract is, therefore, authorized under Government Code section 19130, subdivision (b)(3).

ORDER

The Board hereby sustains the Executive Officer's December 28, 2004 decision approving the Contract under Government Code section 19130, subdivision (b)(3).

STATE PERSONNEL BOARD

William Elkins, President
Maeley Tom, Vice President
Ron Alvarado, Member
Sean Harrigan, Member
Anne Sheehan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 7, 2005.

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Laura M. Aguilera
Assistant Executive Officer
State Personnel Board

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