In the Matter of the Appeal by CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION From the Executive Officer's April 18, 2013, Decision Disapproving the Personal Services Contract for Legal Services [SPB File No. 12-008(b)]	PSC No. 13-01 (SPB File No. 12-008(b)) **BOARD DECISION AND ORDER**

APPEARANCES: Scott Wyckoff, Supervising Deputy Attorney General, on behalf of Appellant, California Department of Corrections and Rehabilitation; Patrick Whalen, General Counsel, on behalf of the California Attorneys, Administrative Law Judges, and Hearing Officers in the State Employment.

BEFORE: Patricia Clarey, President; Richard Costigan, and Lauri Shanahan, Members.

INTRODUCTION

Pursuant to Government Code section 19132 and California Code of Regulations, title 2, section 547.58 et seq., the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) requested the State Personnel Board (SPB) review and disapprove Contract No. 600002914 (the Contract), between Williams and Associates and the California Department of Corrections and Rehabilitation (CDCR). Under the Contract, Williams and Associates (Contractor) would provide legal representation for CDCR and its employees in civil lawsuits filed against them by inmates in the custody of CDCR. The Contract has a term of three years from July 1, 2012, through June 30, 2015, for a total of $6 million.

CASE contends that the Contract was not permissible under any provisions of Government Code section 19130.[1] CDCR asserts that the Contract was justified as CDCR did not have the expertise to handle the litigation under section 19130, subdivision (b)(3) and that the contracted legal services was urgent, temporary, and occasional under subdivision (b)(10).

The Executive Officer issued her Decision on April 18, 2013, disapproving the Contract. The Executive Officer determined that CDCR failed to prove that the Contract was justified under Government Code section 19130, subdivision (b)(3), (b)(8),[2] or (b)(10). Specifically, the Executive Officer found that CDCR failed to present any evidence to show that: CDCR's own attorneys could not handle the contracted cases; CDCR is unable to adequately staff its legal office to handle the legal work; outside legal representation is of an urgent, temporary, or occasional nature; or it was not feasible to provide litigation infrastructure in the location where the contracted service are to be performed.

CDCR appealed the Executive Officer's April 18, 2013, Decision to the five-member Board (Board). CDCR and CASE submitted written briefs and presented oral arguments at the Board's August 9, 2013, meeting. The Board has carefully considered

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[1] All further statutory references are to the Government Code unless stated otherwise.
[2] The Executive Officer considered CDCR's argument that it lacked litigation infrastructural support as an assertion under section 19130, subdivision (b)(8), which permits contracting out when the contractor provides equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

the Decision issued by the Executive Officer as well as written and oral arguments presented by the parties. The Board now upholds the Executive Officer's April 18, 2013, Decision.

BACKGROUND

The Contract at issue is a continuation of CDCR's previous contract with the law firm of Williams and Associates, which covered the period of July 1, 2009, through June 30, 2012. The previous contract for legal services had a total value of $5 million with two one-year renewals. This Contract was extended for an additional three-year period at the added cost of $6 million.

CASE challenged the previous contract as being impermissible under section 19130. In the prior challenge, CDCR similarly argued that the contract was exempt from the state civil service mandate under section 19130, subdivisions (b)(3) and (b)(10). CDCR offered similar, if not identical, reasons for why the contracted services qualified under the asserted subdivisions. The SPB Executive Officer did not find CDCR's assertions legally sustainable and disapproved the previous contract. CDCR appealed the Executive Officer's Decision to the Board, which issued a Decision on May 14, 2012, adopting the Executive Officer's Decision. CDCR subsequently filed a Petition for Writ of Mandate with the Sacramento Superior Court challenging the Board's May 14, 2013, Decision. The case is currently pending before the court.

In the meantime, CDCR entered into the current Contract, which is an extension of the first contract. The Board now evaluates the permissibility of this extension under section 19130.

DISCUSSION

SPB's jurisdiction to review state personal services contracts derives from Article VII of the California Constitution. In *Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547 (hereinafter "*PECG*"), 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. Government Code section 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.

1. The Contract is not justified under section 19130, subdivision (b)(3) because CDCR failed to prove that its attorneys cannot satisfactorily perform the contracted services or that it was unable to hire suitable candidates.

Section 19130, subdivision (b)(3) requires the department to establish either: (1) no civil service job classification exists to which the department could appoint employees with the requisite expertise needed to perform the required work; or (2) the

department was unable to successfully hire suitable candidates for any of the applicable classifications. (*In the Matter of the Appeal by SEIU* (2005) PSC No. 05-03, at p.8.) CDCR has not presented evidence to sufficiently satisfy either requirement.

CDCR argues that since the Attorney General is the sole litigation counsel for state agencies, it is contrary to the Legislative intent for CDCR to represent itself in litigation. CDCR further argues that requiring CDCR's staff attorney to handle litigation would duplicate the functions of the Attorney General and further affront the Legislative intent of designating the Attorney General as the state's litigation counsel. The Board disagrees.

SPB recognizes that employment of the Attorney General as counsel for state agencies and employees in court proceedings enhances the overall efficiency and economy in state government. (Gov. Code, § 11040, subd. (b).) SPB does not find, however, that section 11040 forfeits a state agency's ability to represent itself or otherwise employ counsel to handle its litigation matters when the Attorney General declines to represent the state agency.

To the contrary, the Legislature recognized that the merit principle and the administration of that principle in state hiring and appointments bring about a workforce that is capable and aptly suited to perform the tasks and duties attendant to their classifications. In this regard, the civil service mandate enunciated in the *PECG* case requires work that can be competently performed by civil servants should be done by civil servants absent explicit justification identified by the Legislature in section 19130.

In further recognition of the civil service mandate under Article VII of the California Constitution, the Legislature required that the Attorney General consent to employ outside legal counsel, "if that representation meets any of the standards set forth in paragraph (3), (5), (7), (8), (9), or (10) of subdivision (b) of Section 19130." (Gov. Code, § 12520.) To further guard against erosion of the civil service mandate, the Legislature required that CASE be promptly notified by the Attorney General of any decision permitting a state agency to contract for legal services outside of the civil service system. (Gov. Code, § 11045, subd. (d).)

Upholding the civil service mandate in a manner identified under section 19130 does not offend nor undermine the Attorney General's role as the principal legal representative of state agencies, nor does it preclude the Attorney General from permitting agencies to utilize outside counsels or other resources to handle their own legal matters.[3] The Attorney General's permission, however, does not waive or excuse an agency's obligation to ensure that the work being contracted is not of the type in which civil servants can competently perform.

As to CDCR's assertion that having its own attorneys handle the inmate litigation matters amounts to a duplication of the Attorney General's function, such an assertion is not entirely reconcilable with the circumstances leading to the Contract.

[3] CDCR states that "[t]he Executive Officer [of SPB] appears to read the term 'employ counsel' as necessarily requiring CDCR to hire itself to handle matters the Attorney General." (CDCR's Opening Brief, p. 3, ¶3.) CDCR is mistaken. The Executive Officer's April 18, 2013, Decision does not convey that CDCR is required *without exception* to use its own counsel. The Decision simply analyzed whether the work can be contracted out based on the section 19130 justifications identified by CDCR. The Executive Officer concluded that the justifications are not met here. The Board agrees.

The Attorney General has declined to represent CDCR in inmate litigation matters for a specified period. Indeed, there were approximately 650 cases that were not accepted by the Attorney General with the direction to CDCR that it may seek other legal representation to handle those cases. CDCR's handling of those matters would not result in any duplication of functions.[4] The critical question is whether CDCR's legal staff is capable and competent to perform the task necessary in handling the rejected cases.

In this regard, CDCR, as before, relies on section 19130, subdivision (b)(3), contending that the legal services cannot be performed satisfactorily by its own attorneys or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not readily available within its own legal ranks. The Board had previously rejected this argument based on the evidence that CDCR employs Attorney IIIs and Attorney IVs, whom the Board concluded are capable of handling complex litigation matters.

CDCR essentially asserts that the Board erred in its determination that CDCR Attorney IIIs and IVs are capable or suited to handle the inmate litigation matters. In particular, CDCR contends that the state job specifications for the Attorney series do not require that that the attorneys have the ability to prepare, present, and handle court litigation. (CDCR's Opening brief, p.5, ¶2.)

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[4] Even assuming that there is some duplication of effort, the additional expense associated with the duplication will undoubtedly pale in comparison to the combined $11 million contract price for a total of six years of retaining outside legal counsel.

As addressed in the Board's Decision on CASE's challenge to CDCR's previous contract in this matter, the "Definition of Series" portion of the Board's Attorney Series job specification identifies a list of tasks that incumbents must perform or be able to perform. The tasks include "assist in the preparation of or have responsibility for preparing cases which may result in litigation before...trial or appellate courts, develop strategies and tactics in disputes or litigation; ...represent departments in hearings and litigation." In the "Definition of Levels" section of the same document, the Attorney IV incumbents "are typically assigned litigation of the greatest difficulty." In the "Knowledge and Abilities" section, Attorney III incumbents must have the ability to "conduct crucial litigation," and Attorney IV incumbents must have the ability to "conduct litigation that is most complex and sensitive in nature."[5] Appointments to these levels are based on merit. (Cal.Const. Art. 7, § 1.) Appointments based on merit presumes that the individuals appointed as Attorney IIIs and IVs possess the requisite knowledge, skills, and abilities to ably perform the tasks identified within their job specifications. CDCR may not now credibly assert that its Attorney IIIs and IVs are incapable of performing the essential duties that have been clearly identified within their job specifications. As such, the Board finds that CDCR failed to provide any cogent reason

[5] The job specifications reflect the scope of the duties and responsibilities for each class of positions. (Gov Code, § 18800.) The process of classification is necessarily based upon identifiable job groupings reflecting a sufficient similarity of required skills, duties, knowledge and abilities. (Kaplan, The Law of Civil Service, p. 120; cf. Gov. Code, §18523; *Sonoma Cnty. Bd. of Educ. v. Pub. Employment Relations Bd.* (2008) 102 Cal. App. 3d 689, 700.)

why Attorney IIIs and IVs employed by CDCR should not be required to conduct litigation.

CDCR next argues that its attorneys cannot perform litigation because they are hired as "in-house counsels," and the Attorney General's Office attorneys are CDCR's litigators. Such an arrangement may indeed be a sensible one *if* the Attorney General is obligated without exception to provide legal representation for CDCR. Here, however, when the Attorney General declines to represent CDCR, to meet its obligation under section 19130, CDCR is required to either utilize its "in-house" counsels to litigate or justify outsourcing under subdivision (b). CDCR provides the following justification:

> All attorneys ... work full time on their assigned tasks. For example, the Litigation Team attorneys monitor on average 156 cases per attorney. Litigation counsel represents the individual defendants, including the state, and makes recommendations for case resolution to house counsel (the Litigation Team). House counsel assesses the litigation counsel's recommendation for case strategy and resolution and ultimately makes recommendations to CDCR....
>
> None of the ... attorneys can be allocated to litigate civil rights or medical malpractice cases on a standby basis, without severely compromising the daily legal needs of CDCR.... CDCR's legal office would need additional funding for travel and training, and dozens of additional attorneys to form a new litigation team.
>
> (Declaration of Katherine Tebrock in support of CDCR's January 18, 2013, Response to CASE Request to Review the Contract, Exhibit D, ¶9, 10.)

This declaration does not adequately show that in-house counsels are not legally capable of representing CDCR and/or its personnel in inmate litigation. During

the oral argument before the Board, CDCR represented that its attorneys on the Litigation Team are familiar with the procedural and substantive laws in these inmate lawsuits.[6] The declaration shows that the attorneys handle a large number of litigation cases involving laws and policies governing CDCR. Litigation Team attorneys duties necessarily include reviewing the cases (i.e. pleadings, rulings, correspondence and various other papers normally contained in case files), assisting with witness preparation, assessing litigation strategies, and recommending case resolutions.[7] The evidence does not paint the picture of CDCR attorneys unaccustomed to litigation. While it is possible that, when a large number of cases were first rejected by the Attorney General, the in-house attorneys may not readily represent CDCR due to the lack of familiarity with specific court proceedings or trial presentations. Considerable time has passed as to render the unfamiliarity assertion moot. This is especially true with respect to straightforward cases that can be disposed of rather quickly. Here, CDCR presented no evidence that the cases handled by Williams and Associates are procedurally and substantively complex beyond the capabilities of its internal senior attorneys.

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[6] CDCR stated that the Litigation Team attorneys were familiar with procedural aspects of the cases "in theory," such as the rules of evidence, summary judgment motion, and so forth, but that they were not trained to write briefs or take depositions.

[7] Also, intuitively, with its history dating back to the 1800s and its current Litigation Team attorneys each handling 156 cases on average, CDCR should have more collective institutional knowledge of CDCR-related law than that of any private law firm, including Williams and Associates, a firm with an impressive 26 years of experience handling CDCR cases.

CDCR's continued assertion that assigning its own attorneys to handle inmate litigation matters would greatly disrupt its internal operations, which include attorneys monitoring other legal needs for CDCR holds even less sway this time around. CDCR, in effect, is justifying the Contract based on its limited resources or lack of funding. CDCR relies, in part, on the Declaration of Karen A. Fitzgerald (Exhibit C to CDCR's January 18, 2013, Response), and argues that hiring new attorneys requires legislative approval for a change in the department's budget. (CDCR's Reply Brief, p.5 ¶1.) The Declaration, however, merely states that legislative approval is necessary when there is a budget change *for additional funding.* It begs the question whether additional funding is needed when CDCR obligates itself in the amount of $11 million for a six-year legal contract.

Furthermore, lack of funding to hire, by itself, does not justify contracting out. The Board has held that section 19130, subdivision (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 the Matter of the Appeal by the Department of Pesticide Regulation* (2002) PSC No. 01-09.)

CDCR contends the furlough program implemented throughout most state services during 2009 and 2012 resulted in a shortage of attorneys in both the Attorney General's Office and CDCR. On a similar point, the Board previously held that the imposition by the state of a hiring freeze and the refusal of the Department of Finance to approve an exemption to the freeze is insufficient to justify contracting out under

Government Code section 19130, subdivisions (b)(3). The Board reasoned that the state cannot create an artificial need for private contractors by refusing to hire sufficient numbers of civil service employees to perform its work, and then rely upon the workforce shortage it has created to justify the hiring of private contractors. The Board stated that departments must show that they took steps to restore the funding for loss positions. (*In the Matter of Appeal by California Highway Patrol* (2007) PSC No. 06-05.) Here, CDCR argues that seeking approval for additional position would have been futile; "the state was shedding, not adding positions." (CDCR's Reply Brief, p.8, ¶2.) However, CDCR cannot reasonably argue that that the effort to seek exemption from furlough would be futile if it failed to take even the minimum step to demonstrate to the State's administration that it had sufficient funding readily available to hire additional litigation staff and outsourcing would be more costly to the State. (CDCR's Opening Brief, p.4, ¶2.) Indeed, CDCR was unable to provide a response to the Board's inquiry at the oral argument why the $11 million could not have been used to hire additional attorneys.

As such, CDCR failed to persuade the Board why its seasoned attorneys overseeing a large number of litigation cases cannot conduct litigation; why CDCR cannot hire additional attorneys to litigate the cases rejected by the Attorney General; or why the contracted services cannot be more narrowly tailored to satisfy the immediate needs of the office with a long term goal to eliminate contracting out where its own civil service attorneys should by virtue of their job specifications be able to

handle the cases. Therefore, CDCR's argument that no civil service job classification exists to which the department could appoint employees with the requisite expertise to perform the contracted services or that CDCR was unable to successfully hire suitable candidates for any of the applicable classifications under section 19130, subdivision (b)(3) fails.

2. The Contract is not justified under section 19130, subdivision (b)(10) because CDCR failed to demonstrate that the need for contracted service is temporary and the delay caused by securing civil service would frustrate the purpose of the contract.

Section 19130, subdivision (b)(10), authorizes a state agency to contract out services traditionally performed by civil service employees 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.

It is undisputed that CDCR believes that civil rights cases filed by the inmates take "years to resolve" (CDCR's Opening Brief, p.7, ¶3), and the Attorney General estimated that 41,000 attorney hours would be spent on CDCR cases just for the years of 2008-2009. (CDCR's Reply Brief, p.10, ¶1). Further, after three years of the previous contract, CDCR entered into another three years of contract with a $1 million increase in projected service fees and expenses without any examination of the nature, complexity, and potential duration of the remaining cases. Again, there were approximately 650 cases that were referred to the Contractor for handling. Nothing about these facts indicates a short duration or a temporary situation in this case.

CDCR argues that the contracted work is of a temporary nature because once the remaining contracted cases resolve, there will be no further need for the contracted legal services. Such an interpretation turns the concept of a temporary nature on its head. In actuality, it makes such a determination meaningless and unnecessary.

Under subdivision (b)(10), the Board is charged with evaluating whether the services required under a contract is so urgent, temporary, or occasional that a delay in implementing civil service would frustrate the need for the services in the first place. The Board's evaluation under subdivision (b) is invoked whenever an affected or impacted employee organization or union requests that the Board conduct such a review. (Gov. Code § 19130, subd. (b); Pub. Cont. Code § 10337, subd. (c).) In performing this assessment, the Board determines whether the contracted services is an occasional occurrence, an unanticipated event, or whether the need for services is urgent or sporadic. (*In the Matter of the Appeal by Service Employees International Union (SEIU), Local 1000* (2008) PSC No. 08-10.) The Board does not merely accept a department's representation that the need for services is temporary because after several years the service is about to come to an end.

In furtherance of the argument that the services called for in the renewed Contract is temporary, CDCR offers that the Attorney General's Office has not refused any representation since January of 2013. This assertion is no different from stating that the term of the Contract (a combined six-year term) is coming to an end and therefore the need is temporary. Similarly, the Board does not give any weight to

CDCR's argument that the Contract is temporary because CDCR *could* terminate the Contract with a 30-day notice to the Contractor. An early termination clause does not reasonably lend itself to characterizing a multi-year contract as a temporary one.

In addition, even though CDCR's Litigation Team continuously monitored all of CDCR's inmate civil litigation cases, CDCR has presented no evidence that it made any effort to identify which cases can be transferred to CDCR's attorneys for continued handling and which ones should remain with the Contractor due to the nature or posture of those cases. It is difficult to fathom that none of the remaining cases are suitable to be handled by CDCR's attorneys. Absent such evidence, the Board cannot reasonably conclude that the continued handling of all cases by the Contractor amounts to a temporary assignment. If anything, the evidence points to CDCR's continued approach of referring cases to private contractor(s) without any meaningful consideration of whether they can be handled within.[8]

Finally, CDCR maintains that it lacks the necessary support staff, litigation tracking database and calendaring system to handle the "volume of cases returned by the Attorney General." CDCR did not present any evidence to show why its support staff is unable to process litigation cases, what system, if any, is needed to enable CDCR to handle the "temporary" litigation in-house, and why it is not feasible for CDCR

[8] At oral argument, the Board noted that CDCR Litigation Team attorneys each handle 156 cases, approximately 90 of which are currently handled by the Contractor. The Board inquired of CDCR as to who is presently handling the remaining cases in addition to the Attorney General? CDCR represented that they are likely referred to other private firms.

to retain additional support staff or acquire necessary litigation support infrastructure to aid in its litigation.

The Board finds that CDCR has failed to present any evidence to show that the contracted services are of a temporary, urgent, or occasional nature, and that the delay caused by filling in civil service staff would defeat the purpose of the Contract.

3. The Contract did not circumvent section 19135.

CASE argues that the Contract should also be disapproved on the basis that CDCR circumvented or disregarded the Board's previous Decision when it entered into this present Contract in violation of Government Code section 19135, subdivision (a), which provides,

> If a contract is disapproved by action of the board or its delegate, a state agency shall immediately discontinue that contract unless ordered otherwise by the board or its delegate. The state agency shall not circumvent or disregard the board's action by entering into another contract for the same or similar services or to continue the services that were the subject of the contract disapproved by the board or its delegate. (subdivision (a).)

CDCR argues Government Code section 19135, subdivision (a) does not apply because CDCR entered into the Contract before the Board's previous Decision became final. The Board agrees. The Contract was executed on or about February 21, 2012, and the Board's Decision on the previous similar contract challenge was issued on May 14, 2012. Therefore, the Contract was entered into prior to the Board's Decision on a similar case.

As such, the Board declines to disapprove the Contract on the additional ground that the Contract circumvented section 19135.

CONCLUSION

The Board finds that CDCR has failed to demonstrate that the contracted services cannot be performed satisfactorily by civil services 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, subdivision (b)(3).

The Board further finds that CDCR has failed to demonstrate that the contracted services are of such an urgent, temporary, or occasional nature that the process a state agency undertakes to fill the civil service positions would frustrate their very purpose of the contract, under Government Code section 19130, subdivision (b)(10).

ORDER

1. The attached April 18, 2013, Decision of the Executive Officer is hereby adopted by the State Personnel Board as its Decision with the aforementioned opinion incorporated.

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STATE PERSONNEL BOARD

Patricia Clarey, President
Richard Costigan, Member
Lauri Shanahan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Board Decision and Order at its meeting on September 26, 2013.

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SUZANNE M. AMBROSE
Executive Officer

CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall Sacramento, CA 95814 | www.spb.ca.gov

Governor Edmund G. Brown Jr.

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BEFORE: Patricia Clarey, President; Richard Costigan, and Lauri Shanahan, Members.

INTRODUCTION

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CASE contends that the Contract was not permissible under any provisions of Government Code section 19130.[1] CDCR asserts that the Contract was justified as CDCR did not have the expertise to handle the litigation under section 19130, subdivision (b)(3) and that the contracted legal services was urgent, temporary, and occasional under subdivision (b)(10).

The Executive Officer issued her Decision on April 18, 2013, disapproving the Contract. The Executive Officer determined that CDCR failed to prove that the Contract was justified under Government Code section 19130, subdivision (b)(3), (b)(8),[2] or (b)(10). Specifically, the Executive Officer found that CDCR failed to present any evidence to show that: CDCR's own attorneys could not handle the contracted cases; CDCR is unable to adequately staff its legal office to handle the legal work; outside legal representation is of an urgent, temporary, or occasional nature; or it was not feasible to provide litigation infrastructure in the location where the contracted service are to be performed.

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BACKGROUND

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In the meantime, CDCR entered into the current Contract, which is an extension of the first contract. The Board now evaluates the permissibility of this extension under section 19130.

DISCUSSION

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department was unable to successfully hire suitable candidates for any of the applicable classifications. (*In the Matter of the Appeal by SEIU* (2005) PSC No. 05-03, at p.8.) CDCR has not presented evidence to sufficiently satisfy either requirement.

CDCR argues that since the Attorney General is the sole litigation counsel for state agencies, it is contrary to the Legislative intent for CDCR to represent itself in litigation. CDCR further argues that requiring CDCR's staff attorney to handle litigation would duplicate the functions of the Attorney General and further affront the Legislative intent of designating the Attorney General as the state's litigation counsel. The Board disagrees.

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To the contrary, the Legislature recognized that the merit principle and the administration of that principle in state hiring and appointments bring about a workforce that is capable and aptly suited to perform the tasks and duties attendant to their classifications. In this regard, the civil service mandate enunciated in the *PECG* case requires work that can be competently performed by civil servants should be done by civil servants absent explicit justification identified by the Legislature in section 19130.

In further recognition of the civil service mandate under Article VII of the California Constitution, the Legislature required that the Attorney General consent to employ outside legal counsel, "if that representation meets any of the standards set forth in paragraph (3), (5), (7), (8), (9), or (10) of subdivision (b) of Section 19130." (Gov. Code, § 12520.) To further guard against erosion of the civil service mandate, the Legislature required that CASE be promptly notified by the Attorney General of any decision permitting a state agency to contract for legal services outside of the civil service system. (Gov. Code, § 11045, subd. (d).)

Upholding the civil service mandate in a manner identified under section 19130 does not offend nor undermine the Attorney General's role as the principal legal representative of state agencies, nor does it preclude the Attorney General from permitting agencies to utilize outside counsels or other resources to handle their own legal matters.[3] The Attorney General's permission, however, does not waive or excuse an agency's obligation to ensure that the work being contracted is not of the type in which civil servants can competently perform.

As to CDCR's assertion that having its own attorneys handle the inmate litigation matters amounts to a duplication of the Attorney General's function, such an assertion is not entirely reconcilable with the circumstances leading to the Contract.

[3] CDCR states that "[t]he Executive Officer [of SPB] appears to read the term 'employ counsel' as necessarily requiring CDCR to hire itself to handle matters the Attorney General." (CDCR's Opening Brief, p. 3, ¶3.) CDCR is mistaken. The Executive Officer's April 18, 2013, Decision does not convey that CDCR is required *without exception* to use its own counsel. The Decision simply analyzed whether the work can be contracted out based on the section 19130 justifications identified by CDCR. The Executive Officer concluded that the justifications are not met here. The Board agrees.

The Attorney General has declined to represent CDCR in inmate litigation matters for a specified period. Indeed, there were approximately 650 cases that were not accepted by the Attorney General with the direction to CDCR that it may seek other legal representation to handle those cases. CDCR's handling of those matters would not result in any duplication of functions.[4] The critical question is whether CDCR's legal staff is capable and competent to perform the task necessary in handling the rejected cases.

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CDCR essentially asserts that the Board erred in its determination that CDCR Attorney IIIs and IVs are capable or suited to handle the inmate litigation matters. In particular, CDCR contends that the state job specifications for the Attorney series do not require that that the attorneys have the ability to prepare, present, and handle court litigation. (CDCR's Opening brief, p.5, ¶2.)

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[4] Even assuming that there is some duplication of effort, the additional expense associated with the duplication will undoubtedly pale in comparison to the combined $11 million contract price for a total of six years of retaining outside legal counsel.

As addressed in the Board's Decision on CASE's challenge to CDCR's previous contract in this matter, the "Definition of Series" portion of the Board's Attorney Series job specification identifies a list of tasks that incumbents must perform or be able to perform. The tasks include "assist in the preparation of or have responsibility for preparing cases which may result in litigation before...trial or appellate courts, develop strategies and tactics in disputes or litigation; ...represent departments in hearings and litigation." In the "Definition of Levels" section of the same document, the Attorney IV incumbents "are typically assigned litigation of the greatest difficulty." In the "Knowledge and Abilities" section, Attorney III incumbents must have the ability to "conduct crucial litigation," and Attorney IV incumbents must have the ability to "conduct litigation that is most complex and sensitive in nature."[5] Appointments to these levels are based on merit. (Cal.Const. Art. 7, § 1.) Appointments based on merit presumes that the individuals appointed as Attorney IIIs and IVs possess the requisite knowledge, skills, and abilities to ably perform the tasks identified within their job specifications. CDCR may not now credibly assert that its Attorney IIIs and IVs are incapable of performing the essential duties that have been clearly identified within their job specifications. As such, the Board finds that CDCR failed to provide any cogent reason

[5] The job specifications reflect the scope of the duties and responsibilities for each class of positions. (Gov Code, § 18800.) The process of classification is necessarily based upon identifiable job groupings reflecting a sufficient similarity of required skills, duties, knowledge and abilities. (Kaplan, The Law of Civil Service, p. 120; cf. Gov. Code, §18523; *Sonoma Cnty. Bd. of Educ. v. Pub. Employment Relations Bd.* (2008) 102 Cal. App. 3d 689, 700.)

why Attorney IIIs and IVs employed by CDCR should not be required to conduct litigation.

CDCR next argues that its attorneys cannot perform litigation because they are hired as "in-house counsels," and the Attorney General's Office attorneys are CDCR's litigators. Such an arrangement may indeed be a sensible one *if* the Attorney General is obligated without exception to provide legal representation for CDCR. Here, however, when the Attorney General declines to represent CDCR, to meet its obligation under section 19130, CDCR is required to either utilize its "in-house" counsels to litigate or justify outsourcing under subdivision (b). CDCR provides the following justification:

> All attorneys ... work full time on their assigned tasks. For example, the Litigation Team attorneys monitor on average 156 cases per attorney. Litigation counsel represents the individual defendants, including the state, and makes recommendations for case resolution to house counsel (the Litigation Team). House counsel assesses the litigation counsel's recommendation for case strategy and resolution and ultimately makes recommendations to CDCR....
>
> None of the ... attorneys can be allocated to litigate civil rights or medical malpractice cases on a standby basis, without severely compromising the daily legal needs of CDCR.... CDCR's legal office would need additional funding for travel and training, and dozens of additional attorneys to form a new litigation team.
>
> (Declaration of Katherine Tebrock in support of CDCR's January 18, 2013, Response to CASE Request to Review the Contract, Exhibit D, ¶9, 10.)

This declaration does not adequately show that in-house counsels are not legally capable of representing CDCR and/or its personnel in inmate litigation. During

the oral argument before the Board, CDCR represented that its attorneys on the Litigation Team are familiar with the procedural and substantive laws in these inmate lawsuits.[6] The declaration shows that the attorneys handle a large number of litigation cases involving laws and policies governing CDCR. Litigation Team attorneys duties necessarily include reviewing the cases (i.e. pleadings, rulings, correspondence and various other papers normally contained in case files), assisting with witness preparation, assessing litigation strategies, and recommending case resolutions.[7] The evidence does not paint the picture of CDCR attorneys unaccustomed to litigation. While it is possible that, when a large number of cases were first rejected by the Attorney General, the in-house attorneys may not readily represent CDCR due to the lack of familiarity with specific court proceedings or trial presentations. Considerable time has passed as to render the unfamiliarity assertion moot. This is especially true with respect to straightforward cases that can be disposed of rather quickly. Here, CDCR presented no evidence that the cases handled by Williams and Associates are procedurally and substantively complex beyond the capabilities of its internal senior attorneys.

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[6] CDCR stated that the Litigation Team attorneys were familiar with procedural aspects of the cases "in theory," such as the rules of evidence, summary judgment motion, and so forth, but that they were not trained to write briefs or take depositions.

[7] Also, intuitively, with its history dating back to the 1800s and its current Litigation Team attorneys each handling 156 cases on average, CDCR should have more collective institutional knowledge of CDCR-related law than that of any private law firm, including Williams and Associates, a firm with an impressive 26 years of experience handling CDCR cases.

CDCR's continued assertion that assigning its own attorneys to handle inmate litigation matters would greatly disrupt its internal operations, which include attorneys monitoring other legal needs for CDCR holds even less sway this time around. CDCR, in effect, is justifying the Contract based on its limited resources or lack of funding. CDCR relies, in part, on the Declaration of Karen A. Fitzgerald (Exhibit C to CDCR's January 18, 2013, Response), and argues that hiring new attorneys requires legislative approval for a change in the department's budget. (CDCR's Reply Brief, p.5 ¶1.) The Declaration, however, merely states that legislative approval is necessary when there is a budget change *for additional funding.* It begs the question whether additional funding is needed when CDCR obligates itself in the amount of $11 million for a six-year legal contract.

Furthermore, lack of funding to hire, by itself, does not justify contracting out. The Board has held that section 19130, subdivision (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 the Matter of the Appeal by the Department of Pesticide Regulation* (2002) PSC No. 01-09.)

CDCR contends the furlough program implemented throughout most state services during 2009 and 2012 resulted in a shortage of attorneys in both the Attorney General's Office and CDCR. On a similar point, the Board previously held that the imposition by the state of a hiring freeze and the refusal of the Department of Finance to approve an exemption to the freeze is insufficient to justify contracting out under

Government Code section 19130, subdivisions (b)(3). The Board reasoned that the state cannot create an artificial need for private contractors by refusing to hire sufficient numbers of civil service employees to perform its work, and then rely upon the workforce shortage it has created to justify the hiring of private contractors. The Board stated that departments must show that they took steps to restore the funding for loss positions. (*In the Matter of Appeal by California Highway Patrol* (2007) PSC No. 06-05.) Here, CDCR argues that seeking approval for additional position would have been futile; "the state was shedding, not adding positions." (CDCR's Reply Brief, p.8, ¶2.) However, CDCR cannot reasonably argue that that the effort to seek exemption from furlough would be futile if it failed to take even the minimum step to demonstrate to the State's administration that it had sufficient funding readily available to hire additional litigation staff and outsourcing would be more costly to the State. (CDCR's Opening Brief, p.4, ¶2.) Indeed, CDCR was unable to provide a response to the Board's inquiry at the oral argument why the $11 million could not have been used to hire additional attorneys.

As such, CDCR failed to persuade the Board why its seasoned attorneys overseeing a large number of litigation cases cannot conduct litigation; why CDCR cannot hire additional attorneys to litigate the cases rejected by the Attorney General; or why the contracted services cannot be more narrowly tailored to satisfy the immediate needs of the office with a long term goal to eliminate contracting out where its own civil service attorneys should by virtue of their job specifications be able to

handle the cases. Therefore, CDCR's argument that no civil service job classification exists to which the department could appoint employees with the requisite expertise to perform the contracted services or that CDCR was unable to successfully hire suitable candidates for any of the applicable classifications under section 19130, subdivision (b)(3) fails.

2. The Contract is not justified under section 19130, subdivision (b)(10) because CDCR failed to demonstrate that the need for contracted service is temporary and the delay caused by securing civil service would frustrate the purpose of the contract.

Section 19130, subdivision (b)(10), authorizes a state agency to contract out services traditionally performed by civil service employees 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.

It is undisputed that CDCR believes that civil rights cases filed by the inmates take "years to resolve" (CDCR's Opening Brief, p.7, ¶3), and the Attorney General estimated that 41,000 attorney hours would be spent on CDCR cases just for the years of 2008-2009. (CDCR's Reply Brief, p.10, ¶1). Further, after three years of the previous contract, CDCR entered into another three years of contract with a $1 million increase in projected service fees and expenses without any examination of the nature, complexity, and potential duration of the remaining cases. Again, there were approximately 650 cases that were referred to the Contractor for handling. Nothing about these facts indicates a short duration or a temporary situation in this case.

CDCR argues that the contracted work is of a temporary nature because once the remaining contracted cases resolve, there will be no further need for the contracted legal services. Such an interpretation turns the concept of a temporary nature on its head. In actuality, it makes such a determination meaningless and unnecessary.

Under subdivision (b)(10), the Board is charged with evaluating whether the services required under a contract is so urgent, temporary, or occasional that a delay in implementing civil service would frustrate the need for the services in the first place. The Board's evaluation under subdivision (b) is invoked whenever an affected or impacted employee organization or union requests that the Board conduct such a review. (Gov. Code § 19130, subd. (b); Pub. Cont. Code § 10337, subd. (c).) In performing this assessment, the Board determines whether the contracted services is an occasional occurrence, an unanticipated event, or whether the need for services is urgent or sporadic. (*In the Matter of the Appeal by Service Employees International Union (SEIU), Local 1000* (2008) PSC No. 08-10.) The Board does not merely accept a department's representation that the need for services is temporary because after several years the service is about to come to an end.

In furtherance of the argument that the services called for in the renewed Contract is temporary, CDCR offers that the Attorney General's Office has not refused any representation since January of 2013. This assertion is no different from stating that the term of the Contract (a combined six-year term) is coming to an end and therefore the need is temporary. Similarly, the Board does not give any weight to

CDCR's argument that the Contract is temporary because CDCR *could* terminate the Contract with a 30-day notice to the Contractor. An early termination clause does not reasonably lend itself to characterizing a multi-year contract as a temporary one.

In addition, even though CDCR's Litigation Team continuously monitored all of CDCR's inmate civil litigation cases, CDCR has presented no evidence that it made any effort to identify which cases can be transferred to CDCR's attorneys for continued handling and which ones should remain with the Contractor due to the nature or posture of those cases. It is difficult to fathom that none of the remaining cases are suitable to be handled by CDCR's attorneys. Absent such evidence, the Board cannot reasonably conclude that the continued handling of all cases by the Contractor amounts to a temporary assignment. If anything, the evidence points to CDCR's continued approach of referring cases to private contractor(s) without any meaningful consideration of whether they can be handled within.[8]

Finally, CDCR maintains that it lacks the necessary support staff, litigation tracking database and calendaring system to handle the "volume of cases returned by the Attorney General." CDCR did not present any evidence to show why its support staff is unable to process litigation cases, what system, if any, is needed to enable CDCR to handle the "temporary" litigation in-house, and why it is not feasible for CDCR

[8] At oral argument, the Board noted that CDCR Litigation Team attorneys each handle 156 cases, approximately 90 of which are currently handled by the Contractor. The Board inquired of CDCR as to who is presently handling the remaining cases in addition to the Attorney General? CDCR represented that they are likely referred to other private firms.

to retain additional support staff or acquire necessary litigation support infrastructure to aid in its litigation.

The Board finds that CDCR has failed to present any evidence to show that the contracted services are of a temporary, urgent, or occasional nature, and that the delay caused by filling in civil service staff would defeat the purpose of the Contract.

3. The Contract did not circumvent section 19135.

CASE argues that the Contract should also be disapproved on the basis that CDCR circumvented or disregarded the Board's previous Decision when it entered into this present Contract in violation of Government Code section 19135, subdivision (a), which provides,

> If a contract is disapproved by action of the board or its delegate, a state agency shall immediately discontinue that contract unless ordered otherwise by the board or its delegate. The state agency shall not circumvent or disregard the board's action by entering into another contract for the same or similar services or to continue the services that were the subject of the contract disapproved by the board or its delegate. (subdivision (a).)

CDCR argues Government Code section 19135, subdivision (a) does not apply because CDCR entered into the Contract before the Board's previous Decision became final. The Board agrees. The Contract was executed on or about February 21, 2012, and the Board's Decision on the previous similar contract challenge was issued on May 14, 2012. Therefore, the Contract was entered into prior to the Board's Decision on a similar case.

As such, the Board declines to disapprove the Contract on the additional ground that the Contract circumvented section 19135.

CONCLUSION

The Board finds that CDCR has failed to demonstrate that the contracted services cannot be performed satisfactorily by civil services 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, subdivision (b)(3).

The Board further finds that CDCR has failed to demonstrate that the contracted services are of such an urgent, temporary, or occasional nature that the process a state agency undertakes to fill the civil service positions would frustrate their very purpose of the contract, under Government Code section 19130, subdivision (b)(10).

ORDER

1. The attached April 18, 2013, Decision of the Executive Officer is hereby adopted by the State Personnel Board as its Decision with the aforementioned opinion incorporated.

* * * * *

STATE PERSONNEL BOARD

Patricia Clarey, President
Richard Costigan, Member
Lauri Shanahan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Board Decision and Order at its meeting on September 26, 2013.

_____
SUZANNE M. AMBROSE
Executive Officer

ATTACHMENT

STATE PERSONNEL BOARD

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Governor Edmund G. Brown Jr.

April 18, 2013

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Re: Request for Review of Contract #5600002914 (SPB File No. 12-008(b))

Dear Counsels:

Pursuant to Government Code section 19132 and California Code of Regulations, title 2, section 547.58 et seq., the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) requested the State Personnel Board (SPB) to review and disapprove Contract No. 600002914 (the Contract), which is between Williams and Associates and the California Department of Corrections and Rehabilitation (CDCR). The Contract specifies that Williams and Associates provide legal representation for CDCR in civil lawsuits filed by inmates who are in the custody of CDCR. The Contract has a term of three years from July 1, 2012, through June 30, 2015, for a maximum amount of $6 million dollars.

CASE contends that the Contract does not comply with Government Code section 19130[1] as the legal work may be performed by existing civil-service lawyers and that none of the exceptions under section 19130 applies. CDCR contends that the Contract is exempt from the state civil service mandate under section 19130, subdivisions (b)(3) and (b)(10).[2]

After due consideration and a thorough review of the documents, it is determined that CDCR failed to establish that the Contract is exempt from the state civil service mandate under subdivision (b)(3) or (b)(10). Accordingly, the Contract is disapproved.

[1] All further statutory references are to the Government Code unless specified otherwise.
[2] All further references to subdivision(s) will be to subdivisions within section 19130.

Background

As CDCR points out, this Contract is a continuation of its previous contract with the same firm, Williams and Associates, for the duration of July 1, 2009, through June 30, 2012.[3] The previous contract was for a total of $5 million. (Contract No. 5600000685).

CASE had timely challenged the previous contract. In the prior challenge, CDCR similarly argued that the contract was exempt from the state civil service mandate under subdivisions (b)(3) and (b)(10). The SPB Executive Officer issued a decision disapproving the previous contract. CDCR then appealed the Executive Officer's decision to the five-member Board (Board). The Board invited both CDCR and CASE to present oral argument before the Board. After hearing the oral argument and considering the evidence submitted, the Board issued a decision on December 14, 2012, adopting the Executive Officer's decision.

In the Board's prior decision disapproving CDCR's contract with Williams and Associates under subdivisions (b)(3) and (b)(10), the Board found that CDCR failed to provide any reason why its own attorneys could not represent CDCR in the cases contracted out to Williams and Associates and failed to show, if workload was an issue for its existing lawyers, how it was unable to adequately staff its legal office to handle legal work. The Board further found that no urgency existed to justify CDCR's contracting out. (The Executive Officer's May 14, 2012, Decision and the Board's December 14, 2012, Decision are attached hereto.)

In light of the previous decision, this Decision below will only address additional issues that were not presented or fully explored.

CDCR's Procedural Objection to CASE's Response

CDCR contends that CASE's reply brief filed on January 25, 2013, was untimely. CDCR argues that under California Code of Regulations, title 2, section 547.63, CASE's reply must be filed with SPB and served on CDCR within five calendar days after receiving CDCR's response on January 18, 2013, or by January 23, 2013.

CASE responds that there is no authority stating that the five days reply period in California Code of Regulations, title 2, section 547.63, specifically refers to five *calendar* days. Referencing State Bar Procedural Rule 52.8, subdivision (B), CASE argues that courts and administrative bodies commonly infer "days" as "court days" when the period is five days or fewer. Alternatively, CASE requests, *ex post*, a two-day extension to file its reply brief.

CDCR maintains that "days" means calendar days under California Code of Regulations, title 2, section 51.2, subdivision (m). The scope of this regulation covering "all Appellants,

[3] Amended twice during the term of the contract.

Complainants, and Respondents and all hearings and investigative reviews conducted by the Board or its designees" under section 51.1, although extensive, does not explicitly govern the contract review process. When a union or an employee organization requests SPB's review of a contract, it is neither an appellant nor a complainant. The contract review process does not comport with either a hearing or an "investigative process" under section 51.1.[4] Accordingly, SPB declines to apply the definition of "days" under section 51.2 in this review.

In this case, CASE was served with CDCR's brief on Friday, January 18, 2013. The following Monday, January 21, 2013, was a holiday. If "five days" under California Code of Regulations, title 2, section 547.63 were meant to be calendar days, CASE would have had only two business days to file a reply brief in response to CDCR's lengthy brief and exhibits.

SPB is of the opinion that, given the unreasonably short time frame for CASE to file its reply brief, CASE's two-day delay is not excessive. Absent any evidence that CASE's two-day delay in submitting its brief prejudiced CDCR, CASE's January 25, 2013, submission is accepted for consideration. CDCR's objection is therefore overruled.

Discussion

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. (*Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547.) Section 19130 codifies the exceptions to the civil service mandate recognized in various court decisions. The purpose of SPB's 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.

To justify a personal services contract pursuant to section 19130, 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. The agency seeking the personal services contract bears the burden of establishing applicability of the exception. (*State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 134-135).

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[4] California Code of Regulations, title 2, section 51.2, subdivision (t) defines "investigative interview" as "an investigation conducted by an Investigative Officer during which the Investigative Officer shall have the authority to conduct the investigation in accordance with the provisions of section 55.1." Section 55.1 provides the Investigative Officer the authority to, among other things, interview witnesses, administer oaths, subpoena, and require attendance of witnesses and the production of books and papers. Clearly, the contract review process, which is based on documentary evidence review, is not analogous to an investigative review process, much less a hearing.

Unavailable Staff Attorneys

CDCR made identical argument under subdivision (b)(3) that its current attorneys are assigned to various tasks and are either unavailable or unprepared to handle the inmate-filed lawsuits contracted out to Williams and Associates.

The Board's position that CDCR failed to establish that (1) no civil service job classifications exist to which the department could appoint employees with the requisite expertise needed to perform the required work, or (2) the department was unable to successfully hire suitable candidates for any of the applicable classifications, continues to govern in this instance. Accordingly, subdivision (b)(3) justification does not apply here.

Unpredictable and Decreasing Staffing Needs

It is undisputed that the Attorney General's Office (AG) historically handles a significant portion, if not all, of CDCR's inmate litigation. Since 2009, the AG has declined representation for a significant number of cases due to its own staffing shortage. To justify contracting out under section 19130, CDCR contends its attorneys are assigned to different matters and are not readily able to handle the litigation that has been contracted out. Moreover, CDCR asserts that it is out of CDCR's control and often unpredictable when the AG will elect to decline representation for budgetary reasons. To this end, CDCR claims, any effort at hiring lawyers to staff for an unpredictable litigation need that, as of late, has decreased significantly, is not warranted. Moreover, CDCR claims that any hiring would only result in laying off the hired lawyers as soon as the need ceases to exist. Accordingly, CDCR believes that contracting out the limited legal work is justified under subdivision (b)(10) as the legal need is urgent, temporary and occasional in nature.

Subdivision (b)(10) authorizes a state agency to enter into a personal services contract with a private contractor when:

> [T]he 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.

Accordingly, to justify a contract under subdivision (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 civil service would frustrate the very purpose of those services. (*California State Employees Association* (2003) PSC No. 03-02 at p. 3; *State Compensation Insurance Fund* (2003) PSC No. 03-02 at p. 14.)

CDCR has not made this showing. CDCR fails to provide any evidence that the *continued* reliance on outside legal representation is of "an urgent, temporary, or occasional nature." The

undeniable fact remains that this contract is a continuation of a pre-existing three-year contract with the same firm. The contract provides that the firm continue to handle matters that the AG declines representation due to budgetary reasons. Considering that it is now year four of what, in effect, is a six-year legal contract, any claim of urgency is a stretch. Similarly, any assertion that the need for outside legal services is only temporary or occasional is not reflective of the long-term nature of the contract.

The evidence demonstrates that the firm is presently handling approximately 90[5] active cases. There is nothing presented to show when these cases were assigned to the firm, how far along the cases are in the litigation process,[6] whether there is any harm in having the cases handled by a civil-service legal unit, or how much longer legal services will be required for the firm to complete the cases. In fact, CDCR concedes that the inmate-filed cases are often lengthy in process due to the trial court's own backlog of cases. (See CDCR's Response, Exhibit F: Kathleen Williams' declaration.)

The evidence also includes a letter from the AG advising that as of January 9, 2013, the AG *planned* on "only taking back those cases from Williams & Associates that raise substantial policy issues, are of a high-profile nature, or concern class-related issues" and "cases that are newly appealed after [October 23, 2012]." (CDCR's Response, Exhibit E.) A reasonable interpretation of the AG's statement establishes that it is only accepting the return of cases that meet its unique criteria. There is no indication of whether the AG has taken back a significant or only a small percentage of those cases that were sent to the firm. Regardless of the number of cases actually returned to the AG, the fact remains that approximately 90 cases remain with the firm; a significant number that can be handled by civil-service lawyers.

Further, the AG did not commit to keeping future cases regardless of its own staffing issues. Hence, there is no evidence that the need for continued outside legal services due to budgetary reasons will cease to exist at any point in the near future. The renewal of the existing contract for another three years at the cost of $6 million strongly indicates that CDCR shares in the observation of an ongoing need. Arguably, had CDCR truly expected a reduction in the need for outside counsel, the duration or cost of the contract would not be as extensive.

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[5] CASE observed that the number of cases contracted out to Williams and Associates do not correspond to the total number of cases rejected by the AG. The number 90 is used for the purpose of this discussion. In addition, it is presumed that the 90 active cases were assigned to the firm as a result of the AG declining representation due to budgetary reasons and not based on a conflict of interest.

[6] Kathleen Williams of Williams and Associates provides in a declaration that approximately 90% of CDCR cases presently handled by her office may be resolved by the end of 2013. In particular, she offers that of the 90 active CDCR cases, 11 are set for trial, and summary judgment motions are pending in seven cases. This information is neither instructive nor dispositive on whether transferring any of the 90 cases to civil-service attorneys would result in any appreciable detriment to the individual defendants as to warrant their continued representation by Williams and Associates. Certainly, some, if not many, of the cases may be transferred to civil-service attorneys for continued representation without any harm to the individual clients.

CDCR also argues that hiring a civil-service litigation unit to handle inmate litigation will likely result in the unit standing idle without work because of its expectation that the AG will no longer decline representation for budgetary reasons. For the reasons stated above, CDCR's supposition is not necessarily supported by the evidence. Moreover, while SPB is not seeking to dictate the manner in which CDCR handles its internal assignments, CDCR's stated concerns are administrative in nature and do not serve as justification for contracting out civil service work.

The issue still remains that CDCR fails to make an earnest effort to evaluate the circumstances and determine whether the merit system is better served by CDCR retaining its own counsels, on permanent full time, limited term, or intermittent basis, or the feasibility thereof. Considering the persistent flow of cases over the course of four years, CDCR should have performed a feasibility determination to properly evaluate the need to outsource legal work for which civil service lawyers are capable of performing.

CDCR claims that the Contract should be approved because the Board similarly approved an outsourced contract in the case of *In the Matter of Appeal by California Attorneys, Administrative Law Judges and Hearing Officers in State Employment,* SPB PSC No. 03-01. CDCR's reliance is misplaced. In that case, the outsourced contract dealt with two specific, "highly technical and complex" cases, *Hillside Dairies, et al., v. Lyons, et al.*, and *Ponderosa Dairies, et al. v. Lyons, et al.* The union itself initially agreed that the facts and circumstances warranted contracting out. At the time of SPB's decision, the two cases were in their last stretch before the California Supreme Court. Further, the AG periodically reviewed the contract and only gave durational consent for the contract renewal. In fact, the AG stated in one of its letters,

> Please be advised, however, that this is likely to be the last renewal that we will approve. The litigation appears to be winding down and attorneys within our office who have worked on this case have acquired a great deal of experience and knowledge about these issues.

In the present case, the Contract or the previous similar contract, in contrast, contains no reference to specific cases or their complexity. Assuming CDCR attorneys were unaccustomed to handling the outsourced cases,[7] CDCR did not present any evidence whether it had made plans to retain or train its own attorneys so that they could become competent to handle these matters. Moreover, similar to the cited case, CDCR was given additional time to "wind down" its

[7] CDCR has approximately 100 attorneys working on various assigned tasks. Some, if not many, of its attorneys handle civil litigation albeit on different subject matters. Moreover, CDCR also has staff attorneys whom the AG's litigation attorneys report to on inmate litigation matters. While CDCR posits that its staff attorneys as well as litigation counsels overseeing the inmate litigation matters are principally performing risk analysis on those cases akin to adjusters, such an argument only goes to the point that those attorneys may not be litigation ready at the moment. Also, as observed in the recent Board Decision, CDCR has several Staff Attorney IVs. Attorneys within that classification range are expected to be able to handle complex litigation matters. (Attorney Series Class Specification published at www.calhr.ca.gov.) CDCR's decision not to assign litigation work to its senior-level attorneys does not eliminate the fact that those attorneys should be able to handle litigation matters.

previous contract to lessen the impact of the disapproval. Instead of developing procedures to gradually transfer the cases back to the department's own attorneys, CDCR entered into yet another lengthy three-year contract at an increased maximum amount of $6 million. To accept CDCR's position that contracting out legal work is justified because its civil service attorneys, a number of whom are Staff Attorney IVs, are not appropriately suited for inmate litigation matters would render section 19130 protection of the civil-service mandate an ineffectual screening process.

Litigation Infrastructure Shortage

CDCR contends that it "would require more than simply additional attorneys to assume handling of active litigation... [It needs] a formidable litigation infrastructure..., [that would] minimally consists of specialized support staff; a litigation tracking database and calendaring system..., and a production room for the preparation, processing and tracking of court filings and discovery documents." CDCR implies that William and Associates will be able to provide the "litigation infrastructure" unavailable at CDCR.

It appears that CDCR is arguing the contract's justification under subdivision (b)(8), which states,

> The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

In analyzing subdivision (b)(8), SPB has previously concluded:

> Government Code section 19130(b)(8) sets a higher standard than merely showing that the state does not now have the personnel or equipment to perform the contracted services in the locations in which they are currently being performed. The subdivision requires that [the Department] must show that the state could not "feasibly" provide the services, in other words, that the state is not capable of providing the equipment or personnel to perform the contracted services where the contractors are working. (*In the Matter of the Appeal by Department of Pesticide Regulation* (2001) PSC No. 01-09.)

Here, CDCR has not provided any information to support that it "could not feasibly" provide the necessary facility, equipment, software, and other infrastructure services. The fact that CDCR may not currently have sufficient equipment or personnel to perform the services is not adequate to meet the burden imposed under this subdivision that the equipment and staff could not be "feasibly" provided. As such, CDCR's argument that it lacks infrastructural support under subdivision (b)(8) must be rejected.

Conclusion

CDCR has not demonstrated that the exemptions under subdivision (b)(3) and (b)(10) apply to the Contract. Accordingly, the Contract is disapproved.

The parties have a right to appeal this decision to the five-member State Personnel Board under California Code of Regulations, title 2, section 547.66. Any appeal should be filed no later than 30 days following receipt of this letter in order to be considered by the Board.

Absent an appeal, within 15 days of the Board's final action, CDCR must serve the vendor with a notice of the discontinuation of the Contract consistent with the decision herein. A copy of the notice must be served on the Board and CASE as required by Government Code section 19135, subdivision (b).

Sincerely,

Paul R. Ramsey for

SUZANNE M. AMBROSE
Executive Officer

ATTACHMENT

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Governor Edmund G. Brown Jr.

In the Matter of the Appeal by CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION from the Executive Officer's May 14, 2012, Decision Disapproving the Personal Services Contract for Legal Services [SPB File No. 12-003(b)]	PSC No. 12-02 **BOARD DECISION** DECEMBER 14, 2012

APPEARANCES: Anna Lisa Awiszus, Assistant Chief Counsel, and James Michael Davis, Senior Staff Counsel, on behalf of Appellant, California Department of Corrections and Rehabilitation; Patrick Whalen, General Counsel, on behalf of the California Attorneys, Administrative Law Judges, and Hearing Officers in the State Employment.

BEFORE: Maeley Tom, President; Patricia Clarey, Vice President; and Richard Costigan, Member; Kimiko Burton, Member.

BACKGROUND

Pursuant to Government Code section 19132 and California Code of Regulations, title 2, section 547.58 et seq., the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) requested the State Personnel Board (SPB) to review and disapprove Contract No. 5600000685 (the Contract), which is between Williams and Associates and the California Department of Corrections and Rehabilitation (CDCR). Under the contract, Williams and Associates would provide legal representation for CDCR in civil lawsuits filed by inmates who are in the custody of CDCR. The Contract, which was amended twice, termed from July 1, 2009, through June 30, 2012. CASE contended that the Contract does not comply with Government Code section 19130.

On March 23, 2012, CDCR submitted a copy of the Contract and a written response. CASE submitted a reply dated March 30, 2012. On May 14, 2012, the Executive Officer issued a Decision disapproving the Contract on the basis that CDCR failed to establish that the Contract is exempt from the state civil service mandate under Government Code section 19130, subdivision (b)(3) or (10).

CDCR appealed the Executive Officer's Decision to the five-member Board. CDCR and CASE submitted written briefs respectively before the Board and presented oral argument during the Board's November 1, 2012, meeting. The Board has carefully considered the Decision issued by the Executive Officer as well as the written and oral arguments presented by the parties and now issues the following Decision upholding the Executive Officer's May 14, 2012, decision.

ANALYSIS AND DECISION

The Board finds that CDCR has failed to demonstrate that the contracted services cannot be performed satisfactorily by civil services 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, subdivision (b)(3).

While CDCR proffers that its staff attorneys are unable to handle the contracted litigation work, the evidence suggests otherwise. CDCR employs a sizeable number of staff attorneys with diverse and varying years of experience from entry-level attorneys to Attorney IVs. Notably, Attorney IVs are required to "have the knowledge of legal principles and court procedures, as well as the ability to conduct proceedings in trial and

appellate courts of California and the United States" (California State Personnel Board Specification, Attorney Series, Attorney IV).

The contracted litigation work encompasses defending CDCR's staff and officers in prisoner-filed suits claiming various constitutional violations. While this work is customarily handled by the Office of the Attorney General (OAG), CDCR's staff attorneys are not unfamiliar with these matters. CDCR assigns many of its attorneys to supervise and monitor the litigated matters handled by the OAG. While CDCR may not have directly participated in the litigation, its attorneys are not unaccustomed to litigation. Accordingly, to simply assert that it does not have attorneys who are capable of handling these cases is too convenient and against the weight of the evidence.

Even if CDCR's assertions that its attorneys are without the necessary qualification or experience to defend against the contracted prisoner-filed suits, CDCR has not shown any effort at rectifying this perceived deficiency. Lest not forget, the Supreme Court has firmly held that there is an implied mandate from Article VII of the State constitution prohibiting state agencies from contracting with private entities to perform work that the state has historically and customarily performed and can perform adequately and competently. (*Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547.) Such a mandate requires more than a perfunctory nod or observation to determining whether the work may be handled by state employees.

The facts show that CDCR elected to enter into a three-year contract with Williams and Associates to represent CDCR and its employees in these suits. The facts do not reveal any effort by CDCR during the course of the three-year contract to

determine how to return the work to the state. Perhaps CDCR could have analyzed the complexity of each matter rejected by the OAG and only contract out cases that are highly specialized or technical beyond the knowledge and expertise of its staff attorneys. CDCR could have allotted time to its experienced senior staff attorneys to prepare for, and handle the cases destined for outside counsel. Again, the Attorney IVs are presumptively experienced and qualified to handle litigation as noted within the job specification. Assuming further that CDCR's is devoid of attorneys, including those within the Attorney IV rank, who can handle these litigated matters, CDCR could have made some attempt to obtain necessary funding to hire limited-term or permanent legal staff with the qualifications or skills necessary to take over the cases. While the Board is cognizant of the scarce state resources and the difficulty of obtaining additional funding, CDCR should have at least made the overture to obtain the funding. At the very least, such a step would show the good faith effort by CDCR at complying with implied mandate. (*In the Matter of the Appeal by SEIU, Local 1000* (2005) PSC No. 05-03.) Failing to make any endeavor in this regard, CDCR cannot justify its contract under Government Code section 19130, subdivision (b)(3).

The Board further finds that CDCR has failed to demonstrate that the contracted services are of such an urgent, temporary, or occasional nature that the process a state agency undertakes to fill the civil service positions would frustrate their very purpose of the contract, under Government Code section 19130, subdivision (b)(10).

In particular, CDCR has not presented any facts showing that the proceedings in all contracted cases are of an urgent or occasional nature that termination of the Contract would subject all contracted cases to potential default judgments against

CDCR employees. The Board understands that litigation is often time sensitive. However, replacing attorneys is not a novel or unprecedented event. Substituting attorneys during the course of a case frequently occur for various reasons. In this case, once the perceived urgency subsides, CDCR should have taken the steps at securing state attorneys to handle the cases. There is no evidence of such an effort by CDCR. Further, it is undisputed, albeit at a much lower rate, the OAG has for years continued to reject CDCR cases, which signifies that the OAG rejections are not of such an occasional or temporary nature that CDCR could not have anticipated.

The Board noted CASE's objection of the new documentary evidence and declarations attached to CDCR's August 13, 2012, opening brief. The Board believes that with due diligence, these documents could have been submitted to the Executive Officer for review. The parties have an obligation to adequately prepare and present their case before the Executive Officer to enable the Executive Officer to make an informed and sound decision. The practice of submitting to the Board at the appeal stage documents that could have been obtained by the parties in the proceedings before the Executive Officer is prejudicial to the objecting party, encumbering to the Board's contract review process, and is strongly discouraged by the Board. Accordingly, the new documentary evidence submitted by CDCR in its August 13, 2012, brief is excluded and not considered by the Board.

CASE additionally requests that CDCR's Contract be disapproved on the basis that CDCR failed to provide notice under Government Code section 11045, subdivision (c). Subdivision (c) provides that CDCR *shall* provide a copy of the proposed contract to the designated representative of State Employees Bargaining Unit 2 or CASE,

notwithstanding the notice requirement imposed on OAG by the statute. As such, CDCR's argument that OAG's notice is sufficient in lieu of its own notice is without merit. The Board disagrees, however, that the remedy for not complying with this subdivision is disapproval of the contract. The maxim that "for every wrong there is a remedy" applies only to those wrongs for which the law authorizes or sanctions redress. (Civ.Code § 3523; *Mega Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal. App. 4th 1522.) The Board's authority to disapprove a contract stems from Government Code section 19130, and the Board is without authority to disapprove a contract based on the state agency's violation of Government Code section 11045, subdivision (c). Nonetheless, the Board believes that Government Code section 11045, subdivision (c) serves an important purpose in protecting the civil service merit system, and the Board strongly urges that state agencies, including CDCR, adhere to the requirements of subdivision (c), in notifying CASE of their proposed contracts for legal services.

ORDER

1. The attached May 14, 2012, Decision of the Executive Officer is hereby adopted by the State Personnel Board as its Decision with the aforementioned opinion incorporated.

2. The new documentary evidence and declarations attached to CDCR's August 13, 2012, opening brief is stricken.

3. For future purposes, CDCR is advised to provide adequate notice to CASE when it submits proposed legal services contracts to the Department of General Services for review under Government Code section 11045.

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STATE PERSONNEL BOARD
Maeley Tom, President
Patricia Clarey, Vice President
Richard Costigan, Member
Kimiko Burton, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on December 14, 2012.

SUZANNE M. AMBROSE
Executive Officer
State Personnel Board

ATTACHMENT

STATE
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May 14, 2012

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Re: Request for Review of PS Contract #5600000685 (SPB File No. 12-003(b))

Dear Counsel:

Pursuant to Government Code section 19132 and California Code of Regulations, title 2, section 547.58 et seq., the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) requested the State Personnel Board (SPB or the Board) to review and disapprove Contract No. 5600000685 (the Contract), which is between Williams and Associates and the California Department of Corrections and Rehabilitation (CDCR). The Contract provides that Williams and Associates will provide legal representation for CDCR in civil lawsuits filed by inmates who are in the custody of CDCR. The Contract, which was amended twice, has a total current term from July 1, 2009, through June 30, 2012. CASE contends that the Contract does not comply with Government Code section 19130.

In a letter dated February 23, 2012, the Board notified CDCR of CASE's request for review and disapproval of the Contract. CDCR submitted a copy of the Contract and a written rebuttable dated March 23, 2012. CASE submitted a reply dated March 30, 2012.

After due consideration and a thorough review of the documents, it is determined that CDCR failed to establish that the Contract is exempt from the state civil service mandate under Government Code section 19130, subdivision (b)(3) or (10). Accordingly, the Contract is disapproved.

Position of CDCR

Under Government Code section 11040, subdivision (a), the California Office of the Attorney General (OAG) serves as counsel for most state agencies, including CDCR, and the employees of those agencies. As a result, CDCR is statutorily mandated to use the legal services of the OAG in all civil actions.

Beginning in the summer of 2009, the OAG informed CDCR that the combination of increased prison-related litigation and OAG budget cuts, which prevented the OAG from retaining additional deputy attorneys general, resulted in inadequate staffing to perform legal services for CDCR. Consequently, the OAG, pursuant to Government Code section 11040, provided CDCR with consent to employ counsel other than the Attorney General for the cases that the OAG could not accept. The OAG informed CDCR that it would review and re-assess the situation.

CDCR contracted with Williams and Associates to represent CDCR in inmate civil litigation cases throughout California that the OAG had declined to provide CDCR with legal services. The Contract, which was amended twice, extends from July 1, 2009, through June 30, 2012.

CDCR does not dispute that it never notified CASE of the Contract or the amendments to the Contract. CDCR maintains that Government Code section 11045 [written notification required whenever a state agency requests the consent of the OAG to employ outside counsel] is inapplicable since CDCR did not seek the consent of the OAG to employ private counsel; rather, CDCR sought the legal representation of the OAG, but the OAG declined to represent CDCR and, unilaterally, authorized CDCR to hire outside counsel. CDCR argues in the alternative that even assuming it was required to notify CASE of the Contract, the lack of notification did not prejudice CASE. CDCR does not address CASE's argument that CDCR failed to provide CASE with notice of the Contract as required by Government Code section 11045, subdivision (c) [written notification required whenever any state agency submits a proposed contract for outside counsel to the DGS].

CDCR argues that Government Code section 19130, subdivision (b)(3) and (10) justify the need for the Contract.[1] CDCR relied on the express representations of the OAG that its Correctional Law and Tort and Condemnation units lacked the sufficient number of attorneys to represent CDCR in certain inmate civil litigation matters. Thus, the legal services provided to CDCR by Williams and Associates are services not currently available in state service, albeit the OAG continues to monitor its staffing levels and budget. In addition, the Contract was a transitory situation that has now largely run its course. Given, however, that the OAG still declines to represent CDCR in certain cases, although the number of declines has significantly lessened, CDCR believes it prudent to keep the Contract open. CDCR likens the need for the Contract to

[1] CASE argued that the Contract was impermissible under Government Code section 19130, subdivision (a). In its rebuttal, CDCR acknowledges that subdivision (a) is inapplicable since CASE challenges the Contract under Government Code section 19132, which only provides a basis for review under Government Code section 19130, subdivision (b). Accordingly, only those arguments relative to subdivision (b) are set forth herein.

the factual scenario in *CCPOA v. Schwarzenegger* (2008) 163 Cal.App.4th 802 (*CCPOA*), where the court found that CDCR's contract with private out-of-state peace officers was justified under Government Code section 19130, subdivision (b)(3) and (10).

Finally, CDCR argues that a disapproval of the Contract would cause CDCR to incur the increased expense of paying for both its current attorneys and new attorneys. Additionally, disapproval of the Contract would jeopardize CDCR's legal defenses.

Position of CASE

CASE, which is the exclusive representative of State Bargaining Unit 2 employees, acknowledges that the OAG has for many years represented and defended CDCR in civil litigation brought by inmates. CASE further acknowledges that in recent years the OAG has declined to represent CDCR in these matters. CASE maintains that this type of legal work is traditionally performed by Unit 2 civil servants.

CASE argues that CDCR did not provide it with written notice of the Contract as required by Government Code section 11045, subdivisions (a)(1) and (c). Based on those failures alone, CASE argues that the Contract is legally invalid and should thus be disapproved.

In addition, CASE contends that the Contract does not fall under Government Code section 19130, subdivision (b)(3), because no evidence establishes that the legal services of the Contract are not available within state service. The record demonstrates that not only did the OAG have attorneys, but CDCR had attorneys as evidenced by the fact that CDCR's rebuttal was prepared and signed by a CDCR Senior Staff Counsel. Relying on *CCPOA*, where the court found the test was "whether the civil service could not perform the task...quickly enough," CASE argues that the test here is "whether the state could staff up in time to perform the work." (*CCPOA*, *supra*, 163 Cal.App.4th at p. 823.) In *CCPOA*, the union admitted that attrition, recruitment problems, and training delays encumbered staffing at adequate levels to address prison overcrowding. In contrast, CASE asserts it has made no such admission in this matter, and further, no evidence exists showing delays in hiring state attorneys.

Likewise, CASE argues that Government Code section 19130, subdivision (b)(10), does not justify the Contract. CDCR offers no evidence or even argument that there were any delays in hiring attorneys, that CDCR could not hire attorneys, or that any delay in hiring attorneys would prejudice their ability to handle the legal workload that is subject to the Contract.

Further, CASE argues that no urgent or temporary need exists to justify the Contract under Government Code section 19130, subdivision (b)(10). The three-year length of the Contract term shows that the situation with the OAG is not of a temporary nature. CDCR offers no evidence of a legal crisis or anything remotely resembling the emergency described by the appellate court in *CCPOA*. Moreover, CDCR presents no evidence that CDCR lacks a sufficient number of attorneys to represent CDCR in litigation matters that the OAG had declined.

CASE also maintains that the OAG's decision to allocate attorneys to other sections does not establish a shortage of personnel but simply a shifting of priorities away from the legal sections that perform CDCR legal work. Reallocation of personnel does not establish an emergency like the one in *CCPOA*, since departments cannot manufacture a need for a service and then use that need to circumvent constitutional and statutory civil service requirements.

Analysis

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. (*Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547.) Government Code section 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.

To justify a personal services contract pursuant to Government Code section 19130, subdivision (b), a department must provide *specific and detailed factual information* demonstrating that one or more of the exceptions set forth in section 19130 apply. The agency seeking the personal services contract bears the burden of establishing that a section 19130 exemption applies. (*State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 134-135).

Government Code section 19130, subdivision (b)(3), authorizes a state agency to enter into a personal services contract when:

> [t]he 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.

Government Code section 19130, subdivision (b)(3), thus requires the department to establish either: (1) no civil service job classifications exist to which the department could appoint employees with the requisite expertise needed to perform the required work; or (2) the department was unable to successfully hire suitable candidates for any of the applicable classifications. (*In the Matter of the Appeal by SEIU*, PSC No. 05-03, at p. 8.)

Government Code section 19130, subdivision (b)(10), authorizes a state agency to enter into a personal services contract with a private contractor when:

> [T]he 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.

Accordingly, to justify a contract under Government Code section 19130, subdivision (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 civil service would frustrate the very purpose of those services. (*California State Employees Association* (2003) PSC No. 03-02 at p. 3; *State Compensation Insurance Fund* (2003) PSC No. 03-02 at p. 14.)

In *CCPOA*, the Third Appellate District held that CDCR's contract for services of private out-of-state prisons to house state prison inmates in order to combat overcrowding satisfied the afore-stated exceptions to the state's prohibition against contracting out services ordinarily performed by civil service employees. (*CCPOA*, *supra*, 163 Cal.App.4th 802.) The appellate court based this finding on CDCR's showing that the governor's proclamation of a state of emergency established an urgent need for additional prison facilities and services; however, the design, construction, and renovation of additional prison housing units could not occur quickly enough to resolve the inmate population crisis. (*Id.* at pp. 822.) The appellate court also found that CDCR established it was "unable to employ enough correctional officers to work in the additional inmate housing units needed to combat the prison overcrowding emergency" and "[e]ven if CDCR could have hired and trained the requisite number of officers, ... CDCR had no additional inmate housing units in which the officers could perform their services ...." (*Id.* at pp. 822-23.)

In this case, the record shows that the OAG Tort and Condemnation Section was directed to reduce its size by transferring staff to other sections of the office (Exh. C) and that the Correctional Law Section had been unable to fill vacancies while facing an explosion of inmate lawsuits (Exh. D). A September 11, 2009, letter from the OAG to CDCR states that the Correctional Law and Tort and Condemnation Sections are "simply not funded, and consequently lack the requisite attorneys, to litigate all of the cases" that CDCR sends to the OAG. (Exh. E.) A February 2, 2012, letter from the OAG to CDCR returns to CDCR a pro se plaintiff case since the Tort and Condemnation Section is not currently staffed to provide representation in the case. (Exh. F.)[2] Government Code section 19130, subdivision (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 the Matter of the Appeal by the Department of Pesticide Regulation* (2002) SPB Dec. 01-09, 12-13.)

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[2] It should be noted that CDCR only included as exhibits to its rebuttal correspondence from the OAG to CDCR in 2009, not in 2010 or 2011.

It is undisputed that CDCR is statutorily required to use the legal services of the OAG in civil litigation matters unless the OAG gives CDCR consent to hire outside counsel. In light of this statutory mandate, it is reasonable to assume that CDCR does not necessarily hire or employ attorneys with the federal and state court litigation experience, skills, and knowledge which deputy attorneys general possess by the nature of their work for the OAG. Nonetheless, CDCR does not provide specific information regarding the number and complexity of the cases subject to the Contract, nor does CDCR advance any reason why its own attorneys could not represent CDCR in the cases contracted out to Williams and Associates. CDCR has thus not shown that it exhausted all reasonable avenues for procuring the necessary services through civil service. (*In the Matter of the Appeal by the Department of Pesticide Regulation, supra*, SPB Dec. 01-09 at p. 14.) Accordingly, CDCR has not established the applicability of Government Code section 19130, subdivision (b)(3).

CDCR also fails to establish an exemption under Government Code section 19130, subdivision (b)(10). The original term of the contract was from July 1, 2009, through June 30, 2012. The original projected expenditures for the Contract were: (1) fiscal year (FY) 2009-2010, $300,000; (2) FY 2010-2011, $300,000; and (3) FY 2011-2012, $400,000. Thus, the total original agreement was for a sum of $1,000,000.00. The first amendment to the Contract, which was in January 2011, increased the maximum total amount of the Contract to $2,200,000.00. The second amendment to the Contract, which was only five months later, in June 2011, more than doubled the total sum of the Contract to $5,000,000.00. The three-year length and significant total amount of the Contract is not of a temporary or occasional nature.

The OAG letters to CDCR (Exhs. B, C, D, & E) note that the OAG would monitor the progress of existing CDCR cases and notify CDCR when new CDCR legal work could be accepted by the OAG. CDCR argues that these notations indicate that the OAG "understood the situation to be fluid." This argument is unpersuasive, since the three-year length and significant amount of the Contract suggests that *CDCR* did not view the OAG's fiscal crisis and staffing shortages as short term or temporary. Additionally, the Contract itself shows that CDCR did not at the time of the Contract's implementation view subdivision (b)(10) as applicable. As justification for contracting for private legal services, the Contract *only* relies upon subdivision (b)(7), which concerns conflicts of interest, albeit the stated reason concerns "[t]he private counsel services being contracted are not available within civil service."[3]

CDCR also fails to establish that the Contract was urgent. The September 11, 2009, letter from the OAG to CDCR (Exh. E) shows that over several months prior to the September letter the

[3] It should be noted that CASE did not object to CDCR relying on Government Code section 19130, subdivision (b)(10) as a grounds for approval of the Contract. Hence, CASE has waived any objection to CDCR's reliance upon subdivision (b)(10). (*In the Matter of the Appeal by the Department of Pesticide Regulation, supra*, SPB Dec. 01-09 at p. 14.) Nonetheless, the stated reason in the Contract is considered herein for its relevance to CDCR's position that the Contract was urgent and temporary, and hence exempt from the civil service mandate under subdivision (b)(10).

workload issues faced by the OAG were discussed with CDCR, suggesting that CDCR had the opportunity to plan for an event where CDCR would be unable to acquire the legal services of the OAG. Contracting out is not justified under Government Code section 19130, subdivision (b)(10), where the urgency is self-created and arises as a result of a department's lack of planning. (*In the Matter of the Appeal by SEIU* (2008) PSC No. 08-10.) In addition, as discussed above, the Contract itself states that the Contract is justified under subdivision (b)(7), not (b)(10).

CCPOA is distinguishable. In that case, Governor issued a proclamation declaring an urgent need for additional prison facilities and services; however, the design, construction, and renovation of additional prison housing units could not occur quickly enough to resolve the inmate population crisis. (*CCPOA, supra*, 163 Cal.App.4th at pp. 822.) Here, no similar proclamation existed as to CDCR's need for legal services. While civil litigation involves deadlines and timeframes, CDCR does not explain why the contracted out cases were of an urgent nature. CDCR does not address why, for instance, extensions of time or continuances in these cases were not possible or feasible. CDCR thus fails to establish that the Contract falls within the Government Code section 19130, subdivision (b)(10), exception allowing personal services contracts outside the state civil service system.

CDCR offers no legal basis for the proposition that a personal services contract can be approved on grounds that disapproval of the contract would have a negative fiscal and/or legal impact on the department. Additionally, CDCR's argument in this regard is cursory and vague without any elaboration as to the nature or number of cases that will be impacted by a decision disapproving the Contract.

Nonetheless, a transition period is appropriate to minimize any impact the disapproval of the Contract will have on CDCR's legal stance in the cases being handled by Williams and Associates under the Contract. Accordingly, the legal services being currently performed by Williams and Associates under the Contract may be continued for a period of time not to exceed the end of the term of the Contract to allow the coordination and transfer of cases to the OAG. CDCR shall promptly notify the Board and CASE when the transfer of the cases from Williams and Associates to the OAG is complete.

Given that CDCR fails to establish the applicability of the exemptions under Government Code section 19130, subdivision (b)(3) or (10), CASE's argument as to lack of notice need not be addressed.

Conclusion

CDCR has not demonstrated that the exemptions found in Government Code section 19130, subdivision (b)(3) and (b)(10) apply to the Contract. Accordingly, the Contract is disapproved. However, the legal services being currently performed by Williams and Associates under the Contract may be continued for a period of time not to exceed the end of the term of the Contract to allow the coordination and transfer of cases to the OAG. CDCR shall promptly notify the

Board and CASE when the transfer of the cases from Williams and Associates to the OAG is complete.

The parties have a right to appeal this decision to the five-member State Personnel Board under California Code of Regulations, title 2, section 547.66. Any appeal should be filed no later than 30 days following receipt of this letter in order to be considered by the Board.

Absent an appeal, within 15 days of the Board's final action, CDCR must serve the vendor with a notice of the discontinuation of the Contract consistent with the decision herein. A copy of the notice must be served on the Board and CASE as required by Government Code section 19135, subdivision (b).

Sincerely,

SUZANNE M. AMBROSE
Executive Officer

DECLARATION OF SERVICE

Case Name: California Department of Corrections and Rehabilitation

PSC No.: 12-02

Matter: Appeal

I am a citizen of the United States and employed in the County of Sacramento. I am over the age of eighteen years and I am not a party to the within action. My business address is: California State Personnel Board, Chief Counsel's Office, 801 Capitol Mall – MS-53, Sacramento, CA 95814.

On December 19, 2012, I served the attached **BOARD DECISION**, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, by mail delivery at Sacramento, California, addressed as follows:

Patrick Whalen
General Counsel
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1231 I Street, Suite 300
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Attorney for CASE

James Michael Davis, Senior Staff Counsel
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Office of Legal Affairs
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Attorney for CDCR

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on December 19, 2012.

C. RUBIO
Declarant

C. Rubio
Signature