

February 7, 2001

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

REPORT ON PROPOSITION 35 AND ITS APPLICATION TO THE CITY OF SAN DIEGO

INTRODUCTION

On November 7, 2000, California voters approved Proposition 35, entitled the “Fair Competition and Taxpayer Savings Initiative.” Proposition 35 amends the state constitution to allow state and local governments to contract with qualified private architects and engineers for services in all phases of a public works project. This office has been asked to explain how Proposition 35 affects the City, and to outline what additional steps, if any, would have to be taken to expand the City's ability to contract with private entities for the provision of public services.

PROPOSITION 35 AND ITS APPLICATION TO THE CITY

Under Article VII of the California Constitution, public services provided by state agencies must generally be performed by state civil service employees. Prior to the approval of Proposition 35, the state was only allowed to contract with private entities for services normally provided by the state (also known as “contracting out” services) when the services were: (1) of a temporary nature; (2) not available within the civil service, or (3) of a highly specialized or technical nature. *Professional Engineers in California Government v. Department of Transportation*, 15 Cal. 4th 543 (1997).

Proposition 35 adds Article XXII to the state Constitution to allow the state and local governments to contract out the architectural and engineering services for all phases of a public works project. That Article provides, in pertinent part:

The State of California and all other governmental entities . . . shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement. The choice and authority to contract shall extend to all phases of project development including permitting and environmental studies, rights-of-way services, design phase services and construction phase services. The choice and authority shall exist without regard to funding sources whether federal, state, regional, local or private, whether or not the project is programmed by a state, regional or local governmental entity, and whether or not the completed project is a part of any state owned or state operated system or facility.

Proposition 35 also adds implementing provisions to the California Government Code, including section 4529.10, which defines "architectural and engineering services" to include architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services. This measure was expressly intended by its proponents to respond to the California Supreme Court's ruling in *Professional Engineers*.

This office has previously opined that as a charter city, the City is not subject to the state constitutional provisions which place restrictions on contracting out services. 1999 City Atty MOL 296 (attached as Exhibit 1 for your review.) However, as explained in that memorandum, the City would likely be found to be subject to similar restrictions in its ability to contract out for services, because section 117 of the City Charter creates a civil service system that is substantively very similar to the civil service system created in the state Constitution. *Id.* at 298. Although the *Professional Engineers* decision does not expressly apply to local governments, the City's civil service provisions in the Charter are so similar to the civil service provisions in the state Constitution that a court could likely rule that the limitations on private contracting described in *Professional Engineers* should also apply to the City.

By its express terms, Proposition 35 applies to local government entities, allowing them to contract out architectural and engineering services if they choose to do so. In theory, this measure alone somewhat expanded the City's ability to contract out for the enumerated services. However, as a practical matter Proposition 35 has little or no impact on the City's contracting practices, because the City already has the ability to contract with private entities for most of the services covered by the measure. According to San Diego Administrative Regulation 25.60, entitled "Selection of Consultants for Work Requiring Licensed Architect and Engineering Skills," the City's policy is to contract with private architects and engineers "when the City requires special expertise or when time constraints render the work beyond the capability of City staff." Proposition 35 does not significantly expand the City's ability to contract with private entities for these services. As to services not covered by Proposition 35, further steps would be necessary to provide the City with the legal ability to contract out additional public services.

EXPANDING THE CITY'S AUTHORITY TO CONTRACT OUT PUBLIC SERVICES TO PRIVATE ENTITIES

As noted above, the restrictions which currently limit the City's ability to contract out public services are based upon the civil service provisions of the City Charter. Because these restrictions are based on the civil service system embodied in the Charter, any changes to expand the City's ability to contract out would require amendment of the Charter. One model for such an amendment exists in the charter of the County of San Diego. Section 916 in the County's Charter, which gives the County broad discretion to contract out services, provides as follows:

Nothing in this Article prevents the County from employing an independent contractor when the Board or Purchasing Agent determines that services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service.

Subject to voter approval, the City's Charter could be amended to add a similar provision in order to expand the City's ability to contract out services. The City's ability to contract out services could be expanded even further by enacting a provision similar to County Charter section 916, but eliminating the qualifying language requiring that it be more "economical and efficient" to contract out the services.

NATURE AND SCOPE OF THE CITY'S REQUIREMENT TO MEET AND CONFER WITH EMPLOYEE REPRESENTATIVES CONCERNING THE PROPOSED CHARTER AMENDMENT

Government Code section 3505 requires governing bodies of local agencies to meet and confer with employee representatives in good faith regarding wages, hours, and other terms and conditions of employment. The purpose of this requirement is to encourage management and labor to negotiate and agree on any changes in these employment matters. With respect to a proposed Charter amendment allowing private contracting, the employee representatives will argue it is subject to this meet and confer requirement before it is placed on the ballot. However, the manner in which the amendment is proposed will determine whether the meet and confer requirement applies to the proposal.

Amendments to the City's Charter must be approved by majority vote of the City's electors, but can be proposed by either the City Council, or by citizens using the initiative process. San Diego City Charter section 223; Cal. Const. art. 11, 3. If the City Council were to initiate a proposed Charter amendment to facilitate contracting out, the City would have to meet and confer with bargaining units prior to placing the proposal on the ballot. *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal. 3d 591 (1984). Previous discussions with the employee representatives on this topic lead us to conclude they would vigorously oppose such a proposal. Thus, if the Council is inclined to make such a proposal, we advise commencing the meet and confer process far enough in advance of the proposed election to allow for meaningful dialogue between the City and the employee representatives.

A voter-initiated Charter amendment proposal is entirely different. If the voters duly qualified a contracting out initiative for the ballot, the City Council would have no discretion to make any changes to the proposal in that initiative. The Council must either adopt the proposal or place it on the ballot for voter approval. San Diego Municipal Code 27.1033 - 27.1036; 27.2801 - 27.2802. Thus there would be no purpose for meeting and conferring prior to placing the amendment on the ballot, because the City would have no power to change anything in the initiative proposal. Unless and until the measure were approved by the voters and was ready for implementation, there would be nothing to meet and confer about. *Id.* at 599, fn.8. Depending on the language of the proposal adopted, meet and confer may be appropriate before actual implementation. This office would have to analyze any adopted Charter amendment to render a definitive opinion on whether there was a requirement for meet and confer at the implementation stage.

CONCLUSION

Proposition 35 does not significantly impact the City's ability to contract out for services,

because the City already contracts out most of the types of services covered by Proposition 35. Expansion of the City's current ability to contract out other services would require a change to the City's Charter to overcome the restrictions on contracting out related to the City's civil service requirements. A proposed Charter change could implicate the meet and confer process with the City's bargaining units, if initiated by the City Council. We will continue to update you on any developments that take place in the law governing public/private contracting.

Respectfully submitted,

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