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REPORT TO THE RULES COMMITTEE

MANAGED COMPETITION AND SERVICE LEVELS

INTRODUCTION

At the recommendation of the Independent Budget Analyst, the San Diego City Council (Council) has requested that this Office provide clarification on the process for increasing City of San Diego (City) service levels in the context of managed competition. This request was prompted by a discussion at the Rules Committee on September 28, 2011, and October 11, 2011, and at the Council on December 1, 2011, regarding whether existing service levels can be modified through a managed competition process. The Council requested that this Office report back to the Rules Committee.

QUESTION PRESENTED

What is the process for increasing service levels within the parameters of managed competition, labor matters, and the City's budget process?

SHORT ANSWER

The Council has authority under the San Diego Charter (Charter) to increase service levels, which is generally done through the budget process. If the Council desires to increase service levels through the budget process, the City must ensure that it meets its obligations under the Meyers-Milias-Brown Act (MMBA), the state law governing collective bargaining between a public agency employer and its recognized employee organizations, to meet and confer, as required, with the impacted employee organizations. *See* Cal. Gov't Code §§ 3500- 3511.

Managed competition is a process negotiated by the City with its impacted employee organizations to determine, under Charter section 117(c), whether City services can be provided more economically and efficiently by an independent contractor than by classified employees while maintaining service quality and protecting the public interest. As negotiated, employees compete with outside contractors to provide existing, budgeted services. The negotiated process does not appear to contemplate a competition between City employees and outside contractors based on service levels beyond what are budgeted. Therefore, if the Council desires to set service levels in a competition higher than budgeted amounts, this Office recommends engaging in bargaining with the impacted employee organizations to work through a process before a competition occurs.

ANALYSIS

I. IF THE COUNCIL DESIRES TO MODIFY SERVICE LEVELS, IT SHOULD UTILIZE THE BUDGET PROCESS.

Under the authority of the Charter, the Council establishes the services the City provides and the levels of services, generally through the budget process. *See* San Diego Charter § 26.1 (Public Services Required).¹ The Council establishes the funding of City services through the annual budget and appropriations process. By Report to the Budget and Finance Committee, dated May 18, 2011 (City Att’y Report 2011-24), this Office advised that the Charter provides distinct roles for the Council and the Mayor related to the preparation and adoption of the budget and the Appropriations Ordinance.

The Mayor is the “Chief Budget Officer of the City,” who must “keep the Council advised of the financial condition and future needs of the City” and “prepare and submit to the Council the annual budget estimate.” San Diego Charter §§ 28, 260. The Mayor is also “responsible for planning the activities of the City government and for adjusting such activities to the finances available” to maintain a balanced budget. San Diego Charter §§ 28, 260; *see also* San Diego Charter § 69 (stating the budget must have “balanced relations between the total proposed expenditures and the total anticipated income and other means of financing the budget”).

The Council has non-delegable legislative power and responsibility “in the adoption of any ordinance or resolution which raises or spends public monies, including but not limited to the City’s annual budget ordinance or any part thereof, and the annual ordinance setting compensation for City employees, or any ordinance or resolution setting public policy.” San Diego Charter § 11.1. The Council adopts the budget, as proposed by the Mayor or as modified by the Council, subject to veto by the Mayor and override by the Council. San Diego Charter § 290(b). Once the budget is adopted, it becomes the controlling document for preparation of the Appropriation Ordinance, and the Mayor has no veto power over the Appropriation Ordinance. San Diego Charter §§ 290(b)(2)(C), 290(d).

Further, the Council has authority to summon any City official or department head in the administrative service to appear before the Council or any committee of the Council “to provide information or answer any question.” San Diego Charter § 270(h). If the Council desires a briefing on service levels to assist in making budget decisions, the Council may request one.

This Office has provided guidance on the Charter process for revising the budget after the annual budget has been adopted as well as amending the Appropriation Ordinance. *See* City Att’y Report 2010-35 (Nov. 5, 2010); City Att’y Report 2011-1 (Jan. 7, 2011); City Att’y Report 2011-24 (May 18, 2011). To summarize the prior guidance, this Office has advised: “the budget

¹ Charter section 26.1 mandates that certain services be provided, including police protection, fire protection, public works services, water services, building inspection services, park and recreation services, and library services. *See* City Att’y Report 2011-10 (Feb. 23, 2011), for a discussion. The Charter provides that the Council, in establishing salaries for all City employees, must consider “the needs of the citizens of the City of San Diego for municipal services, the ability of the citizens to pay for those services, local economic conditions and other relevant factors as the Council deems appropriate.” San Diego Charter § 11.1. The Council is also directed, by Charter, to “give priority in the funding of municipal services to the need of the citizens for police protection.” *Id.*

revision process would be similar to the process used to adopt the annual budget as set forth in San Diego Charter section 290(b), and would begin with the presentation of a revised budget to the City Council by the Mayor.” City Att’y Report 2011-1 (Jan. 7, 2011).

If the Council desires to increase service levels, it may do so through the budget process. However, if service levels are enhanced, the Council must ensure that there is sufficient income or revenue to pay for the enhanced services. *See, e.g.*, San Diego Charter §69 (stating that the budget must “show the balanced relations between the total proposed expenditures and the total anticipated income and other means of financing the budget for the ensuing year”). *See also* San Diego Charter §§ 92 (“Nothing herein contained shall be construed to authorize the incurring of an obligation against the municipality in excess of that authorized to be incurred by the Constitution of the State of California.”), 99 (regarding incurring indebtedness or liability).

II. IF THE CITY INCREASES SERVICE LEVELS, IT MUST ENSURE COMPLIANCE WITH ITS DUTIES TO ITS RECOGNIZED EMPLOYEE ORGANIZATIONS UNDER THE MMBA.

Under the MMBA, the Council must meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with the City’s affected employee organizations “prior to arriving at a determination of policy or course of action.” Cal. Gov’t Code § 3505.

A public employer’s determination as to service levels is not negotiable. *Newman-Crows Landing Unified School District*, PERB Dec. No. 223 (1982). *See also The Regents of the University of California (Lawrence Livermore National Laboratory)*, PERB Dec. No. 1221-H (1997). However, a change in service levels is likely to trigger the City’s duty to meet and confer over workload and other impacts. *See State of California (Employment Development Department)*, PERB Dec. No. 1284-S; *Davis Joint Unified School District*, PERB Dec. No. 393 (1984). As an example, if the City were to increase operating hours for libraries, there will likely be an impact on employees’ hours and working conditions, which are both mandatory subjects of labor negotiations.² If the City desires to increase service levels, it must determine whether there is a duty to provide notice and opportunity to negotiate the impacts of the increased service levels with the affected employee organizations.

² Under the City’s collective bargaining agreement with the San Diego Municipal Employees’ Association (MEA MOU), approved by the Council, the City’s management rights include the exclusive right to “determine the mission of its constituent departments, . . . set standards of service; . . . maintain the efficiency of governmental operations; determine the method, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work.” MEA MOU, art. 31, § 1, San Diego Resolution R-306776 (May 11, 2011). The exercise of the City’s management rights does not preclude MEA “from consulting with Management representatives about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment.” MEA MOU, art. 31, §2. The City’s collective bargaining agreement with Local 127, American Federation of State, County, and Municipal Employees, AFL-CIO (Local 127 MOU) contains a similar “Management Rights” provision. Local 127 MOU, art. 11, San Diego Resolution R-306359 (Dec. 9, 2010). *See also* City Council Policy 300-06, art. I (Nov. 14, 2005)(relating to management rights).

III. THE MANAGED COMPETITION GUIDE SETS FORTH A NEGOTIATED PROCESS IN COMPLIANCE WITH CHARTER SECTION 117.

The Council has approved the managed competition process, under the authority of Charter section 117(c).³ The City negotiated the Managed Competition Guide (Guide), with its impacted employee organizations pursuant to the MMBA. The Council adopted the Guide by San Diego Ordinance O-19995 (Oct. 12, 2010).⁴

The California Public Employment Relations Board (PERB), the administrative agency which enforces the MMBA, has stated that a process that concerns the possibility of a future transfer of bargaining unit work to an independent contractor, when labor costs are a factor, is a mandatory subject of bargaining. *State of California (Department of Personnel Administration)*, PERB Dec. No. 574-S (1986)(policy structuring how contracting decisions will be made); *Healdsburg Union High School Dist.*, PERB Dec. No. 375 (1984)(policy requiring notice and negotiation of contracting out). If the City desires to deviate from the negotiated process contained in the Guide, it should provide notice to the impacted employee organizations and opportunity to negotiate over the proposed deviation. *County of Riverside*, PERB Dec. No. 1577-M (2004)(it is a per se violation of the MMBA, when the employer alters the parties' written agreement, without giving the impacted employee organization notice or an opportunity to bargain over the change in policy, that concerns a matter within the scope of bargaining). *See also Callexico Unified School Dist.*, PERB Dec. No. 357 (1983)(the obligation to meet and negotiate in good faith must be fulfilled before implementing changes to matters within the scope of representation).

The Guide describes managed competition as “a structured, transparent process that allows public sector employees to be openly and fairly compared with independent service providers (normally private sector firms) for the right to deliver services.” Guide, at 1. Managed competition gives City employees “the opportunity to structure organizations and processes in ways similar to best practices in competitive businesses, yet still compatible with public sector realities.” Guide, at 1.

The Guide provides that employees responding to a competition “analyze existing business processes and develop a more efficient organizational structure that is capable of performing the tasks presented in the [Statement of Work].” Guide, at 17. The employee proposal focuses on the development of “the Most Efficient Government Organization (MEGO).” Guide, at 17. To develop the MEGO, the employees rely on an efficiency study or other assessment, such as a Business Process Reengineering (BPR), reorganization, or benchmarking study, that includes an employee involvement component. Guide, at 17. The

³ Charter section 117(c) provides, in pertinent part: “The City may employ any independent contractor when the City Manager determines, subject to City Council approval, City services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service while maintaining service quality and protecting the public interest.” San Diego Charter § 117(c). Any contract with an independent contractor to provide City services in lieu of classified employees must be approved by the Council. *Id.*

⁴ Charter section 117(c) also provides: “The City Council shall by ordinance provide for appropriate policies and procedures to implement this subsection. Such ordinance shall include minimum contract standards and other measures to protect the quality and reliability of public services.”

efficiency information will, by its nature, be based on current service levels. The employee proposal team uses this information as a reference in developing its proposal in the competition.

The managed competition process recognizes that, in recent years, most City functions have undergone some form of assessment or analysis, aimed at improving efficiency. Guide, at 5. The Guide provides that, where the assessment or analysis results in Council-approved modifications to City Department appropriations through an amendment to the City's Appropriations Ordinance, the function that was the subject of the efficiency improvement will not be subject to managed competition for at least one year.⁵

IV. THE NEGOTIATED MANAGED COMPETITION GUIDE CONTEMPLATES A COMPETITION BASED ON CURRENT SERVICE LEVELS.

Under the negotiated managed competition process, the Mayor initiates a managed competition by preparing a Pre-competition Assessment Report. This Report contains specific information, including "the required level of service provided to customers." Guide, at 6. The Guide provides: "The service levels will be based *on current status* and/or what the City is required to perform per existing Ordinance. The service levels should define the state of the desired outcome instead of how that outcome is to be derived." Guide, at 6 (emphasis added). The Pre-competition Assessment also documents "the *current costs of service provision based on the function's actual costs from the most recently completed fiscal year and/or budgeted costs* contained in the City's Appropriations Ordinance." Guide, at 6 (emphasis added).

The information contained in the Pre-competition Assessment Report is used to develop the Preliminary Statement of Work, a document which goes to the Council for review and approval. The Preliminary Statement of Work includes a description of the function or functions to be "competitively sourced" and "[c]urrent or budgeted service levels associated with the function(s) selected for competition." Guide, at 8. The Guide provides:

⁵ The Guide states:

Most City functions have undergone some form of assessment/analysis and improvement, using such tools as BPR, reorganization, and/or efficiency studies. In cases where the assessment or analysis resulted in impacts to the City's Appropriations Ordinance and Council approval was sought for change authorization, a one-year change implementation period from the date of Council approval will ensue during which the function will not be solicited for competition. (Note: Changes made to the Appropriations Ordinance through regular, mid-year, or special budget adoptions are not considered as part of this.)

In some instances, improvement activities will require more than a year for implementation. In instances in which implementation is expected to take more than year, the Assistant Chief Operating Officer, or designee, in consultation with City Departments, will document in writing the expected implementation timeline before or at the time City Council approval is sought and the function will not be solicited for competition during the implementation period identified at approval.

Guide, at 5.

The purpose of the Preliminary SOW is to document the service levels associated with the delivery of the function(s) selected for competition. The service levels will be based on current status and/or what the City is required to perform per existing Ordinance. They will be included in the Request for Proposals, ensuring that there will be no service degradation as a result of the managed competition effort.

Guide, at 8.

After Council approval of the Preliminary Statement of Work, the City prepares for the solicitation, which includes development of the Statement of Work (SOW), the document that guides the response of employees and independent services providers taking part in the competition. The Guide states:

The SOW defines the requirements to which the Employee Proposal Team and independent service providers will respond. The SOW will be performance-based and will specify-[sic] required service levels. . . .

The SOW will focus on what is to be done rather than on how it is currently done. . . . The SOW will provide the information necessary for all bidders (independent service providers as well as the Employee Proposal Team) to develop an approach and cost for providing the service.

Guide, at 11. *See also* Guide, at 13 (stating the SOW is “[a] description of the functions and services to be provided by the selected service provider with the associated desired service levels or outcomes and monitoring requirements by the City”). The SOW’s “standards and measurements” must be “quantifiable and attainable.” Guide, at 28. If employees are required to bid on higher service levels, which are not budgeted, they may not have the ability to properly compete because employees do not have authority to mandate budget increases.

As negotiated, a managed competition is based on existing, budgeted service levels. The negotiated Guide does not appear to contemplate a managed competition based on service levels other than what is currently budgeted or required by existing ordinance.

The Guide contains some language suggesting that it may be possible to set forth the current, budgeted service levels as the minimum service levels to be provided and then invite proposers to describe the cost for providing the enhanced service levels within a competition. For example, there is a reference in Exhibit B of the Guide that states a role of the Council in the managed competition process is to “[a]pprove budget and service changes as appropriate.” Guide, at 27. However, the Guide does not provide guidance to the Managed Competition Independent Review Board on how to evaluate these types of proposals if the City were to structure a competition in that manner.

Further, the Guide directs City employees in preparation of their proposals, as follows: “Assumptions regarding service growth should be clearly stated in the technical proposal and reflected in the Employee Proposal Team cost proposal.” Guide, at 45. This language suggests that employees may respond to a proposal for higher service levels. In preparing their proposals, employees are also directed to, where possible, include budgeted amounts. Guide, at 44. Thus, there are ambiguities in the Guide as it relates to service levels.

Overall, given the ambiguities, the most cautious approach is to continue to conduct managed competitions based on existing, budgeted service levels. If the Council desires to use a managed competition process to evaluate whether it could achieve higher service levels through cost efficiencies, the Council could, through the negotiation process, clarify the intent of the Guide with the affected employee organizations.

CONCLUSION

Under the Charter, the Council authorizes the terms and conditions under which City services are provided. If the Council desires to increase service levels, it should act through the budget process. The City must also ensure its compliance under the MMBA by providing notice to the affected employee organizations and opportunity to negotiate the impacts of the increased service levels. A managed competition, under the City’s negotiated process, must be within the parameters of existing, budgeted amounts, unless there is a budget adjustment made, which generally should occur prior to initiation of a competition. If the Council desires to utilize managed competition to increase service levels beyond existing, budgeted amounts, the City should engage the impacted employee organizations in discussions to clarify the Guide.

By _____ /s/ _____
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