

Office of  
The City Attorney  
City of San Diego

MEMORANDUM

**DATE:** March 24, 2008

**TO:** Budget and Finance Committee

**FROM:** Mark D. Blake, Chief Deputy City Attorney 

**SUBJECT:** Proposed Amendment to the Municipal Code regarding Managed Competition

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INTRODUCTION

In November 2006, Proposition C was approved by the voters of the City of San Diego [City] permitting the City to bid out the provision of City services to private contractors. As a result, section 117(c) was added to the City Charter and the City Council adopted Ordinance O-19565 to amend the Municipal Code [Code] in accordance therewith. This ordinance described only a limited role for the City Council in the managed competition process, and during the Budget and Finance Committee meeting of February 20, 2008, you requested that the City Attorney's office draft an ordinance amending the Code to allow the City Council and the public to participate in the managed competition process, particularly with regard to the development of the Statement of Work for a particular City service.

QUESTION PRESENTED

Does the City Council have the authority to review the Statement of Work for City services being subjected to the managed competition pursuant to Charter section 117(c) prior to the development and circulation of a final request for proposals?

SHORT ANSWER

Yes. Pursuant to Charter section 26, the City Council has adopted an administrative code that details the powers and duties of the administrative offices and departments of the City. Charter section 26 further requires that any ordinance "creating, combining, abolishing or decreasing the powers of any department, division, or board shall require a vote of two-thirds of the members elected to the Council." Because the organization of the departments of the City is a power specifically granted to the Council under the Charter and the changes to City departments contemplated by the managed competition process require the exercise of this

power, the Council must consider these changes before a City service is subjected to managed competition.

#### DISCUSSION

Managed competition fundamentally addresses the powers and duties of City departments and Charter section 26 requires Council action to establish or alter those powers and duties. Charter section 117(c) merely permits the City to contract out City services under specified circumstances. Charter section 117(c) also requires the Council to pass legislation to “provide for appropriate policies and procedures to implement” managed competition. Article 2, Division 27 of the Municipal Code contains the policies and procedures for implementing managed competition. This legislation delegates much of the responsibility for the managed competition process to the City Manager (i.e., the Mayor), though it does specify the role of the Managed Competition Independent Review Board [Board] and the “authority” of the Council to “accept or reject... any proposed agreement” that results from the managed competition process; this language is also contained in Charter section 117(c). This language is surplusage because the Council already has this authority, derived from Charter section 26 and from other Charter provisions.

The amendment of Article 2, Division 27 of the Code would allow the Council exercise its authority, and provide the City Manager with appropriate Council direction. Once the City Manager determines that managed competition is appropriate for a particular City service, Code section 22.3702 requires the preparation of a preliminary written Statement of Work and a pre-competition assessment report which are then submitted to the Board for consideration. The Council could amend this section to require that the preliminary Statement of Work and the pre-competition assessment report be submitted to the Council at the same time.

The Code is silent as to how a preliminary Statement of Work becomes final. This is a crucial element of the managed competition process and should be addressed by the Council. Section 22.3702 could be amended to require the City Manager to submit a proposed Statement of Work to the Council prior to the preparation of any request for proposals related to that Statement of Work. Proposed amendments to the Code are attached for your consideration.

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MDB:jdf

DOUBLE UNDERLINE: New

STRIKETHROUGH: ~~Old~~

## § 22.3702 Pre-Competition Assessment

- (a) If the City Manager determines as part of a pre-competition assessment that a City service may 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, the City Manager may select appropriate services for Managed Competition. If the City Manager intends to submit a City service to Managed Competition, the City Manager will then prepare a preliminary written Statement of Work for that particular City service, and will prepare a report setting forth the rationale for putting a City service into Managed Competition. This report will be transmitted to the City Council and to the Managed Competition Independent Review Board for its consideration.
- (b) In determining whether a City service is appropriate for Managed Competition, the City Manager will consider such factors as the type of service provided, the abilities of the current and projected competitive market, potential efficiencies that could be achieved, the capacity of the City to deliver essential services in the event of contractor default, and the overall welfare of the public. The City Manager will not recommend for Managed Competition, inherently governmental services, or those services so intimately related to the exercise of the public interest as to mandate their performance by City employees. Police Officers, Fire Fighters and Lifeguards who participate in the Safety Retirement System will not be subject to Managed Competition.
- (c) Once the City Manager determines that a City service is appropriate for Managed Competition, the City Manager shall prepare a proposed written Statement of Work incorporating any recommendations received from the Managed Competition Independent Review Board. Upon receipt of the proposed written Statement of Work, the City Council shall hold a public hearing to allow the City Council and the public to comment on the proposed written Statement of Work, prior to the development of any request for proposals related to the particular City services being considered for Managed Competition.
- ~~(e)~~
- ~~(d)~~ A request for qualifications process may be used prior to the solicitation for services in appropriate cases.
- ~~(d)~~
- ~~(e)~~ Nothing in this Division shall confer any right to any potential or current independent contractor to bid on a City service for which a solicitation has not been issued.