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OPINION NUMBER 2009-2

DATE: October 8, 2009

SUBJECT: Outsourcing City Services

REQUESTED BY: Scott Chadwick, Director, Human Resources Department

PREPARED BY: City Attorney

INTRODUCTION

This Legal Opinion on the ability of the City of San Diego [City] to outsource City services is provided to the Mayor and City Council in response to a request from the Human Resources Department. The question presented is as follows: what are the legal parameters of the City's authority to outsource services currently provided by City employees, under the San Diego Charter, specifically Charter section 117(c), adopted by the voters as Proposition C on November 7, 2006?

SUMMARY

Charter section117(c) [Section 117(c)] was approved by voters to give the City broad authority to outsource City services provided by classified, civil service employees. The first sentence states that "[t]he City may employ any independent contractor when the [Mayor][1] 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."

Under Section 117(c), the decision on whether to outsource begins with the Mayor's determination that certain City services can be provided more economically and efficiently by an independent contractor than by civil service employees while maintaining service quality and protecting the public interest. The Mayor must refer the question to the Managed Competition Independent Review Board for a recommendation before submitting an outsourcing contract to

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[1] The references in Charter section 117(c) to City Manager are intended to mean the Mayor: "During the period of time that the City operates under the Strong Mayor form of governance pursuant to Article XV, the reference herein to City Manager shall be deemed to refer to the Mayor." San Diego Charter § 117(c).

the City Council for approval. The City Council has authority to accept or reject in its entirety a proposed agreement with an independent contractor.

In determining whether City services can be provided more economically and efficiently by an independent contractor than by City employees, the Mayor may solicit proposals from City departments. Section 117(c) does not mandate that the Mayor solicit proposals from City departments before outsourcing. The Mayor may use other methods of obtaining information upon which to make his determination. If the Mayor does solicit proposals, the City must provide the affected City department with "an opportunity and resources to develop efficiency and effectiveness improvements in their operations as part of the department's proposal."

The City Council must enact an ordinance providing appropriate policies and procedures to implement Section 117(c). The ordinance must "include minimum contract standards and other measures to protect the quality and reliability of public services."

The implementing ordinance must be consistent with Section 117(c) and may seek to clarify ambiguities, but may not enlarge or narrow its scope. Although not necessarily controlling, the City Council's interpretation of ambiguous provisions will have great weight. Any interpretation must be reasonable and consistent with the voters' intent.

Since 2006, the City has been negotiating with several labor organizations regarding an implementing ordinance and a corresponding administrative regulation, known as a guidebook, related to Section 117(c). Since September 2008, the City has been represented by outside legal counsel, Liebert Cassidy Whitmore. Chief City negotiator Steven Berliner of that firm should be consulted for advice as to what, if any, impacts the labor negotiations may have on implementation of our legal conclusions. This office cannot opine on that issue given our minimal involvement in the labor negotiations.

There are additional Charter provisions providing authority to use independent contractors as experts and consultants to assist City departments and for public works projects.

In contracting out the work of employees represented by one of the City's recognized employee organizations, the City must comply with state collective bargaining laws under the Meyers-Milias-Brown Act [MMBA]. California courts have held that the transfer of work from existing employees to an outside entity requires giving the affected employee organization notice of the decision and an opportunity to negotiate prior to the decision being made.

DISCUSSION

I. LEGAL STANDARDS FOR INTERPRETING A BALLOT INITIATIVE

In interpreting a ballot initiative, a court applies the same principles that govern statutory construction. *People v. Rizo*, 22 Cal. 4th 681, 685 (2000). A court looks first at the language of the statutory or charter provision, giving the words their ordinary meaning. *Id.* As stated by the

Supreme Court in *Professional Engineers in California Government v. Kempton,* 40 Cal. 4th 1016 (2007):

> Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.

40 Cal. 4th at 1037 (citations and quotations omitted).

When the language is ambiguous or subject to multiple constructions, a court may "refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." *Rizo*, 22 Cal. 4th at 685 (quoting *People v. Birkett*, 21 Cal. 4th 226, 231 (1999)). While ballot summaries, arguments, and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language, it is the intent of the electorate and not the opinion of drafters or of legislators who sponsored an initiative that is relevant. *Amador Valley Joint Union High School District v. State Bd. of Equalization*, 22 Cal. 3d 208, 245-246 (1978); *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm.*, 51 Cal. 3d 744, 764, fn. 10 (1990).

"The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme." *Rizo*, 22 Cal. 4th at 685 (citing *Horwich v. Superior Court*, 21 Cal. 4th 272, 276 (1999)). The California Supreme Court has long held:

> The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. Morever, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Such purpose will not be sacrificed to a literal construction of any part of the act.

Select Base Materials, Inc. v. Board of Equalization, 51 Cal. 2d 640, 645 (1959) (citations and quotations omitted).

Uncertainties and ambiguities may be clarified or resolved in accordance with generally accepted rules of statutory construction. Further, charter enactments, like constitutional provisions, "must receive a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people." *Amador Valley Joint Union High School District*, 22 Cal. 3d at 245-246 (1978) (quotations omitted). "A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words. The literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers." *Id.* at 245.

A ballot initiative must be construed to give the effect the voters intended it to have. *Amwest Surety Ins. Co. v. Wilson*, 11 Cal. 4th 1243, 1251 (1995). As the California Supreme Court has explained:

> We do not examine [initiative] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the [voters] did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.

Coalition of Concerned Communities, Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004).

The intent of the electorate in adopting a charter amendment must be effectuated. *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n.*, 51 Cal. 3d 744, 764 (1990).

II. CHARTER SECTION 117(C) GIVES THE CITY BROAD AUTHORITY TO OUTSOURCE CITY SERVICES

On November 7, 2006, voters approved Proposition C, which amended the City Charter to add Section 117(c) to the civil service provisions.[2] San Diego Resolution R-302222 (Dec. 5, 2006). Section 117(c) gives the City broad authority to outsource City services:

> The City may employ any independent contractor when the [Mayor] 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).

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[2] Most employees in the City are under the civil service system, and are considered "classified employees." San Diego Charter § 117. Certain designated employees are "unclassified," and are not in the civil service system. San Diego Charter § 117. Unclassified employees include elective City officers; members of boards and commissions; department heads and one principal assistant or deputy in each department; employees in Charter-created positions, such as the City Manager and Assistants to the City Manager, City Clerk, Chief Financial Officer, Independent Budget Analyst and assistants, City Auditor and assistants, Purchasing Officer, Treasurer, Assistant and Deputy City Attorneys, and Planning Director; confidential secretaries to designated officers; persons in "expert professional temporary service when such positions are exempted from the Classified Service for a specified period of temporary service by order of the Civil Service Commission"; interns; and managerial employees responsible for formulating or administering departmental policies and programs who are exempted from the Classified Service by the process set forth in Charter section 117(a)(17). San Diego Charter § 117.

Proposition C was placed on the ballot by the City Council "to improve City operations and provide necessary services to the citizens of San Diego." San Diego Ordinance O-19474 (Mar. 27, 2006). It was presented to voters as a means to allow outsourcing of City services performed by classified, civil service employees.[3] *See* Ballot Materials, Proposition C, City Election (Nov. 7, 2006); San Diego Resolution R-302222 (Dec. 5, 2006).

With approval of Proposition A in June 2008, San Diego voters amended Charter section 117(c) to provide that core public safety services provided by police officers, firefighters, and lifeguards who participate in the City's Safety Retirement System shall not be subject to the contracting out provisions of Section 117(c). San Diego Charter § 117(c); *see also* San Diego Ordinance O-19714 (Feb. 4, 2008).

III. THE OUTSOURCING PROCESS UNDER SECTION 117(C)

Section 117(c) envisions a three-step outsourcing process. First, the Mayor determines whether City services can be provided more economically and efficiently by an independent

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[3] Proposition C was placed on the ballot by the City Council, in part in response to the question of whether the City has an implied civil service mandate under a 1997 California Supreme Court case, *Professional Engineers in California Government v. Department of Transportation* ("*Professional Engineers*"), 15 Cal. 4th 543 (1997).

In *Professional Engineers,* the California Supreme Court analyzed article VII of the California Constitution, which creates the State of California's civil service system, and the Court held that the Constitution contains an "implied civil service mandate" that limits the state's authority to contract with private entities to perform work that state employees have historically or customarily performed. 15 Cal. 4th. at 547. The Supreme Court acknowledged that there is no express limitation on contracting out in the California Constitution; however, the Court said, the implied civil service mandate "emanates from an implicit necessity for protecting the policy of the organic civil service mandate against dissolution and destruction." *Id.* at 548. In reaching this decision, the Court applied prior case law precedent involving the state civil service provisions, including *State Compensation Ins. Fund v. Riley*, 9 Cal. 2d 126, 134-136 (1937), and concluded that the civil service mandate forbids private contracts for work that the state itself can perform "adequately and competently." *Professional Engineers*, 15 Cal. 4th at 549.

It is the opinion of this Office that the *Professional Engineers* case is not binding or controlling on this City, as a charter city. There is an argument that given similarities between the constitutional provisions analyzed in *Professional Engineers* and the City Charter, a court may find that there is an implied civil service mandate in San Diego arising out of the City's civil service system set forth in Article VIII of the Charter.

However, there is no language in the Charter that expressly prohibits the City from contracting out work that City employees have historically or customarily performed. The City, as a charter city established under article XI of the California Constitution, has plenary power over municipal affairs, subject only to the clear and explicit limitations and restrictions contained in the Charter, or federal or state constitutional limitations and preemptive state law. *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598-599 (1949)("The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation."); *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994)("[T]he charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law."). Further, Charter section 117(c) provides express enabling authority to contract out the work of civil service employees.

contractor than by City employees while maintaining quality and protecting the public interest. Second, if the Mayor's determination favors outsourcing, he submits a proposal or proposals to the Managed Competition Independent Review Board for a recommendation. Third, after receiving the Board's recommendation, if the Mayor continues to favor outsourcing, the proposed outsourcing contract is presented to the City Council, which may accept or reject the contract in its entirety.

A. Step One: The Mayor determines whether City services can be provided more economically and efficiently by an independent contractor than by City employees while maintaining service quality and protecting the public interest.

The first step in the outsourcing process is a determination by the Mayor that certain City services can be provided more economically and efficiently by an independent contractor than by City employees in the Classified Service while maintaining service quality and protecting the public interest. San Diego Charter § 117(c). Broken down into four prongs, the standard or test under Section 117(c) that must be met to employ an independent contractor is that City services can be provided (1) more economically and (2) efficiently by an independent contractor than by persons in the Classified Service, (3) while maintaining service quality, and (4) protecting the public interest. The Mayor makes this determination, which is subject to City Council approval.

The Mayor is acting in his administrative capacity in making this determination. *See* San Diego Charter §§ 28, 265(b) (providing that the Mayor under the strong mayor form of government supervises the administrative affairs of the City and makes recommendations to the City Council concerning the affairs of the City as may seem to him desirable). The Mayor's determination to employ an independent contractor must be presented to the City Council, the legislative body, for approval. Any action involving the expenditure of public monies is legislative in nature. San Diego Charter § 11.1.

In exercising discretion under Section 117(c), the Mayor must support his determination to employ an independent contractor by a finding, and his determination may not be arbitrary and capricious. A court reviewing an administrative decision that is quasi-legislative in nature will ask three questions. First, did the agency act within the scope of its delegated authority? Second, did the agency employ fair procedures? Third, was the agency action reasonable? *Small v. Superior Court*, 148 Cal. App. 4th 222, 229 (2007).

A reviewing court applies a deferential test to a quasi-legislative, administrative decision. "A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." *Id. See also Ralphs Grocery Co. v. Reimel*, 69 Cal. 2d 172, 179 (1968) (stating a court will not superimpose its own policy judgment upon an agency decision that is quasi-legislative in nature in the absence of an arbitrary and capricious decision); *Young v. State Department of Fish & Game*, 124 Cal. App. 3d 257, 282 (1981) (stating that quasi-legislative regulations are valid if they are (a) within the granted power; (b) issued

pursuant to proper procedure; and (c) reasonable). Further, a court may intervene through an ordinary mandamus action, under California Code of Civil Procedure section 1085, to correct the exercise of a discretionary legislative action, "only if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test." *Carrancho v. California Air Resources Bd.*, 111 Cal. App. 4th 1255, 1264-1265 (2003) (citing *County of Del Norte v. City of Crescent City*, 71 Cal. App. 4th 965, 972 (1999)).

Section 117(c) does not specify what information the Mayor might use to determine whether outsourcing is justified. The Mayor's determination includes a comparison of the private and public sector capabilities. Presumably, the Mayor could solicit opinions, historical or budgetary data, and formal or informal proposals from City departments. Receiving proposals from City departments is one tool that may be employed to support a determination. Section 117(c) does not require City departments to submit proposals and does not make City department proposals a prerequisite to outsourcing. There is no express mandate in Section 117(c) that City employees be given an opportunity to present proposals.

Section 117(c) states that "[a] City department shall be provided with an opportunity and resources to develop efficiency and effectiveness improvements in their operations as part of the department's proposal." Some might argue that this sentence requires that departments be provided an opportunity to submit proposals. But, the Charter does not state that a "City department shall be provided with an opportunity and resources to submit a proposal." It states that departments will be given an "opportunity and resources to develop efficiency and effectiveness improvements in their operations."

The "opportunity and resources" requirement only applies if a proposal is submitted. The sentence begins that the City department "shall be provided," but ends with the limiting phrase "as part of the department's proposal." Therefore, whatever it is that "shall be provided" applies only <u>if</u> there is a department proposal. There is nothing in this sentence (or, for that matter, in Section 117(c)) that <u>requires</u> a department proposal.

The most reasonable interpretation of the "opportunity and resources" phrase is that it applies only if there is a department proposal submitted. This is consistent with the language discussed above. It is also consistent with the voters' grant of broad outsourcing authority to the City in adopting Proposition C. Proposition C was presented to voters as a means to allow contracting out of City services. The ballot description was broad:

> PROPOSITION C. AMENDS THE CITY CHARTER TO ALLOW FOR CONTRACTING OUT OF CITY SERVICES.

See Ballot Materials, Proposition C, City Election (Nov. 7, 2006); San Diego Resolution R- 302222 (Dec. 5, 2006).

The ballot question presented to voters was whether to approve outsourcing, not outsourcing that only applies if departments submit proposals. The specific ballot question matched Section 117(c)'s broad grant of authority to outsource City services:

> "Shall the Charter be amended to allow the City to contract services traditionally performed by City civil service employees if determined to be more economical and efficient while maintaining the quality of services and protecting the public interest?"

See Ballot Materials, Proposition C, City Election (Nov. 7, 2006); San Diego Resolution R-302222 (Dec. 5, 2006).

This interpretation is consistent with the Mayor's authority over department functions under Charter section 28 [Section 28].[4] Department Directors are responsible to the Mayor. Section 28 empowers the Mayor to "set aside any action taken by a Director or Department subordinate responsible to him, and [the Mayor] may supersede him in authority in the functions of his office or employment." San Diego Charter § 28. Nothing in Section 117(c) impairs the Mayor's authority under Section 28 or imposes independent obligations on City departments to submit proposals.

Based upon the foregoing, we conclude that in determining whether City services can be provided more economically and efficiently by an independent contractor than by City employees, the Mayor may solicit proposals from City departments. There is no requirement that he must solicit proposals from City departments before outsourcing, and he may, instead, use other methods of obtaining information upon which to make his determination. But, if he does solicit proposals, the City must provide the department with "an opportunity and resources to develop efficiency and effectiveness improvements in their operations as part of the department's proposal."

B. Step Two: The proposed outsourcing is submitted to the Managed Competition Independent Review Board for a recommendation.

Section 117(c) requires the Mayor to "establish the Managed Competition Independent Review Board to advise the [Mayor] whether a City department's proposal or an independent contractor's proposal will provide the services to the City most economically and efficiently while maintaining service quality and protecting the public interest."

Section 117(c) states that the "City Council shall have the authority to accept or reject in its entirety any proposed agreement with an independent contractor submitted by the [Mayor] upon recommendation of the [Board]."

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[4] Charter section 28 sets forth the duties of the City Manager. The Mayor assumes and carries out these duties during the period of time the Strong Mayor Trial Form of Governance is in effect. San Diego Charter § 260(b).

Section 117(c) does not address what happens when the Mayor and the Board disagree. The language is ambiguous and possibly contradictory on its face. The City Attorney's Impartial Analysis [Impartial Analysis] accompanying Proposition C interpreted this portion of Section 117(c) to require the following process:

> If the Board recommends that an independent contractor provide public services, the measure provides that the [Mayor] may choose to have the City Department continue to provide the service, or accept the Board's recommendation to employ an independent contractor. If the [Mayor] accepts the Board's recommendation to employ an independent contractor, the [Mayor] must forward the recommended and proposed agreement to the City Council. The City Council must accept or reject the proposed agreement in its entirety.

See Ballot Materials, Proposition C, City Election (Nov. 7, 2006). The Impartial Analysis for Proposition C did not address the situation where the Board does not recommend use of an independent contractor, but the Mayor believes an independent contractor should be used because the test for outsourcing has been met. Under this circumstance, can the Mayor present a proposed outsourcing contract to the City Council, or is the City Council bound to comply with the Board's recommendation and provide City services by using City employees?

Section 117(c) states that the Board's role is advisory on whether the test for outsourcing has been met. It also states that a proposed agreement with an independent contractor may be approved by the City Council when "submitted by the [Mayor] upon recommendation of the [Board]." The language could mean the Mayor can only submit a proposed agreement with an independent contractor when it is recommended by the Board.

However, the more reasonable interpretation is that the Mayor must submit a proposal for outsourcing to the Board for review and recommendation. Notwithstanding a Board recommendation to outsource or not, the Mayor may, upon receipt of the Board recommendation, submit a proposed agreement with an independent contractor to the City Council for approval. Section 117(c) makes it clear that the Board is solely advisory. If the Mayor is restricted in any way to the Board's recommendation, the Board's decisions would be final, not advisory. That would not only conflict with the advisory nature of the Board, but would also conflict with the first sentence of Section 117(c) vesting power in the Mayor to determine whether the test for outsourcing has been met. Further, the expenditure of public monies to provide City services is ultimately a legislative decision for the City Council. San Diego Charter §§ 11.1, 26.1. Vesting this power in an advisory board may be construed as an unlawful delegation of the City Council's legislative power.

C. Step Three: The proposed outsourcing agreement is submitted to the City Council for approval which may either accept or reject in its entirety.

Under Section 117(c), the Mayor's determination to outsource City services is "subject to City Council approval." The City Council has authority to accept or reject in its entirety any proposed agreement with an independent contractor submitted by the Mayor.

IV. THE CITY COUNCIL MUST ADOPT AN IMPLEMENTING ORDINANCE

Section 117(c) states that the "City Council shall by ordinance provide for appropriate policies and procedures to implement this subsection." San Diego Charter § 117(c). The ordinance "shall include minimum contract standards and other measures to protect the quality and reliability of public services." San Diego Charter § 117(c).

The implementing ordinance must be consistent with Section 117(c) and may seek to clarify ambiguities, but may not enlarge or narrow its scope. *See Mobilepark West Homeowners Ass'n v. Escondido Mobilepark West*, 35 Cal. App. 4th 32, 42-43 (1995). Although not necessarily controlling, the City Council's interpretation of ambiguous provisions will have great weight. *See Green v. Ralee Engineering Company*, 19 Cal.4th 66, 82 (1998); *Coca-Cola Co. v. State Bd. of Equalization*, 25 Cal. 2d 918, 921 (1945). "[A]pparent ambiguities frequently may be resolved by the contemporaneous construction of the Legislature or of the administrative agencies charged with implementing the new enactment." *Amador Valley Joint Union High School District*, 22 Cal. 3d at 258. Any interpretation must be reasonable and consistent with the voters' intent. *Green v. Ralee Engineering Company, supra.*

Since 2006, the City has been negotiating with two of the City's labor organizations regarding an implementing ordinance and a corresponding administrative regulation related to Section 117(c). Since September 2008, the City has been represented by outside legal counsel; the most recent law firm is Liebert Cassidy Whitmore, with attorney Steven Berliner of that firm serving as the City's chief negotiator. That firm should be consulted for advice as to what, if any, impacts the labor negotiations may have on implementation of our legal conclusions. This Office cannot opine on that issue given our minimal involvement in the labor negotiations.

V. OUTSOURCING UNDER OTHER CHARTER SECTIONS

There are other Charter provisions that permit contracting with an independent contractor to provide City services without the need to follow the Section 117(c) process, where work is not being performed by classified, civil service employees.

A. Employing Experts and Consultants

The City may employ experts and consultants to assist with the work of City departments. Charter section 28 provides the conditions upon which experts or consultants may be hired.

> The [Mayor] shall have the power to employ experts, or consultants to perform work or give advice connected with the Departments of the City when such work or advice is necessary in connection therewith.

By ordinance, the City Council has limited the definition of consultants, as set forth in Charter section 28. The City Council has defined "consultants" as "providers of expert or professional services." San Diego Municipal Code § 22.3003. "Consultant" specifically excludes a provider of "services." *Id.* "Services" is defined as all work provided by persons others than consultants. San Diego Municipal Code § 22.3003. "Consultation" generally means "the act of asking the advice or opinion of someone (such as a lawyer)." Black's Law Dictionary (7th ed. 1999). An "expert" is generally defined as "[a] person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder." Black's Law Dictionary (9th ed. 2009).

The City Council has adopted a Council Policy regarding use of consultant services that sets forth how consultants are to be used to assist the City. It provides, in relevant part:

> The City requires services of a recurring nature or for a specific one-time project which cannot be routinely provided by City staff, either because of the expertise required or the ongoing work load. Consultants may be employed where City staff is unable to accommodate this requirement. . . . .The type and scope of the required service or product must be clearly defined by the [Mayor] to determine whether it can be most efficiently provided by City staff or by a consultant, and where a consultant is chosen, whether licensed or non-licensed services are necessary.

Council Policy 300-07, at p. 1.

Council Policy 300-07 also mandates that, as a general rule, consultants be selected through a formal, competitive process. *Id.* *See also* San Diego Admin. Reg. 25.60 ("Selection of Consultants for Work Requiring Licensed Architect and Engineering Skills"); San Diego Admin. Reg. 25.70 ("Hiring of Consultants Other than Architects and Engineers").

It is our opinion that Charter section 28 does not provide authority to contract with experts or consultants to perform the work of City employees in Charter-created positions.[5]

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[5] The Charter creates certain appointed positions within the City, including Directors of City Departments (Charter § 28); the Purchasing Agent (Charter § 35), the Personnel Director (Charter § 37), City Clerk (Charter § 38); Chief Financial Officer (Charter § 39); City Auditor (Charter § 39.2); Assistant and Deputy City Attorneys (Charter § 40); City Treasurer (Charter § 45); Chief of Police and officers, members and employees (Charter § 57); Chief of the Fire Department and officers, members and employees (Charter § 58). There are also Charter-created departments, specifically, the Police Department (Charter § 57) and Fire Department (Charter § 58), and Charter section 90.1 discusses the Water Department.

Charter section 40 covers employment of attorneys in addition to assistant and deputy city attorneys. It provides, in relevant part: "The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith." San Diego Charter § 40.

B. Authority to Use Independent Contractors on Public Works Projects

Charter section 94 mandates that public works projects be done by contractors rather than City forces in certain circumstances. The section provides, in relevant part:

> In the construction, reconstruction or repair of public buildings, streets, utilities and other public works, when the expenditure therefore shall exceed the sum established by ordinance of the City Council, the same shall be done by written contract, except as otherwise provided in this Charter, and the Council, on the recommendation of the Manager or the head of the Department in charge if not under the Manager's jurisdiction, shall let the same to the lowest responsible and reliable bidder. . . . The Council may, however, establish by ordinance an amount below which the Manager may order the performance of any construction, reconstruction or repair work by appropriate City forces without approval of the Council. When such Council approval is required, the Manager's recommendation shall indicate justification for the use of City forces and shall

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There is a legal distinction between an employee and an independent contractor. An employee is "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." Black's Law Dictionary (9th ed. 2009). An "independent contractor" is "[o]ne who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method of accomplishing it." Black's Law Dictionary (9th ed. 2009).

The word "employee" is not specifically defined in the Charter or the San Diego Municipal Code. However, Charter section 117 provides that "employment in the City shall be divided into the Unclassified and Classified Service." San Diego Charter § 117. Certain employees are designated as unclassified and outside of the civil service system. San Diego Charter § 117(a). All other employees are classified, and within the civil service system. San Diego Charter § 117 (b). Charter sections 70 and 290 refer to "employees" as those individuals working for the City whose salary and other compensation is determined through adoption of the annual Salary Ordinance. San Diego Charter §§ 70, 290. Further, California courts have held, as a general rule, when the word "employee" is used in a statute or ordinance without definition, the legislative body intended to adopt the common law definition and to exclude independent contractors. *People v. Palma*, 40 Cal. App. 4th 1559, 1565-1566 (1995). *See also Metropolitan Water District of Southern California v. Superior Court (Cargill)*, 32 Cal. 4th 491, 500 (2004) (stating when a statute refers to employees, without defining the term, courts have generally applied the common law test of employment, which is the conventional master-servant relationship as understood by common law agency doctrine).

By creating certain positions, it is our opinion that the Charter intended that these positions be filled by employees, whose work and compensation are under the control of the City rather than by independent contractors, who are tasked with completing a project but who are not bound to adhere to a certain method or means to complete the project.

indicate whether the work can be done by City forces more economically than if let by contract.

San Diego Charter §94.

The City Council has determined the threshold amount, set forth in Charter section 94, to be $100,000. San Diego Municipal Code § 22.3105. It is the City Attorney's opinion that employment of an independent contractor on public works projects is not governed by application of Charter section 117(c) where the work exceeds the dollar amount set by the City Council.

VI. STATE COLLECTIVE BARGAINING LAWS APPLY

As a charter city, this City must comply with the meet and confer rules set forth in the Meyers-Milias-Brown Act. *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591, 601-602 (1984).

Before eliminating employment positions in the bargaining unit and reassigning the work to employees outside the unit, the City is required to provide written notice to the affected employee organization and opportunity to negotiate, pursuant to Government Code section 3504.5. *Building Material & Construction Teamsters' Union v. Farrell*, 41 Cal. 3d 651, 668 (1986); *see also Rialto Police Benefit Ass'n v. City of Rialto*, 155 Cal. App. 4th 1295 (2007).

The City is required to provide notice and opportunity to meet and confer with affected labor organizations over a decision to contract out positions within an affected employee organization prior to the decision being made. *Rialto Police Benefit Ass'n*, 155 Cal. App. 4th at 1309. The notice and opportunity to negotiate must be provided "prior to arriving at a determination of policy or course of action." Cal. Gov't Code § 3505. Further, the City must provide "a reasonable period of time in order to exchange freely information, opinions, proposals, and to endeavor to reach agreement." Cal. Gov't Code § 3505. The City must also allow "adequate time for the resolution of impasses." Cal. Gov't Code § 3505. The City's impasse procedure is contained in City Council Policy 300-06.

California courts have held that a public agency's decision to contract out bargaining unit work when motivated by labor costs or other factors that could be addressed through collective bargaining is subject to meet and confer requirements because these issues are "eminently suitable for resolution through collective bargaining." *Rialto Police Benefit Ass'n*, 155 Cal. App. 4th at 1309.

A public agency also cannot "end around" the bargaining process by eliminating work by City employees with the idea that the work will later be performed by outside contractors. In *San Diego Adult Educators v. Public Employment Relations Board*, 223 Cal. App. 3d 1124, 1133 (1990), the court explained:

> The transfer of work from existing employees to employees of others by subcontracting the work is a decision which requires negotiation with the union. It is therefore an unfair labor practice for an employer unilaterally to shift work by means of contracting the services previously done by its employees to an outside entity.

In the *San Diego Adult Educators* case, the court upheld a PERB administrative decision finding that a community college district had not committed an unfair labor practice when it contracted out teaching work after having previously terminated the class taught by a district employee. The court found that the district had not improperly transferred bargaining work from an existing employee to an outside contractor because the decision to terminate the class and the later decision to offer the class through an outside contractor were not linked:

> The evidence in this case is undisputed (and neither the administrative law judge nor PERB found or intimated to the contrary) that at the time the College District determined to terminate the noncredit fee courses in French, German and Spanish it had no intention or expectation of sponsoring those courses through other means. Termination occurred in March 1983. It was not until new and presumably unexpected public pressure was put upon the trustees that they commenced consideration of alternative means of providing the language courses, which was in May -- a full two months later. There is no suggestion in the factual record or in appellate briefs that the separation of the two decisions was not bona fide, or that the original decision to eliminate these classes was made in contemplation of restoring such classes under the auspices of the Foundation.

223 Cal. App. 3d at 1134.

If the City determines to employ an independent contractor to perform the work of classified, represented employees, the City must comply with its duties under the MMBA, specifically to provide notice to the affected employee organization and an opportunity to negotiate prior to a decision being made.

CONCLUSION

The City may outsource work performed by City employees in compliance with the City Charter and state collective bargaining laws. The City may rely on Charter section 28 to employ experts or consultants to perform work or give advice to City departments when such work or advice is necessary. The term "consultants" has been defined by the City Council to mean providers of expert or professional services. Charter section 40 enables the City Council to hire additional legal counsel to assist City departments when such assistance or advice is necessary. Charter section 94 provides that certain public works projects be performed by independent contractors.

Charter section 117(c) provides broad authority to contract out the work of classified, civil service employees when the Mayor determines, subject to City Council approval, City services can be provided more economically and efficiently by an independent contractor than by persons in the Classified Service while maintaining service quality and protecting the public interest. In making his determination, the Mayor must establish and seek advice from a Managed Competition Independent Review Board. The City Council is mandated to provide, by ordinance, for appropriate policies and procedures to implement Section 117(c). The ordinance must include minimum contract standards and other measures to protect the quality and reliability of public services.

If the City contracts out work of employees represented by one of the City's recognized employee organizations, the City must provide notice to the affected employee organization and opportunity to negotiate prior to the decision to contract out the work.

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LO-2009-2

ARTICLE VIII

CIVIL SERVICE

Section 117: Unclassified and Classified Services

(c) 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. 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. A City department shall be provided with an opportunity and resources to develop efficiency and effectiveness improvements in their operations as part of the department's proposal. The core public safety services provided by police officers, firefighters, and lifeguards who participate in the City's Safety Retirement System shall not be subject to Managed Competition. The City Manager shall establish the Managed Competition Independent Review Board to advise the City Manager whether a City department's proposal or an independent contractor's proposal will provide the services to the City most economically and efficiently while maintaining service quality and protecting the public interest. The City Manager will appoint seven (7) members to the Board. Four (4) shall be private citizens whose appointments shall be subject to City Council confirmation. Each shall have professional experience in one or more of the following areas: finance, law, public administration, business management or the service areas under consideration by the City Manager. Three (3) shall be City staff including a City Manager staff designee, a City Council staff designee and the City Auditor and Comptroller or staff designee. Such appointees shall not have any personal or financial interests which would create conflict of interests with the duties of a Board member. Members of the Board shall be prohibited from entering into a contract or accepting employment from an organization which secures a City contract through the managed competition process for the duration of the contract. The City Council shall have the authority to accept or reject in its entirety any proposed agreement with an independent contractor submitted by the City Manager upon recommendation of the Managed Competition Independent Review Board. The City Manager shall have the sole responsibility for administering and monitoring any agreements with contractors. The City Manager shall be required to produce annual performance audits for contracted services, the cost of which must be accounted for and considered during the bidding process. In addition, the City Manager shall seek an independent audit every five (5) years to evaluate the City's experience and performance audits. During the period of time that the City operates under the Strong Mayor form of governance pursuant to Article XV, the reference herein to City Manager shall be deemed to refer to the Mayor.

(Amendment voted 03-13-1945; effective 04-09-1945.)
(Amendment voted 03-11-1947; effective 03-24-1947.)
(Amendment voted 04-17-1951; effective 05-03-1951.)
(Amendment voted 04-21-1953; effective 05-29-1953.)
(Amendment voted 06-08-1954; effective 01-10-1955.)
(Amendment voted 11-06-1956; effective 01-10-1957.)
(Amendment voted 04-16-1957; effective 05-15-1957.)
(Amendment voted 04-21-1959; effective 05-20-1959.)