

MEMORANDUM OF LAW

DATE: December 14, 2001

TO: City Manager

FROM: City Attorney

SUBJECT: Effect of New California Public Contract Code Section 1100.7 on
City's Contracting Procedures/Proposed Changes to the
San Diego Municipal Code

QUESTIONS PRESENTED

1. Does newly enacted section 1100.7 of the California Public Contract Code [PCC], which purports to apply all provisions of the PCC to charter cities in the absence of conflicting or exempting local legislation, apply to the City of San Diego?
2. If so, what action should the City take in response to the enactment of PCC section 1100.7?

SHORT ANSWERS

1. No. The state Legislature cannot by mere declaration convert an otherwise purely municipal affair, such as a charter city's public contracting, into a matter of statewide concern.
2. Even though in this memorandum we conclude that section 1100.7 of the PCC probably does not apply to this City, in an abundance of caution, the City Attorney recommends amending the Municipal Code to expressly exempt the City from the PCC requirements.

These proposed amendments are shown in the draft ordinance attached to this memorandum.

BACKGROUND

Effective January 1, 2002, section 1100.7 is added to the California Public Contract Code [PCC]. This section reads in full as follows:

This [public contract] code is the basis of contracts between most public entities in this state and their contractors and subcontractors. With regard to charter cities, this code applies in the absence of an express exemption or a city charter provision or ordinance that conflicts with the relevant provision of this code.

If indeed this statute applies to charter cities, the City would be required to follow California PCC sections 100 - 22355¹, unless either:

- (1) the City Charter or Municipal Code expressly exempted the City from these PCC sections; or,
- (2) a specific Charter or Municipal Code provision conflicted with a provision in the PCC.

This statute is clearly an attempt by the state Legislature to occupy the field of public contracting and to preempt many local laws and policies governing public contracts. The issues are whether the purported preemption is effective and what action the City should take in response to this legislation.

This City's public contracting procedures are governed by many laws and policies, which range from, for example, section 99 of the City Charter, to Chapter 2, Article 2, Divisions 30 through 35, of the Municipal Code, to Council Policy 000-29 ("Contract Award Protests by Non-Selected Bidders/Proposers"), to Administrative Regulation 25.40 ("Alterations in Public Works Contracts"), to unwritten but longstanding policies and practices. Arguably, some of these laws, policies, regulations, and practices are in direct conflict with state law, while others supplement statutory provisions. In the interest of fairness and to expedite contracting, the City's practice has been to apply some portions of the state's Public Contract Code, for example, the Subletting and Subcontracting Fair Practices Act, located at PCC 4100 - 4114.

ANALYSIS

I .

Charter Cities' "Home Rule" Authority

The City of San Diego is a charter city. Under the California Constitution, a chartered city enjoys autonomy over its "municipal affairs." Cal. Const. art. XI, § 5. Section 5 states:

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

The principle of “home rule” is that a charter city has the power to control all municipal affairs without interference from general state laws and subject only to limitations contained in the state constitution and charter itself. *City Council v. South*, 146 Cal. App. 3d 320, 326 - 27 (1983). The purpose of home rule is to curtail the state legislature’s authority to intrude into matters of local concern, since cities are familiar with their own local problems and can often act more promptly to address problems than the state legislature. *Isaac v. City of Los Angeles*, 66 Cal. App. 4th 586, 599 (1998). Consequently, a chartered city’s ordinances which deal with purely municipal affairs are valid even if they conflict with general laws. *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981). On the other hand, general laws on subjects of statewide concern supersede any conflicting enactments of chartered cities. *Id.*

II. Public Contracting is a Municipal Affair and the Legislature Cannot Convert It into a Matter of Statewide Concern By Mere Declarations Made in PCC Section 1100.7

Except as otherwise determined by the courts, this City has always viewed its ability to enter contracts as a municipal affair. *See, e.g.*, 1993 City Att’y MOL 217. The dilemma posed by section 1100.7 is that the state Legislature has attempted by mere declaration to make portions of the state’s entire Public Contract Code apply to both general law and charter cities, even though longstanding case law clearly establishes that charter cities may have their own rules governing city-funded contracts for city projects. *Domar Electric Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 - 71 (1994); *Piledrivers’ Local Union v. City of Santa Monica*, 151 Cal. App. 3d 509, 512 (1984); *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 534 (1973); *Loop Lumber Co. v. Van Loben Sels*, 173 Cal. 228, 232 - 34 (1916). Section 1100.7 places an affirmative burden on charter cities to enact legislation to identify “relevant” PCC sections and rebut their effect. This portion of the memorandum examines the legal effect of the Legislature’s declaration.

Whether a particular law deals with a municipal affair or is a subject of statewide concern is for the courts, not the Legislature, to decide. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61 - 62 (1969). The court in *Bishop* specifically rejected the notion that the Legislature alone could define what is, and what is not, a matter of statewide concern:

[T]he fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs. . . . stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.

Id. at 63.

In so holding the California Supreme Court in *Bishop* specifically disapproved earlier cases that held the contrary. *Id.* at 63 *n.6*. The court is concerned not with legislative intent, but with whether good reasons exist, grounded on statewide interest, to label a given matter one of “statewide concern.” *Johnson v. Bradley*, 4 Cal. 4th 389, 405 (1992). Courts may sometimes conclude that a matter is a municipal concern despite legislative declarations attempting to preempt local legislation. *Bishop*, 1 Cal. 3d 62.

If a court is persuaded that the subject of a state statute is one of statewide concern, the statute must still be reasonably related and narrowly tailored to resolving the problem at hand. *Johnson*, at 399. Only then will a conflicting city measure cease to be a municipal affair and the state Legislature will not be prohibited by article XI, section 5, from superseding city laws. *Id.*

Because the City has always treated its public contracting as a matter of purely municipal concern, the City has applied its own charter, municipal code, policies, and practices to let contracts out for bid and to award them. In our opinion, the City is entitled to continue to do so, in spite of the Legislatures’s attempt in PCC section 1100.7 to turn a hundred years of home rule authority on its head.

Additionally, despite the state Legislature's declaration in PCC section 1100.7 of the Public Contract Code, the judiciary has not declared the entire area of public contracts to be a statewide concern. The mere fact that section 1100.7 attempts to make the Public Contract Code a matter of statewide concern is not dispositive on whether it actually is a matter of statewide concern. Even if a court were to find that public contracting is a matter of statewide concern, section 1100.7 would have to be "reasonably related" to the state's needs and "narrowly tailored" to address those needs. *Johnson*, at 399. Given the fact that the section attempts to apply an entire area of law to a charter city, a court would likely place the burden on the state to establish how the statute is reasonably related to the state's needs and a court would likely find that the statute is not narrowly tailored to meet those needs. For these reasons we assert that PCC section 1100.7 is unenforceable against this City.

III. The City Should Amend its Municipal Code to Expressly Exempt the City from the Effect of PCC Section 1100.7

We have concluded that, absent a judicial finding that public contracting is a matter of statewide concern, PCC section 1100.7 is unenforceable against this City. In an abundance of caution and to avoid unnecessary and costly litigation, however, the City Attorney recommends adopting an ordinance expressly exempting the City from application of the state's Public Contracting Code. PCC section 1100.7 expressly offers this option to cities. We have drafted such an ordinance and attach a copy to this memorandum.

CONCLUSION

Under the California Constitution, a charter city enjoys broad home rule powers over purely municipal affairs. A city's public contracting has traditionally been considered a purely municipal affair. The state can impose preemptive legislation only if the subject matter is of statewide concern. The state Legislature cannot by mere declaration convert an otherwise purely municipal affair into a statewide concern. Whether something is a municipal affair or is a matter of statewide concern is for the courts to decide.

In adopting PCC section 1100.7, the state Legislature purports to make the state's public contracting code apply to charter cities unless a city takes an affirmative action to exempt itself from application of the PCC. Although we conclude in this memorandum that PCC section 1100.7 is unenforceable against the City, to avoid costly litigation and in an abundance of caution, the City Attorney recommends adoption of an ordinance expressly exempting the City from application of the PCC to its public contracting procedures. A copy of the proposed ordinance is attached to this memorandum.

CASEY GWINN, City Attorney

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By

Cristie C. McGuire
Deputy City Attorney

CCM:vl
Attachment
ML-2001-26