

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: December 19, 2013

TO: Honorable City Councilmembers

FROM: City Attorney

SUBJECT: Legal Obligation to Implement “Most Efficient Government Organization”
Proposal Following Managed Competition

This memorandum is in response to a question from Councilmember Myrtle Cole, who asked whether the City of San Diego (City) is legally obligated to implement the proposal prepared by City employees known as the Most Efficient Government Organization or MEGO, if the City employees “win” a managed competition. In response, with further detail below, the Mayor has discretion to implement the MEGO following a managed competition, subject to any obligations of the City under the Meyers-Milias-Brown Act (MMBA), California’s collective bargaining law,¹ and any budgetary issues.

DISCUSSION

I. THE CITY’S MANAGED COMPETITION PROCESS IS USED TO DETERMINE IF THE CITY SHOULD HIRE A CONTRACTOR TO PROVIDE CITY SERVICES AS AN ALTERNATIVE TO CITY EMPLOYEES IN THE CLASSIFIED SERVICE.

The City’s managed competition process was developed and implemented by the San Diego City Council (Council) in 2010, under the authority of San Diego Charter (Charter) section 117(c) (Section 117(c)). Section 117(c) was approved by City voters in November 2006, to allow the City to hire an independent contractor as an alternative to classified, civil service employees when the Mayor determines, and the Council agrees, that an independent contractor will be more economical and efficient.² As we explained in this Office’s 2009 Legal Opinion, Section 117(c) relates to contracting out the work of classified, civil service employees. 2009 Op. City Att’y 709 (2009-2; Oct. 8, 2009).

¹ The MMBA establishes a procedure for communication between public employees and their employers and for resolving disputes regarding wages, hours, and other terms and conditions of employment. It is applicable to charter cities. *People ex rel. Seal Beach Police Officers Ass’n v. City of Seal Beach*, 36 Cal. 3d 591, 597 (1984).

² The question presented to voters was: “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?” Ballot Materials, Proposition C, General Municipal Election (November 7, 2006), at <http://www.sandiego.gov/city-clerk/pdf/pamphlet061107.pdf>.

Section 117(c) states, in part: “The City may employ any independent contractor when the [Strong 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).³ It also states that the Council must, by ordinance, adopt policies and procedures to implement the section. The policies and procedures must include minimum contract standards and other measures to protect the quality and reliability of public services. *Id.* Those policies and procedures are set forth in the City’s “Managed Competition Guide,” which was adopted by Council, by ordinance. San Diego Ordinance O-19995 (Oct. 18, 2010) (Guide). The Guide is the negotiated process that the Mayor may use to make the required determination under Section 117(c) if the Mayor wants to hire a contractor as an alternative to classified employees.

In the negotiated managed competition process, the targeted City department or division puts together a group of employees, called the Employee Proposal Team. They prepare a department bid – the MEGO – which is used as a basis to evaluate any proposals of independent contractors. *See* Guide, at p. 17. As the Guide explains, managed competition is 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. This strategy recognizes the high quality and potential of public sector employees, and seeks to tap their creativity, experience and resourcefulness by giving them 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 p. 1. The MEGO is a proposal that sets forth the employees’ “strategies for optimized efficiency, economy and effectiveness.” *Id.* The Guide, at Task M, says:

The Employee Proposal Team will develop their most efficient and effective proposal based on the requirements defined in the RFP. City employees involved in Managed Competition will be provided with resources-such as information, technical assistance and staff support-to develop strategies for optimized efficiency, economy and effectiveness, in order to respond to a solicitation.

Id.

³ Section 117(c) also states that if the Mayor makes a determination that an independent contractor will provide City services more economically and efficiently, then the Council has authority “to accept or reject in its entirety any proposed agreement with an independent contractor.” San Diego Charter § 117(c). The Mayor must administer and monitor any agreements with contractors, and must produce annual performance audits for contracted services. *Id.*

It is within the discretion of the Mayor as the head of the City's administrative service⁴ to decide whether or not to implement the MEGO, subject to compliance with the MMBA. Presumably, the Mayor's decision to implement the MEGO will be based on any perceived budgetary savings that may result from implementation. If the Mayor decides to implement the MEGO, there is no Council action required, other than action to capture any budgetary savings or related to meet and confer.

II. PRIOR TO IMPLEMENTATION OF THE MEGO, THE CITY MUST MEET AND CONFER WITH ITS IMPACTED EMPLOYEE ORGANIZATIONS REGARDING ANY MODIFICATIONS TO A MANDATORY SUBJECT OF BARGAINING IN THE MEGO, AND REACH AGREEMENT OR COMPLETE IMPASSE PROCEDURES.

Under the MMBA, the City must provide notice and opportunity to meet and confer with the City's impacted employee organizations if the MEGO involves modifications to any mandatory subject of bargaining, defined as wages, hours, and other terms and conditions of employment. Cal. Gov't Code §§ 3504, 3505. As an example, the MEGO may include proposals to modify employee working hours or workload. As a general rule, these proposed modifications will require meet and confer. Upon completion of a managed competition, and prior to implementation of the MEGO, the City must analyze the MEGO to determine what elements involve a mandatory subject of bargaining.

For purposes of the meet and confer process, the MEGO essentially becomes the City's proposal to the impacted employee organizations. As a result of the meet and confer, those elements of the MEGO that involve mandatory subjects of bargaining may change because meet and confer must be a collective, good faith process in which proposals of both the City, as a public agency employer, and the impacted employee organization are considered before the City arrives at a determination of policy or course of action. Cal. Gov't Code §3505. The City must complete the meet and confer process to agreement or impasse and exhaustion of any necessary impasse procedures before modifying any mandatory subject of bargaining. If agreement is reached, the City will enter into a memorandum of understanding – or a side letter agreement to be read in conjunction with an existing memorandum of understanding – with the impacted employee organizations related to implementation of the MEGO.⁵

⁴ The City's Strong Mayor, among other rights, powers, and duties, has the "[s]ole authority to direct and exercise control over the City Manager in managing those affairs of the City under the purview of the Mayor as expressly permitted in the Charter." San Diego Charter § 265(b)(8). Under Charter section 28, the Manager, "as Chief Budget Officer of the City, shall be responsible for planning the activities of the City government and for adjusting such activities to the finances available." San Diego Charter § 28. The Manager also supervises "the administration of the affairs of the City." *Id.*

⁵ If the City is unable to reach agreement with its affected employee organizations over implementation of the MEGO and impasse is declared, the provisions of Council Policy 300-06 – the City's employee-employer relations policy – and the MMBA will control.

III. THE CITY DOES NOT ENTER INTO A CONTRACT WITH A CITY DEPARTMENT TO PROVIDE SERVICES OR WITH CITY EMPLOYEES IF THEY “WIN” A MANAGED COMPETITION.

An essential element of a contract is that parties must be capable of contracting. Cal. Civil Code § 1550. “[T]here must be an assent of at least two separate, independent minds for no person, natural or corporate, can effectually make a contract with himself.” *Luis v. Orcutt Town Water Co.*, 204 Cal. App. 2d 433, 444 (1962).

The City cannot contract with one of its departments because the City is not a separate legal entity from its departments. The City is a municipal corporation, which is composed of its various departments, divisions, and boards. San Diego Charter §§ 1, 26. Therefore, if, as a result of a managed competition, the employee proposal team “wins” the competition, then the City does not enter into a contract with the City department for the department to act as the service provider.⁶

Further, the City also does not contract with its civil service employees, who hold their employment by the provisions of the Charter and by ordinance, not by contract. *Holmgren v. County of Los Angeles*, 159 Cal. App. 4th 593, 602 (2008) (as a general rule, the terms and conditions of civil service employment are governed by statute, not by contract).

Section 117(c) does not alter the City’s employment relationship with its classified employees.⁷ Section 117(c) was added to the Charter to allow the City to contract out the work of classified employees.

⁶ There is some language in the Guide that appears to contemplate a contract between the City and a City department. For example, in Task H, it states, “Contracts with all service providers shall include consequences for non-performance, up to and including termination of the agreement with the service provider, including an independent contractor or City department.” Guide, at p. 14. Task V states, “The contract with the service provider (including City forces) shall specify the duration of performance.” Guide, at p. 23. Phase V of the Guide states, “Within the term of a managed competition contract (for city workers or contractor), the City Auditor shall conduct a performance evaluation of the service – determining whether cost efficiencies and performance standards have been achieved and identifying ways for the department to improve contract management.” Guide, at p. 22. It is this Office’s view that this language is of no significance. The Guide must be read in light of controlling law. As explained, the City cannot contract with itself.

⁷ Section 117(c) is in Article VIII of the Charter, related to the City’s civil service system. Charter section 129 provides: “Upon attaining permanent status pursuant to the Rules of the Civil Service Commission, any officer or employee of the City in the classified service may be removed from office or employment for cause by the appointing authority.” San Diego Charter § 129. This Charter section sets forth the procedural requirements that the City must follow if it is terminating a permanent civil service employee. The Charter also states that the Civil Service Commission must “promulgate rules and regulations necessary to govern layoffs for lack of funds, lack of work, or insufficient appropriation to meet the salary requirements necessary to maintain existing personnel in any office or department of the City of San Diego.” San Diego Charter § 129. These provisions make clear that employees in the classified service cannot be terminated if the budgetary savings believed to result from implementation of the MEGO do not result. Employees can be terminated pursuant to a layoff or for cause under the City’s Civil Service Rules. See San Diego Charter § 129; San Diego Municipal Code, art. 3, div. 6 (codifying Civil Service Rule V related to layoffs), San Diego Municipal Code, art. 3, div. 12 (codifying Civil Service Rule XI related to removals). The relationship between the City as an employer with its classified employees is different than the relationship between the City and a contractor; contractors generally can be terminated for convenience under the City’s standard contract terms

