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I. INTRODUCTION

Privatization, often called "contracting out," is the process whereby government services traditionally provided by government employees are bid competitively in the private sector. Often, an identical level of service can be supplied at a reduced cost because the companies that step in to deliver the services are able to benefit from economies of scale, non-union wages, flexible work rules, and the competitive pressures of the free market.

Until recently, judicial rulings seemed to require that all traditional functions of government entities be performed by public employees represented by exclusive unionized bargaining units. New cases suggest that public employers may now explore areas of potential savings or improvements in services which may be available by contracting out, unless they are clearly restricted from doing so by collective bargaining agreement provisions or Board policy.

Although the issue is not completely settled, new cases indicate that public employers may wish to explore outside contracts for certain services in order to reduce costs and/or to improve quality of service. In particular, management may want to consider contracts with outside businesses to provide services such as janitorial, clerical, and maintenance services. Because of the legal complexities of this area, however, public entities should proceed only with the advice of counsel. Management also should be aware that bargaining over the "effects" and "impacts" of a particular contract for outside services may be required even in situations where there are few other legal issues raised by a proposed contract.

Guidelines for Privatizing

- Public sector employers have an obligation to discuss any business strategies with their unions that entail reductions-in-force or the subcontracting of services.

- The entity should conduct a thorough review of all collective bargaining agreements and Board policies to determine whether they limit the employer's right to subcontract services.

- Management should discuss the financial basis for the subcontracting

proposal with the public agency's Board.

- Obtain Board consent and direction relative to the proposed subcontracted services.
- Obtain Board authorization to accept bids for subcontracted service.
- Notify the union of the possible subcontracting and provide a copy of the bid specifications.
- Review bids.
- Consider the realities of an initial bid. Most private sector contractors tend to low-ball their initial service contracts and raise them later.
- Notify the union of the bids received and negotiate with it over the proposed subcontracting in light of the bids.
- Consider options such as restructuring the existing contract to allow cooperative partnerships between management and labor aimed at improving efficiency and controlling costs.
- Always bargain in good faith with the union and consider its proposals.
- Look for opportunities to achieve significant, lasting reductions in cost and improvements in quality without reducing wages and benefits.
- Document that the appointed subcontractor's proposal is superior to any counterproposals submitted by the union. Create a record showing attempts were made to deal with the challenge of scarcer resources through partnerships with employees rather than through job cuts or privatization.
- Submit the low bid to the Board for approval if the union fails to provide a better proposal than the lowest bid of a subcontractor.

- Obtain Board direction on terminating bargaining unit employees and negotiating with the union regarding the impact of the subcontracting decision.

- Consult with counsel to ensure legality of each step in the process.

II. CONTRACTING OUT EXAMPLES: THE ROCKY ROAD TO PRIVATIZATION

Although privatization of a number of traditional functions recently has received judicial approval in a number of cases, these cases also demonstrate that this area is far from settled and that public employers should proceed with caution before contracting out to reduce labor costs.

Public employers should be aware that any decision to contract out may be subjected to legal attack. Such attacks may occur in multiple forums and, as the cases discussed below show, may result in decisions which the entity must be prepared to appeal. Additionally, as the legal decisions in this area often turn on subtle distinctions and factual nuances, it is important to carefully explore contracting out options and strategies at every step with qualified counsel.

School District's Transportation Contract Upheld

The Court of Appeal let stand a Public Employment Relations Board ("PERB") decision that expanded an employer's right to contract out in *Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871. In order to reduce costs, Barstow -- a "merit system" school district -- decided to eliminate 28 classified positions in its transportation department and contract with a private company for student transportation services. Of the 28 affected employees, 10 received other positions with the district and 18 were laid off. The private transportation company interviewed and hired many of the laid off workers.

An administrative law judge found that the contracting out and layoffs were improper. PERB, however, reversed the decision of the administrative law judge, holding that the school district had no duty to negotiate its decision to contract out transportation services where the decision was motivated by a desire to reduce labor costs. *(CSEA v. Barstow Unified School District* (1996) PERB No. 1138.)

PERB based its ruling on the "District rights" clause in the parties' collective bargaining agreement. It gave the district the "exclusive right" to "contract out for work, which may lawfully be contracted for." PERB held that by agreeing to this clause the union waived its right to negotiate the contracting-out decision and that the union could only negotiate about the "effects" of the contracting decision. Notably, PERB refused to scrutinize two Education Code sections implicated by the express terms of the agreement, indicating that the meaning of the code sections is a question for the courts.

Contrary to PERB, the lower court ruled in the civil suit arising out of the same events that the district's actions violated the Education Code. However, the Court of Appeal reversed the lower court and found that statutory interpretation was appropriately left to PERB, at least initially, and that the union had failed to exhaust its administrative remedies with PERB prior to seeking court relief.

School Psychologists Properly Replaced by Independent Contractors

Another recent case shows the current favorable climate towards contracting out, at least in the Courts of Appeal. *(Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571.) The school district developed a program to trim $1.1 million from its budget by reducing or eliminating 14 full-time equivalent positions. In addition to cutting eight teachers, one nurse, one district

counselor, and one director of children's services, the district eliminated its three elementary school psychologist positions. To provide mandated services, the district created a position titled "Administrative Psychologist" with the responsibility of hiring independent contractor psychologists to perform psychological testing and assessment services that the district's certificated elementary school psychologists previously had performed. The district shifted non-mandated services to nurses and counselors, contending that Education Code section 44955 permits a district to reduce the number of permanent employees in certain circumstances when the district is reducing or discontinuing the "particular kind of service" at issue.

An administrative law judge found that the district improperly used contract employee psychologists. In the administrative law judge's view, the contract psychologists provided the identical services previously performed by the certificated employees. Similarly, in a civil suit, the trial court judge found that replacing the employee psychologists with independent contractors was improper as the facts did not support a finding that the district reduced or discontinued a "particular kind of service." The court concluded that the services would "not be performed in a different manner," but would "merely be performed by a different psychologist."

However, on appeal, the Fourth District reversed the trial court's judgment. The appellate court found abundant evidence that the independent psychologists would not perform the services in the same manner as the former employee psychologists. The district virtually discontinued in-house employee psychological assessment, and contract employees received referrals from the administrative psychologist rather than being assigned to a school site. Therefore, the district was not continuing the "identical kind of service" the terminated employees had performed; rather, "a service [would] continue to be performed or provided in a <u>different manner</u> by the district." (Emphasis added.)

The Court of Appeal focused on a number of differences between district services under the old system and the new independent contractor program. For example, the independent contractor psychologists would "type" their own reports and submit them to the administrative psychologist for evaluation. In some cases, they would conduct assessments at the end of the work day or on the weekend in students' homes. The independent contractors would not attend routine meetings and some would conduct tests completely or partially in Spanish. Because the district had reduced or discontinued its prior psychological services, the appellate

court reversed PERB and the trial court and approved the district's decision to contract out for psychologist services.

Non-Merit Community College District Can "Contract Out" Groundskeeping Services

A new ruling allows a non-merit community college districts to subcontract groundskeeping services to an outside contractor under certain circumstances. *(California School Employees Association v. Kern Community College District* (1996) 41 Cal.App 4th 1003.) The Kern County Community College District entered into a contract with an outside firm for upkeep of grounds surrounding some new buildings. Prior to the contract, all such work had been performed exclusively by the district's own classified employees. No classified employees were laid off or suffered a reduction in hours because of the contract. Although one classified groundskeeper declared that he had been responsible for maintaining the same area of the campus later maintained by the employees of the outside firm, he had been reassigned.

The collective bargaining agreement between the parties contained two provisions relating to the contracting out of bargaining unit work. One section stated: "The District shall not contract out for services which result in the layoff (as defined in Education Code Section 88001) or reduction of regular hours or regular wage rates of existing bargaining unit members." The other relevant section stated: "No supervisory or management employee may perform any work within the job description of a bargaining unit employee to the extent of replacing bargaining unit employees."

Based on interpretation of applicable Education Code provisions, earlier cases required that classified employees be allowed to perform all traditional district functions. The *Kern County* court distinguished the earlier cases and found that classified service for merit and non-merit school districts are governed by distinct and separate sections of the Education Code. The statute controlling merit districts provides that the board shall "employ, pay and otherwise control" the services of persons performing the classified functions set out in the statutes. The court determined that non-merit districts are not subject to a similar statutory restriction as there is no parallel language requiring the employment of specific classified personnel. Therefore, non-merit districts have much greater freedom to contract out services than do merit districts.

Non-Merit Community College District's Outside Contract for Bookstore Upheld

In another recent case, a court upheld a district's contract with an independent bookstore chain, relying in part on the *Kern County* groundskeeping case. (*Service Employees International Union v. West Valley/Mission Community College District* (1996) 96 C.D.O.S. 5770.) Mission College entered into a five-year contract with Barnes & Noble Bookstores, Inc., to manage, operate and provide services for the college bookstore. The contract required Barnes & Noble to staff the bookstore with "experienced and qualified managerial and clerical personnel." Barnes & Noble agreed to utilize the services of the three classified employees who had been involved in the prior bookstore operation, and to follow the provisions of their collective bargaining agreement. The company was to reimburse the district for payroll and state retirement expenses for the classified employees. Additionally, Barnes & Noble guaranteed the district minimum annual payments in excess of the profits that the district-run bookstore had generated. This new source of funds was earmarked for a new student center.

Even though the contract resulted in the substitution of outside employees for classified employees, the court held that the district could legally contract with Barnes & Noble for bookstore services because it is a non-merit district. The court noted that the Barnes & Noble contract provided substantial benefit to the district in expertise, technology, management skills and buying power that could not be duplicated by the bookstore assistants employed by the district.

III. CONTRACT LANGUAGE AND CONTRACTING OUT OPTIONS

Management rights clauses in the public entity setting typically provide that the agency has the right to contract or subcontract any work or operation of the agency. But the typical management rights clauses also prohibit the entity from prejudicing the right of the unions to meet and confer regarding the impact and effect of the decision to contract out. In such a case, although the union does not have the right to bargain about the decision to contract out, it may demand effects or impacts bargaining.

A Management Rights provision in a collective bargaining agreement that is designed to allow for contracting out without strong legal challenge might read as follows:

> The Agency reserves, retains, and is vested with, solely and exclusively, all rights of management, which have not been expressly abridged by specific provisions of this agreement or by law, to manage the Agency as such rights existed prior to the execution of any collective bargaining agreement. The sole and exclusive rights of Management, as they are not abridged by this agreement or by law, shall include (but not be limited to) the following rights: 1) To determine the necessity and organization of any service or activity conducted by the Agency, and to expand or diminish services and/or activities; 2) To determine and change the number of locations, relocations, and types of operations, processes and materials to be used in carrying out all Agency functions, including, but not limited to, the right to contract for or subcontract any work or operation of the Agency without prejudice to the right of the Union to meet and confer regarding the impact and effect ofsuch decision. Should the Agency decide to permanently contract out any work presently being performed by bargaining unit employees resulting in any displacement of employees, the Agency shall meet and confer with the Union over the impact of such contracting out and discuss placement of those employees displaced by such permanent contracting out.

Note, though, that the above provision leaves questions relating to temporary, seasonal and other non-permanent staffing changes subject to challenge.

Another way to draft language into a collective bargaining agreement to allow for contracting out is to have management affirm that it will maintain its existing full time work force. Under such a provision, the public entity is free to subcontract any and all functions (consistent with law), so long as it maintains its existing workforce. Part time and seasonal employees are not covered by the protection of this provision, and the entity can contract out even if it results in the layoff of these types of employees. A contract provision of this sort might read:

> Management reserves, retains, and is vested with, solely and exclusively, all traditional rights of management, which have not been expressly abridged by specific provisions of this agreement or by law, to manage the employees as such rights existed prior to the execution of the collective bargaining relationship. Specifically, management reserves the right to contract for or subcontract any

> work or operation so long as no employee, who was classified as full-time as of January 1, 1997, shall be laid off as a result of such subcontracting or contracting during the term of this agreement.

Example: A District Well Positioned to Explore Contracting Out

One California Community College District's collective bargaining agreement with their faculty unit illustrates this situation. The District Rights article states:

> It is understood and agreed that the District retains all of its power and authority to direct, manage and control to the full extent of the law. Included in, but not limited to those duties and powers are the exclusive right to: determine its organizations; direct the work of its employees; determine the times and hours of operations; determine the kinds and level of service to be provided and the methods and means of providing them; establish its educational policies, goals and objectives; insure the rights and educational opportunities of students; determine staffing patterns; determine the number and kinds of personnel required; maintain or modify facilities; establish budget procedures and determine budgetary allocation; determine the methods of raising revenue; contract out non-bargaining unit work; and take action on matters in the event of an emergency. In addition, the Board retains the right to hire, classify, assign and promote. The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the District, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, will be limited only by the terms and conditions of this agreement, and then only to the extent such terms and conditions are in conformance with law.

The collective bargaining agreement also contains a specific article on "Reduction in Force" setting out procedures and allowing for grievances of alleged failures to follow the procedures. The article also states: "The District will meet and confer with the Association upon request with respect to the nature and impact of any anticipated faculty layoffs prior to issuing final notices of layoff."

A Difficult Example: Collective Bargaining Agreement Between A California High School District and CSEA

Unlike the situation posited above, many collective bargaining agreements never mention the phrase contracting out at any place in their text. The following relevant provisions are contained in one such agreement.

> *DISTRICT RIGHTS:* "It is understood and agreed that the District retains all of its powers and authority to direct, manage, and control to the full extent of the law. Such powers and authority shall be limited only by the specific and express terms of this agreement, and then only to the extent such specific and express terms are in conformance with law."
>
> *RECOGNITION:* "All newly created positions, except those that lawfully are certified as management, Certificated, confidential or supervisory, shall be assigned to the bargaining unit."
>
> *ASSOCIATION RIGHTS:* "In the even that the District contemplates a reduction in services affecting bargaining unit employees, CSEA shall be provided with a complete and accurate seniority list by classification, name and work location of affected employees and their assigned hours per day. The District will also indicate all bargaining unit vacancies."
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> *RECLASSIFICATION:* "If, during the term of this agreement, the District proposes to reclassify a bargaining unit position or group of bargaining unit positions, or if CSEA proposes reclassification, CSEA and the District shall schedule a meeting for the purpose of reaching an agreement on salary, class title, and job description."
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> *INCUMBENT RIGHTS:* "When a position is reclassified, the incumbent in the position shall be entitled to serve in the new position, if qualified."
>
> *ABOLITION OF A POSITION OR GROUP OF POSITIONS:* "If the District proposes to abolish a position or group of positions and create new positions in a different class, the incumbent in the abolished position who meets the minimum qualifications shall

have a right to the new position. Incumbents who do not meet the minimum qualifications of the new position, but could reasonably acquire the skills necessary to be efficient in the new position within sixty days shall be assigned to the new position in a probationary status. Employees who do not meet the minimum qualifications within the sixty-day period shall be assigned to an alternate position, if one exists, equal to their original position. If an equal position does not exist, the employee will have the right to the first available position equal to the abolished position."

ABOLITION OF VACANT POSITIONS: "Vacant positions may be abandoned by the administration provided that: 1) CSEA is given formal written notification indicating which position(s) will be abolished no later than sixty working days prior to the effective date of implementation, and 2) the District furnishes CSEA with a report stating its reasons for abandoning the position(s) and the impact on immediate unit members. This procedure is not subject to the grievance procedures of this collective bargaining agreement."

LAYOFF PROVISIONS: "An employee whose position is eliminated or whose hours are reduced or is bumped, may bump a lesser length of service person in a position of equal or less hours within their classification, or, if no such position is available, the employee may bump into an equal or lower classification in which the employee has worked. An employee may elect layoff in lieu of exercising bumping rights. An employee may refuse up to three reemployment offers made by the District, after which he or she shall be dropped from the eligible list."

COMPLETION OF MEET AND NEGOTIATION: "Unless mutually agreed upon by the parties hereto, during the term of this agreement, the Association expressly waives and relinquishes the right to meet and negotiate and agrees that the District shall not be obligated to meet and negotiate with respect to any subject or matter, whether or not referred to or covered in this agreement."

In the above situation, contracting out remains a viable option, but one that must be carefully explored with competent counsel at each step of the process

because of the vagueness and silence in the controlling collective bargaining agreement.

IV. CONTRACT LANGUAGE MAY NOT BE ENOUGH

As discussed above in the cases controlled by the Education Code, particular statutory requirements may prevent contracting out that would otherwise be permissible. More troubling, though, is the ruling of the Court of Appeal in *Department of Transportation v. Chavez* (1992) 7 Cal.App.4th 407. In *Chavez*, contracting out was allowed by a controlling statute that had been enacted 20 years before. Because the state entity utilized Department of Transportation employees during that period, the Court held that the private contract the Department entered fell outside the scope of the allowable contracting out. This decision was reached in spite of the fact that no Department of Transportation employees were subject to lay off as they were all absorbed into other highway crews.

It is thus clear that statutes and bargained-for agreements may not always shield an employer who wishes to contract out. The past practices of the employer are also subject to examination.

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