Why Can’t We Contract Out Half Our Workforce?

By Irma Rodriguez Moisa, Nate Kowalski, and Lisa M. Carrillo

In the wake of the economic recession that rocked the country over the past few years, cities and counties have searched for ways to trim their budgets. Because a significant proportion of a public entity’s funds are dedicated to personnel costs, solutions have ranged from layoffs to furloughs to changes in retirement benefits. In addition, an increasingly popular option has been to contract with another public or private entity to provide public services that are currently performed by an agency’s own civil service employees.

There are a number of advantages associated with contracting out public services. First and foremost, it is a way to achieve significant savings. For example, it eliminates costs associated with training. Second, it provides increased flexibility and greater control over the workload — if a public entity no longer needs a particular service, it is much easier to adjust the scope of a contract than to reduce hours or lay off employees. Finally, contracting out is a means to retain experts or specialists in a particular field.

On the other hand, there are potential disadvantages. The public entity loses a degree of control over the quality of the services being provided. Contractors may not have the same degree of loyalty to the public entity as civil service employees. And, there is the danger of lowered morale of regular employees, who may interpret contracting out as a sign of future layoffs. Labor unions often challenge the decision to contract out public services.

As critical as these personnel considerations are, it is equally as important to review the legal parameters associated with the decision to enter contracts for public services. The discussion below provides the legal framework a public agency must consider before making such a decision.

Charter Counties and Cities
California’s Constitution provides for the creation of charter cities and counties.[1] Article XI, section 3, provides: “For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question.”[2] Under this constitutional authority, city and county charters supersede California’s general laws with regards to local affairs, a concept also known as “home rule.” Under this doctrine, citizens have the authority “to create and operate their own local government and define the powers of that government, within the limits set out by the Constitution.”[3] The provisions of a duly adopted charter are the laws of the state and have the force and effect of legislative enactments.[4]

The home rule doctrine, however, does not provide a charter county or city with unfettered authority. In general, a charter county may exercise authority on matters of local or “municipal” affairs, as opposed to matters of statewide concern.[5] Similarly, charter cities are given broad legislative discretion over municipal affairs. Article XI, section 5, of the California Constitution provides cities with the authority to adopt charters that will govern the city and the ability to enact ordinances with respect to municipal affairs.[6]

With regards to contracting out, a county charter may provide for:

*the fixing and regulation by governing bodies, by ordinance, of the appointment and number of assistants, deputies, clerks, attaches, and other persons to be employed, and for the prescribing and regulating by such bodies of the powers, duties, qualifications, and compensation of such persons, the times at which, and terms for which they shall be appointed, and the manner of their appointment and removal.*[7]

Similarly, for a city charter:

*[P]lenary authority is hereby granted, subject only to the restrictions of this article, to provide…the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.*[8]

While there is no case law specifically pertaining to a charter entity’s ability to contract out, there have been many cases concerning a charter entity's authority over salaries. Courts have consistently held that charter entities, not the state, have the authority to provide for the compensation of their employees, which is a municipal affair.[9] “Autonomy with regard to the expenditure of public funds lies at the heart of what it means to be an independent governmental entity.”[10] Consequently, because contracting out concerns the expenditure of funds and the composition of the workforce, a court would likely find it relates to a “municipal affair,” and a decision to contract out public services based on a provision in a county or city charter would likely be upheld as consistent with the “home rule”
General Law Counties and Cities

Unlike charter counties and cities, general law public entities are controlled by statute.[11] Thus, any decision to contract out public services must be based on specific statutory authority granted by the legislature. California Government Code sections 31000 and 53060[12] have been interpreted by the attorney general to limit a general law public entity’s authority to enter into contracts to “special services,” and “contractors who are specially trained, experienced, and competent to perform such services.”[13] Nothing in the statutes “suggests that a county may contract for services without regard to the ‘special services’ limitation, solely on the basis of costs savings.”[14] Moreover, the attorney general noted that when the legislature intended to grant authority to contract out services on the basis of cost savings, it did so explicitly.[15] Therefore, a general law county cannot contract out public services currently performed by its civil service employees based solely on a desire to cut costs.

Determining whether a service is of a “special” nature is a fact-based inquiry. In Darley v. Ward, the Court of Appeal stated that “whether services are special requires a consideration of facts such as the nature of the services, the qualifications of the person furnishing them and their availability from public sources.”[16] The court held that management services provided at two county hospitals was a “special service” because it required expertise not possessed by county employees. In general, “special services” include financial, economic, accounting, engineering, legal,[17] administrative, medical, therapeutic, architectural services,[18] airport or building security, and laundry services.[19]

In addition to the ability to enter contracts for “special services,” there are several specific statutes that grant public entities the right to contract out for particular services. For example, a general law city may contract for financial, economic, accounting, engineering, legal, or administrative matters;[20] collection or disposal of garbage;[21] a ferry system;[22] personnel selection and administration services;[23] construction or maintenance of airports;[24] and ambulance services.[25] General law counties may contract out health care services;[26] in-home supportive services;[27] rescue and resuscitator services with the state;[28] optometric services;[29] joint operation of jails with other counties;[30] and collection, disposal, or destruction of garbage and waste.[31]

Duty to Bargain

Determining if an employer has a duty to bargain depends on how the employment action is characterized. As an initial matter, the decision to completely eliminate a public service is distinct from contracting out and is not subject to the duty to bargain.[32] Moreover, a public entity has not contracted out work when it decides to discontinue a service and a second agency continues to provide the service at its own expense, without any involvement from the entity discontinuing the service.[33] However, there is still a duty to bargain over the “effects” of a wholesale decision to eliminate a particular public service.[34] Effects may include the timing of layoffs.[35]
the number or identity of the affected employees,[36] seniority and bumping rights,[37] the reorganization of positions,[38] the work load and safety of remaining employees,[39] reemployment rights,[40] benefits for laid off employees,[41] and severance pay.[42]

“Transfer of work” occurs when an employer transfers unit work between bargaining units, or to unrepresented employees of the same employer. Transfers of work are mandatory subjects of bargaining. In Building Material & Construction Teamsters’ Union, Loc. 216 v. Farrell,[43] the court held that San Francisco’s decision to transfer the work of truck drivers to new positions at a lower pay outside the bargaining unit was a negotiable decision and the city had violated the meet and confer requirements of the Meyer-Milias-Brown Act. The decision was within the scope of bargaining because the transfer of work had a significant effect on the wages, hours, and working conditions of bargaining unit employees.[44]

While transfer of work is a mandatory subject of bargaining, contracting out decisions — also known as subcontracting — are not always within the scope of representation.[45] As discussed above, contracting out occurs when the employer contracts with either a private entity or another public employer for services. In Ventura County Community College Dist., the Public Employee Relations Board noted that the “primary difference between the two concepts is whether the work is being transferred within the same employer or to another employer.”[46] A decision to contract out is not always within the scope of bargaining because “a decision to subcontract may constitute a managerial decision ‘at the core of entrepreneurial control’ and be based upon factors not amenable to negotiation.”[47] However, a decision to contract for services that is based purely on a public entity’s desire to cut costs is within the scope of representation and aptly suited to negotiation.[48]

A public agency must also consider whether there are any further limitations on contracting out by virtue of its labor agreements with unions representing its civil service employees. In a recent decision, PERB held that the parties to a collective bargaining agreement can agree to waive the right to bargain over the decision to contract out.[49] The collective bargaining agreement in that case contained a management rights clause giving the Long Beach Community College District the exclusive right to subcontract work. PERB found that the management rights clause constituted a waiver of the police association’s right to bargain over the decision to contract out; however, the parties were still required to bargain over the effects of contracting for police services.

In the absence of a waiver pursuant to an applicable management rights provision, a public entity must still consider whether the decision to enter contracts for services is subject to bargaining under the MMBA, or the public entity’s own ordinances, code sections, or charter provisions. Moreover, even if there is a management rights provision that allows the public entity to contract out public services, it still must bargain with unions over the “effects” of contracting out.

In Rialto Benefit Assn. v. City of Rialto,[50] the court articulated a three-part test to determine if the decision to contract out was subject to the meet and confer requirements of the MMBA. In that case, a general law city wanted to contract out
police services to the sheriff’s department. The city sent a letter to the police union offering to meet and confer over the effects of the decision, but the union claimed it was required to negotiate over the decision as well. Instead of addressing any contractual language between the two parties, the court fashioned the following test to determine if the meet and confer obligation applies to certain management decisions:

1. Does the decision have a significant and adverse effect on wages, hours, or working conditions? (If no, there is no obligation to meet and confer.)

2. Does the significant and adverse effect arise from the implementation of a fundamental managerial or policy decision? (If no, the city must meet and confer.)

3. If the answer to both questions is “yes,” then the following balancing test is applied: the decision falls within the scope of bargaining only if the need for unencumbered bargaining is outweighed by the benefit to employer/employee relations by bargaining. The test is driven by the question of whether the employer’s decision is motivated by labor costs or some other difficulty that can be overcome through collective bargaining.[51]

Applying this framework, the court held that the decision to contract out police services affected the wages, hours, and working conditions of city police officers. The court further found that the city’s decision was primarily motivated by a desire to reduce costs, as well as issues involving employee morale, level of service, and management conflicts — all issues suitable for resolution through collective bargaining. Therefore, the city’s decision to contract for police services was subject to the meet and confer requirement of MMBA.

Case Study: City of Costa Mesa

In 2010, the City of Costa Mesa — a general law city — sent out over 100 layoff notices to city employees whose jobs it intended to contract out to private entities. As discussed above, there must be specific statutory authority for a general law city to contract out any particular service. The city sought to contract for a variety of public services including street sweeping, graffiti abatement, animal control, jail operations, special event safety, information technology, graphic design, reprographics, telecommunications, payroll, employee benefit administration, building inspection, and park, fleet, street, and facility maintenance.[52]

The Orange County Employees Association sued on behalf of its members seeking injunctive and declaratory relief. In an opinion issued in August 2012, the appellate court upheld the trial court’s issuance of a preliminary injunction and found that the city failed to negotiate with the union over the decision to contract out. The court based its decision on a provision in the parties’ memorandum of understanding that required the city to discuss the decision to contract for services, not just the impact of the decision. Turning to the parties’ state law arguments, the court found the city’s
attempt to contract with private entities for the provision of “nonspecial services would be suspect as being violative of those particular statutes, as well as the state Constitution because...a city is not empowered to act in contravention of state law.”[53] Further, the court held that there was statutory authority for the city to contract out only two of the services at issue — jail services and administration of the payroll.[54]

Most recently, the city placed a ballot measure to approve a city charter in the November 2012 election.[55] Ultimately, the ballot measure did not pass and layoff notices to its employees were rescinded.[56] The city continues to explore the possibility of becoming a charter city and has backed away from the approach of mass layoffs and shifted to a comprehensive “attrition model,” replacing retiring workers with contractors as they retire.[57] For the time being, a non-charter city in the same situation could escape the same result by considering the limitations placed on it by the general laws of the state and its labor agreements with its employees.

**Conclusion**

As the state continues its slow progress along the road to economic recovery, contracting out public services will remain an attractive option. Before doing so, however, there are a number of issues to consider:

1. Is the public entity governed by a charter or the general laws of the state?

2. If a city is governed by a charter, it will have more flexibility and control over contracting out decisions that relate to municipal affairs. If the charter includes the authority to contract out, that authority is likely valid. However, it is still likely that the charter city would have to meet and confer over the effects of the decision.

3. If the public entity is governed by the general laws of the state, it must have statutory authority authorizing contracts for the service at issue.

4. Finally, are the services at issue currently performed by bargaining unit employees? If yes, then a management rights clause may provide language constituting a waiver of the union’s right to bargain over the contracting out decision. If there is no such language, then the courts will apply a three-part analysis to determine if the decision to contract out is subject to the meet and confer obligations. Regardless, the effects of a decision to contract out public services will be subject to bargaining.

**Irma Rodríguez Moisa** is a partner with Atkinson, Andelson, Loya, Ruud & Romo. She is an experienced litigator, labor negotiator, and trial attorney who offers unique insights and develops winning strategies for her public entity clients. She has numerous jury trials to her credit and has obtained defense verdicts in numerous cases, on claims including discrimination, sexual harassment, retaliation, and wrongful termination. **Nate Kowalski**, a partner with Atkinson, Andelson, Loya, Ruud
& Romo, is an accomplished litigator who handles a wide array of labor, employment and wage and hour matters. Lisa Carrillo, an associate with Atkinson, Andelson, Loya, Ruud & Romo, practices in the public entity labor and employment group, representing public sector employers in all aspects of labor and employment law including discrimination/harassment, retaliation, leaves of absence, privacy, and employee discipline.

[2] Id.
[4] Cal. Const., art. XI, sec. 3 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws”).
[9] See State Building and Construction Trades Council of California v. City of Vista (2012) 54 Cal.4th 547 (holding that the wages paid contract workers constructing locally funded projects is a matter of local concern); Dimon v. County of Los Angeles (2008) 166 Cal.App.4th 1276 (holding that the home rule doctrine precludes application of statewide wage order); Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, 8 CPER SRS (holding that salaries are a matter of local concern rather than statewide concern).
[12] Government Code section 31000, which applies to counties, states:

The board of supervisors may contract for special services on behalf of the following public entities: the county, any county officer or department, or any district or court in the county. Such contracts shall be with persons specially trained, experienced, expert and competent to perform the special services. The special services shall consist of services, advice, education or training for such public entities or the
employees thereof. The special services shall be in financial, economic, accounting (including the preparation and issuance of payroll checks or warrants), engineering, legal, medical, therapeutic, administrative, architectural, airport or building security matters, laundry services or linen services. They may include maintenance or custodial matters if the board finds that the site is remote from available county employee resources and that the county’s economic interests are served by such a contract rather than by paying additional travel and subsistence expenses to existing county employees. The board may pay from any available funds such compensation as it deems proper for these special services. The board of supervisors may, by ordinance, direct the purchasing agent to enter into contracts authorized by this section within the monetary limit specified in Section 25502.5 of the Government Code.

Government Code section 53060, which applies to counties, cities, and other public entities, states:

The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.

The authority herein given to contract shall include the right of the legislative body of the corporation or district to contract for the issuance and preparation of payroll checks.

The legislative body of the corporation or district may pay from any available funds such compensation to such persons as it deems proper for the services rendered.

While not analyzed in the attorney general’s opinion, Government Code section 37103 is the city analogue to section 31000. Section 37103 states in full: “The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters. It may pay such compensation to these experts as it deems proper.”


[14] Id.

[15] Id. Government Code section 19130, which pertains to contracts for state services, allows contracting out to achieve cost savings but only if a number of conditions are followed.

Montgomery v. Superior Court, County of Solano (1975) 46 Cal.App.2d 657 (holding that the prosecutorial functions performed by an attorney were “special services” because no one else employed by the city was qualified to perform them).

Cobb v. Pasadena City Board of Education (1955) 134 Cal.App.2d 93 (holding that an architect provides “special services” and is specially trained and experienced).

Gov. Code secs. 31000, 53060.

Gov. Code sec. 37103.


Gov. Code sec. 45008.

Gov. Code sec. 50474.

Gov. Code sec. 38794.


Gov. Code sec. 55640.

Gov. Code sec. 25208.3.

Pen. Code secs. 4050 et seq.

Pub. Resources Code secs. 49200 et seq.


Trustees of the California State University (San Diego) (2008) PERB Dec. No. 1955-H, 191, CPER 92. A state university decided to discontinue staffing remedial courses it co-taught with a local community college. The local community college decided to continue teaching the classes at its own expense. PERB found that the state university would have stopped teaching the classes and laid off instructors regardless of the decision of the local community college, and therefore, there was no contracting out.


[36] *Id.*

[37] *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 7 CPER SRS.


[44] *Id.* at 659-660.


[46] *Id.*

[47] *Id.* (quoting *Fibreboard Paper Products Corp. NLRB* (1964) 379 U.S. 203, 223 (concurring opinion of Justice Stewart)).

[48] *Id.* (noting that “subcontracting decisions motivated by an employer’s enterprise costs are ‘peculiarly suitable for resolution through the collective bargaining framework’” (quoting, *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 680)).


[51] *Id.* at 1301.


[53] *Id.* at 311.

[54] The statutory authority to contract out for these two services exists at Penal Code section 6031.6 and Government Code sections 37103 and 53060,
respectively.


[56] *Id.*

[57] *Id.*

**Letter From the Editor**

Dear *CPER* Readers,

It’s a sign of the times that both feature articles in this issue look at the constraints on reducing labor costs. First, while retired annuitants are sometimes a great value — experience without the expense of benefit costs — Sabrina Thomas’ article explains that new laws further restrict their employment. “It’s After January 1, 2013….What Should We Do With Our Retired Annuitants?” is her answer to the questions she has been fielding.

Second, while replacing employees with contract workers is an option some employers are exploring, the notorious attempt of the City of Costa Mesa to contract out much of its workforce met with resistance from the union representing its employees and a preliminary injunction forbidding most of the contracts. Irma Rodriguez Moisa, Nate Kowalski, and Lisa Carillo lay out the differences in the laws governing charter cities and counties and general law entities like Costa Mesa. In addition to constitutional and statutory constraints, they warn, pay attention to collective bargaining agreements and the duty to bargain.

As the times have changed, our readers’ needs have changed as well. That’s the message from our recent survey of present and former subscribers, who want more focus on labor relations and best practices within the public sector labor and employment field. If you would like to write an article about recent successes or lessons learned, please send your ideas to Managing Editor Stefanie Kalmin.

And, this is a time of personal transition as well. While I will remain involved in public sector labor relations as a full-time arbitrator, this will be my last issue as editor of *CPER Journal*. I have enjoyed passing along what I continue to learn about public sector labor relations and the ever-evolving legal developments in our field.

Sincerely,

Katherine J. Thomson
Editor, *CPER*
Table of Contents

Features

1. Why Can’t We Contract Out Half Our Workforce?
   by Irma Rodriguez Moisa, Nate Kowalski and Lisa M. Carrillo
2. It’s After January 1, 2013… What Should We Do With Our Retired Annuitants?
   by Sabrina Thomas

Recent Developments

Local Government

1. Application of AB 646 to Effects Bargaining Challenged
2. Labor Code Whistleblower Provisions Do Not Protect Employee Who Refuses to Violate City Charter
3. San Francisco’s Pay Equity Proposals Said to Target Women and People of Color
4. County May Be IHSS Provider’s Employer for Purposes of Wage Claim
5. Los Angeles ERB Has Exclusive Initial Jurisdiction to Decide DFR Claims

Public Schools

1. ‘Reformers’ and Teachers Union Pull Out the Stops
2. LAUSD and UTLA Agreement on Teacher Evaluations Looking Shaky
3. Yet Another Run at NCLB Waiver
4. Fremont Teachers Declare Impasse
5. Teacher Credentialing Commission Activity

State Employment

1. Litigation of Similar Claims Does Not Excuse Failure to File Whistleblower Claim With SPB

Higher Education

1. Professors Prepare for Bargaining Online Education

Discrimination

1. California Supreme Court Finds Liability, But Limits Remedies in Mixed-Motive Cases
2. Employee’s Discrimination Claims Barred Where Not Raised at Administrative Hearing
3. Employer May Demote Peace Officer Who Cannot Perform Essential Duties
4. No FEHA Violation for Terminating Manager on Leave Who Could Not Perform
Essential Functions

General

1. Legislation and Lawsuits Seek to Avoid Provisions of PEPRA
2. Two More Retiree Health Benefits Cases Revived
3. Union Representative-Member Privilege Legislation Introduced
4. AG: Quo Warranto Action Appropriate Only for State-Law-Based Procedural Challenges

Arbitration

1. Discharge Upheld for Personal Use of Law Enforcement Data and Harassment of Ex-Wife

Departments

1. Letter From the Editor
2. Public Sector Arbitration Log
3. Public Employment Relations Board Decisions
4. PERB Activity Reports

>> Table of Contents

Dear CPER Readers,

It’s a sign of the times that both feature articles in this issue look at the constraints on reducing labor costs. First, while retired annuitants are sometimes a great value — experience without the expense of benefit costs — Sabrina Thomas’ article explains that new laws further restrict their employment. “It’s After January 1, 2013….What Should We Do With Our Retired Annuitants?” is her answer to the questions she has been fielding.

Second, while replacing employees with contract workers is an option some employers are exploring, the notorious attempt of the City of Costa Mesa to contract out much of its workforce met with resistance from the union representing its employees and a preliminary injunction forbidding most of the contracts. Irma Rodriguez Moisa, Nate Kowalski, and Lisa Carillo lay out the differences in the laws governing charter cities and counties and general law entities like Costa Mesa. In addition to constitutional and statutory constraints, they warn, pay attention to collective bargaining agreements and the duty to bargain.

As the times have changed, our readers’ needs have changed as well. That’s the message from our recent survey of present and former subscribers, who want more focus on labor relations and best practices within the public sector labor and employment field. If you would like to write an article about recent successes or lessons learned, please send your ideas to Managing Editor Stefanie Kalmin.
And, this is a time of personal transition as well. While I will remain involved in public sector labor relations as a full-time arbitrator, this will be my last issue as editor of *CPER Journal*. I have enjoyed passing along what I continue to learn about public sector labor relations and the ever-evolving legal developments in our field.

Sincerely,

Katherine J. Thomson
Editor, *CPER*