Contracting Out in California’s Public Sector: The Good, the Bad, and the Ugly

By

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Background

There are few aspects of civic life that the public sector does not touch. Citizens have relied on the public sector to provide community services such as law enforcement, fire, parks, libraries and garbage collection for hundreds of years. The dramatic decline in public funding in recent years has not decreased the demand for these services. Instead, dire financial times have revived the ongoing debate about whether the public sector should continue to provide these services or outsource them to the private sector, also known as “contracting out”. Contracting Out of a bargaining unit function is the transfer of work currently performed by bargaining unit members to an external provider or outside vendor.

A 2003 University of California-Berkeley study¹ found that 14 million jobs are vulnerable to contracting out. These are not just custodial, customer-service and back-office jobs. Today, agencies consider contracting out human resources, training, information technology, accounting, architecture, advanced engineering design, news reporting, stock analysis and legal services. Plans to merge, coordinate or consolidate public services have increased dramatically since the start of the Great Recession in 2007. Issues of worker rights, transparency, cost/benefit, cronyism, efficiency, and access and benefit to the public, surround many of the proposed contracting out plans.

The decision of whether or not to contract out work is no less controversial in Higher Education. California’s colleges and universities are contracting out auxiliary enterprises (e.g. bookstore and food services), custodial services, record keeping responsibilities, administrative functions such as human resources and accounting, and maintenance services.

Labor relations in California higher education is governed by the Higher Education Employer-Employee Relations Act—commonly referred to as HEERA. HEERA does not limit an educational employer’s ability to contract out work. Section 3562 of HEERA states:

“The scope of representation shall not include consideration of the merits necessity or organization of any service, activity, or program established by statute or regulations adopted by the trustees, except for the terms and conditions of employment of employees who may be affected thereby.”

Therefore, as a general rule, colleges and universities may contract out bargaining unit work, but must meet and confer with the affected labor union regarding the impact of the contracting out. However, many colleges and universities have negotiated collective bargaining agreements (“CBA”) over the years that further limit contracting out. In addition to tenure, health insurance and pensions guarantees, many collective bargaining provisions require the University to provide notice to the union prior to contracting out, and place prohibitions on displacing bargaining unit employees through the contracting out of bargaining unit work. The CBA controls on the issue of contracting out in most instances.
Rules of the Road: Decision Bargaining versus Effects Bargaining

When reviewing a proposed contracting out plan, it is important to determine if the plan requires the employer to give the union notice and an opportunity to bargain the decision. This determination involves a review of the applicable collective bargaining agreement(s), policies, and laws. If the proposed contracting out involves something within the scope of bargaining, the decision itself is subject to negotiation.

Even if a contracting out plan is not within the scope of bargaining, an employer is still obligated to provide the exclusive representative with notice of the proposed contracting out and an opportunity to bargain the effects of the decision. Whether the contracting out plan involves decision or effects bargaining, labor professionals must remember that the implied covenant of good faith and fair dealing requires bargaining with a “genuine desire to reach agreement”.

Although an employer does not have to negotiate a proposed contracting out plan that is outside the scope of bargaining, labor professionals should critically analyze the proposed plan in the light most favorable to the union before making the final determination that the matter is outside the scope of bargaining. The best way to ensure that this analysis includes the union’s perspective is to discuss the proposal with the union to give them an opportunity to identify any potential impacts on the scope representation.

Many employers fear that discussing a contracting out plan with the union when it may not have been legally required will cause delays in the contracting out due to the union’s involvement. The perception is that the union will always intentionally delay any plan. PERB has consistently ruled that a categorical refusal to negotiate on a
proposal may constitute a violation of the duty to bargain. An employer is much more susceptible to this type of ruling from PERB unless the employer conducts at least an initial discussion with the union regarding the plan. An initial discussion will allow the union an opportunity to identify potential impacts from the plan. Given the fact that employers must meet and confer regarding the effects of a decision, making the determination that bargaining is not necessary without any communication with the union may cause the delay the employer was seeking to avoid thorough unfair practice charges and/or injunctions filed by the union.

Many labor professionals first learn about proposed contracting out plans from the employees and unions anyway. Refusing to give notice or discuss the proposal with the union may unnecessarily invite pushback for an otherwise acceptable contracting out plan.

The Good: Successful contracting out includes transparency and open communication.

There is no dispute that contracting out can lead to tension within an organization. There may be resistance to contracting out by some unions primarily based upon the fear of losing jobs. While the first objective of the union may be to convince employers that it may not be necessary to contract out the work, active involvement by labor professionals can diffuse, prevent, or resolve any impediments to contracting out.

The key to navigating the meet and confer process regarding contracting out is to deal with the union honestly and openly to the greatest extent possible. An employer’s credibility improves even more if labor professionals are allowed to keep the union informed of current projects at every step of the bidding and requisition process.
When the union requests to meet-and-confer regarding proposed contracting out, discussions usually center on the feasibility of the contracting out versus performing the work “in-house”. Labor professionals must understand what is ultimately at stake for the union—potential losses of jobs, benefits and/or membership dues. Be prepared to respond to the argument that contracting out is nothing but a mechanism for replacing permanent, unionized workers with contract workers that receive lower wages and have fewer rights. And recognize that employees are asking these questions as both an employee and as a taxpayer.

To best address union concerns, even if the collective bargaining agreement doesn’t require it, employers should give the union as much relevant written information regarding the proposed contracting out plan as possible. Relevant information includes the request for proposal, copies of all bids received, and any cost analysis used by the employer to evaluate the need for contracting out. Be prepared to discuss how these options were assessed. Hard data that identifies the scope of the plan and any projected cost savings will assist the union in discussing the plan with their members.

Rather than approaching the process as a negative, consider the meet-and-confer process a great opportunity to implement a proposed contracting out with the union’s cooperation.

The Bad: The failure to provide notice and an opportunity to bargain can result in unfair labor practices.

PERB decisions have favored the concept that both the decision and the effects of a decision to contract out bargaining unit work are within the scope of bargaining. This is based on the rationale that any advantages that may be achieved through contracting out, including cost savings, are based upon factors which have long been regarded as
matters within the collective bargaining framework, such as reduction of the work force, decrease of fringe benefits, and elimination of overtime payments. This means that in most instances, whether it is in the CBA or not, most plans to contract out bargaining unit work require employers to give notice to the affected union.

Public employers should comply with meet and confer and other applicable bargaining requirements before implementing a contracting out proposal. Absent some viable defense, such as a waiver by the union or an emergency, a public employer’s failure to give notice and meet and confer regarding a decision to contract out services will constitute an unfair labor practice charge. Failing to provide notice and/or engage in the meet and confer process can stall future contract negotiations with the union and hurt the agency in negotiating future contracting out opportunities.

The Ugly: Contracting out is a necessary evil given today’s fiscal climate.

From the standpoint of labor union, contracting out contributes to worker insecurity and stagnated wages, and is reflective of the negative impact of globalization on our economy. In the public sector, contracting out work has additional risks: creating a profit motive for service delivery, decreased transparency of contract terms, and reduced accountability for the services provided. However, recent studies find that contracting out either saves taxpayer money without sacrificing quality, or saves money and actually improves quality. That means contracting out in the public sector is here to stay.

If contracting out leads to the elimination or consolidation of services, or employee overtime opportunities and employee staffing levels are ultimately reduced

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due to contracting out, labor professionals will have to work through the issues with the affected unions. PERB rulings tell us that the parties must make a serious attempt to resolve differences and reach a common ground.

Conclusion

There are many positive reasons for contracting out public goods and services. The two most often cited are cost savings and improved quality of service. Unions understand the fiscal climate, and the challenge of completing the work of the organization with a reduced permanent staff. However, in order to have successful contracting out, labor professionals must encourage employers to continually monitor the cost versus the benefits of contracting out. This analysis must include the potential social costs of contracting out, including any economic harm to unionized employees and the very community it is seeking to serve through contracting out.