

de la Guerra, Sheila **Public Comment**



From: Andrew Schouten <aschouten@wlelaw.com>
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Cc: Ray Gayk; Fish, Greg; Hartmann, Joan; Supervisor Das Williams; Hart, Gregg; Nelson, Bob; Lavagnino, Steve; Miyasato, Mona; Hartwig, Mark
Subject: May 10, 2022 Santa Barbara County Board of Supervisors Agenda Item D(4) (File # 22-00406)
Attachments: SB BOS.pdf

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Dear Clerk of the Board,

Attached, please find correspondence from me, on behalf of the California Fire Chiefs Association, Inc. ("CalChiefs") and the Fire Chiefs Association of Santa Barbara County ("SB Chiefs"), to the Santa Barbara County Board of Supervisors regarding item D(4) on their agenda item for tomorrow's meeting. Please ensure that my correspondence is included in the record for item D(4) and each Supervisor receives a copy of my correspondence.

Please let me know if you have any questions.

Sincerely,
 Andrew Schouten

Andrew Schouten
 Lawyer

Wright, L'Estrange & Ergastolo

402 West Broadway, Suite 1800 | San Diego, CA 92101
 Office: (619) 231-4844 | Direct: (619) 702-8203 | Fax: (619) 231-6710
aschouten@wlelaw.com | <http://www.wlelaw.com/>

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WRIGHT, L'ESTRANGE & ERGASTOLO

LAWYERS

402 West Broadway, Suite 1800
SAN DIEGO, CALIFORNIA 92101
(619) 231-4844 · FAX (619) 231-6710
www.wlelaw.com

Writer's e-mail address:
aschouten@wlelaw.com

May 9, 2022

VIA ELECTRONIC MAIL

The Honorable Board of Supervisors
County of Santa Barbara
105 E. Anapamu Street, Room 407
Santa Barbara, CA 93101
sbcob@countyofsb.org

**RE: May 10, 2022 Santa Barbara County Board of Supervisors Agenda Item D(4)
Regarding An Ambulance Service Contract Policy Resolution And Ambulance
Services Update (File # 22-00406)**

Dear Members of the Board of Supervisors:

This firm represents the California Fire Chiefs Association, Inc. ("CalChiefs") and the Fire Chiefs Association of Santa Barbara County ("SB Chiefs") in connection with the above-referenced matter. We are a leading California law firm on antitrust, unfair competition, and ambulance and emergency medical services ("EMS") law and regulation.

The Board of Supervisors ("Board") should not adopt the proposed AB 389 resolution ("Resolution"). The Resolution is a misleading attempt by the County Department of Public Health and the County EMS Agency (collectively, "LEMSA") to usurp the Board's policymaking authority under Stats. 2021 ch. 460 ("AB 389") and the Santa Barbara County Code ch. 5 ("Ambulance Ordinance.")

AB 389 provides, among other things, the County of Santa Barbara "shall not enter or renew a contract for emergency ambulance services" unless the Board has adopted, by ordinance or resolution, a written policy for the County's emergency ambulance services contracts. (Health & Saf. Code, § 1797.230(c).)¹ The new law grants the Board discretionary authority and "exclusive jurisdiction" over these policy making requirements. (*Id.* at §§ 1797.230(c), (e).) CalChiefs co-sponsored AB 389 and one of its purposes is to return to county boards of supervisors policymaking authority over county contracting for emergency ambulance services, which had been systematically undercut over the years by the Emergency Medical Services Authority ("EMSA") and county-level local EMS agencies.

For example, the Ambulance Ordinance provides for the creation of a countywide ambulance licensing system governed by rules and regulations adopted by the Board. The Board has not exercised this power for at least twenty years. Instead, the LEMSA has effectively determined County policy through Section 1797.224 exclusive operating area ("EOA") contracts

¹ All statutory references are to the Health & Safety Code unless otherwise indicated.

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and amendments with American Medical Response (“AMR”) and having the Board ratify its actions.

The LEMSA seeks to continue making County ambulance services policy, this time through the Resolution and the Request for Proposals for an Exclusive Ambulance Services Provider for the Santa Barbara County Exclusive Operating Area (“RFP”). While the Resolution contains eleven policy items, the RFP reflects numerous policy decisions that LEMSA made without first obtaining direction from the Board, including:

- Eliminating so-called “stop the clock” subcontracts and millions of dollars of funding for fire agencies, including the Santa Barbara County Fire Department (“County Fire”);
- Including UCSB into a countywide EOA, notwithstanding the current agreement for services between UCSB and County Fire;
- The delegation of contracting and procurement authority to the LEMSA, such that the LEMSA has total control over the RFP process and the Board’s only role is an up-or-down vote on the final, negotiated contract with the winning bidder;
- Crafting an RFP that prioritizes recordkeeping, employee wellness, and customer relations over a provider’s ability to timely and reliably respond to emergency calls.
- Including all emergency and nonemergency ambulance services in the EOA because the LEMSA determined it was in the community’s best interests;
- Fixing prices for nonemergency ambulance services even though ambulance providers and health care facilities ordinarily negotiate those rates between them;
- Creating an “EMS Clinical & Technical Enhancement Fund” to be overseen by the LEMSA without any specified limitations or controls;
- Increasing the LEMSA’s budget and operational scope by nearly 200% outside of the normal budgeting process;
- Continuing the County’s EMS system lack of transparency and accountability for ambulance providers’ performance, deployments, and operations; and

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- Creating a requirement that EMSA must approve the final, negotiated contract when such approval is not required under Section 1797.224 and reflects a so-called “underground regulation” that EMSA is precluded from enforcing by a court judgment.

Furthermore, the LEMSA fails to grasp that the Resolution will apply to both the RFP and the proposed exclusion of the AMR contract. It does not appear that all of the Resolution’s policy elements are covered by the AMR contract, suggesting the Resolution is a sham to feign compliance with AB 389.

Finally, ten of the Resolution’s policy elements are vague and fail to establish meaningful standards to guide and measure the implementation of those elements by County staff and the LEMSA. The Board is legally prohibited from delegating such unfettered policymaking authority to County staff and the LEMSA.

Accordingly, the Board should not adopt the Resolution. Instead, it should work to modernize and revamp the dormant Ambulance Ordinance to create orderly procedures for the Board to discharge its policymaking functions and oversee the LEMSA.

The Board should not approve the RFP. The RFP is anticompetitive, contrary to law, and insufficiently detailed, definite, and precise to allow for full and fair competition on a common, objective standard.

First, the RFP is anticompetitive in two respects, rendering it invalid. The RFP’s section on retention of the incumbent provider’s workforce in the event of a provider transition is inconsistent with the County’s human relations policies and therefore preclude County Fire from submitting a responsive proposal. The RFP’s section on vehicles and equipment requires that bidders submit a list detailing their vehicles’ make, model, age, and maintenance records. This unfairly advantages the incumbent provider, AMR, over non-incumbent bidders, including County Fire. AMR can provide such a list because it already has an existing fleet of vehicles in the County. As a practical matter, non-incumbent bidders cannot provide such a list because they will not purchase those vehicles until they obtain the EOA contract.

Second, the RFP is contrary to federal laws. The RFP proposes to establish maximum rates for emergency and nonemergency ambulance services. This amounts to price fixing and would violate the Sherman Antitrust Act unless a federal court determines the County has state action antitrust immunity. To have such immunity, the County must show that it acted pursuant to state statutory authority to displace competition with regulation or monopoly public service and that its alleged anticompetitive conduct is the inherent, logical, or ordinary result of its exercise of such authority. (*FTC v. Phoebe Putney Health Sys.* (2013) 568 U.S. 216, 225-26, 229 [*“Phoebe Putney”*].) But Section 1797.224 authorizes the LEMSA to restrict operations in an EOA to one or more providers, not to fix prices within the EOA.

The RFP’s requirements for retention of the incumbent provider’s workforce run afoul of federal labor laws. Among other things, they require a new provider to preferentially hire such

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personnel, grant them the same or similar positions, allow them to keep their seniority for shifts and personnel assignments, and provide them the same or better benefits. These are all terms and conditions of employment subject to collective bargaining under the National Labor Relations Act ("NLRA"). Because the RFP requirements interfere with the collective bargaining process or purport to dictate the substantive terms of collective bargaining agreements, they are preempted by the NLRA.

Third, the RFP's specifications are confusing, contradictory, incomplete, and imprecise and fail to create an objective, common standard to measure proposals. An instruction sheet for proposal reviewers appended to the RFP contains explanations on how to score the various components of a proposal and those explanations contradict the corresponding text of the RFP. The explanations are also incomplete, as the instruction sheet provides explanations for only one-third of the proposals' required content. The RFP is similarly flawed in that it does not provide bidders with clear instructions on what forms they must submit.

More importantly, the RFP process created by the LEMSA does not guard against conflicts of interest in the evaluation of proposals. While it identifies the membership of the five-person RFP review panel, the RFP does not restrict persons from serving on the panel if they or anyone in their immediate family are employed by, or have a financial interest in, a bidder. In addition, the review panel does not evaluate the financial elements of proposals; that task is delegated to unidentified persons or entities that will grade those elements on a pass/fail basis independently of the review panel. These procedures are legally insufficient.

Finally, the RFP reviews bidders' minimum qualifications on a pass/fail basis. However, such minimum qualifications go to whether a bidder is trustworthy and has the quality, fitness, capacity, and experience to adequately perform the requirements of the contract. Not only should these aspects of the RFP be fully scored, but California law also prohibits the County from evaluating bidder minimum qualifications in this manner because it opens the door to abuse, double standards, and favoritism.

If it authorizes the LEMSA to negotiate an extension of the AMR contract, the Board should limit any such extension to no longer than 12 months. The LEMSA requests authority to negotiate a short-term extension to AMR's contract. The contract expires on December 31, 2022 and the LEMSA cannot complete the RFP process by that date. so that it can complete the RFP process. However, AMR has served the County with an ultimatum: either grant it a four- or five-year extension or it will leave the County. If the County decides it will grant the LEMSA the authority to negotiate an extension with AMR, that extension should be limited to 12 months.

The Board should immediately dispense with the RFP and develop a direct contract solution through County Fire. In light of the impending expiration of the AMR contract, the LEMSA's documented bias toward AMR, AMR's hardball tactics, and the many flaws in the RFP, the Board should start planning to dispense with the RFP and the EOA and award an exclusive contract to County Fire.

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The Government, Vehicle, and Welfare and Institutions Codes grant the County the authority to award an exclusive contract and *de facto* exclusive permits and licenses for emergency and nonemergency ambulance services to County Fire, and do so without engaging in competitive bidding or relying on EOAs under Section 1797.224. These statutes not only allow for exclusivity, they have also been construed to grant the County the authority to set service rates. And because it is authorized by state statutes, such an arrangement would give rise to state action antitrust immunity from the federal antitrust laws.

Moreover, the direct contract solution would actually increase the LEMSA's ability to make changes to the EMS system and promote clinical excellence and innovation. Section 1797.224 EOAs place limits on what a LEMSA can do in designing and implementing the EMS system. In a so-called "grandfathered" EOA, the LEMSA cannot change the manner and scope in which services have been provided since January 1, 1981. In a competitive process EOA, EMSA must approve the RFP and, consistent with competitive bidding laws, the County cannot make any material changes to the resulting contract without re-soliciting the contract. But in a direct contract solution with County Fire, the LEMSA could continually optimize the EMS system and introduce new innovations and enhancements simply by renegotiating the contract with County Fire.

The steps for implementing this solution are relatively simple:

- The Board amends the Ambulance Ordinance to provide that the County may award a sole franchise and issue and deny permits for ambulance services and to include other policy items and elements the Board develops under AB 389;
- The County, the LEMSA, and County Fire negotiate an exclusive contract, effective January 1, 2023;
- The Board approves the exclusive contract with County Fire; and
- The County denies future requests for ambulance service permits on the ground that an additional ambulance service is not needed due to the contract with County Fire.

However, the Board must act immediately to implement this solution to give County Fire sufficient time to stand up a countywide service and begin providing service on January 1, 2023, the day after AMR's contract expires.

CalChiefs and SB Chiefs stand ready to assist and support the Board in implementing this very reasonable solution. Nevertheless, given the importance and gravity of the issues, CalChiefs and SB Chiefs reserve all their rights to take legal action to protect their members.

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- A. The Resolution Is Designed To Rubberstamp The LEMSA's Brazen And Misleading Attempt To Usurp The Board's Authority Under AB 389 And The County Ambulance Ordinance To Set County Policy On Emergency Ambulance Services.**
- 1. AB 389 And The Ambulance Ordinance Provide That The Board, Not The LEMSA Or EMSA, Establishes County Policy For Emergency Ambulance Services And Contracts.**

As noted, CalChiefs co-sponsored AB 389 and I was on the CalChiefs team that helped draft the law and interacted with Assemblymember Grayson's staff and EMSA during the legislative process. One of the new law's purposes is to return to county boards of supervisors policymaking authority regarding their county's emergency ambulance services contracts that had been impinged upon by EMSA and the local EMS agencies.

To that end, Section 1797.230(c) provides, effective January 1, 2022, that the County "shall not enter into or renew a contract for emergency ambulance services unless" the Board "has adopted, by ordinance or resolution, a written policy setting forth issues to be considered for inclusion in the county contract for emergency ambulance services." In turn, Section 1797.230(e) provides that the statute's requirements "are within the exclusive jurisdiction" of the Board.

It is immaterial that the EMS Act grants the LEMSA responsibility over developing, implementing, and evaluating the County's EMS system. First, AB 389 amends the EMS Act and Section 1797.230 is the only statute in the Act that expressly concerns the County's emergency ambulance services contracts. Under those circumstances, Section 1797.230 controls. (*County of Placer v. Aetna Casualty & Surety Co.* (1958) 50 Cal.2d 182, 189 ["Where the terms of a later specific statute apply to a situation covered by an earlier general one, the later specific statute controls."].)

Second, the Legislature expressly tasked the Board with making policy regarding the County's emergency ambulance services contracts, which indicates the Legislature intended to make such policy making a political, not administrative, process and determination. (*Cf. Memorial Hospitals Ass'n v. Randol* (1995) 38 Cal.App.4th 1300, 1310 [by tasking local EMS agencies with authority over EOAs, "the Legislature sought to make the EOA decision a professional, not a political, determination."])

Like AB 389, the Ambulance Ordinance establishes an "ambulance system" that "shall be administered in accordance with a county Emergency Medical Response Manual" ("EMRM"). (Santa Barbara County Code § 5-1.) The Board "shall adopt, and may from time to time amend, the [EMRM] by resolution," which "shall have the force and effect of law." (*Id.*)

Thus, under both AB 389 and the Ambulance Ordinance, the Board, not the LEMSA or EMSA, is responsible for establishing County policy regarding its emergency ambulance services contracts and such policy must be adopted through a resolution or ordinance. As we explain in the next section, the LEMSA made several policy decisions in the development of the RFP without input from the Board and it now asks the Board to rubberstamp its actions.

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2. The LEMSA Is Attempting To Usurp The Board's Authority Under AB 389 And The Ambulance Ordinance By Making County Policy In The RFP.

The LEMSA has designed a comprehensive ambulance services system for the County in the RFP. In doing so, however, LEMSA made the numerous policy decisions without consulting with the Board. Compounding its actions, the LEMSA attempts to conceal its usurpation of the Board's policymaking authority by failing to mention or explain in the Resolution, the Board Letter, or its attachments the following policy decisions it made in developing the RFP:

- **Elimination of "stop the clock" subcontracts with, and funding for, fire agencies.** The RFP prohibits the ambulance contractor from subcontracting with fire agencies to provide first response EMS and receive an extension to its response times. This is a dramatic change from the current contract. From 2019 to 2022, the contract required AMR to pay subcontracting city and district fire agencies approximately \$3.9 million, including \$1.4 million to County Fire. The decision to eliminate these subcontracts and funding is unquestionably a policy decision for the Board and the governing bodies of other cities and fire districts.
- **Inclusion of UCSB into the EOA.** Currently, UCSB contracts with County Fire provide to provide emergency ambulance services on the campus and in Isla Vista, the most densely-populated area of the County. In developing the RFP, the LEMSA unilaterally determined to include UCSB in the EOA. In so doing, the LEMSA spoke only with EMSA and did not consult the Board, County Fire, or UCSB.
- **Delegation of contracting and procurement authority to the LEMSA.** The LEMSA developed the RFP without any policy direction from the Board or any input from the public. The RFP grants the LEMSA total control over the procurement process, including evaluating proposals, selecting the winning bidder, and negotiating the contract with the winning bidder, and relegates the Board to rubberstamping all of the LEMSA's actions on an up-or-down vote on the final, negotiated contract. The delegation of such authority over crucial emergency services to politically unaccountable bureaucrats in the LEMSA is deeply concerning, particularly given the LEMSA's on-the-record statements during the Board's October 1, 2019 meeting recommending against competitive bidding and endorsing AMR as the County's contractor.
- **Prioritizing clinical recordkeeping and employee wellness, and customer relations over timely and effective service.** The LEMSA describes the RFP's sections on clinical performance and provider safety requirements as "key components" to address ambulance services in the new EOA. (Board Letter at 5-6.) However, the LEMSA fails to explain how the RFP weights these components in relation to a bidder's capability to provide timely and effective ambulance service. Under the RFP, a provider's demonstration of its ability to provide services and develop a deployment model to satisfy the RFP's requirements, including response times, is worth only 30 out of 400 points. (RFP §§ 2.11(A), 3.1 3.2, 5.1).

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In contrast, the RFP allocates 75 out of 400 points to bidders' proposed process for reporting clinical performance data to the LEMSA (*id.* at §§ 2.11(A), 4.2), and allocates 50 out of 400 points to bidders' programs to promote employee health, wellness, and other human resources issues (*id.* at §§ 2.11(a), 5.2, 5.7, 7.4-7.7). In addition, the bidders' proposed customer surveying tools and complaint hotlines are worth 10 out of 400 points (*id.* at §§ 2.11(a), 7.2-7.3), which is more than the 5 out of 400 points allocated to a bidder's demonstration of its ability to provide ambulance services (*id.* at §§ 2.11(a), 3.2, App'x 10). The Board, not the LEMSA, should make the decision regarding whether to prioritize recordkeeping, employee wellness, and customer relations over the provision of timely and effective ambulance services

- **Combining emergency and nonemergency services into the RFP.** According to the LEMSA, “[c]areful consideration was given to multiple approaches and models” and “[i]t was determined to be in the Community’s interest” to include both emergency and nonemergency services in the RFP. (Board Letter Ex. E at 1.) This is a policymaking decision that should have been presented to the Board for its consideration.
- **Fixing prices for nonemergency services.** The RFP establishes maximum allowable services rates for both emergency and nonemergency services. (Board Letter Ex. E at 9.) It is generally accepted that the Board may establish maximum rates for emergency services to protect consumers who have no choice between providers when they call 911 and may not even be able to consent to services or their cost due to their injuries and condition. The same rationale does not apply to nonemergency services, which are arm’s length transactions between health care facilities and ambulance services. The politically accountable Board, not the LEMSA, should be making the policy decision to impose price controls on sophisticated parties that have sufficient bargaining power to negotiate their own contracts.
- **Creating a fund administered by the LEMSA.** The RFP creates a so-called “EMS Clinical & Technical Enhancement Fund” to be managed by the LEMSA. The intent of the fund is to provide “systemic enhancements” and for providers to “request funding for specific clinical or technological enhancements.” The RFP makes clear that the LEMSA has already determined many of the fund’s aspects, including the contractor’s contribution levels and adjustments to those contributions. The creation of such a fund and determination of its various features and controls should be policy decision by the Board as part of the County’s budgeting processes.
- **Increasing the LEMSA’s budget and operational scope.** The current contract with AMR requires it to pay the County \$505,520.23 (adjusted annually for inflation) to recover the costs of the LEMSA’s oversight and medical control. The RFP nearly doubles that amount, providing that the contractor shall reimburse the

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County \$1,085,708 to recover the actual costs of the LEMSA's operations. The Board Letter and its attachments do not explain or justify this 200% increase in the LEMSA's cost recovery. Assuming the increase is not merely a ham-fisted money grab, the Board should be making informed policy decisions regarding the LEMSA's budget and operational scope as part of the County's budgeting processes before the Board commits the County to them in the RFP and resulting contract.

- **Continuing the LEMSA's (and AMR's) lack of transparency.** The RFP provides that the winning bidder shall make a number of reports to the LEMSA and that they shall make an annual joint presentation to the Board. This is not enough. At a minimum, the LEMSA should be required to post to its website monthly reports tracking the ambulance contractors' performance. Additionally, the ambulance contractor should be required to provide fire agencies with real-time information regarding its deployments and system status. Finally, the County must reconstitute the Emergency Medical Care Committee ("EMCC") to provide independent advice to the Board and the LEMSA on EMS issues following the LEMSA's failure to follow through on the Board's April 26, 2006 direction to do just that.
- **Subverting a lawful judgment against EMSA.** Section 1797.224 requires EMSA to approve the "competitive process" (i.e., the RFP) used by the LEMSA to select providers and determine the scope of their operations. The statute does not require, or authorize, EMSA to approve the final negotiated contract. Nevertheless, EMSA had issued interpretive rules for Section 1797.224 that granted it such contract review authority. However, CalChiefs successfully sued to have this and other EMSA interpretive rules related to Section 1797.224, exclusivity, and antitrust immunity declared invalid "underground regulations" in *CalChiefs v. Emergency Med. Svcs. Auth.*, No. 34-2019-80003163 (Sacramento Cnty. Super Ct. 2019). As a result of the judgment in that case, EMSA may not enforce such underground regulations until and unless it properly adopts them as regulations following mandatory statutory procedures. It has not done so. Although EMSA is precluded from enforcing that rule by a lawful court judgment against it, the LEMSA has effectively decided to unilaterally adopt EMSA's unenforceable underground regulation in the RFP. The Board should not tolerate the LEMSA's effort to subvert a lawful judgment entered against EMSA that restricts it from enforcing unlawful rules and regulations.

The LEMSA made these and other policy decisions in developing the RFP without consulting the Board. It was able to do so because County staff and the LEMSA built an elaborate "firewall" that marginalized the Board from the RFP process. Although it was intended to ensure a fair process due to County Fire's intent to submit a proposal in response to the RFP, the firewall apparently enabled the LEMSA to surreptitiously make policy decisions without Board oversight and present them to the Board as a *fait accompli* following EMSA's approval of the RFP and the upcoming expiration of the AMR contract.

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The Board should reject the LEMSA's attempt to have the Board rubberstamp the policy decisions the LEMSA made in the RFP as inconsistent with AB 389 and the Ambulance Ordinance.

3. The LEMSA Misunderstands That AB 389 Applies To The RFP And The AMR Contract Extension.

The LEMSA represents to the Board that the Resolution's eleven "elements are contained in the Ambulance RFP." (Board Letter at 2.) This misses the point.

AB 389 provides in pertinent part:

On and after January 1, 2022, *a county shall not enter into or renew a contract for emergency ambulance services unless the county board of supervisors has adopted, by ordinance or resolution, a written policy setting forth issues to be considered for inclusion in the county contract for emergency ambulance services.*

(Section 1797.230(c) [italics added].)

In other words, under AB 389, the Resolution must specify the policy elements for both the renewed AMR contract *and* RFP.

The AMR contract dates to 2005. It has been amended four times. Neither the original agreement nor the four amendments address certain elements of the Resolution, such as requiring AMR to implement diversity, equity, and inclusion efforts to address the needs of vulnerable, underserved, and under-resourced populations, or to develop adopt workforce development standards related to treating such populations, or community outreach.

The Board should clarify with the LEMSA whether these and other elements of the Resolution will be in the AMR contract if it gets renewed or whether the Resolution is really a sham effort to create the appearance that the County is complying with AB 389 without the Board engaging in meaningful policymaking regarding the County's emergency ambulance services contracts.

4. The Resolution Is Vague And Fails To Establish Any Actual Substantive Policy Standards.

Section 1797.230(c) mandates the Board exercise its legislative discretion and adopt policy for the contents of county emergency ambulance services contracts. Under these circumstances, the Board is "constitutionally prohibited from delegating the formulation of legislative policy but may declare a policy, fix a primary standard, and authorize executive or administrative officers to prescribe subsidiary rules and regulations that implement the policy and standard." (*Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129, 167.) In other words, the Board must make the fundamental policy

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decisions, declare its policies and goals, and establish the yardstick to guide the LEMSA's implementation of the Board's policies. (*People v. Wright* (1982) 30 Cal.3d 705, 712-13.)

The Resolution fails this test in at least two respects. First, the Resolution states that the eleven element "shall be considered for inclusion" in county contracts for, or procurement of, such services.² In other words, the Resolution does not actually require that the eleven elements be included in a contract or RFP; rather, they need only be "considered for inclusion." Thus, rather than setting policy for the County, the Resolution grants County staff and the LEMSA the discretion to decide whether to include or not include an element in a County contract or RFP. Nor does the language convey any meaningful policy standard or yardstick to determine whether for County staff and the LEMSA followed County policy. If all they are required to do is consider the elements for inclusion, how much consideration must County staff and the LEMSA give?

Second, elements 1-10 do not contain any meaningful standards to guide County staff and the LEMSA in applying them. For example, element 1 provides for employment retention requirements for the incumbent workforce be included in the event of a provider transition. But element 1 does not specify what those requirements should be.

Similarly, element 3 provides for established minimum qualifications and documentation of credentials, including demonstrated experience serving similar populations and geographic areas, but does not specify what those minimum required qualifications and credentials should be. Nor does the language establish standards to evaluate whether a provider has the requisite "experience serving similar populations and geographic areas." What type of experience? How long? Can a bidder show capacity and capability in lieu of experience (which is a government contracting best practice)? Must the populations be similar in number, demography, or density? Must the geographical area be similar in size, topography, or infrastructure?

Element 9 provides for "[m]inimum community education and outreach requirements," without establishing any requirements, much less the minimum level necessary to satisfy the element. In terms of community education, do the requirements pertain to the contents of educational efforts or the time devoted to such efforts? In terms of community outreach—what kind and levels of community outreach does element 9 contemplate? In addition, how are community education and outreach requirements in element 9 different from the diversity, equity, and inclusion efforts in element 4 or the public information, education activities, and community involvement in element 7?

The lack of any meaningful standards in the Resolution means that there are no safeguards to guide County staff and the LEMSA in implementing County policy and protecting against their misuse of authority under the Resolution. Absent such safeguards, the Resolution is unconstitutional. (*Wright, supra*, 30 Cal.3d at 713.)

² The Resolution's language mirrors Section 1797.230(c), which represents a grant of discretionary policymaking authority to the Board, not to County staff or the LEMSA.

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5. Rather Than Adopt The Resolution, The Board Should Revamp The Ambulance Ordinance.

The Board Letter, Resolution, and RFP are entirely silent on, and show no connection with, the Ambulance Ordinance. This is not surprising: County staff and the LEMSA have flatly ignored its requirements for decades. SB Chiefs has never seen a copy of the EMRM required by the ordinance. (Santa Barbara County Code § 5-1.) There are no references to the EMRM in database of the Board's actions from 2000 to the present (<https://santabarbara.legistar.com/>), the County website, or in commercial search engines.

Furthermore, while the Ambulance Ordinance establishes an EMCC to advise the Board on ambulance rules and regulations (Santa Barbara County Code § 5-1), the County has not had an EMCC for decades. Sections 1797.270-1797.276 authorize the Board to create and appoint the members of an EMCC to serve as an independent advisory body that reports to the Board and the LEMSA on EMS issues. The Board established an EMCC in 1985 only to discontinue it in the 1990s in favor of committees that are staffed by, and report to, the LEMSA. On April 26, 2005, the Board directed the LEMSA to work with EMS stakeholders, and particularly the fire agencies, to develop and present to the Board a plan for reconstituting an EMCC by September 6, 2005. The LEMSA failed to return to the Board with such a plan and no EMCC currently exists in the County.

Finally, there are no existing processes for licensing or regulating ambulance services through the Ambulance Ordinance. (Santa Barbara County Code § 5-4.) All such processes and procedures are supposed to be adopted by the Board and included in the EMRM. (*Id.* at §§ 5-1, 5.4.) The LEMSA's policies and procedures do not have rules, criteria, or procedures for licensing ambulance services. A search of the County's website also fails to reveal any mechanisms, procedures, or protocols related to licensure or regulation of such services pursuant to the Ambulance Ordinance or the EMRM.

Rather than adopt the Resolution, the Board should instead revamp and modernize the Ambulance Ordinance to create orderly processes for it to discharge its policymaking functions, license ambulance services, and oversee the LEMSA.

B. The RFP Is Anticompetitive, Contrary To Law, And Fatally Flawed.

Where, as here, County must award an EOA contract based on "public bidding, the proposals and specifications inviting such bids must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free of any restrictions tending to stifle competition." (*Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 821.) The courts will therefore invalidate the RFP, in whole or in part, if its specifications: (1) deny equal opportunities to interested bidders; (2) are illegal; or (3) are insufficiently detailed, definite, and precise. (*Id.* at 821-23; *Associated Builders & Contractors, Inc. v. San Francisco Airports Com'n* (1999) 21 Cal.4th 352, 366-367 ["AB&C"].) All three defects exist here.

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1. The RFP Is Anticompetitive Because It Denies Equal Opportunity To All Interested Bidders And Unfairly Advantages AMR.

The RFP is anticompetitive (and therefore invalid) in at least two respects.

First, “competitive bidding requirements necessarily imply equal opportunities to all whose interests or inclinations may impel them to compete at the bidding.” (*AB&C, supra*, 21 Cal.4th at 366-367.) Section 5.8 of the RFP denies County Fire an equal opportunity to compete for the RFP. In that it encourages the winning bidder to “recruit from, and preferentially hire,” the incumbent provider’s workforce. To that end, section 5.8 requires the winning bidder to agree that “all incumbent personnel hired will retain ‘seniority status’ earned while working full-time in the Santa Barbara County EMS system and will be used as criteria for ‘bidding’ shifts, partners or other assignments” and receive “a benefit program comparable to or better than the employees’ current program.”

It is our understanding that County human resources policies, which apply to County Fire, are inconsistent with section 5.8’s requirements. Because it cannot agree to comply with the requirements of section 5.8, County Fire cannot submit a fully responsive proposal, which effectively precludes it from an award of the EOA contract.

These instant circumstances are almost identical to the circumstances in *CalChiefs v. Emergency Med. Svcs. Auth., et al.*, No.: RG18890846 (Alameda Cnty. Super. Ct. 2018) (“*Alameda RFP Litigation*”). There, CalChiefs brought a mandate action on behalf of one of its members, the Alameda County Fire Department, against EMSA and the Alameda County EMS Agency to invalidate specifications in a request for proposals for a Section 1797.224 EOA in Alameda County. The RFP’s specifications allowed bidders to form joint ventures to submit proposals, but prohibited them from providing through subcontracts with other providers. The Alameda County Fire Department desired to submit a bid but could only do so if subcontracted some of the services. The court agreed with CalChiefs that Section 1797.224 RFPs are subject to general competitive bidding laws and, because the subcontracting prohibition effectively denied Alameda County Fire Department equal opportunity to bid on the RFP, the RFP’s specifications were anticompetitive and invalid.

Like the subcontracting prohibition in the *Alameda RFP Litigation*, section 5.8’s incumbent workforce requirements are anticompetitive because they deny County Fire equal opportunity to bid on the RFP.

Second, section 5.3(A)(viii) of the RFP unfairly advantages the incumbent provider, AMR, over other bidders. Section 5.3 sets forth vehicle and equipment requirements for the contract and requires bidders to articulate, in their proposals, “their intended [ambulance] fleet that can conform to the [section’s] requirements.” Among other requirements, section 5.3(A)(viii) states that “[a] list of all vehicles detailing make, model, age, and maintenance records must be provided to the LEMSA.”

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As a practical matter, non-incumbent providers cannot comply with section 5.3(A)(viii). Non-incumbent providers do not have a cache of unused ambulances that satisfy the LEMSA's various requirements. Instead, they procure ambulances in the "ramp up" period following the award of a contract. Such procurement has been made more difficult by current global supply challenges associated with the Covid-19 pandemic. (Board Letter at 2.) Indeed, it is our understanding the County policy expressly prohibits County Fire from procuring ambulances unless it has a contract to provide such services.

Consequently, non-incumbent bidders, including County Fire, cannot submit with their proposals the list required by section 5.3(A)(viii). Absent such list, their proposals will be nonresponsive and the bidders will be ineligible for a contract award. (*Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, 238 ["A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted."].)

In contrast, AMR, as the incumbent, already has a fleet of ambulances deployed and operating in the County. AMR therefore has the ability to submit a proposal with the list required by section 5.3(A)(viii). Because non-incumbent bidders' proposals cannot similarly comply with its requirements, section 5.3(A)(viii) improperly stifles competition and renders the RFP invalid. (*Baldwin-Lima-Hamilton, supra*, 208 Cal.App.2d at 821.)

2. The RFP Threatens To Violate The Federal Antitrust Laws By Proposing To Fix Prices For Ambulance Services Without Statutory Authorization.

As noted, the RFP proposes to establish maximum allowable rates for both emergency and nonemergency ambulance transportation in the countywide EOA, which will apply to the provider through the contract with the County. (RFP § 8.3(A); Board Letter Ex. E at 9.) Such maximum rates would also become part of any contract for nonemergency ambulance services between the provider and competing health care facilities. These provisions violate federal antitrust laws and the County likely will not qualify for state action antitrust immunity for such violations.

Agreements to fix prices violate Section 1 of the Sherman Act. (*Freeman v. San Diego Ass'n of Realtors* (9th Cir. 2003) 322 F.3d 1133, 1144.) The County is not automatically immune from federal antitrust laws; rather, it must show that it acted "pursuant to state policy to displace competition with regulation or monopoly public service." (*Phoebe Putney, supra*, 568 U.S. at 225-26.) This requires the County to prove two elements: (1) it acted pursuant to state policy to displace competition with regulation or monopoly public service; and (2) the alleged anticompetitive effects of their actions are the inherent, logical, or ordinary result of their exercise of authority delegated by the state legislature. (*Id.* at 225-26, 229.)

The County likely cannot make the required showing here. As to the first element, the County must be able to show that the state's regulatory structure specifically authorizes it to regulate and fix prices. (*Chamber of Commerce of the United States v. City of Seattle* (9th Cir. 2018) 890 F.3d 769, 782 ["*Chamber of Commerce*"].) Section 1797.224 authorizes the LEMSA to create EOAs and is entirely silent on whether it or the County may set prices for ambulance

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services within the EOAs. No other provision of the EMS Act or implementing state regulations purport to grant the LEMSA (or the County) the authority to set ambulance service rates. The LEMSA's authority, standing alone, is insufficient to grant immunity.

Moreover, price fixing is not the inherent, logical, or ordinary result of the exercise of the LEMSA's authority to create EOAs. In *Chamber of Commerce*, *supra*, 890 F.3d at 785-787, the Ninth Circuit held that Washington state statutes authorizing cities to regulate the rates charged to passengers for transportation services did not authorize a city to fix the rates ride-share companies may charge for-hire drivers to use their platforms. If the authority to set rates for passengers does not give rise to immunity for fixing prices for driver services, then the authority to create EOAs almost certainly does not immunize fixing prices within the EOAs.

Accordingly, the maximum allowable rate provisions of the RFP are not only "illegal and invalid," (*Baldwin-Lima-Hamilton*, *supra*, 208 Cal.App.2d at 821), but they could also expose the County, the LEMSA, the winning bidder, and the County's health care facilities to federal antitrust liability for fixing prices for ambulance service.

3. The RFP Is Unlawful Because It Runs Afoul Of The National Labor Relations Act.

Section 5.8 encourages a winning non-incumbent bidder to engage in preferential hiring of the incumbent provider's workforce and offer them "substantially similar positions," and requires the bidder to agree that "all incumbent personnel hired will retain 'seniority status' earned while working full-time in the Santa Barbara County EMS system and will be used as criteria for 'bidding' shifts, partners or other assignments" and receive "a benefit program comparable to or better than the employees' current program."

While CalChiefs and SB Chiefs acknowledge and appreciate the LEMSA's efforts to ensure that highly trained workers remain in the County's EMS system, the requirements in section 5.8 purport to regulate terms and conditions of employment within the meaning of federal labor laws. As such, section 5.8 is likely preempted by the National Labor Relations Act ("NLRA") under the so-called *Garmon* and *Machinists* preemption doctrines.

Garmon preemption prohibits state and local regulation of activities that the NLRA "arguably protects or prohibits" as a means of preserving the "integrated scheme of regulation" embodied in the NLRA and the National Labor Relations Board's exclusive jurisdiction. (*Bldg. & Constr. Trades Council v. Assoc'd Builders & Contractors* (1993) 507 U.S. 218, 224-25.) Section 7 of the NLRA protects collective bargaining over terms and conditions of employment and *Garmon* preemption precludes state and local government interference in the collective bargaining process over wages. (*Bechtel Constr., Inc. v. United Bhd. of Carpenters & Joiners* (9th Cir. 1987) 812 F.2d 1220, 1225.) Section 5.8 of the RFP violates this principle by altering the balance of power between labor and management and creating a floor for wage negotiations. (*Id.*; *Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca* (N.D. Cal. 1991) 769 F. Supp. 1537, 1545.) [county and city resolutions and ordinance requiring contractors to pay workers prevailing

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wages subject to *Garmon* preemption because they impermissibly interfered in the collective bargaining process and established wages contractors must pay].).

Machinists preemption forbids state and local “regulation of areas that have been left ‘to be controlled by the free play of economic forces,’” as a means of preserving Congress’ “intentional balance” of bargaining power between management and labor. (*Bldg. & Constr. Trades Council, supra*, 507 U.S. at 225-26.) Where, as here, a local government “attempts to influence the substantive terms of collective bargaining agreements,” such action is inconsistent with the NRLA and is preempted. (*Int’l Ass’n of Machinists & Aero. Workers v. Wis. Emp’t Relations Comm’n* (1976) 427 U.S. 132, 153; e.g., *Chamber of Commerce of the United States v. Bragdon* (9th Cir. 1995) 64 F.3d 497, 502 [county ordinance that dictated specific minimum wages and benefits for union workers on particular projects subject to *Machinists* preemption because it invades the collective bargaining process]).

4. The RFP Fails To Create Objective, Impartial Standards For The Evaluation Of Proposals And Award Of The Contract.

The RFP also fails to satisfy the requirement that its specifications “be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard.” (*Baldwin-Lima-Hamilton, supra*, 208 Cal.App.2d at 821.)

i. The RFP’s Evaluation Criteria Are Contradictory, Confusing, And Apparently Incomplete.

In addition to its substantive provisions, the RFP contains criteria for the evaluation of proposals, including a section explaining scoring, the points value for each section, and a scoring section (RFP § 2.11), as well as an appendix with section-by-section explanations for the evaluation criteria (RFP App’x 10).

However, the evaluation criteria explanations do not comport with the information requested from bidders in the RFP’s substantive sections. Here are but a few examples:

Section 4.1 (“Progressive Clinical Quality Improvement & Continuing Education”) is worth 50 out of 400 points. (RFP § 2.11(A).) It requires bidders to document their commitment to having key personnel of their local operating unit actively participate in the leadership and oversight of the provider’s quality management system, including but not limited to the active participation of senior leadership in required local/regional meetings to improve EMS, submission of Key Performance Indicator (“KPI”) reports to the LEMSA, and actively participating in projects designed to improve the quality of EMS in the region. Bidders must also “describe their overall approach to comprehensive quality management (operational and clinical) and the tracking and reporting of clinical [KPIs].”

Yet in Appendix 10, the review committee is instructed to evaluate a bidders’ responses to section 4.1 by asking, “Has the [bidder] provided sufficient information to determine what financial and staffing commitments it is making to ensure robust clinical quality improvement &

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continuing education?” Nothing in section 4.1 instructs bidders to discuss fiscal commitments. Conversely, Appendix 10 does not include standards for evaluating bidders’ “overall approach” to quality management, much less address it. Nor do section 4.1 or Appendix 10 provide any explanation as to how the “financial and staffing commitments” are scored.

Section 4.2 (“Clinical Performance Measurement and Incentives”) is worth 75 out of 400 points. (RFP § 2.11(A).) It reflects the LEMSA’s desire to make clinical performance a key contract performance metric. Section 4.2 states that the LEMSA as identified clinical KPIs in four bundles of care and plans to use the four bundles of care as the basis for monthly reporting and financial credits or liquidated damages for performance. The RFP section 1.5(I) states the LEMSA has developed the KPIs and a “Clinical Scoreboard” to measure clinical performance. But the RFP does not identify the KPIs developed by the LEMSA. Moreover, section 4.2 states that the “clinical scorecard” and the compliance percentages in Appendix 9 to the RFP³ are “for illustrative purposes.” The actual clinical performance measures will be developed during the “contract negotiation process” with the winning bidder. There are no instructions to bidders in section 4.2.

The Appendix 10 evaluation criteria explanation for section 4.2 instructs evaluators to ask: “Has the proposer fully outlined what data/metrics it will collect and how it will be used to improve the clinical practice within the EMS system?” But section 4.2 does not ask bidders to outline the data/metrics they propose to collect and measure. Moreover, if the LEMSA has, in fact, developed the KPIs it will use to monitor and evaluate the winning bidder’s clinical performance, why omit these KPIs from the RFP? In other words, the LEMSA has chosen to evaluate bidders based on the KPIs they propose the LEMSA monitor instead of evaluating them on their ability to implement a system to track and report on the KPIs the LEMSA plans to use. This effectively rewards bidders that correctly guessed (or were told) the LEMSA’s future plans instead of rewarding bidders that can implement the best solution for the County in accordance with LEMSA requirements.

Section 4.10 (“Clinical Innovations”) is worth 45 out of 400 points. (RFP § 2.11(A).) It states that the LEMSA intends the winning bidder have a proven track record of clinical innovation. To that end, bidders shall “provide a list of recent clinical innovations that they have implemented within the past five (5) years” addressing seven elements.

The Appendix 11 explanation for section 4.10 instructs evaluators to ask two questions:

- Since the RFP contemplates a clinically sophisticated system involving [sic] has the Proposer sufficiently described suggested clinical benchmarks and what commitments it makes to collaborate and otherwise support the system’s ongoing research initiatives?
- Does the Proposer describe any additional research initiative commitments?

³ Section 4.2 states that the clinical scorecard is in appendix 11 when it is actually found in Appendix 9.

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These questions have no connection to the express requirements of section 4.10. Nothing in that section discusses clinical benchmarks, the system's research initiatives, or future research initiative commitments.

Although sections 4.1, 4.2, and 4.10 are central pieces of the RFP (worth 170 out of 400 points combined), the instructions given evaluators are unrelated to or contradict the actual language of those sections. Other sections of the RFP suffer from the same or similar defects.

Furthermore, Section 2.10(C) of the RFP states that evaluators "will be provided a copy of each responding organization's proposal and written instructions on scoring." Presumably, this refers to Appendix 10, because the evaluation of proposals based on criteria not included in an RFP is improper and grounds to invalidate the resulting contract award. (*Schram Constr., Inc. v. Regents of Univ. of Cal.* (2010) 187 Cal.App.4th 1040, 1055-56, 1060). But Appendix 10 is incomplete: it only explains the evaluation criteria for 13 out of 36 elements of the scoring sheet. In other words, the evaluator instruction sheet included in the RFP instructs evaluators on how to evaluate only one-third of mandatory, scored elements of proposals.

Finally, the scoring sheet in section 2.11(A) provides that whether bidders submit all required forms with their proposals and follow the RFP's instructions shall be graded on a pass/fail basis. In other words, a bidder's failure to submit all required forms or follow instructions will make its proposal nonresponsive and ineligible for a contract award. But the RFP does not provide clear instructions on which forms are required:

- Section 2.8(b) states a proposal "must contain all forms located in Appendix 4," but there is only one form—a mandatory front page—in Appendix 4.
- Section 2.9(E)(iii)(b) requires bidders to submit the Financial Review Form in Appendix 5.
- Section 2.10(A) identifies the sections of the RFP that proposals must address and be scored on, and it only identifies the Pricing Form in Appendix 6 as mandatory.
- Appendix 13 appears to be a form requiring bidders to detail field personnel's compensation, but no section of the RFP refers to or contains a requirement that proposals address such compensation.

In sum, bidders and evaluators must guess as to what proposals must include and how those proposals are to be scored. The RFP is not sufficiently detailed, definite or precise and fails to provide for full and fair competitive bidding upon a common standard." (*Baldwin-Lima-Hamilton, supra*, 208 Cal.App.2d at 821-23.)

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ii. The RFP's Procedures Do Not Guard Against Conflicts Of Interest In The Evaluation Of Proposals.

The purpose of competitive bidding laws like Section 1797.224 “is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition.” (*Konica Business Machs. U. S. A. v. Regents of Univ. of Cal.* (1988) 206 Cal.App.3d 449, 456.) Because of the potential for abuse, “the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside.” (*Id.*) “This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process.” (*Id.*) “The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.” (*Id.* at 456-57.)

The RFP explains that proposals will be evaluated by a five-member Review Panel comprised of one EMS physicians, two individuals with experience in “high-performance EMS system design and services,” and two community leaders. (RFP § 2.10(D).) While LEMSA staff⁴, consultants, and legal advisors are prohibited from serving on the panel (*id.* at § 2.10(C)), there are no prohibitions against persons serving on the panel if they or their immediate family members are employed by, or have a financial interest in, one of the bidders.

In addition, the Review Panel does not evaluate all the proposals' contents. Section 2.10(B) of the RFP provides:

The financial elements of each Proposal, including ambulance rates proposed in Appendix 6, will be conducted independently and in advance of the Review Panel's review of the Proposals. Each Proposal will be evaluated on a pass/fail basis. The results of the financial analysis will be provided to the RFP Review panel.

The RFP does not state which persons or entities will review the proposals' financial elements, the criteria to be employed by such persons or entities in the pass/fail evaluation of the proposals' financial elements, what information will be relayed to the Review Panel in the financial analysis, or why such an analysis is even necessary to support a pass/fail evaluation.

“The mere potential for abuses likely to arise from significant deviations from standards designed to eliminate favoritism, fraud, and corruption, avoid misuse of public funds, and stimulate advantageous market place competition” competitive bidding standards “is a sufficient basis upon which to grant judicial relief even without a showing that the deviations actually

⁴ Section 2.10(c) states “LEMSA staff, nor consultants, nor legal advisors, shall serve as members of the proposal review team nor shall they score the proposals.” This language is ambiguous – it could be read to authorize or not authorize LEMSA staff to serve on the team and score proposals, CalChiefs and SB Chiefs assume this is a typographical error that will be corrected to state “Neither LEMSA staff”

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resulted in such abuses.” (*Eel River, supra*, 221 Cal.App.4th at 238.) Because the potential for abuse is palpable in sections 2.10(B), (C), and (D), the Board must not approve the RFP.

iii. The RFP Proposes To Evaluate Bidders’ Minimum Qualifications On A Pass/Fail Basis, Which Is Unlawful And Opens The Door To Abuse, Double Standards, And Favoritism.

The RFP is further flawed in that bidders’ minimum qualifications are evaluated on a pass/fail basis. (RFP § 2.11(A).) Such minimum qualifications go to whether a bidder is a “responsible” bidder, i.e., a bidder “who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform” the solicited contract. (*Great W. Contractors, Inc. v. Irvine Unified Sch. Dist.* (2010) 187 Cal.App.4th 1425, 1451.) A bidder is not responsible if it is “not qualified to the particular work” solicited in the RFP. (*Inglewood-Los Angeles County Civic Ctr. Auth. v. Superior Court* (1972) 7 Cal.3d 861, 867.)

Bidder responsibility is contrasted with proposal responsiveness: a proposal is responsive if it promises to do what the RFP specifications require, while a bidder is responsible if it can perform on the contract as promised. (*Taylor Bus Serv. v. San Diego Bd. of Educ.* (1987) 195 Cal.App.3d 1331, 1341.) For example, in *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, the bid documents required that subcontractors perform less than 50 percent of the contemplated construction project. The lowest bid stated that subcontractors would perform over 80 percent of the work. The court held this bid nonresponsive and concluded the city was not permitted to award the contract based on the nonresponsive bid. (*Id.* at 1441-1442.)

Section 2.9 of the RFP contains extremely detailed minimum qualification requirements. Among other things, bidders must provide the following:

- Evidence of the bidder’s experience managing emergency ambulance services in a single service area.
- Documentation of the bidder’s “sophisticated internal management systems and programs,” including clinical training and quality improvement processes, recruitment and retention activity, risk management and driver training procedures, and “[c]urrent deficiencies/planned solutions.”
- A demonstration of the bidder’s ability to comply with response time standards.
- Evidence of the bidder’s financial history and capability.
- Evidence of the bidder’s compliance with regulatory requirements and the outcome of any litigation or investigations involving the bidder.

Although they cut to the essence of the RFP and bidder responsibility—whether a bidder has the trustworthiness, quality, fitness, capacity, and experience to perform the contract—the

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minimum qualifications requirements are evaluated on a pass/fail basis. This is the same standard employed by the RFP to determine whether a proposal is responsive—the scoring sheet indicates that whether a proposal contains all the required forms is a pass/fail question.

By evaluating a bidder's responsibility and the responsiveness of its proposal using the same standard, the RFP erroneously confuses these two concepts. For example, a bidder could submit the overall best solution for timely and cost-effectively delivering ambulance service in compliance with response time standards and be given a "fail" score on its minimum qualifications because it did not sufficiently document its driver training procedures.

The foregoing example shows how evaluating bidders' responsibility as a matter of proposal responsiveness defeats the purposes of competitive bidding and opens the door to abuse, double standards, and favoritism. To protect the integrity of government contracting, the courts will not hesitate to grant relief in favor of a bidder whose proposal was rejected as nonresponsive "when, *in substance*, the real reason for the rejection" is that the bidder is not responsible. (*Great West Contractors, supra*, 187 Cal.App.4th at 1429 [original italics].)

C. If The Board Authorizes The LEMSA To Negotiate A Contract Extension With AMR, The Extension Must Be Limited To No More Than 12 Months.

The LEMSA requests authority to negotiate a short-term extension to AMR's contract. It explains that such an extension is needed because the contract expires on December 31, 2022 and the LEMSA cannot complete the RFP process by that date.

And while it anticipates returning to the Board to approve the fifth amendment in June 2022 (Board Letter at 4), the LEMSA fails to mention that AMR has served the County with an ultimatum: either agree to extend its forty-year ambulance services monopoly for another four or five years or it will leave the County.

The Board should not reward AMR's ultimatum. If the County to authorize LEMSA the authority to negotiate an extension with AMR to allow for the RFP process to continue, the extension must be limited to 12 months

D. The Board Should Dispense With The RFP And Develop A Direct Contract Solution With County Fire.

At the Board's October 1, 2019, meeting, the LEMSA recommended that the County continue its long-term partnership with AMR. The Board disagreed, directing the LEMSA to develop an RFP and solicit providers for a countywide EOA. More than 31 months, two consultants, one extension to the AMR contract, and tens of thousands of dollars later, the LEMSA has developed an RFP that usurps the Board's policymaking authority, unfairly favors AMR, is unlikely to survive judicial review, and requires additional time to complete. As its contract's December 31, 2022 expiration date approaches, AMR has threatened to leave the County unless it gets a four- or five-year extension.

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This situation is unconscionable. The County cannot be held hostage by a recalcitrant administrative agency and its preferred too-big-to-fail contractor. It should begin plans to dispense with the RFP and the EOA and award an exclusive contract to County Fire.

The County has the statutory authority to do so. In discharging its duty to provide emergency ambulance services, the County may: (1) create a separate county department to directly provide such services; (2) assign the duty of providing such services to existing county departments or districts; (3) contract with local agencies to provide such services to county residents; or (4) contract with private ambulance companies. (*City of Lomita v. County of Los Angeles* (1983) 148 Cal.App.3d 671, 673-674; *City of Lomita v. Superior Court* (1986) 186 Cal.App.3d 479, 481-482.).

A direct contract between the County and County Fire would not need to be awarded on the basis of competitive bidding. Government Code sections 54980-54981 authorize a county and a fire agency to enter intergovernmental agreements for “municipal services and functions,” including “ambulance” services, and, unlike Section 1797.224, do not contain a competitive bidding requirement. (*San Diego Serv. Auth. for Freeway Emergencies v. Superior Court* (1988) 198 Cal.App.3d 1466, 1469 [“absent a statutory requirement, a public entity is not bound to engage in competitive bidding”].)

Furthermore, state statutes apart from Section 1797.224 authorize the County to grant exclusive contracts for emergency and nonemergency ambulance services. (See Welf. & Inst. Code § 14136(e) [county may award “sole franchise” for ambulance services]; *Fuchino v. Edwards-Buckley* (2011) 196 Cal.App.4th 1128, 1139-1140 [under Welf. & Inst. Code, § 16817, county may contract with “selected providers” to provide ambulance services to indigents and county medical services patients and require such persons to use such providers]; *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo* (9th Cir. 1986) 791 F.2d 755, 756-58 [EMS Act, and particularly Section 1797.178, authorize counties to enter exclusive contracts for ambulance services without relying on Section 1797.224].

Other statutes authorize the County to issue licenses and permits for ambulance services that result in *de facto* exclusivity. (See Welf. & Inst. Code § 14136(f) [county may award ambulance permits on “need and necessity” basis]; *Subriar v. City of Bakersfield* (1976) 59 Cal.App.3d 175, 194-202 [Veh. Code, § 2512(c) authorizes local governments to grant an “ambulance business monopoly to certain persons and exclude all others”].)

Because these statutes expressly authorize, or have been construed to authorize, the County to enter or issue exclusive contracts or permits, state action antitrust immunity would likely apply. (See *Mercy-Peninsula, supra*, 791 F.2d at 756-58 [because they were authorized by the EMS Act, county’s exclusive ambulance contracts were immune]; *W. Star Hosp. Auth., Inc. v. City of Richmond*, (4th Cir. 2021) 986 F.3d 354, 358-359 [because statute authorized it to issue and deny ambulance service permits, city’s denial of such a permit was immune]; *Tom Hudson & Assocs., Inc. v. City of Chula Vista* (9th Cir. 1984) 746 F.2d 1370, 1373-74 [because it was expressly authorized by statute, city’s grant of an “exclusive franchise” for waste collection without competitive bidding was immune].)

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And since the courts have construed Vehicle Code § 2512(c) to authorize cities and counties to regulate ambulance service rates, (*Bell v. City of Mountain View* (1977) 66 Cal.App.3d 332, 338-339), this solution would also result in state action antitrust immunity to the County, the LEMSA, County Fire, and health care facilities in the event of an antitrust lawsuit alleging price fixing in the market for such services. (*Llewellyn v. Crothers* (9th Cir. 1985) 765 F.2d 769, 773 [finding defendants immune for setting rates for health care services because statutes allowed them to do so.])

Moreover, while it will not rely on any EOAs created under Section 1797.224, the direct contract solution would actually increase the LEMSA's ability to make changes to the EMS system and promote clinical excellence and innovation. Section 1797.224 places limits on what a LEMSA can do in designing and implementing the EMS system. In a so-called "grandfathered" EOA, the LEMSA cannot change the manner and scope in which services have been provided since January 1, 1981. In a competitive process EOA, EMSA must approve the RFP and, consistent with competitive bidding laws, the County cannot make any material changes to the resulting contract without re-soliciting the contract. But in a direct contract solution with County Fire, the LEMSA could continually optimize the EMS system and introduce new innovations and enhancements simply by renegotiating the contract with County Fire.

The steps for implementing this solution are as follows:

- The Board amends the Ambulance Ordinance to provide:
 - The County may award a sole franchise for emergency and nonemergency ambulance services if such franchise is necessary to assure the economic viability of those services within the County. (Welf. & Inst. Code, § 14136(e).)
 - The County may issue licenses and permits for emergency and nonemergency ambulance services based on need and necessity findings. (Welf. & Inst. Code, § 14136(f).)
 - Other policy items and issues for inclusion in County contracts, such as the system enhancement goals identified in the Fitch Studies and the issues identified in AB 389 (Section 1797.230(c)(1)-(5).)
- The County, the LEMSA, and County Fire negotiate an exclusive contract, designating County Fire as the County's exclusive ambulance and EMS system operator and exclusive provider of emergency and nonemergency ambulance services, effective January 1, 2023.
- The Board approves the exclusive contract with County Fire.
- The County denies future requests for ambulance service permits on the ground that there is no need for such services in light of County Fire's contract.

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To implement this solution, however, the Board must act immediately to give County Fire sufficient time to stand up a countywide ambulance service and begin providing service on January 1, 2023. The Board can rely on CalChiefs and SB Chiefs to support and assist the County in implementing the County Fire solution.

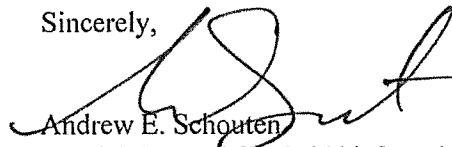
E. Conclusion.

For the foregoing reasons,

- The Board should not approve the Resolution and, instead, develop the County's AB 389 emergency ambulance services contract policies itself.
- The Board should not approve the RFP until such time as its many defects are fixed.
- If it authorizes the LEMSA's to negotiate an extension to AMR contract, the Board should limit such extension to no more than 12 months.
- The Board should implement a direct contract solution that dispenses with the RFP and the EOA in favor of an exclusive contract with County Fire.

CalChiefs and SB Chiefs thank the Board for the opportunity to comment on these significant issues. While they are willing to work with the Board and County staff to resolve all these issues, including a direct contract solution with County Fire, CalChiefs and SB Chiefs reserve all their rights to take legal action to protect their members.

Sincerely,



Andrew E. Schouten
Special Counsel for CalChiefs and SB Chiefs

cc: CalChiefs President Ray Gayk, ray.gayk@calchiefs.org
SB Chiefs President Greg Fish, g.fish@csfd.net
Third District Supervisor and Chair, Board of Supervisors, Joan Hartman,
jhartmann@countyofsb.org
First District Supervisor and Vice Chair, Board of Supervisors, Das Williams,
SupervisorWilliams@countyofsb.org
Second District Supervisor, Gregg Hart, ghart@countyofsb.org
Fourth District Supervisor Bob Nelson, bob.nelson@countyofsb.org
Fifth District Supervisor Steve Lavagnino, steve.lavagnino@countyofsb.org
County Executive Officer Mona Miyasato, mmiyasato@countyofsb.org
Santa Barbara County Fire Department Fire Chief Mark Hartwig,
mhartwig@countyofsb.org