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Ramirez, Angelica Public Comment

From: Miyasato, Mona
Sent: Friday, May 20, 2022 6:55 PM
To: sbcob
Subject: Fwd: AMR Response to Wright Law Firm May 9 Letter Regarding May 31, 2022 Board Mtg re Ambulance Contract
Attachments: AMR - Response to Wright letter re Santa Barbara contract - May 20 2022.pdf

Letter regarding 5/31 agenda item on EMS

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From: Johnston, Pam <PJohnston@foley.com>
Sent: Friday, May 20, 2022 3:55 PM
To: Hartmann, Joan <jHartmann@countyofsb.org>; Supervisor Das Williams <SupervisorWilliams@countyofsb.org>; Hart, Gregg <gHart@countyofsb.org>; Nelson, Bob <bnelson@countyofsb.org>; Lavagnino, Steve <slavagnino@countyofsb.org>
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Subject: AMR Response to Wright Law Firm May 9 Letter Regarding May 31, 2022 Board Mtg re Ambulance Contract

Dear Members of the Board of Supervisors,
We represent American Medical Response ("AMR"). Please find enclosed AMR's response to the May 9 letter sent by the Wright Law Firm on behalf of two fire trade associations regarding the extension of the ambulance contract in Santa Barbara County. These letters pertain to an item on your agenda for a special meeting set for May 31, 2022.
Please advise if you need anything further from me or AMR.
Thank you,
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CLIENT/MATTER NUMBER
027013-0127

May 20, 2022

Via Email (list below)

Members of the Board of Supervisors
of Santa Barbara County
105 East Anapamu Street, Room 406
Santa Barbara, California 93101

Re: May 31, 2022, Meeting of the Board of Supervisors to Consider the Ambulance Service Contract

Dear Honorable Members of the Board of Supervisors:

On May 31, 2022, the Santa Barbara County Board of Supervisors ("Board") is scheduled to consider an extension of the Ambulance Services contract for the County of Santa Barbara (the "Ambulance Contract"). On May 9, 2022, the law firm of Wright, L'Estrange & Ergastolo ("Wright Law Firm"), representing two trade associations – CalChiefs and SB Chiefs (collectively "Fire Assns."), sent this Board a 25-page letter ("Fire Assns.' Letter"). We represent American Medical Response ("AMR"), the current ambulance contract provider in Santa Barbara County (the "County"). On behalf of AMR, this letter responds to the Fire Assns.' Letter.[1]

I. Executive Overview

AMR has faithfully served the County and its citizens for many years. The County's current Ambulance Contract with AMR expires December 31, 2022 ("Expiration Date"). AMR has worked and will work with the County to ensure that the citizens of the County are properly served by safe, professional, cost-efficient ambulance responses. AMR will be here to serve the County and its residents regardless of whether

[1] For the sake of brevity, we address only a subset of the errors in the Fire Assns.' Letter. Our lack of response on a particular argument from this 25 page letter should not be construed as a concession as to the merits of an unaddressed point.

the Ambulance Contract is extended by then, or not.[2] AMR is here to serve the citizens of the County and will not abandon them; AMR will be here to serve the citizens of this County even after the Expiration Date of the current contract if that is needed to permit the County and its local emergency medical services agency sufficient time to work through the process of awarding the Ambulance Contract via the pending request for proposal ("RFP") to the best-suited provider.[3]

AMR is responding to this Fire Assns.' Letter to assist the County in this process of considering the pending RFP. The Fire Assns.' Letter is not helpful in this process and constitutes a rehash of positions about the EMS Act that their lawyers have been peddling to various public agencies around California. Recently, this same law firm convinced the City of Oxnard to file suit to try to exit the EMS system in Ventura County and establish their fire department as the ambulance transport provider in the City of Oxnard. This lawsuit failed. The Ventura Superior Court and then the Court of Appeal rejected all of the City of Oxnard's arguments. We urge the County to listen to its own trusted legal advisors and disregard the Fire Assns.' Letter.

In this letter, AMR discusses five topics: (1) the rightful role for the County's LEMSA to review and recommend how to proceed with the Ambulance Contract; (2) the EMS Act's prohibition against the Fire Assns.' recommendation that the County bypass the RFP competitive process and award the Ambulance Contract directly to the Santa Barbara Fire Protection District ("Fire District"); (3) the absence of federal antitrust immunity for the Fire Assns.' proposal that the Fire District take over the Ambulance Contract; (4) the EMS Act's preemption of local laws; and (5) the lack of standing of these Fire Assns. to maintain a lawsuit in Court about the Ambulance Contract.

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[2] AMR initially sought an extension of more than 10 months to provide stability for its Santa Barbara-based work force.

[3] This RFP will be the first time that Santa Barbara County is using a competitive process to award the Ambulance Contract. In the past, the County relied upon the grandfathering provision in Health & Safety Code Section 1797.224 ("Section 224" or "224") to award the contract to AMR. This change in direction to the "competitive process" prong of Section 224 understandably requires a tremendous amount of time and work by the County's LEMSA to study all the issues and industry changes, and prepare a comprehensive RFP. If the County and the LEMSA need additional time to fine-tune the process, AMR stands ready to provide any requested information as needed.

AMR remains committed to serving the County's citizens now and in the future.

II. The EMS Act Empowers the LEMSA to Review and Recommend How to Proceed in Connection with the EMS Contract[4]

The California EMS Act empowers the County's EMS Agency (the "LEMSA") to prepare a RFP for the award of exclusive operating areas of ambulance transports throughout Santa Barbara County. *See* Health & Safety Code Section 1797.200 et seq.

In response, the Fire Assns. argue that the County's LEMSA is trying to illegally "usurp" the Board's authority, citing to AB 389 for support. This recent piece of legislation does not support the Fire Assns.' argument. In fact, the California legislature passed AB 389 in 2020, and this law is now part of California's EMS Act at Health and Safety Code Section 1797.230. The plain wording of Section 1797.230(a)(1) and (f) provide that:

> "(a)(1) [a] county may contract for emergency ambulance services with a fire agency that will provide those services, in whole or in part, through a written subcontract with a private ambulance service" [and]
>
> "(f) This section shall not supersede Section 1797.201 and shall not alter, modify, abridge, diminish, or enlarge the requirements for creating, establishing, or maintaining an exclusive operating area under Section 1797.224."

Taken together these subsections of Section 230 mean that a County is empowered to award an EMS ambulance transport contract to a fire agency which subcontracts with a private provider (subsection (a)(1)) but only if the County complies with Section 224's requirements (subsection f). Thus, this new section in the EMS Act, Section 230, only applies in the following very limited circumstance: when a county follows the competitive processes in Section 224 to award an emergency medical services RFP to

[4] The Santa Barbara Fire District was established in 1957 according to the Fire District's website. http://www.sblafco.org/directory/fire_santa_barbara_county.sbc

a fire agency with the fire agency simultaneously subcontracting services to a private ambulance provider. Here, the Fire District has not won any County emergency medical services RFP contract, and the Fire District does not have a subcontract with a private provider to provide EMS to the County. Therefore, Section 230 should play no role here.

Contrary to the representations by the Fire Assns., the LEMSA remains the agency solely empowered by state law to administer any emergency medical services contract in the County. *See, e.g.* Health & Safety Code Section 1797.94 and 1797.200 *et seq.* The LEMSA was entitled to draft and present this Board with the pending emergency medical services RFP. Any suggestion by the Fire Assns. otherwise is incorrect.

III. Contrary to the Fire Assns.' Position, There is No Legal Way to Bypass the RFP Process and Award the Ambulance Contract Directly to the Fire District

Contrary to the Fire Assns.' position, the County is not legally allowed to award the right to exclusively provide ambulance transports in Santa Barbara County to the Fire District because of the requirements of the California EMS Act. The Fire Assns. urge the Board to "dispense with the RFP and develop a direct solution through County Fire." (Fire Assns.' Letter at pp. 4, 8-11). In other words, these groups urge the Board to bypass California statutory requirements and award the contract directly to the Fire District. The EMS Act[5] forbids the Board to do so. The EMS Act in Section 224 makes it abundantly clear that the Board can ***only*** skip the RFP's competitive process when the LEMSA

> "develops or implements a local plan that continues the use of **existing providers** operating within a local EMS area in the **manner and scope** in which the services have been provided **without interruption since January 1, 1981**."

H&S Code Section 1797.224 (emphasis added). In other words, the only time a county may avoid using a competitive process is when it chooses to continue to use a grandfathered provider that has been providing the services in the same manner and scope since 1981. AMR is eligible for treatment as a grandfathered provider – it has

[5] California Health & Safety Code Sections 1797.1 *et seq.*

continuously provided the County's ambulance transports since before 1981. In contrast, the Fire District was not the ambulance provider in 1981. It has not provided ambulance transport services without interruption since then. It is not eligible for treatment as a grandfathered provider. To directly award the contract to the Fire District would violate California law and would be reversed if challenged in Court.[6]

California only permits a county to create exclusive operating areas ("EOAs") for ambulance transports if the County follows the requirements of Section 224 of the EMS Act. As the California Supreme Court stated in 1997 in *County of San Bernardino v. City of San Bernardino*. 15 Cal. 4th 909 (1997):

> "[T]he Legislature recognized [that] creating an EOA is an important administrative tool for designing an EMS system, for it allows these agencies to plan and implement EMS systems that will meet the needs of their constituencies and at the same time ensure that the EMS providers with which they contract have a territory sufficiently populated to make the provision of these services economically viable. [Citation.] ... [¶] The ability to create EOAs recognized in section 1797.224 would be rendered largely futile, however, if cities or fire districts that had no history of operating ambulance services were able at any time to expand into these services, thereby partially nullifying an existing EOA." (*County of San Bernardino*, supra, 15 Cal.4th at pp. 931–932, 64 Cal.Rptr.2d 814, 938 P.2d 876.)

The County, like all counties in California, must follow the competitive requirements set forth in Section 224 of the EMS Act when awarding an exclusive contract to operate ambulance transports. California law prevents the County from directly awarding such a grant of exclusivity of ambulance transports to the Fire District.

[6] Such an approach would likely violate other laws such as the federal and state antitrust laws, state anti-competition laws, and conflict of interest provisions, to name a few.

IV. If the County Follows Section 224, There is Little Risk of Violating Federal Antitrust Laws

The County is shielded from antitrust lawsuits if it follows the requirements of the EMS Act to award the Ambulance Contract through a competitive process or through the grandfathering provision in Section 224 to a grandfathered provider (such as AMR). The Fire Assns. try to argue that the County risks violating federal antitrust laws if it awards the EMS contract pursuant to the RFP to the selected bidder. (Fire Assns.' Letter at pp. 15-16). If the County were to act contrary to the EMS Act and award an exclusive contract to the Fire District outside of the parameters of California's EMS Act, the County would likely violate the federal antitrust laws and could be sued successfully for such an anticompetitive approach.

Federal law is clear: if the County acts pursuant to an express grant of anticompetitive conduct provided for in state law, it enjoys immunity from the federal antitrust laws. This has been the law in this country since 1943 when the United States Supreme Court in *Parker v. Brown,* 317 U.S. 341, 350 (1943) held that the federal antitrust laws do not apply to anticompetitive conduct undertaken by the state or which derives "its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." Here if the County follows the requirements of California's comprehensive EMS Act by using a competitive process to award an exclusive contract for ambulance transports authorized by Section 224 or it awards the contract, without a competitive process, to a properly grandfathered provider, it will enjoy immunity from the antitrust laws. This is protected activity. The federal appellate court that reviews federal cases filed in California held in a case involving Sonoma County that "California has 'clearly articulated' its intention to grant state action immunity to local governments that **implement emergency medical services plans that are consistent with the terms of the EMS Act**." *Redwood Empire Life Support v. County of Sonoma*, 190 F.3d 949, 953 (9th Cir. 1999) (emphasis added).

The Fire Assns. try to argue that the *Phoebe Putney* case supports their antitrust viewpoint. The United States Supreme Court in *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013) refined how clear the grant of anticompetitive conduct had to be in state law to qualify as *Parker* immunity. The Supreme Court found that a state law that (1) provides only broad goals such as "adequate and affordable" health

care and (2) does not expressly allow for anticompetitive behavior does not confer *Parker* immunity. Section 224 directly permits anticompetitive behavior – it allows a County to renew a contract, without a RFP, with a grandfathered provider that has been providing the ambulance transport services in the same manner and scope since 1981. Thus, the County is shielded from any antitrust attack as long as the County follows the requirements outlined in the EMS Act's Section 224.[7] If it strays from the four-corners of Section 224, it could lose its *Parker* immunity from the federal antitrust laws.

V. The EMS Act Preempts Any Inconsistent Local Law

A county ordinance or resolution cannot supersede or conflict with the requirements of the State EMS Act. The EMS Act trumps any local law. Nevertheless, the Fire Assns. urge the Board not to adopt the recommended resolution, award the contract directly to the Fire District, and revamp a "dormant Ambulance Ordinance." (Fire Assns.' Letter at pp. 3, 23-25). This is a risky approach for several reasons including the potential loss of antitrust immunity discussed above. This approach is also foreclosed by a recent Court of Appeal case brought by the City of Oxnard against Ventura County. Last year, in *City of Oxnard v. County of Ventura*, the Court of Appeal ruled against the City of Oxnard (also represented by the Wright Law Firm) and held that the EMS Act **preempts** inconsistent local laws because the EMS Act is a "general" state law, thus a local entity's "authority to provide and administer ambulance services is...subject to the limits set forth in the EMS Act." *City of Oxnard v. County of Ventura*, 71 Cal.App.5th 1010, 1017 (2021)[8] (citing to the Cal. Const., Art. XI, Section 7 and *Keenan v. San Francisco Unified School Dist.*, 34 Cal.2d 708, 713 (1950) (local laws cannot conflict with a California "general law"). The Wright Law Firm representing the City of Oxnard

[7] The Fire Assns. argue that Section 5.8 of the RFP "is likely preempted by the National Labor Relations Act ('NLRA') under the so-called *Garmon* and *Machinists* preemption doctrines." (Fire Assns.' Letter at pp. 16-17). These old labor union cases will have no application to Section 5.8 of the RFP. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (no court can regulate conduct that is actually or arguably protected by the National Labor Relations Act); *International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (Congress preempted the field of what constitutes an unfair labor practice so a state board *lacked the power* to find that a labor practice was unfair).

[8] The City of Oxnard, through these same lawyers, sought review by the California Supreme Court, which the Supreme Court denied on March 9, 2022. *City of Oxnard v. County of Ventura*, 71 Cal.App.5th 1010 (Nov. 23, 2021), as modified on denial of rehearing (Dec. 14, 2021), review denied (Mar. 9, 2022).

unsuccessfully expended a significant amount of public monies trying to avoid the application of the EMS Act in Ventura County.

On page 23 of the Fire Assns.' Letter, the Fire Assns. argue that two Court of Appeal decisions decided about the City of Lomita allow the County to bypass the RFP process and contract directly for ambulance services with a local agency (meaning the Fire District). These cases do not stand for this proposition. *See City of Lomita v. County of Los Angeles*, 148 Cal.App.3d 671 (1983); *City of Lomita v. Superior Court*, 186 Cal.App.3d 479 (1986). The *Lomita* cases concern only the breadth of indigent care in California, not how an EMS system can be structured. The cases provide that state law requires counties to ensure provision of health services, including ambulance services, to indigent persons. The County is well-aware of its duties owed to indigents. The statutes relied on in the *Lomita* cases (Government Code Section 25369.5 and 26612) were all enacted in the 1940s and 1950s – years before the EMS Act was passed in 1980. As the *City of Oxnard v. County of Ventura* case makes clear, the EMS Act is a general law in California that preempts all laws inconsistent with the EMS Act. The *Lomita* cases add nothing to the analysis here.

The EMS Act overrides any local ordinance. If the County relies on the analysis put forth by the Fire Assns., the County may encounter costly, unsuccessful litigation just as the City of Oxnard did.

VI. Lack of Standing in Court

Finally, it is worth noting that these two Fire Assns. likely lack legal standing to challenge any contract awarded by the Board. *SJJC Aviation Servs., LLC v. City of San Jose*, 12 Cal.App.5th 1043, 1057-59 (2017); *Thompson v. Petaluma*, 231 Cal.App.4th 101, 105-06 (2014); *see Lyons v. Santa Barbara County Sheriff's Office*, Cal.App.4th 1499, 1502 (2014). In other words, if these groups were to file a lawsuit against the County seeking to challenge a contract renewal or an award of the contract by RFP under the EMS Act, the court would likely dismiss the case because these bystanders are not allowed to bring a lawsuit about the award of the contract.

VII. Conclusion

In summary, we encourage the County to continue with its thoughtful RFP process. The law supports the County. Although AMR desires a longer-term bridge contract to provide stability to its dedicated team of caregivers, AMR is resolved to stay in the County and continue to provide its life-saving care. We have been serving the citizens of this County for many years and will not let the County down.

Very truly yours,

/s/ Pamela L. Johnston

Pamela L. Johnston

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