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From: Andrew Schouten <aschouten@wlelaw.com>
Sent: Friday, May 27, 2022 11:43 AM
To: sbcob
Cc: Ray Gayk; Greg Fish; Hartmann, Joan; Supervisor Das Williams; Hart, Gregg; Nelson, Bob; Lavagnino, Steve; Miyasato, Mona; Hartwig, Mark
Subject: May 31, 2022, Santa Barbara County Board of Supervisors Special Meeting
Attachments: SB BOS 002 (05-31-22 Special Meeting).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 its special meeting scheduling for 11:00am on Tuesday, May 31, 2022. Please ensure that my correspondence is included in the record for the special meeting and each Supervisor receives a copy of my correspondence.

Please let me know if you have any questions.

Sincerely,
Andrew Schouten

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May 27, 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 31, 2022, Santa Barbara County Board of Supervisors Special Meeting Regarding Ambulance Services Policy, Request for Proposals, and Fifth Amendment to the Professional Services Agreement with American Medical Response West

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.

CalChiefs and SB Chiefs thank the Board of Supervisors ("Board") for the opportunity to provide the following written comments:

- The Board has ultimate authority over the County of Santa Barbara's ("County's") ambulances services contracts and procurements, including contracts and requests for proposals ("RFPs") for exclusive operating areas ("EOAs") under Health and Safety Code Section 1797.224.

- If American Medical Response ("AMR") is unwilling or unable to agree to an extension of its existing contract for no more than 10-12 months, the Board should immediately dispense with the draft RFP for a countywide EOA ("EOA RFP") and directly contract with County Fire for emergency and nonemergency ambulance services.

CalChiefs and SB Chiefs are ready, willing, and able to assist and support the Board and County regarding these matters.[1] 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.

[1] SB Chiefs submitted to the Board proposed revisions to County's Ambulance Ordinance and the EOA RFP under different cover.

A. The Board Has Ultimate Authority Over The LEMSA And County's Ambulance Services Contracts And Procurements.

Section 1.1 of the RFP EOA makes a startling claim: the County Department of Public Health and the County EMS Agency (collectively, "LEMSA") "has the exclusive responsibility to plan, implement, evaluate, and regulate the Santa Barbara County EMS System." This statement is incorrect. CalChiefs and SB Chiefs are concerned that County staff and/or the LEMSA may be interfering with the Board's authority over the LEMSA and County's ambulance services contracts and procurements.

"It is axiomatic that a county acts only through its board of supervisors, which as its governing body "exercises the powers of the county." (*Rose v. County of San Benito* (2022) 77 Cal.App.5th 688, 716; Gov. Code, § 23005.) Furthermore, the Government Code mandates the Board "supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county." (Gov. Code, § 25303; *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1209 [board of supervisors authorized by statute to "supervise county officers in order to insure that they faithfully perform their duties."].)

Nothing in the EMS Act, and particularly, Health and Safety Code Section 1797.224.[2], purports to limit the Board's supervisory authority over the LEMSA or otherwise limit the Board's authority over County's ambulance services contracts and procurements.

The LEMSA's erroneous statement in section 1.1 of the EOA RFP likely arises from a misreading of two cases interpreting the EMS Act and Section 1797.224. *Memorial Hospitals Assn. v. Randol* (1995) 38 Cal.App.4th 1300, 1310, holds that only a local EMS agency may establish an EOA under Section 1797.224 and that if a county board of supervisors usurped that power, the EOA would be invalid. In turn, *County of Butte v. Emergency Medical Services Authority* (2010) 187 Cal.App.4th 1175, 1194-1195 holds that a county must have one local EMS agency that exercises all the statutory functions of such an agency under the EMS Act; a county may not splinter those functions between several different agencies or delegate some functions to the agency while retaining other functions for itself.

However, nothing in the EMS Act, Section 1797.224, *Randol,* or *Butte* says the Board has no role in the EMS system or the EOA process. To the contrary, the EMS Act defines an EOA as a geographical area wherein "a local EMS agency, *upon the recommendation of a county*, restricts operations to one or more [EMS] providers." (Section 1797.85 [italics added].) As such, the Board's approval of an EOA (and the corresponding RFP) is a mandatory prerequisite to the LEMSA's performing its statutory function to create the EOA; if the LEMSA created an EOA without the Board's approval, the EOA would be void. (*Randol, supra* 38 Cal.App.4th at 1310-11.) In addition, the EMS Act authorizes the Board, "'upon the recommendation of [the LEMSA],' to 'adopt ordinances governing the transport of a patient who is receiving care in the field from prehospital emergency medical personnel." (*Id.* at 1308 [quoting Section 1797.222].)

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[2] All statutory references are to the Health & Safety Code unless otherwise indicated.

Thus, the EMS Act provides express statutory functions for both the Board and the LEMSA, and neither may usurp the other's functions. (See *Smith v. County of Los Angeles* (1893) 99 Cal. 628, 631 [board of supervisors had no power to sell or negotiate county bonds by itself; rather, statute provided county treasurer had such power, subject to supervisors' direction and approval].)

Nor do EMS Act or Section 1797.224 grant the LEMSA express statutory authority over County's ambulance services contracts and procurements. Section 1797.224 provides that the LEMSA may create an EOA in the development of the local EMS plan and, if so, the LEMSA must develop and submit to EMSA "its competitive process for selecting providers and determining the scope of their operations." The statute is wholly silent on contracts and RFPs. Instead, interpretive rules issued by state EMSA purported to define the Section 1797.224 "competitive process" to mean an RFP and construe the statute to require the RFP be used to award a contract for the EOA. (See EMSA Guideline No. 141: Competitive Process for Creating Operating Areas (1985, 1997) ["Guideline 141"]: EMSA Guideline No. 141: "Review Criteria and Policy for Transportation and Exclusive Operating Area Components of the EMS Plan" (2008) ["Guideline 141-B"].) On July 15, 2020, the Sacramento County Superior Court issued a judgement declaring Guidelines 141 and 141-B to be void "underground regulations" and commanding EMSA to cease enforcing such underground regulations until it properly adopts them as regulations in compliance with the Administrative Procedure Act. (*Cal. Fire Chiefs Ass'n v. Cal. Emergency Med. Servs. Auth.* (Super. Ct. Sacramento County 2020 No. 34-2019-80003163) 2020 Cal. Super. LEXIS 53756 ["*EMSA Underground Regulations* Litigation"].) Accordingly, there is no statute, case, or valid regulation providing the LEMSA with sole authority over County ambulance services contracts and procurements.

Moreover, recently enacted AB 389 expressly provides that the Board—not the LEMSA—is the agency responsible for making policy for County's emergency ambulance services contracts and it has "exclusive jurisdiction" over such policy. (Section 1797.230(c), (e).) These statutory provisions are intended to return to county boards of supervisors the authority to make policy regarding their county's contracts and procurements, which had been impinged upon by EMSA and the LEMSAs. Although the new law does not modify the requirements for creating EOAs under Section 1797.224 (*id.* at § 1797.230(f)), the only requirements in Sections 1797.85 and 1797.224 are procedural—the Board must "recommend" the creation of the EOA, the LEMSA must develop the "competitive process," and the LEMSA must submit that process to state EMSA for approval. Nothing in these statutory procedures remove the LEMSA from the Board's supervision and oversight or curb the Board's authority over County contracting and procurements.

The County's so-called "firewall" is similarly erroneous and undercuts the Board's authority to supervise County staff and the LEMSA and over County contracting and procurements. Because County Fire is interested in submitting a proposal responding to the RFP, County implemented a "firewall" that divided County staff into groups aligned with the LEMSA and County Fire and effectively precludes the Board from participating in either the LEMSA's development of the RFP or County Fire's development of its proposal.

First, there is no conflict of interest that disables the Board from participating the development and approval of the LEMSA's Section 1797.224 RFP and County Fire's proposal

responding to the RFP. By statute, the Board is the governing body of County (Gov. Code, § 23005) and County Fire (*Id.*, at § 25213, subd. (b); Health & Saf. Code, § 13803). Because such dual role is authorized by statute, the Board's participation in the LEMSA's RFP and County Fire's proposal cannot give rise to a conflict of interest as a matter of law. (*Am. Canyon Fire Prot. Dist. v. County of Napa* (1983) 141 Cal.App.3d 100, 103-105 (because statutes authorized it to act as governing body of county and county fire district, county board of supervisors did not have a conflict of interest preventing county from distributing certain "bail out" funds to the county fire district].)

Second, the Board's participation in the LEMSA's RFP and County Fire's proposal does not constitute bid rigging, bid suppression, or bid collusion in violation of state and federal antitrust laws. (E.g., *U.S v. Joyce* (9th Cir. 2018) 895 F.3d 673, 678 [bid rigging is a form of price-fixing and a per violation of the Sherman Antitrust Act].) Here, County cannot be liable for bid rigging as a matter of law if the Board dictates the RFP's requirements, even if those requirements favor County Fire over other proposers, because County is purchasing ambulance services in the RFP. (*Security Fire Door Co. v. County of Los Angeles* (9th Cir. 1973) 484 F.2d 1028, 1030-1031 [county's decision to adopt specifications in an RFP favoring one vendor over another did not constitute bid rigging; as the purchaser, county could not conspire to violate federal or California antitrust laws as a matter of law].)

In sum, nothing in the EMS Act, Section 1797.224, valid EMSA regulations, or case law provides that the LEMSA's actions, including the development of a Section 1797.224 RFP and obedience to the Board's policies, are somehow immune from the Board's supervision and direction. Nor is there any statute, regulation, or judicial opinion which provides that the Board is disabled from participating in the development and approval of the EOA RFP simply because County Fire desires to submit a proposal.

B. If AMR Will Not Agree To A 10-12 Month Extension, The Board Immediately Should Dispense With The EOA RFP And Contract Directly With County Fire.

In my prior letter dated May 9, 2022, CalChiefs and SB Chiefs urged the Board to immediately dispense with EOA RFP and pursue a direct contract solution with County Fire. At the May 10, 2022, meeting, the Board directed the LEMSA negotiate a 10–12-month extension of the existing County-AMR agreement and return to the Board in three weeks. Because County has not yet made public the board letter for this special meeting, CalChiefs and SB Chiefs do not know whether AMR has or has not agreed to such extension. If AMR has not agreed to the extension, CalChiefs and SB Chiefs renew their request that the Board immediately dispense with EOA RFP and directly contract County Fire.

My prior letter dated May 9, 2022, provided a roadmap to the Board for the direct contract solution. Rather than repeat those written comments, CalChiefs and SB Chiefs highlight some aspects of that analysis.

Even if it chose not to enter an exclusive contract with County Fire, County could still achieve de facto exclusivity in the provision of emergency and nonemergency ambulance services

by relying on its statutory ambulance permitting and licensing authority and revising the County's Ambulance Ordinance.

Welfare and Institutions Code section 14136(f) expressly authorizes County to grant or deny permits for emergency and nonemergency ambulance services on a "need and necessity" basis. Similarly, Vehicle Code section 2512(c) authorizes County to adopt "restrictive regulations" for ambulance services. (*Empire Fire & Marine Ins. Co. v. Bell* (1997) 55 Cal.App.4th 1410, 1418.) As construed by the courts, Vehicle Code section 2512(c) authorizes County to adopt an ambulance permitting and licensing ordinance and deny such permits and licenses (and exclude providers) on the ground that "public convenience and necessity" does not require additional ambulance services because County's existing services are sufficient. (*Subriar v. City of Bakersfield* (1976) 59 Cal.App.3d 175, 180, 194-202] *Sievert v. City of National City* (1976) 60 Cal.App.3d 234, 236; *Bell v. City of Mountain View* (1977) 66 Cal.App.3d 332, 335-336, 338-339.)

Finally, in a recent decision, the U.S. Fourth Circuit Court of Appeals held that when state law authorizes a local government to adopt an ambulance licensing and permitting ordinance, the denial of a license or permit and resulting exclusion of a provider pursuant to such ordinance is immune from the federal antitrust laws. (*W. Star Hosp. Auth., Inc. v. City of Richmond,* (4th Cir. 2021) 986 F.3d 354, 358-359.) Because the Virginia statute in that case (Va. Code Ann. § 32.1-111.4) provides nearly identical authority to local governments as Vehicle Code section 2512(c) and Welfare and Institutions Code section 14136(f), federal courts would almost certainly follow *Richmond* and conclude that County's enforcement of licensing and permitting requirements in the County's Ambulance Ordinance is immune from federal antitrust liability. (See *Catalina Cablevision Assocs. v. City of Tucson* (9th Cir. 1984) 745 F.2d 1266, 1269-70 [city's issuance of single non-exclusive license that resulted in monopoly cable service and exclusion of rival providers was ordinary result of statute authorizing cities to regulate cable television by issuing permits and limiting number of authorized providers].)

C. Conclusion.

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

Sincerely,

Andrew E. Schouten
Signer ID: FRGHZM8WM7
Special Counsel for CalChiefs and SB Chiefs

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