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Honorable Leroy F. Greene  
3082 State Capitol

## Professional Services Contracts - #22858

Dear Senator Greene:

### QUESTION

Does Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code apply to charter cities?

### OPINION

Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code applies to charter cities.

### ANALYSIS

Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code<sup>1</sup> (hereafter Chapter 10) generally outlines the procedures to be used by public entities for acquiring the professional services of architectural, engineering, land surveying, or construction management firms. In that regard, Section 4526 states, in part, as follows:

"4526. Notwithstanding any other provision of law, selection by a state or local agency head for professional services of private architectural, engineering, environmental, land surveying, or

<sup>1</sup> Unless otherwise stated, all statutory references are to the Government Code.

construction project management firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.

\* \* \* (Emphasis added.)

"Local agency head" is defined, for purposes of Chapter 10, to include the "head of a department, agency, or bureau of any city, county, city and county, whether general law or chartered, or any district which is authorized to contract for architectural, engineering, environmental, land surveying, and construction management services" (subd. (c), Sec. 4526, emphasis added). Thus, Chapter 10 purports to include charter cities within its application.

Charter cities are granted supremacy over conflicting state law with regard to subjects deemed to be "municipal affairs" pursuant to Section 5 of Article XI of the California Constitution (see Teves v. City & County of San Francisco, 43 Cal. 2d 190, 197). Thus, the issue raised is whether regulating the letting of city contracts, as specified in Chapter 10, is in the nature of a municipal affair.

In this regard, the courts have stated that, generally, the Legislature is not forbidden to legislate with respect to the local municipal affairs of a chartered city, but in the event of a conflict or intended preemptive state legislation, the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations on the other (Bishop v. City of San Jose, 1 Cal. 3d 56, 62). The term "municipal affairs" is not defined in the California Constitution, and it has become necessary for the courts to decide, under the facts of each case, whether a subject matter is of municipal or statewide concern. In determining whether a matter is a municipal affair or one of statewide concern, the courts will give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field, but the fact that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue (Bishop v. City of San Jose, supra, pp. 62-63).

There is some support for the proposition that the mode of contracting for work by a charter city is generally a municipal affair (see, for example, Piledrivers' Local Union v. City of Santa Monica, 151 Cal. App. 3d 509; Smith v. City of Riverside, 34 Cal. App. 3d 529).

The cases cited, however, differed from the issue in question in that in the statutes involved in those cases, the

Legislature had made no attempt to apply the provisions to charter cities and the issue was discussed in the absence of a legislative determination that the matter was one of statewide concern. In fact, there is no case construing a statute involving public construction contracts which the Legislature attempted to make applicable to charter cities which a court has held not to be applicable to charter cities.<sup>2</sup> The cases cited also differed from the question at hand in that the issue in both cases was whether the work was to be let by competitive bid or be performed by city employees. The requirement in question, in contrast, only applies when a local agency makes a determination to utilize private architectural, professional engineering, environmental, land surveying, and construction project management services.

With regard to the requirement in question, not only does the provision specifically apply to charter cities, but the legislative history of the provisions in question indicates that the Legislature has been considering the subject of the selection of the specified professional services on the basis of demonstrated competence and the professional qualifications necessary for the satisfactory performance of the services provided on a statewide basis over an extended period of time. When Section 4526 was added by Chapter 1434 of the Statutes of 1974, it provided in pertinent part that "it shall be considered to be the public policy of the State of California and any political subdivision thereof" that the selection of the specified professional services be on the basis of demonstrated competence and professional qualification necessary for the satisfactory performance of the services required and required state contracts to be let on that basis. While the reference to political subdivisions was considered not to be applicable to local agencies because of contrary indications of legislative intent (see 62 Ops. Cal. Atty. Gen. 332), that language is clear evidence that the Legislature was considering the desirability of a uniform statewide policy on the issue.

In 1988, Section 4525, the definition section, was amended to refer to local agency heads, including the reference to chartered cities (Ch. 1016, Stats. 1988). However, the policy statement was not revised and the procedural provisions were made discretionary. As a result, state agencies were required to make the selection of the applicable professional services on the basis of demonstrated competence and professional qualification, while

<sup>2</sup> cf. Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal. 3d 296, involving an attempt to limit cost-of-living increases of employees of charter cities in view of language in Section 5 of Article XI giving charter cities "plenary" authority over compensation of city employees.

local agencies, including chartered cities, could choose to do so.

The next step came when Section 4526 was amended by Chapter 293 of the Statutes of 1989 to delete the phrase regarding the public policy of the state, thereby explicitly requiring the hiring or contracting of the professional services by local agencies, as well as state agencies, to be on the basis of demonstrated competence and professional qualifications statewide.

Moreover, treating the issue as a matter of statewide concern and making the requirement applicable to charter cities is consistent with the treatment of other related matters. For example, the Legislature has enacted extensive legislation in the area of construction standards and professional qualifications. Specifically, the State Housing Law (Pt. 1.5 (commencing with Sec. 17910), Div. 13, H.& S.C.), with express procedures for permissible local modifications, regulates residential building standards statewide and the State Building Standards Law (Pt. 2.5 (commencing with Sec. 18901), Div. 13, H.& S.C.) applies to all occupancies throughout the state (Sec. 18941.5, H.& S.C.). Provisions of state law establish statewide standards for access to public buildings and public accommodations by physically handicapped persons (Ch. 7 (commencing with Sec. 4450), Div. 5, Title 1, Gov. C.; Pt. 5.5 (commencing with Sec. 19955), Div. 13, H.& S.C.). Architects, engineers, contractors, and land surveyors, among others, are licensed regulated professionals (Ch. 3 (commencing with Sec. 5500), Ch. 3.5 (commencing with Sec. 5615), Ch. 9 (commencing with Sec. 7000), Ch. 15 (commencing with Sec. 8700), Div. 3, B.& P.C.).

Viewed in one sense, these provisions indicate that the Legislature has treated the quality and safety of buildings, particularly public buildings, as a matter which requires statewide uniformity and therefore a matter of statewide concern. As stated in Bishop v. City of San Jose, *supra*, "[in] exercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts will of course give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation." (Id., at 63.)

Consequently, there is a basis for a court to conclude that a selection process for architectural, professional engineering, environmental, land surveying, and construction project management services based on competence and the resulting safety and compliance with existing statewide standards is a matter of statewide concern, and, hence, that Section 4526 is applicable to chartered cities.

Therefore, in our opinion, Chapter 10 applies to charter cities.

Very truly yours,

Bion M. Gregory  
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By  
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RBW:kg

