

Crisis in the Public Workplace: Cutting Edge Issues in Personnel and Labor Relations, Presented by Municipal Law Institute Committee, League of California Cities and UC Berkeley, School of Law

**Contracting Out Under Government Code
§§ 53060 and 37103:
Guiding and Defending Your City**



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Preliminary Observations

- The contributions of the **union movement** and **civil service protections**. (Stability, longevity, institutional fairness, engendering loyalty.)
- The skills, public service commitment and experience of **government employees**.
- Balanced against the need for **flexibility** in **servicing the public** in cost-effective ways.
- Think critically, make decisions **pragmatically, not ideologically**, and minimize the human toll.
- Cases are won by how reasonably decisions are made, **much before any lawsuit is filed**.





Framers Intended All Cities To Have Broad Powers Under Cal. Const. Art XI § 7.

- “Section 7 presents the most widely used of the home rule provisions of the California Constitution.” (Grodin et al., *The Cal. State Constitution: A Reference Guide* (2011) p. 208.)
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- “The decision was made then not to restrict local governments narrowly to those specified powers that are overtly granted to them by the legislature but to allow them to exercise whatever powers appeared necessary, without the need to request legislative authorization before taking action.”
- (Ibid)



Cases Confirm Broad Police Powers of Cities

- The police power granted by the Constitution is “**the power of local governments to legislate for the general welfare.**” (*Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal.App.4th 678, 689)
- **General law cities have wide latitude in deciding what municipal services they will provide or services they need.** (See *Myers v. City of Calipatria* (1934) 140 Cal.App. 295, 298 [“It was discretionary with the city council whether the office of city attorney should be filled or not.”].)
- “[A] city has authority to enter into contracts which enable it to carry out its necessary functions, and this applies to powers expressly conferred upon a municipality and to **powers implied by necessity.** [Citation.]” (*Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, 734.)

Even the *Costa Mesa* court agrees but . . .

- “Cities have the **implied authority to enter into contracts** to carry out their necessary functions.” (*Costa Mesa City Employees Association v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 310)
- But court assumes that “[b]y **implication**, and as interpreted over the years, the statutes generally prohibit a city from contracting with a private entity for nonspecial services.” (*Id.* at pp. 315-16 [emphasis added].) But **no discussion of implied preemption doctrine**.
- Holding, there is “‘some possibility’ [plaintiffs] will prevail on both their contract and [MOU] claims . . .), and the relative harm to the parties favors preliminary relief.” (*Id.* at p. 316)
- **Dictum? But trial court likely to feel bound so apply special services statutes, which have interesting history. Stay tuned....**



1949: Gov't Code §§ 37112, 37103

- Government Code section 14 (1943) provides that, within the Government Code, “‘Shall’ is mandatory and ‘may’ is permissive.”
- 1951: Attorney General concludes Government Code section 4334, providing for a 5 percent differential for California manufacturers in public works contracts, was “optional” because it used the word “may.”
- What about the special services statutes 37103 and 53060 which also use “may” ???



Government Code §§ 37112 and 37103 - Powers of Cities

- Gov't Code §37112 enacted in 1949 provides: “In addition to other powers, a legislative body **may** perform all acts necessary or proper to carry out the provisions of this title.”
- AG opines inherent power codified in Government Code section 37112 authorized a city to contract with a private operator to operate a city jail (74 Ops. Cal. Atty. Gen. 109 (1991)) concluding that since the Government Code recognized city jails, a city council may enter into a contract with a private entity to operate a local detention facility as a “necessary or proper” way in which to exercise its power to establish a city jail. **AG does not even refer to § 37103, which does not mention jails.**
- Gov't Code § 37103 also enacted in 1949 reads: “The legislative body **may** contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters. It may pay such compensation to these experts as it deems proper.”





Gov't Code § 53060 & AG's Contemporaneous Construction-Special Services Statutes Are Permissive

- Gov't Code §53060 adopted in **1951**: The legislative body of any **public or municipal corporation or district may** contract with and employ any persons for the furnishing to the corporation or district special services”
- **1952** AG opines “that the proper interpretation of section 53060 . . . is that a county or school district may employ persons with unique and special skills of the types mentioned **when these services cannot be rendered by county or district officers or employees charged with the performance of such duties.**” 19 Ops.Cal.Atty.Gen. 153 (1952).
- Section 53060 was “**merely a clarification of existing law,**” which permitted municipalities to contract with persons with special skills **without a formal bidding process**, but prohibited legislative bodies, entrusted with the expenditure of public funds, from incurring **a useless or unnecessary expense** for services that another public entity or official already had a duty to perform.”



Jaynes v. Stockton (1961) 193 Cal.App.2d 47 Confirms AG's Construction

- In *Jaynes v. Stockton* (1961) 193 Cal.App.2d 47, the court relied on the two 1952 Attorney General Opinions: “[C]ontemporaneous construction of a statute by those charged with its enforcement and interpretation, although not necessarily controlling, ‘is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.’” (*Id.* at 56 [citation omitted].)
- *See also. Montgomery v. Superior Court* (1975) 36 Cal.App.3d 657 [general law city may remove prosecutorial duties from city attorney because special services statutes are not preemptive and use of the word “may” in the Government Code is permissive].)



A Road Map To Legal Validity When Contracting Out

- *Costa Mesa* presents problem in trial court so demonstrate compliance with special services statutes
- Make back up argument as to cities' inherent constitutional power to contract,
- that special services statutes are declarative of existing common law,
- And are permissive, not preemptive, using implied preemption doctrine.



Interpretation of Special Services Statutes

- Literal language- does **type of service** fall into **categories** in statute?
- **But**, special services **cases** treat categories as **illustrative not restrictive**.

Special Services Cases

- “The test as to whether a school district may contract for services under Government Code section 53060 depends on [1]the nature of the services; [2] the necessary qualifications required of a person furnishing the services; and [3] the availability of the service from public sources.” (*California Sch. Employees Assn v Sunnyvale Elementary Dist.* (1973) 36 Cal.App.3d 46, 60-61. [“*Sunnyvale*,” numbers inserted].)
- **Note: No requirement that service fall within statutory category.**



Cases Approving Services Without Discussion of Whether Within 53060 Statutory Category

- Architect's services authorized by 53060 (*Cobb v. Pasadena City Bd. of Education* (1955) 134 Cal.App.3d 93, 96: “That statute removes all question of the necessity of advertising for bids for ‘special services’ by a person specially trained and experienced and competent to perform the special services required. Now, a board may pay from any available funds a fair compensation to capable and worthy persons for special services.”)
- Operation of book store (*Serv. Employees Internat. Union v. Bd. of Trustees* (1996) 47 Cal.App.4th 1661, 1673-1675)
- Management services for hospital. (*Darley v. Ward* (1982) 136 Cal.App.3d 614, 627-628)
- Research and development in transportation and maintenance services (*California Sch. Employees Assn v Sunnyvale Elementary Dist.* (1973) 36 Cal.App.3d 46.)





Gov't Code § 53060 language still broad

- [1] “special services and advice in
- [2] financial, economic, accounting, engineering, legal, or **administrative matters . . .**” “The authority given shall include the right of the legislative body of the corporation or district to contract for the issuance and preparation of **payroll checks.**”
- [3] The persons contracted with are to be “specially trained and experienced and competent to perform the special services required

Standards of review

- **City** argued review of legislative action is limited to whether action:

[1] “was **arbitrary, capricious,**

[2] **entirely lacking in evidentiary support,** or procedurally unfair” and

[3] “whether the [challenged action] is **consistent with applicable law.**”

(Associated Building & Contractors Inc. v. San Francisco Airports Commission (1999) 21 Cal.4th 352, 361.)

- **Special services cases silent** turn on procedural posture:
- **Cobb** decided on demurrer,
- **Darley and Sunnyvale** trial court had issued findings of fact after a trial challenging particular contracts, not legislative action
- **Serv. Employees Internat. Union v. Bd. of Trustees** summary judgment no disputed issue of fact.



Tale of Two/Three Cities

- Redding – a model approach, good thoughtful reasons, careful minimizing of impact on employees and respect for MOU process and eliminating vacancies not people. City Attorney and staff did excellent job. Union ideological challenge, did not appeal has been decertified.
- Hemet – absorbed employees lengthy MOU process, union sued, employees rebelled, union dismissed.
- Costa Mesa, ideological decision, blunderbuss not surgically tailored based on cost benefit analysis.



Conclusion

- Contracting out is neither inherently superior nor inferior.
- The facts really matter - act in a thoughtful deliberate and compassionate manner, reflected in the record.
- Understand and work within the analytical framework of the special cases and statutes
- Preserve preemption and legislative history arguments. (See brf. re no preemption)

