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## MEMORANDUM

**To:** Kurt Triplett, City Manager  
**From:** William R. Kenny, Human Resources Director  
**Date:** September 17, 2010  
**Subject:** Outsourcing and Labor Relations Context

This Issue Paper is in response to the information requests of Council regarding outsourcing in the public sector.

It is hoped that this information will be helpful to the City Manager's Office and to City Council in the necessary and critical deliberations as to meeting the budget challenges.

It may generally be said that there are more complexities to accomplishing outsourcing in the public sector than in the private sector. Despite this, the City of Kirkland (COK) has been very efficient in looking at these opportunities. This paper will provide an overview of outsourcing, a look at the labor and employee relations considerations and some of the benefits and challenges.

### Key Messages:

- Outsourcing, contracting and privatization are considered the same action by Unions
- Legal and labor relations requirements influence the ability to make changes in bargaining unit work
- Negotiation is almost always required, absent mutual agreement; the level is case-by-case
- Management has and will continue to look for opportunities
- Kirkland Unions have been historically cooperative in looking at efficiencies and flexibility
- Kirkland Unions have cooperated in numerous concessions to save positions
- Outsourcing simply to save labor costs is resisted by PERC and Courts (and Unions)
- Outsourcing to enhance service, expertise and efficiencies is more readily achievable
- A public Employer carefully "picks their battles," considers the internal cost, and conducts cost/benefit analysis of each opportunity to assure gains without a degradation of service
- It is prudent to recognize that outsourcing is not only a financial and performance issue; it is also a people issue. It is essential to demonstrate a high degree of sensitivity in this area.

## **Background**

It may be helpful to provide some broader-based definitions and information. In response to general economic conditions, outsourcing in the public sector has been gaining some attention and momentum, despite multiple concerns and stakeholders. However, while private sector outsourcing has been driven by the need to cut costs and the bottom line, the overwhelming reasoning for outsourcing in the public sector has historically been to find new and innovative ways to streamline process, procedure and productivity. More recently, the economy has required government agencies to at least ask "...are there more efficient or effective ways to provide a service..?" as well as even question "...what services must we provide?...and how...?" This has led to more frequent inquiries into outsourcing, contracting and privatization in government service.

Critics argue that due to the nature of government services, privatization may not be the best alternative and in many situations is deemed unsuitable for the public sector.. They also point out that contracting may entail hidden costs because of lack of information or complexity, the need for monitoring, and "low-ball" bidding. They note that in some places creating the competition necessary for effective contracting is impossible, and suggest that in practice privatization is more complicated than it seems.<sup>1</sup>

In the public perception, there are mixed emotions that run very deep; people tend to favor labor, generally believe government employees are deeply committed and inherently believe government employees should make a livable wage. This has been countered, especially with the recent economy, with an increasing voice suggesting that we need to shrink the size and cost of government. The "rubber hits the road" when citizens are faced with addressing their service level expectations and their view of government accountability for providing these services.

## **A Labor Relations Perspective**

Within the public sector, the ability to outsource current services is complex and often needs agreement between many parties, including the Unions.

As noted in the key messages, outsourcing, contracting and privatization are considered the same by Unions. If there is a history of a represented classification doing the work, the Union's view is that it is bargaining unit work.

"Bargaining unit work" is that which is historically and exclusively performed by the represented employees. Unions are most willing to look at efficiencies and even to recognize that an Employer may need to contract out for expertise and specialization. However, the Unions are also most insistent that others do not perform bargaining unit work (or that the transfer or erosion of the bargaining unit work does not occur) to the detriment of members, without justifiable necessity. Unions typically insist upon CBA language and the requirement to provide notice to the Union and to bargain to enforce that goal.

Additionally, the Collective Bargaining Agreements of each Employer may also have provisions that affect outsourcing or the right to "contract" bargaining unit work. (Please see *Addendum B* for an example of City of Kirkland language)

By legislation, administrative rules and court guidance, each Union has "ownership" of the job classifications within their bargaining unit and a corresponding duty to represent the people in those job classifications. The duty to represent includes both the preservation of the work itself and the number of FTEs allocated to perform it. (*Addendum B* - Resource Materials #1) Further,

the past practice and the history concerning how the work has historically been performed at that Employer's organization also influence this representation and the outsourcing opportunity.

As an example, the City of Sammamish has not historically provided its own individual law enforcement and fire services, whereas, the City of Bellevue has provided these as part of the municipal government. Therefore, the abilities and obligations of each are vastly different in regard to any current or future decisions as to contracting or outsourcing that type of work.

When the work is reduced due to economic downturn or variances in demand, Unions have been generally cooperative in working with the Employer (i.e. reductions in force, reduction in costs or in exploring alternatives to these). When the sole driver is more simply to reduce labor costs, a greater demonstration of necessity is called for by the Unions.<sup>2</sup> The opportunity or motive of increased efficiencies lies between these two standards.

There are a couple of general distinctions that are important with regard to Union work. Any changes that affect wages, hours, benefits, and/or working conditions require bargaining as a "mandatory subject" of bargaining. As to mandatory subjects, both the decision itself as well as the impacts must be bargained. With "permissive subjects," while there may be no duty to bargain the decision, there is a duty to give reasonable notice and an opportunity to bargain over the impacts of said action/decision.<sup>3</sup>

Management also has rights and obligations. This legal requirement to bargain is balanced with the very specific management rights and the prerogative to establish the budget. In general, Employer budgets are non-mandatory subjects of bargaining. Inherent in that management right to establish the budget is also the right to determine the number of FTEs assigned to that work (...and even whether or not to offer a service and at what level).<sup>4</sup>

The distinction of mandatory subjects of bargaining also affects "when" the parties need to negotiate. For example, a Union is not required to discuss a reduction as to the wage rate for a classification mid-term of a Collective Bargaining Agreement (CBA) but, upon receiving notice of a proposed lay-off, would have to either waive or meet and confer regarding the reduction of the represented position.

The core question therefore becomes, does management have to bargain the decision to "contract" or outsource bargaining unit work or does it have an obligation to bargain just the impacts and effects of that decision? The answer lies with Court-established "balancing tests."

A balancing test is applied when it comes to disagreements regarding whether the action of outsourcing is a mandatory subject of bargaining. It is case-by-case. This balancing test analyzes which of the following two characteristics predominate in the individual decision:

- (1) How much does the decision impact the employees' wages, hours or working conditions?, and/or
- (2) Is the action an essential management prerogative or right and, if so, what either authorizes or limits that right?<sup>5</sup> (For example, what does the CBA say?)

An additional balancing test is applied when an Employer decides to contract out or discontinue a service. Drawn from United States Supreme Court precedent,<sup>6</sup> this test for the requirement to bargain the decision focuses on examining whether or not the:

- (1) Employer's motivation was to reduce labor costs;
- (2) Employer continued to maintain control over the work performed;
- (3) Employer contributes to operating costs along with other public entities;
- (4) New contractor has its own facility, equipment, and employees;
- (4) Work performed is the same; and/or
- (5) Decision was "forced" on the Employer.

As an illustrative example, numerous public agencies in a variety of states have looked at fire service. A public agency's decision to discontinue its own fire service in favor of, for example, a Regional Fire Authority (or a private enterprise), may or may not require decision bargaining. If the decision is predominately based upon the desire to reduce labor costs, it probably would be deemed to be a mandatory subject. If, however, the action is predominately based upon seizing the opportunity to provide superior fire services to an area, partnerships with multiple other jurisdictions, legal requirements and/or other service and efficiency goals, etc. it probably would require bargaining of the impacts but may not require negotiation of the decision itself. (Of course, in this type of situation, the Union and the Employer may not necessarily agree as to the Employer's motives and, if contested, the above balancing test is applied.)

These balancing test and the rights and obligations of the parties may also be affected by the specific language of their respective Collective Bargaining Agreements.

A Union's recourse for the failure to bargain is to grieve, file a Unit Clarification complaint, or file an Unfair Labor Practice complaint. If these claims prevail, generally the Employer will be required to re-establish the "status quo" and also be sanctioned. Should they fail to prevail in these claims, in some instances a bargaining unit will simply "chase the work" and organize the employees of the contractor or other agency to become unionized.

### **The Kirkland Perspective**

It must first be underscored that the City of Kirkland has enjoyed great cooperation from our Unions in developing and providing quality services for the public. Efficiency and effectiveness are part of the continuous improvement efforts, and both management and labor has embraced a commitment to look for better ways to do things, while measuring historical and current performance.

The City is a unionized environment (84.5% of the COK employee population is represented by a Union<sup>7</sup>). The City has built good relationships with the Unions and as a result, has had the benefit of cooperation from the Unions when it became necessary. This has been true in regard to not just those relationships, but also in great flexibility as to "how" actual service and work gets accomplished.

In contrast to the private sector, Unions in the public sector have generally cooperated with work flexibility and change. This has most often occurred with a demonstration by the Employer of an opportunity for efficiencies or a lack of ability to be competitive in cost or production. However, as is often true in Kirkland, it is frequently the worker employees who have come up with and advocated for better ways of doing things.

It is also important to note that employees at Kirkland "wear many hats" and while the phrase "...does more with less" is not inherently popular at the City, its history demonstrates that the Kirkland workforce has characteristically responded to the challenge of efficiency and flexibility. For purposes of this discussion, it is important to recognize that many functions are "inter-mingled"

within individual performers, a concept that generally does not lend itself to dissecting the work for outsourcing purposes.

Kirkland has never been a "...it's not in my job description..." kind of place. This can be attributed to the respect that management and labor has for each other, as well as recognition of shared interests and a strong commitment to public service.

Additionally, Kirkland has been a leader in sharing this perspective with neighboring and regional groups. Looking at e-Gov Alliance as one example, Kirkland employees have advocated for synergy rather than protectionism in the quest for better ways to provide service.

While the public sector Unions are generally more cooperative and innovative, achieving this cooperation has sometimes required a demonstration by the Employer of the need for the change. An example that may be illustrative is the recent situation of the Washington State Printer Department. Legislation was proposed to eliminate the 100 employee, \$10 million function. The Washington State Labor Council rallied in opposition of this approach, believing the program to be effective, while at the same time generally cooperating with and supporting State budget reductions and a furlough program. After further study and analysis, it was ascertained that the State Printer was cost effective, when appropriate had already contracted significant pieces of work to the private sector and had modernized equipment and services. It was also demonstrated that most retained functions were important (and competitive in cost) to do "in-house" due to the timeliness and specialized requirements of the Legislature and various state agencies. Ultimately, it was ascertained that the opportunity for savings was not in the elimination of the service (or further contracting of pieces of the work) but through an administrative realignment or reorganization by moving the State Printer under the State Department of Information Services.

More direct to the question and the Kirkland situation, management and labor have historically cooperated in looking at opportunities to improve efficiencies, including many instances where that resulted in the outsourcing of some services. This has included multiple instances where the Employer put work flow or practices into place that affected bargaining unit work. Obviously, this fact is more easily achieved during "growth periods" than during down-sizing, however, recent events have continued to demonstrate that collaborative approach.

A noteworthy exception to this has been the recent NORCOM / Police Dispatch case, which clearly demonstrates not just the distinction between mandatory and permissive bargaining requirements, but also that Union resistance solidifies if "outsourcing" of the bargaining unit work actually results in a loss of positions or layoffs as a result of the Employer's decision.<sup>8</sup> When this occurs, even where the Employer has acted appropriately and for defensible reasons, significant costs and tensions can be associated.

To understand the opportunity and the challenges, it is helpful to examine the history. Whether as to work flexibility or other working conditions, Kirkland employees and its Unions have been collaborative. More specifically, when asked to participate in concessions, the Unions have generally acknowledged the general and specific economic realities, the City's budget shortfalls and the fact that the City looked at revenues, reserves service levels and expenditures as all part of the equation for potential solutions. As a result they participated in reductions of resources / FTEs, agreed to not fill vacancies, had lay-offs and generally agreed to a wage-reducing furlough program. Their question was: "...With less resources and people, will we as a City reduce service levels correspondingly?"

An illustrative example of the complexity of this situation may be in the Kirkland Planning Department. In accomplishing Planning activities, consultants have often been used in certain functions requiring greater specialized expertise, such as preparation of environmental impact statements, some components of comprehensive plan amendments and certain permit review components or long-range planning activities. The Union has understood and cooperated with this approach. This outsourcing made eminent sense and allowed in-house staff to focus on the Department's primary services and Kirkland-specific requirements. However, consulting dollars were among the first eliminated or reduced in the last biennium budget reduction process. At the same time, in-house resources and staff time were also reduced. The Union was then asked for additional concessions and agreed to these in an effort to avert the need for even further reductions. Therefore, even with a slow-down of development activities, the levels of service and associated priorities/timelines must be adjusted.

It should also be emphasized that, the current budget and economic challenges aside, the Kirkland management team (and City employees in general) are constantly looking for opportunities for the outsourcing of bodies of work or segments thereof. This includes an assessment of the pros/cons and cost benefit analysis. When it makes sense, management has proven they will pursue it. In other instances, cost or the complexity/timeliness of Kirkland's needs make it impractical at this time. For example, despite the number of independent payroll services, the complexity and specificity of Kirkland payroll would not lend itself to contracting. Further, as just one example of reviewing for cost opportunities, the IT Department continuously monitors the cost differential of outsourcing concerning certain services such as off-site data storage and hardware replacement. The same occurs in each of the City's departments.

Obviously, the Union cooperation has been hugely critical in meeting service needs and budget shortfalls. It is prudent to recognize that it is also accompanied by an increased "sensitivity" as to job preservation. As an example, most of our bargaining units voluntarily cooperated with the 3.4% wage reduction and furlough program, providing the City with a tool of \$1.1 million in aid in expenditure reductions for 2010. They understood this was part of their shared interest with the City to preserve jobs, avert lay-offs and minimize service level impacts. It is understandable that, from the Union perspective, contracting to further reduce costs would need to be more greatly justified than in other organizations where their respective Unions have not stepped up to make concessions.

It should also be identified that this Union sensitivity exists whether the bargaining unit work is being supplanted through outsourcing or the increased use of volunteers. Volunteers can be a great asset to the public sector, but can more readily be integrated and serve as a resource when utilized in supportive or additive functions, rather than in ways that are directly doing bargaining unit work, which must be negotiated. For example, an Ivy Pull is very different than volunteers mowing the lawns or otherwise maintaining City Parks. Similarly, volunteer participation in City coordinated neighborhood, community or event functions is very different than performing administrative or main street counter services at City Hall, from a Union perspective.

### **Conclusion**

With the continuance of increasing economic pressures, the trend by local governments to review and evaluate outsourcing opportunities in the public sector has increased. This is coupled with a greater review of all aspects of what do we do and how do we do it. The City has and will continue to consider the different perspectives, look at the benefits and challenges of our workload and how that work is accomplished. During that time, it will be important to continue partnering

with the Unions, the affected departments, and outside agencies to bridge the gaps and preserve the positive working relationships.

The last point is important: "preserving positive working relationships." There is no question that outsourcing of bargaining unit work has significant labor relations, employee relations and morale impacts. Especially with cooperative Unions, the wise Employer will be mindful of the legal and bargaining requirements of contracting, as well as assuring that the hoped-for gains can be accomplished and those gains are worth both the internal and external cost.

Outsourcing has and still remains an opportunity. The complexity of the work, the Kirkland specific requirements and the need for ongoing flexibility and responsiveness would seem to suggest that at Kirkland that opportunity may lie more-so in discreet aspects or functions, rather than whole services or programs. This will continue to be examined.

This Issue Paper is intended to illustrate some of the considerations and perspectives that should be acknowledged in any consideration of outsourcing. *Addendum A* also identifies some of the generic "Benefits and Challenges" of public sector outsourcing.

Council and City Manager consideration of these perspectives is appreciated. It is hoped they are of some assistance in the Budget process and your determinations of Kirkland's services.

## **Addendum A – Public Sector Outsourcing – Generic Benefits and Challenges**

When determining levels of service and workloads, outsourcing can be an opportunity for greater bandwidth. However, in our environment, it can be very complicated, comes at an internal and external price. What is a benefit can also be a challenge and vice versa. Below is a summarized list of some of the examples of the benefits and challenges to outsourcing:

### **Benefits**

**Expertise** – vendors or contractors may have more up-to-date information on a specific subject area or specialized knowledge that is needed on a case-by-case basis.

**Resource collaboration** – the opportunity to provide a superior experience or service to the public is possible in some discreet functions

**Cost savings** – the cost of doing business can be cheaper and economies of scale are possible for some functions

**Record keeping** – all materials are offsite which reduces overhead cost and improves disaster preservation and recovery

**Opportunity** – allows staff to focus on the primary functions of the organization

### **Challenges**

**Labor Relations** - collective bargaining agreements require negotiation with applicable Unions that can slow down or completely impede the process. The relationship between the Union and Employer can be adversely affected and cooperation on more important issues affected

**Expertise** - vendors may have more specialized knowledge but do not know how it integrates into the “big picture,” core services or mission of an organization

**Costs** – the upfront costs for transitioning to a vendor/contractor may be prohibitive, as well as ongoing fees. Part of the upfront costs is to also do a vigorous cost assessment of current costs (establish baseline) that discreetly measures the function and all associated costs

**Questionable Savings realization** - numerous studies have suggested that after the first couple of years, costs at the vendor tend to “float” back up to former levels mitigating any savings in the contract arrangement. This seems more-so true in services than in manufacturing and production contracting

**Costs to bring functions back in-house** – if outsourcing proves unsuccessful, there will be higher costs associated with bringing the function back in-house. Studies have suggested that the new cost is generally higher than formerly, while quality and performance suffer

**Responsibility** – contracting does not in itself alter or diminish the organization’s responsibility for the provision of the service

**Loss of Control** – the vendors’ service levels & quality of work may be below the employer’s standards of quality or performance

**Security/Productivity** – if vendor security is compromised, there may be an increase in downtime and a decrease in productivity

**Vendor selection and monitoring** – the selection and performance of the best vendors to meet COK’s needs could be challenging and time consuming

**Specialized computer systems** – certain computer systems are customized to an organizations needs and processes and may be hard to transition to vendors

**Interdepartmental synergy** – functions that require communication and coordination among multiple departments may be difficult for vendors to navigate



**Politics** – stakeholders may have vested interests in certain functions and are reluctant to outsource. Regardless of outsourcing, citizens expect the public agency to be ultimately accountable for the end-result service

**Employee morale** – employees will worry about job security and be concerned about the outsourcing of functions they perform, resulting in productivity loss and job shopping

**Recruit and Retain** - generally, when outsourcing becomes a fear, you lose the best, retain the rest and have difficulty recruiting to other positions

**Responsiveness** – vendors generally do not customize services or go beyond a narrow array of options. Therefore, the initial contract sets the terms and performance and is difficult to adjust to changing needs

## **Addendum B - References**

**Collective Bargaining Language** - 2009-2011 AFSCME Articles example:

### **21.1 MANAGEMENT RIGHTS AND RESPONSIBILITIES**

...The Employer has the right to assign work and determine the duties of employees; to schedule hours of work, to determine the number of personnel to be assigned at any time, to determine new work methods, to contract out bargaining unit work, for goods and services (provided that the Employer agrees to meet and confer with the Union regarding the impact of the decision), to perform all other functions not expressly limited by this Agreement....

### **5.3 CONTRACTORS**

The Employer will make good faith efforts to limit bargaining unit work to employees covered by this Agreement. "Contractors" who are not employees of the Employer will be permitted to do bargaining unit work where both the need is occasional and temporary and when there are not regular staff either qualified or available to do such work.

## **Footnotes:**

1. Restructuring Local Government – Privatization; 2006 Cornell University Study
2. NLRB v. Plymouth Stamping Div., 870 F.2d 1112 (6th Cir. 1989)
3. Permissive subjects of bargaining are those that are neither required nor prohibited and only indirectly affect wages, benefits and working conditions. For example, a "Union Recognition" clause is typical in most CBAs, however, it is a Permissive subject.
4. City of Anacortes, Decision 6830-A (PECB, 2000)
5. *Wapato School District*, Decision 10743 (PECB, 2010) at 3.
6. *Fibreboard Paper Products Corp. v. NLRB*, 379 US 203 (1964) and *First National Maintenance Corp. v. NLRB*, 452 US 666 (1981) NLRB v. Plymouth Stamping Div., 870 F.2d 1112 (6th Cir. 1989)
7. Of the 458 COK employees (as of 09/15/10 IFAS report), 387 of them are represented by Unions (AFSCME, IAFF, Police Guild, Police Guild Support Staff, PSEU and Teamsters). The other 71 employees are MAC – Management and Confidential – and are unrepresented.
8. City of Bellevue and Bellevue Police Support Guild, Decision 10830 (PECB, 2010)  
Note: While many rulings in the past have given the right to make outsourcing and service decisions to management, a recent ruling/decision by an examiner of the Washington State Public Employees Relation Commission (PERC) demonstrates reason for concern. In the

recent Bellevue NORCOM case, the examiner cited the Employer's decision to lay-off employees to be a mandatory subject of bargaining, suggesting that the decision itself needed to be bargained, not just the effects. It was also ruled however, that the Union waived the obligation to bargain the decision due to specific language in the Collective Bargaining Agreement providing for management's right to lay-off. A similar case is still outstanding and it is unknown if the Bellevue case will be appealed at this time.

**Resource materials:** (Please contact Human Resources for copies)

1. "Labor Relations Overview" – Kenny, May 27, 2008
2. City of Bellevue and Bellevue Police Support Guild, Decision 10830 (PECB, 2010)
  - Police Guild Brief
  - City of Bellevue Brief
  - Hearing Examiner's Decision
3. Restructuring Local Government – Privatization; 2006 Cornell University  
[http://government.cce.cornell.edu/doc/viewpage\\_r.asp?ID=Privatization](http://government.cce.cornell.edu/doc/viewpage_r.asp?ID=Privatization)