AB 1250 (JONES-SAWYER) **COUNTIES AND CITIES: CONTRACTS FOR PERSONAL SERVICES**
MAY 10, 2017 ASSEMBLY APPROPRIATIONS HEARING

BACKGROUND | SPECIAL COUNSEL REVIEW

Clients and private sector stakeholders have contacted MuniServices regarding proposed AB 1250 that would, beginning January 1, 2018, restrict cities and counties from entering into contracts for essential services.

MuniServices Government Relations team learned of AB 1250's amended language and the April 18 Assembly Public Employees, Retirement and Social Security Committee hearing during the final days of Spring Recess and immediately contacted the author's office and submitted a brief letter of concern and opposition. MuniServices respects and appreciates the valuable work provided by those who have dedicated their lives to public services. Our initial opposition is based on a foundational position that has been in place since MuniServices inception nearly 40 years ago that municipal agencies are unique and must retain the flexibility to make decisions and adopt policies that best meet the respective service needs.

City and county governments have a long history of addressing services delivery challenges with creativity, self-reliance and innovation. AB 1250 puts significant burdens on local businesses who attempt to bid on service contracts for cities and counties. Not only would this legislation hinder the ability for locals to provide services to residents, it would adversely affect businesses that contract with cities and counties.

MuniServices was invited to early stakeholder meetings with the author, sponsor and other local government representatives to discuss the respective concerns and possible common ground. We very much appreciate that the author and sponsor are willing to hear MuniServices' concerns and to find a way to craft agreeable language.

According to recent committee analysis several local agencies including several MuniServices clients, the League of California Cities, California State Association of Counties, and California Contract Cities Association oppose AB 1250. Because of AB 1250s complexity, and to provide the best feedback to the author, MuniServices asked its special counsel to review the measure (as amended April 25, 2017) and provide comments as they related to public contracts and procurement requirements. We have attached those comments which further underscore MuniServices' concerns and opposition to AB 1250. This communication can be forwarded to City Managers, City Attorneys, County Administrators, County Counsels, and others that may be evaluating AB 1250.

Please contact your Client Services Manager with any questions regarding this communication. MuniServices Government Relations Team can be reached at: Brenda Narayan (Brenda.Narayan@MuniServices.com/ 916.261.5147) or Fran Mancia (559.288.7296 / Fran.Mancia@MuniServices.com).

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May 3, 2017

The Honorable Reginald Jones-Sawyer
California State Assembly
State Capitol, Room 4126
Sacramento, CA 95814

Subject: **Assembly Bill 1250 (As Amended April 25, 2017). Counties and Cities: Contracts for Personal Services Notice of Opposition**

Dear Assembly Member Jones-Sawyer:

MuniServices regrets to inform you that we are opposed to AB 1250 (as amended April 25, 2017) that would place substantial roadblocks affecting and increasing the cost of most contracting services for cities and counties. AB 1250 sets up a complex process for cities and counties to follow when seeking to contract for various services, potentially including consulting and specialty services, as currently drafted.

AB 1250 puts significant burdens on local businesses who attempt to enter into service contracts with counties or cities. For example, the measure requires a potential contractor to provide private information related to salaries and benefits of employees, executives and officers, who must be identified by name; descriptions of all federal, state and local complaints against the contractor; descriptions of all civil complaints made in the last 10 years; and descriptions of all charges and complaints made against the contractor with any agency over the past 10 years.

Overall, AB 1250 would impose complex procedural demands that would vastly exceed any other procurement procedures that are currently required for cities or other public agencies. These procedures would restrict ordinary and necessary municipal operations without providing a public benefit. Instead, these procedures are more likely to increase the cost and decrease the quality of special services. This bill would subvert the public interest in cost-effective procurement of special services and retention of qualified service providers.

Also, AB 1250 does not specify how its provisions would be enforced. If an unsuccessful applicant for a municipal contract could bring a lawsuit challenging the award of a contract based on a claimed violation of these statutes, cities may find themselves mired in litigation between economic rivals. The threat of litigation could become a political tool for special interests seeking to oppose a city's action.

We respect and appreciate the valuable work provided by those who have dedicated their lives to public service. Local governments have a long history of addressing service delivery challenges with creativity, self-reliance and innovation. Unique local challenges and limited budgets continue to fuel innovative efforts to obtain expertise and provide high quality services. City employees provide many services, while others such as refuse collection and specialized or professional services are provided on a contract basis.

MuniServices for nearly 40 years has worked *exclusively* as partner to California's local governments in developing thoughtful revenue enhancement programs that work in conjunction with existing public services. We take pride in the relationships we establish with our local government partners and their highly skilled employees. It is only through our mutual cooperation that we deliver our services to the benefit of both the employees and the community. It is our position that municipal agencies are unique and must retain the flexibility to make decisions and adopt policies that best meet the respective service needs.

For the reasons stated above, MuniServices respectfully opposes AB 1250. If you have any questions regarding MuniServices position on this bill please do not hesitate to contact me. Ben Fay or Clare Gibson, Attorneys with Jarvis, Fay, Doporto & Gibson, LLP are also available to address the legal issues raised in this communication. Mr. Fay or Ms. Gibson can be reached at (510) 238-1400 or via email at bfay@jarvisfay.com or cgibson@jarvisfay.com, respectively.

Respectfully,

Brenda Narayan, Director of Government Relations
916.261.5147 or brenda.narayan@muniservices.com

CC: Members, Assembly Committee on Appropriations

DATE: May 8, 2017

TO: Brenda Narayan
Fran Mancia
MuniServices

FROM: Clare M. Gibson
Benjamin P. Fay
Special Counsel

RE: Comments on AB 1250 (as amended April 25, 2017)

This memorandum comments on AB 1250 as amended on **April 25, 2017**, and is informed by our extensive experience advising California cities on public contracts and procurement requirements. Our comments focus solely on Sections 3 and 4 of the bill, which pertain to cities, but most of the comments are equally applicable to the nearly identical Sections 1 and 2, which pertain to counties.

Legal Context:

To begin with, Sections 3 and 4 must be considered within the existing legal context, including Government Code section 37103,[1] which governs city authority to enter into contracts for specialized services. The two proposed city-related statutes (sections 37103.1 and 37103.2) would immediately follow existing section 37103, and would be interpreted in relationship to section 37103. They would also be construed in the context of the comprehensive body of case law pertaining to section 37103 and the expansive legal power for cities to contract for specialized services. Section 37103 states:

> "The legislative body [of a city] 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."

Any court called upon to interpret the provisions of AB 1250 would consider it within this related and relevant legal context.

[1] All subsequent statutory references are to the Government Code.

Overall, this bill would impose complex procedural requirements that would significantly exceed any other procurement procedures that currently apply to cities or other public agencies under California law. For example, the procurement procedures that would apply to a small, routine special service contract under this bill would be more demanding, time-consuming, and costly than the procurement procedures that currently apply to complex multi-million dollar infrastructure projects.

These added procedures would impair ordinary and necessary municipal operations without providing any clear public benefit. Instead, these procedures are likely to increase the cost and decrease the quality and availability of special services, as explained in greater detail below. As such this bill is inconsistent with the well-established public policy interest in granting cities broad discretion to engage in cost-effective procurement of special services and retention of qualified service providers.

Comments on proposed new section 37103.1 (Section 3):

As a threshold matter, this section applies to "personal services contracts" but there is no definition for "personal services contracts." Without a clear definition for this key term there is no way to objectively determine which contracts would be subject to these provisions and which would not. Contracting parties—both the awarding agency and the service provider—would be deprived of certainty as to applicable procurement requirements at the outset, and this may result in over-application or under-application of the law. This imprecision and uncertainty would likely generate considerable litigation. It would be left to the courts to determine which contracts are "personal services contracts" subject to these proposed new statutes. It could take many years and extensive litigation and appeals before this could be fully resolved by the courts.

As a matter of custom and practice, the term "personal services contracts" is generally used to refer to a wide variety of service contracts, including, but not limited to, the specialized services addressed in section 37103. Without a clear and precise definition, it is not possible to discern whether this bill applies only to those specialized service contracts encompassed by section 37103, or whether this has an even broader reach to *all* types of personal services contracts—unless expressly exempted.

While keeping in mind this fundamental concern about the undefined scope and reach of the statute as a whole, we offer the following comments on specific provisions within proposed new section 37103.1:

- Subdiv. (a): "*If otherwise permitted by law, a city or city agency may contract for **personal services** currently or **customarily** performed by **city employees** when all the following conditions are met:*" (Emphasis added.)

  This provision will be subject to dispute and to litigation because there is no *objective* basis to determine what is meant by "personal services currently or customarily performed by city employees."

  - The term "personal services" is not defined.

  - "Customarily" is a subjective term. Who has authority to determine which services are "customarily" performed by city employees?

  - It is not clear whether "city employees" means the employees of that particular city or all cities.

  - These compounded ambiguities mean it will be left to the courts to construe the scope and application of this provision. However, as drafted, the courts will not be supplied with sufficient objective terms or standards to facilitate consistent interpretation, which may result in conflicting court rulings. Until there is clear appellate case law guidance, cities (and counties) and service providers will be at risk for costly legal challenges.

- Subdiv. (a)(1): "*The city council or city agency clearly demonstrates that the proposed contract will result in actual **overall cost savings** to the city for the duration of the entire contract as compared with the city's **actual costs** of providing the **same services**, provided that:"* (Emphasis added.)

  - The requirement to demonstrate "overall cost savings" is inconsistent with the expansive discretion granted under section 37103, which provides that a city "may pay such compensation to these experts as it deems proper." It is difficult to predict how the courts would resolve this apparent inconsistency, given that it is not clear whether AB 1250 applies to service contracts subject to section 37103.

  - The requirement to demonstrate "overall cost savings" implies that the purpose of this statute is to promote cost savings. However, the procurement procedures required under this proposed statute would substantially increase the cost for contracting for services that cannot be provided by a city's employees—

particularly while it remains unclear which service contracts would be subject to these new requirements.

- It will also be difficult to implement or enforce this provision because it is not possible to objectively determine "the city's **actual costs** of providing the **same services**." (Emphasis added.)

  - It cannot be objectively determined what constitutes the "same services." For example, if a city employs a city attorney with general expertise in municipal law, but requires the highly specialized services of bond counsel, would that constitute the "same services" since both the city attorney and bond counsel provide legal services? As drafted, that is a plausible interpretation.

  - The "actual costs" cannot be determined if there are no "actual costs" to use as a point of comparison. For example, if a city needs to hire a tax or revenue specialist and there is no city employee providing such services, how would "actual costs" be determined?

- Subdiv. (a)(1)(A): "*In comparing costs, there shall be included the city's additional cost of providing the **same service** as proposed by a contractor. These additional costs shall include the salaries and benefits of additional staff that would be needed and the cost of additional space, equipment, and materials needed to perform the function.*" (Emphasis added.)

  Again, it cannot be objectively determined what constitutes the "same service." There cannot be any meaningful cost comparison without defining the "same service."

- Subdiv. (a)(1)(B): "*In comparing costs, there shall not be included the city's indirect overhead costs unless these costs can be attributed solely to the function in question and would not exist if that function was not performed in city service. Indirect overhead costs shall mean the pro rata share of existing administrative salaries and benefits, rents, equipment costs, utilities, and materials.*"

  Excluding the city's "indirect overhead costs," but not the consultant's overhead, will unfairly affect the outcome of a cost comparison, because a consultant's fees, whether charged on a lump sum or hourly basis, will factor in the consultant's "indirect overhead costs."

- Subdiv. (a)(1)(C): "*In comparing costs, there shall be included in the cost of a contractor providing a service any* ***continuing city costs*** *that would be directly associated with the contracted function. These continuing city costs shall include, but not be limited to, those for inspections, supervision, and monitoring.*" (Emphasis added.)

  It is not clear which "continuing city costs" would be "directly associated with the contracted function." More importantly, it would not be relevant to a cost comparison since those city costs (whatever they might be) would presumably be incurred regardless of whether the services are being provided by an employee or an outside specialist.

- Subdiv. (a)(2): "*Proposals to contract out work shall not be approved solely on the basis that savings will result from lower contractor pay rates or benefits. Proposals to contract out work shall be eligible for approval if the contractor's wages are at the industry's level and do not significantly undercut city pay rates.*"

  The wages paid by a service provider are not relevant to determining "actual overall cost savings," because the cost savings relates solely to the cost of the *particular contract*. For example, if a city retains the services of a nationwide accounting firm to provide specialized accounting services, the cost comparison for providing those services in-house will depend on the cost of that particular service *contract*, regardless of the nationwide wage schedule of the accounting firm.

- Subdiv. (a)(4): "*The contract does not cause vacant positions in city employment to remain unfilled.*"

  This provision would be difficult to implement or enforce because there is no objective basis to determine the causal relationship between retention of services under contract and vacancy of a position: A position may be vacant due to the lack of interested or qualified candidates, which is a recurring problem for cities in remote and rural areas. This requirement would place an additional burden on remote and rural municipalities.

- Subdiv. (a)(5): "*The contract does not adversely affect the city's affirmative action efforts.*"

  This provision is problematic because there is no correlation between "affirmative action efforts" and "overall cost savings." Further, the reference to "affirmative action efforts" is unclear because preferential treatment is illegal in California. (Cal. Const. Art. I, § 31, subd.(a).)

- Subdiv. (a)(6): "*The savings should be large enough to ensure that they will not be eliminated by private sector and city cost fluctuations that could normally be expected during the contracting period.*"

  This provision would be subject to abuse because it appears to require economic forecasting without any objective standard or metrics. Moreover, most service contracts are not subject to cost fluctuations: the cost is set when the parties enter into the contract and cannot change unless the contract expressly allows for cost adjustments.

- Subdiv. (a)(7): "*The amount of savings **clearly justifies** the size and duration of the contracting agreement.*" (Emphasis added.)

  This provision would be difficult to implement or enforce because the term "clearly justifies" is subjective. There is no objective standard for a city to determine whether the cost savings from a proposed personal services contract would "clearly" justify the proposed contract.

- Subdiv. (a)(8): "*The contract is awarded through a **publicized, competitive bidding process**. The city shall reserve the right to reject any and all bids or proposals.*" (Emphasis added.)

  This provision would significantly increase the cost for procurement of municipal consulting or special services throughout California, and would be inconsistent with current laws and policies pertaining to public service procurements.

  - Cities routinely rely on outside specialists for matters that arise on an episodic basis, or for which the city has no qualified staff. This is especially true for smaller municipalities with a very limited staff pool. Generally what matters most for these service contracts is the relevant experience and expertise of the consultant. This is reflected in the unfettered discretion afforded under section 37103 to "pay such compensation to these experts as it [a city] deems proper." In addition, cities have broad discretion under constitutional and statutory provisions that apply to hiring design professionals, where price is not required to be the determining factor. (See Cal. Const. Art. XXII and Govt. Code section 4529.10 et seq.)

  - Although the requirements are not specified, based on existing public bidding laws a "publicized, competitive bidding process" would presumably require 1)

published notice in a newspaper of general circulation, 2) submission of bids, and 3) award to the lowest bidder without regard to any other qualifications. A *bid* is simply a price quote, as distinguished from a service *proposal* that is evaluated based on components in addition to price, such as experience, qualifications, proposed schedule, proposed staffing, etc.

- Eliminating a city's discretion to retain the best qualified consultants by limiting award to the low bidder is likely to result in a substantial and statewide reduction in the level of services provided if public services are provided by cheap, but underqualified, consultants.

- Public *bidding* is generally limited to procurements where the end product is (at least in theory) identical, regardless of who provides the services, most notably for construction contracts where the final product is pre-determined by the project specifications rather than by the competing bidders. As such, cost can be the sole determinative factor (on the assumption that the competing bidders meet the threshold qualifications as "responsible" bidders). With special services there is often no pre-determined end product, so the selection process properly depends on factors in addition to cost, including relative experience, qualifications, staff capacity, etc. That is why bidding is generally not required for special service agreements that require more nuanced selection criteria. Public bidding is not a problematic procurement method for special services where cost should not be the sole determining factor.

- Noticed public bidding is costly. Requiring public bidding will add a new layer of costs to routine service or consulting procurements, which is inconsistent with the objective of "overall actual cost savings."

- Subdiv. (a)(9): "*The contract includes specific provisions pertaining to the qualifications of the staff that will perform the work under the contract, as well as assurance that the contractor's hiring practices meet applicable nondiscrimination, affirmative action* ***standards.***" (Emphasis added.)

  This provision imposes mandatory contract terms, rather than a basis for comparing cost savings. While standards for the qualifications of individuals providing special services are important, they are not relevant to determining "overall actual cost savings." It is also unclear what "standards" are referenced. If this is intended to refer to existing laws, regulations, or ordinances prohibiting discrimination, the law is already applicable, regardless of whether it is referenced in the contract. Most municipal service

contracts routinely include provisions pertaining to staffing qualifications and most also prohibit discrimination. This provision is unnecessary. In addition, as already noted, preferential treatment is illegal in California. (Cal. Const. Art. I, § 31, subd.(a).)

- Subdiv. (a)(10): "*The potential for future economic risk to the city from potential contractor rate increases is minimal.*"

  This provision appears to require speculation as to potential rate increases. However, most municipal service contracts are not at "risk" for rate increases, either because 1) they are based on a lump sum price, 2) the hourly rates are fixed, or 3) the contract forbids any cost increases without city approval.

- Subdiv. (a)(11): "*The contract is with a firm. "Firm" means a corporation, partnership, nonprofit organization, or sole proprietorship.*"

  The public interest is unlikely to be served by limiting service contracts to "firms." The best qualified service provider for a particular need may be a sole practitioner, particularly in remote or rural areas. This is often the case for semi-retired former city attorneys who may be hired to provide interim legal services when the city attorney has resigned or been dismissed and a new city attorney has not yet been selected. This is true for many other types of limited or intermittent special service contracts.

- Subdiv. (a)(12): "*The potential economic advantage of contracting is not outweighed by the public's interest in having a particular function performed directly by city government. Before executing a contract for personal services under this section, the city shall demonstrate that outsourcing the particular functions at issue is in the public interest, addressing the cost of the contract, the cost of administering the contract, the effect on the quality of services provided to the public, and any other relevant circumstances.*"

  The balancing test required by this provision is predicated on the assumption that there is a public interest "in having a particular function performed directly by city government [employees]." This assumption may be subject to legal challenge on the basis that it is inconsistent with the well-established public interest in cost-effective procurement that results in retention of the best qualified service provider. Moreover, because this provision calls for a subjective determination, implementation and enforcement would be uncertain and subject to litigation.

- Subdiv. (a)(13): "*The contract shall provide that it may be terminated at any time by the city without the penalty if there is a material breach of the contract and notice is provided at least 30 days before termination.*"

  This provision, which imposes mandatory contract terms, is also unrelated to assessment of cost savings during a procurement process. Most municipal service contracts already contain effective and sophisticated termination provisions which often include the opportunity to cure and correct a breach, as well as a shorter time period for notice, both of which inure to the benefit of the municipality and the public its serves. This requirement would impair a city's ability to craft termination terms that are more tailored to the particular procurement and to the city's specific needs.

- Subdiv. (a)(14): "*The city shall provide an orientation to employees of the contractor who will perform services pursuant to the contract. The orientation shall include, but is not limited to, all of the following:*"

  This provision is also unrelated to assessment of cost savings during a procurement process and will impose an additional cost burden on cities. Most municipal services contracts already contain provisions regarding the obligations of the service provider and its employees relative to the specific scope of work. This requirement would impair a city's ability to craft contract terms that are tailored to the particular procurement and to the city's specific needs. It would also add an additional layer of cost to the service agreement without any commensurate benefit to the city or to the public.

- Subdiv. (a)(15): "*If the contract is for personal services in excess of one hundred thousand dollars ($100,000) annually, all of the following shall occur:"*

  The disclosures required by this provision are not relevant to determining the "overall actual cost savings," but rather, discourage service providers from entering into a service agreement with a city, if the cost will exceed $100,000—which appears to be an arbitrary dollar threshold.

  - Subdiv. (a)(15)(A): *"The city shall require the contractor to disclose all of the following information as part of its bid, application, or answer to a request for proposal:*

    (i) A description of all charges, claims, or complaints filed against the contractor with any federal, state, or local administrative agency during the prior 10 years.

(ii) A description of all civil complaints filed against the contractor in any state or federal court during the prior 10 years.

(iii) A description of all state or federal criminal complaints or indictments filed against the contractor, or any of its officers, directors, or managers, at any time.

(iv) A description of any debarments of the contractor by any public agency or licensing body at any time.

(v) The total compensation, including salaries and benefits, the contractor provides to workers performing work similar to that to be provided under the contract.

(vi) The total compensation, including salaries, benefits, options, and any other form of compensation, provided to the five highest compensated officers, directors, executives, or employees of the contractor.

(vii) Any other information the city deems necessary to ensure compliance with this section."

The requirements under (A)(v) and (vi) for disclosure of compensation and benefits provided within an organization would make private compensation arrangements public with no apparent public gain, and with the likely consequence of discouraging private firms from contracting with municipalities. This requirement is also subject to constitutional challenge for violating the "inalienable" right to privacy. (Cal. Const. Art. I, § 1.) Municipal requests for qualifications (RFQs) or requests for proposals (RFPs) routinely seek background information similar to that required under items (i)-(iv). Cities are already well-versed in crafting RFQs and RFPs to elicit information relevant to the specific procurement. Mandating such detailed disclosures for every routine or short-term service contract will place an undue burden on cities and on service providers.

- Subdiv. (a)(15)(B): "*Prior to entering into the contract, the city shall conduct, and make public, a cost-benefit analysis considering the potential impact of outsourcing the work covered by the contract. The analysis shall include:*

  (i) The potential loss of employment opportunities within the city and resultant loss of income to workers.

  (ii) The impact on local businesses if consumer spending power is reduced as a result of reduced wages under the contract.

(iii) The impact on the city's ability to provide social services and the effect of any reduction in social services on city residents.

(iv) Potential impacts on the environment, if any."

The requirement under (B) for conducting an *additional* cost-benefit analysis before entering into a service contract is largely duplicative of the core requirement in subdiv. (a)(1) that the city first demonstrate the "overall cost savings." It also requires speculation on "employment opportunities," "consumer spending power," "social services," and the "environment," regardless of whether any of these categories relates to the subject matter of the service agreement. For example, a city would have to perform a cost-benefit analysis of each of these items for specialized legal or financial services, even if the required services are unrelated to "consumer spending power" or "social services." This provision would add cost to the public procurement of professional services without delivering any appreciable benefit.

- Subdiv. (a)(15)(C): "*Prospective contractors shall reimburse the city for the cost of the cost-benefit analysis."*

  The requirement under (C) for the service provider to pay for the cost of the cost-benefit analysis will ultimately add to the public cost for special services, since the cost for the analysis will inevitably be factored in to the cost for providing the services. In other words, the *public*, and not the service provider, will ultimately pay for the cost of the cost-benefit analysis. This will also impair a city's ability to perform a fair and balanced cost comparison.

- Subdiv. (a)(15)(D): *"The contract shall provide that the city is entitled to receive a copy of any records related to the contractor's or any subcontractor's performance of the contract, and that any such records shall be subject to the California Public Records Act (Chapter 5 (commencing with Section 6250) of Division 7 of Title 1). In furtherance of this subdivision, contractors and any subcontractors shall maintain records related to performance of the contract that ordinarily would be maintained by the city in performing the same functions."*

  The mandated contract requirements under (D) are unnecessary because most city service contracts already require the service provider to maintain records related to the services provided, and most specify a period of 3-4 years for retaining those records. In addition, the last sentence in this provision will be difficult to implement or enforce because there is no objective way to determine

which records would "ordinarily be maintained by the city," or to interpret the scope and meaning of "the same functions."

- Subdiv. (a)(15)(E): *"(1) The city shall include in the contract specific, measurable performance standards and provisions for a performance audit by the city, or an independent auditor approved by the city, to determine whether the performance standards are being met and whether the contractor is in compliance with applicable laws and regulations. The legislative body shall not renew or extend the contract prior to receiving and considering the audit report.*

  (2) The contractor shall reimburse the city for the cost of the audit."

  The mandated contract requirements under (E) are also unnecessary because most city service agreements already specify the performance standards that are important to that city for that particular service agreement. These service agreements are managed and administered by knowledgeable city staff who are in a better position than an outside auditor to evaluate the service provider's performance relative to the city's needs and expectations.

  Requiring the service provider to pay for the cost of the audit will only add to the cost for special services, since the cost for such an audit will inevitably be factored in to the cost for providing the services. In other words, the *public*, and not the service provider, will ultimately pay for the cost of the audit.

- Subdiv. (c): "*When otherwise permitted by law, the absence of any requirement of subdivision (a) shall not prevent personal services contracting when any of the following conditions are met:*"

  It is not clear what is meant by "the absence of any requirement of subdivision (a)." Regardless of the meaning of the introductory provision, the remainder of subdiv. (c) are apparent exceptions to the requirements of subdiv. (a). Most of the exceptions are vague and rely on subjective rather than objective measurements. Even if these exceptions were drafted with greater clarity, that would not resolve the problem of determining with certainty which service contracts would remain subject to subdiv. (a) for the reasons discussed above, including the lack of definition for "personal services."

- Subdiv. (d): "*All persons who provide services to a city under conditions constituting an employment relationship shall be employed directly by the city.*"

This provision would be difficult to implement or enforce because the phrase "conditions constituting employment relationship" is subject to a wide range of interpretation. Even if this was clarified, mandating employment of any person by a city is both unfair to the city, which might not have funding available, and unfair to the service provider, who may have no interest in becoming a city employee.

Comments on proposed new section 37103.2 (Section 4):

All public contracts are already subject to disclosure under the Public Records Act. Creation and maintenance of a separate public database for all contracts over $5 million will create substantial costs and burdens for cities. It is not clear what the consequences would be if due to ordinary human error, a contract subject to this provision was not posted on the online database.

- Subdiv. (a)(8)-(9): "*(a) Each city shall maintain on its Internet Web site [sic] a searchable database of all contracts of an annual value in excess of five million dollars ($5,000,000) entered into pursuant to Section 37103.1. The database shall include, but is not limited to, the following: . . . .*

  *(8) The **names of the employees** of the contactor and any subcontractors providing services pursuant to the contract and their hourly pay rates, and the total number of full-time equivalent positions involved in performing the services under the contract.*

  *(9) The **names of any workers** providing services pursuant to the contract as independent contractors and the compensation rates for such workers.*" (Emphasis added.)

  The requirements to include the names and compensation of the service provider's employees are intrusive and may infringe on "inalienable" individual privacy rights which are protected under the California Constitution. (Cal. Const. Art. I, § 1.) This would also discourage service providers from contracting with cities, as discussed above with regarding to subdiv. (a)(16) of section 37103.1. If the pool of qualified service providers is diminished, the likely consequence is that competition will be reduced, and prices will increase.

Comments on potential litigation:

The bill does not specify how its provisions would be enforced, but as noted in the comments above, many of its provisions are likely to attract legal challenges. If an unsuccessful competitor for a municipal (or county) services contract could bring a lawsuit challenging the award of a contract based on a claimed violation of these statutes—in whole or in part—cities (and counties) may find themselves mired in litigation between economic rivals. The threat of litigation could also arise from special interests seeking to oppose a city's action for other reasons. As such, this bill could steeply increase the cost to contract for any special services that might *arguably* be subject to the strictures of this bill—even contracts for services that the drafters did not intend to include within the ambit of this bill.