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# MEMORANDUM

DATE: March 29, 2018

TO: Barbie Robinson
Director, Department of Health Services

FROM: Jeff Berk

RE: EMS EOA Issues Memo

## I. INTRODUCTION

In 2008, the Department of Health Services conducted an RFP for an Exclusive Operating Agreement (EOA) for Emergency Medical Services (EMS) for the Santa Rosa area. The contract was awarded to AMR. That contract expires June 30, 2019. The Department is holding stakeholder meetings to provide and obtain information to be used in preparing the new RFP. Questions have arisen during this process. This memo will try to address those questions.

## II. QUESTIONS

### A. At what point in the development of a new EOA franchise RFP should potential bidders be excluded from further participation in stakeholder discussions? Are there specific topics or levels of detail that should not be shared with potential bidders?

The legal concerns for any RFP are the same and include avoiding any conflicts of interest and trying to ensure a fair process. I am not aware of any possible conflicts in this case. My understanding of the process is that the meetings are noticed and open to all stakeholders and, so long as no potential bidders have any ex parte (one-sided) communications with county staff, I do not see any fairness issues. I am not aware of any specific topics that cannot be discussed in the meetings.

Once staff determines there have been sufficient meetings and the drafting of the RFP begins, there should be no further discussions with stakeholders/potential bidders. The state has issued Guidelines on the RFP process, which provide for a "Responders Conference" after the RFP has been issued. The Guidelines state that this "should be the only time that RFP questions are answered. This will ensure that all prospective responders receive the same information."

**B. What is the legal framework establishing which authorities are available to the Board of Supervisors and which are available to the EMS acting as LEMSA as it applies to Sonoma County, a general law county?**

The legal framework for the regulation of prehospital care is established by the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act ("Act") and California Health and Safety Code sections 1797-1799.201. The Act created the State of California EMS Authority ("Authority"), as the state agency responsible for coordination and integration of all state activities concerning EMS and invested the Authority with the power to create regulations implementing the Act. The regulations issued by the Authority are in the California Code of Regulations (CCR) Title 22, Sections 100000-100334.

The Act also authorized each county to develop an EMS program by creating a Local EMS Agency (LEMSA) to administer the Act at the county level. Section 1797.200 gives a county four options in designating a local EMS agency: (1) Use the county health department; (2) Establish an agency operated by the county; (3) Contract with an entity; or (4) Create a joint powers agency. In 1980, the County designated the Department of Health Services as the local EMS agency (the LEMSA).

The LEMSA is responsible for, among other things: (1) Planning, implementing and evaluating an EMS system, consisting of an organized pattern of readiness and responsive services based on public and private agreements and operational procedures (section 1797.204); (2) Developing a formal plan for the system in accordance with the Authority's guidelines and submitting a plan to the Authority on an annual basis (sections 1797.250 and 1797.254); and (3) Consistent with such plan, coordinating and facilitating arrangements necessary to develop the EMS system (section 1797.252). Once a local EMS agency implements a system, all providers of prehospital EMS within its jurisdiction must operate within that system (section 1797.178).

There are some sections of the Act that created separate roles for the Board and LEMSA. The sections have had some limited review of the Courts and Attorney General. The Act permits a "county, upon the recommendation of the local EMS agency, to 'adopt ordinances governing the transport of a patient who is receiving care in the field from prehospital emergency personal'" Section 1797.222.

Section 1797.224 provides, in relevant part, "A local EMS agency may create one or more EOA in the development of a local EMS plan…" An EOA is defined as "an EMS area…for which a local EMS agency, upon the recommendation of a county, restricts operations to one or more emergency ambulance services…" Section 1797.85. One court looked at these sections, the relationship between a board of supervisors and the local EMS agency, and the significance of the word "recommendation" in these code sections. The court stated: "The Board is not authorized by statute to establish an EOA; only the local agency can do so. . . . It is apparent that, by requiring the EOA decision to be made by the local agency, which is in turn required to have a physician as its medical director, the Legislature sought to make the EOA decision a professional, not a political, determination. . . . If a board of supervisors impermissibly usurps the powers of a local agency and actually adopts an EOA, that action properly could be challenged in legal proceedings." However, the court also noted that: "We are not confronted in this case with questions about the exact nature of the 'recommendation' relationship between the Board and the local EMS agency. Accordingly, we intimate no views on that subject." *Memorial Hospitals Association v Randol* (1995) 38 Cal. App. 4th 1300

Interestingly, the County was sued in the 1990's by an ambulance agency that claimed, in part, that the creation of an EOA should be enjoined because the Board, not the LEMSA, created it. The ambulance company cited *Memorial Hospital* to support its position. The County argued it established the EOA by adopting the recommendation of the LEMSA, which is permissible under Memorial Hospital. The court never reached the issue, as it ruled against the ambulance company on procedural grounds. *Redwood Empire Life Support v County of Sonoma* (1999) 190 F.3d 949

In one other area in the Act, the Attorney General expressed an opinion on the relationship between a county board of supervisors and an EMS agency. The AG concluded that the EMS agency, not the board, has the authority to designate local trauma facilities in the county. The AG had reviewed section 1798.165 of the Act and the Authority's regulations and reasoned that such designations are "not a local issue to be resolved politically, but instead a medical decision to be made by medically trained officials in carrying out the Act's purposes of providing "the State with a statewide system for EMS." (AG opinions are not binding like court decisions, but they are entitled to great weight.) (1998) 81 Ops. Cal. Atty. Gen. 349.

Question 'B' further asks what the LEMSA's authority is regarding several specific topics discussed below.

(1) MEDICAL CONTROL

Section 1797.90 defines "medical control" as the medical management of the emergency medical services system. Section 1798 provides that the medical direction and management of an emergency medical services system shall be under the medical control of the medical director of the local EMS agency. This section adds that this medical control shall be maintained in accordance with standards adopted by the Authority. See Regulation 100170. Finally, section 1797.220 provides that medical control includes dispatch, patient designation policies, patient care guidelines, and quality assurance requirements.

The California Supreme Court has interpreted these code sections regarding medical control. The court explained that the Act's language confirms "the Legislature conceived of 'medical control' in fairly expansive terms, encompassing matters directly related to regulating the quality of emergency medical services, including policies and procedures governing dispatch and patient care." Other subjects of medical control include those policies designed to improve the "speed and effectiveness" of emergency response, as well as "how the various providers will interact at the emergency scene." As the court summarized, a policy constitutes medical control so long as it is "medically related," that is, whether it affects patient outcomes**.** The court distinguished this from providers retaining control of "purely internal administrative matters, such a
s the level of and deployment of staff." County of San Bernardino v City of San Bernardino (1997) 15 Cal. 4th 909.

(2) EXCLUSIVE OPERATING AREA

As discussed above, section 1797.85 defines "exclusive operating area" as an area defined in the EMS plan for when a local EMS agency, upon the recommendation of a county, restricts operations to one or more emerging ambulance services or providers.

Section 1797.224 allows a local EMS agency to create an EOA in the development of a local plan, if a competitive process is used to select the provider(s). The local EMS agency electing to create an EOA shall develop and submit, as part of its plan, to the Authority for review and approval, the competitive process used for selecting providers.

Section 1797.224 also provides that an EOA can be created without a competitive process if an existing provider has been "operating within a local EMS area in the manner and scope in which the services have been provided without interruption since January 1, 1981."

As mentioned above, the Authority issued Guideline 141 to advise local EMS agencies on the RFP process. It explains that the RFP should list specific services to be provided, in addition to other contractual requirements. The Guideline provides a list of proposed contents

for the RFP, which includes asking about the prospective contractor's experience and qualifications.

Concerns of the Board of Supervisors in deciding whether to approve or deny an EOA agreement include confirming that the appropriate procurement procedures were followed and that any risk to the County is in balance with the benefits of having a regulated accountable service provider.

(3) NON-COMPETITIVE OPERATING AREAS

Other than section 1797.224, no other section specifically provides a method to create exclusivity. Some have argued that the grandfathering provision under section 1797.201 (commonly referred to as "201 rights") creates exclusivity. No California court decision specifically addresses this issue. However, there are two court decisions in which the County was sued and those decisions resulted in defined non-competitive operating areas.

In the first decision, in the early 1990's, the County authorized an ambulance service to operate in a portion of the unincorporated area that had been served by the Petaluma Fire Department. Petaluma claimed that the County was precluded from doing so. A question before the court was to define the scope of the area grandfathered in under section 1797.201. In a published decision (which means attorneys can cite it in court as legal authority), the California Court of Appeal stated that this section did not allow Petaluma to provide exclusive service outside its borders. Thus, Petaluma's "201 rights", or non-competitive operating area, were exclusive within its city boundaries, but not beyond. See City of Petaluma v County of Sonoma (1993) 12 Cal. App. 4th 1239.

In the other case, in 1993, the Sonoma County Superior Court ruled that Glen Ellen, Schell Vista and Valley of the Moon Fire Protection Districts could exclusively provide EMS services within their respective jurisdictions. Because this decision is only a superior court case, it is not citable in court as precedent, but it is binding on the parties to the case.

It should be pointed out that even though the courts in these cases have concluded that these agencies have 201 rights that are exclusive, they are still subject to a LEMSA's medical control.

In 2017, a federal district court in California issued a decision finding that 201 rights can be exclusive. In this case, a private ambulance company (AmeriCare) asked to be placed on rotation for EMS services within the geographic area of several cities in that county. The cities refused claiming that their 201 rights were exclusive. The local EMS agency was not named in the action. AmeriCare argued section 1797.224 was the only mechanism that allowed a local

EMS agency to create an exclusive operating area. The court dismissed AmeriCare's action, stating that "section 1797.224 explicitly states that "[n]othing in this section supercedes section 1797.201. Therefore, section 1797.224 does not limit in any way a city's authority to maintain a monopoly emergency ambulance service under section 1797.201 if that was the city's arrangement as of June 1, 1980." This case is on appeal to the Ninth Circuit Court of Appeals and a decision is expected later this year. AmeriCare v. City of Anaheim et al (2017)

(4) DISPATCH OF RESOURCES

As noted above, the California Supreme Court in the San Bernardino case found that policies and procedures governing dispatch are within the scope of the medical control provided by the LEMSA Medical Director. An Attorney General opinion issued after that decision further explained that emergency medical dispatch services are subject to review and approval of a local EMS agency even when the services are developed, implemented and operated in accordance with the Authority's Guidelines.

**C. What happens with exclusive operating area and non-competitive operating area boundaries that are co-terminus with an underlying governmental agency boundary when the underlying governmental agency boundary changes?**

Boundaries in an EOA agreement are determined by the contract, so changing boundary lines would have no impact. As to the impact on non-competitive operating areas, I am not aware of any statutory or case law on point. If boundary lines were to change, and there was a dispute among agencies as to who could continue to provide service in the "new" area, I think a court would look at the impact on a case-by-case basis. This would include a review section 1797.201, to determine whether the agency provided EMS services at the same level since June 1, 1980. A court would need to then look at applicable case law and determine whether those 201 rights are exclusive.