The Firehouse Lawyer

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HAPPY HALLOWEEN

On October 31, 2022, according to Governor Inslee's latest rescission order, the emergency declaration resulting from the Covid-19 outbreak will be no more. What does this mean to you, if you are an elected fire commissioner or a Fire Chief in Washington?

The rescission order is pertinent on several levels. However, this order is the culmination of a number of efforts by the Governor's office to gradually transition from an emergency mode to a set of procedures or rules more appropriate to a disease that is endemic in the state, rather than a life-threatening pandemic.

Our readers may recall that in May 2022 (effective June 1, 2022) the Governor rescinded Proclamation 20-28 that prohibited in-person public meetings and made changes to the Public Records Act as well. We wrote about that rescission in the May 2022 issue of the *Firehouse Lawyer*. After that change, we commented on the changes wrought by that order, taken together with ESHB 1329 (Chapter 115, Laws of 2022).

We stressed that it is now mandatory again that board meetings be held in-person at a specified time and place as set forth by resolution of the governing body, unless an emergency has been declared (local, state or federal emergency) and the board has determined that an in-person meeting

cannot be held with reasonable safety.[1] We now note that this rescission of the underlying emergency declaration by the Governor further underscores the need to return to in-person meetings as the general rule.

Of course, this change relates to more than just the OPMA.[2] Many of our clients adopted local emergency declarations in the last few years to enable the waiver of the need for competitive bidding. Typically, this was done by an order or memo of the Fire Chief. We have recommended that the Fire Chief in those cases should rescind those orders or memos in light of the latest Governor's rescission order. We are essentially returning to the status quo before the pandemic. In other words, there is still the "emergency" exception in RCW 39.04.280. In accordance with RCW 39.04.280(1)(c) and (1)(e), "in the event of an emergency" both purchases and public works need not be done through bidding, as long as the emergency is well documented.

We hasten to add that the rescission order raises numerous questions relating to the vaccine mandate as it affects health care providers such as EMTs and paramedics. As many of you know, especially in King County, many firefighters (EMTs) objected to vaccination requirements and requested accommodations, based primarily on religious grounds.[3] While departments/employers may have been willing to accept these accommodation requests, in many cases there were no ways to reasonably accommodate all of these employees without presenting a direct threat to the public health or to the safety and health of co-workers. Alternatively, some employers found that accommodating them and allowing them to continue to treat patients posed an undue burden or hardship on the employer or co-employees. The upshot of this controversy was that numerous firefighter/EMTs retired, went out on disability, were laid off, or were simply terminated.

Now the situation has drastically changed. With the Governor's rescission of the Covid-19 emergency declaration and the vaccine mandate for health care professionals in general, the question becomes: should (or can) these former employees be reinstated to their prior positions, if they so desire?

Our conclusion is that, lawfully, they can be reinstated to their prior positions—whether this works practically is another issue. We assume that some transitional work may be necessary to assure that such returnees are fit for duty and conversant with all of the protocols and rules that such patient-facing EMTs follow in the field. The situation is analogous to the return-to-work procedures commonly used after a long absence due to temporary disability. The question is being asked: does this reinstatement solution open up legal challenges or liabilities not heretofore

[1] https://www.firehouselawyer.com/Newsletters/May2022ExtraFinal.pdf

[2] But see our July 2021 Firehouse Lawyer discussing why virtual meetings are permissible so long as the meeting is held in a physical location and attendees can hear what is going on at the meeting: https://www.firehouselawyer.com/Newsletters/July2021FINAL.pdf

[3] https://www.firehouselawyer.com/Newsletters/AugustSeptember2021FINAL.pdf

contemplated? We have analyzed that potential concern exhaustively and concluded that, on balance, such liabilities or exposures are not significant obstacles to the reinstatement program.

One problem area has been noted by some King County Fire Chiefs. King County has taken the position that, notwithstanding the Governor's rescission order, their King County mandate that applies to all agencies that are county *contractors* is still in effect. If your agency has a contract with King County, pursuant to which your EMTs work at King County facilities, or other kinds of contracts, what does this mean? Most agencies have contracts with the county that entitle the fire agency to receive BLS funds from the county (from the county-wide EMS levy). Suppose you reinstate a few EMTs that previously applied for and received religious exemptions, but you were not able to reasonably accommodate them so they quit. In our opinion, you could reinstate them but expect them to observe strenuous preventive measures as part of a reasonable accommodation process. Even the latest message from the county acknowledges that the mandate must take into account exemptions and therefore accommodations. Also, the order still contains exceptions for "visitors" and "patrons." There is a difference between casual contact with a county worker or facility and actually working in a county facility for hours.

This does not mean, of course, that the employers' course of action in the first place, during the Covid-19 pandemic (and commensurately, during the pendency of the Governor's vaccine mandate) was inappropriate or illegal in the first instance. It was not. The actions of the Governor and also of the local governing bodies was defensible under the circumstances.

Those actions were in fact defended successfully in the few instances of litigation that worked their way through the legal system in Washington. Both the Governor's emergency declarations and the local governments' actions relative to patient-facing EMTs were successfully defended in court.

THE RESPONSIBLE BIDDER: WHAT IS PIGGYBACKING?

In the *Firehouse Lawyer,* and often in legal opinions and writing about the bid law exceptions, we often use the term "piggybacking" without defining it. The concept of piggybacking arises from the operation of RCW 39.34.030, a section of a statutory chapter on cooperative action between local governments, known as "The Interlocal Cooperation Act."

Specifically, RCW 39.34.030(5)(b) allows for an exception to the public bid law when "one or more public agencies" [is] "purchasing or otherwise contracting through a bid, proposal, or contract awarded by another public agency or by a group of public agencies… (emphasis added)." This statute goes on to provide that the bid law is satisfied if two prerequisites are met. First, the original agency that awarded the contract must have complied with its own statutory requirements (such as notice or advertisement). Second, that original agency must have either posted the bid or solicitation on their website or on the website of a purchasing cooperative or similar provider or provided an access link to the state's web portal to the notice in question.

We routinely provide a short interlocal agreement, to be executed between the "piggybacking agency" and the original agency that awarded the bid, just to be sure that the original agency is willing to have the procurement used for that purpose. It is also advisable to check the original specifications to see if the vendor assented to other agencies purchasing through that original bid, proposal, or solicitation.

Ordinarily, there are few obstacles to piggybacking but in every case, documentation and a proper paper trail ensures that an audit will not lead to a finding that competitive bidding should have been done.

We also caution clients to be aware that sometimes bids or solicitations become stale. For example, if the contract you want to piggyback on is more than two or three years old, you might want to reconsider. Also, if the price the vendor is now quoting is more than 15-20% above the original price, exclusive of added options, the auditor may question whether the item being purchased is truly the same item sold in the first instance.[4]

We think that in every case, it is best to consult your usual attorney before you just assume that you can piggyback on a prior procurement. That extra pair of (knowledgeable) eyes can often spot an issue that could lead to problems if not addressed.

DELEGATION DOCTRINE AGAIN

In the April 2022 *Firehouse Lawyer* we discussed the 2021 Court of Appeals decision in a case involving the prevailing wage law and the Association of General Contractors.[5] Now the Supreme Court has reversed the Court of Appeals and upheld the State's position.[6] The Court held it is constitutional for the legislature to delegate to the state's industrial statistician the discretion to adopt the prevailing wage from whichever collective bargaining agreement (CBA) covering work in a particular county has the highest wages, if such a CBA exists, to set the prevailing wage in a particular industry. The Court disagreed with the Court of Appeals, which found that the law at issue established no standards from which the industrial statistician should use to establish the prevailing wage. Indeed, the Court held that "highest collective bargaining agreement" standard was a very precise standard and it was not a delegation to the private parties that negotiated the contract.

The change of course by the Court does not surprise us actually, as we felt the Court of Appeals decision was a somewhat strict interpretation of the delegation doctrine in light of the leading case of *Barry & Barry v. Department of Motor Vehicles,* which provides a fairly broad interpretation of the right to delegate legislative authority.

RETIREMENT? NEVER!

Actually, the *Firehouse Lawyer* would like to announce that Joe Quinn is officially semi-retired. (Old lawyers seldom retire completely.) Joe closed out his practice—the firm known as Quinn & Quinn, P.S.—at the end of August. But do not despair. Joe will continue to practice law as "of counsel" to the law office of Eric T. Quinn, P.S. for the immediate future.

We would like to also announce that Joe is beginning to work with ESCi—Emergency

[4] The same is true in the context of using purchasing cooperatives, which we have discussed recently: https://firehouselawyer.com/Newsletters/August2022FINAL.pdf

[5] https://www.firehouselawyer.com/Newsletters/April2022FINAL.pdf

[6] https://www.courts.wa.gov/opinions/pdf/1002581.pdf

Services Consulting Inc.—as a consultant. Based on his more than 35 years of experience working with fire districts and regional fire authorities, Joe feels he has a lot to offer to agencies like these, and ESCi agreed.