



Finance and Administration Committee Agenda Item 5a

June 21, 2017

Item Name: Addition of Provision to CalPERS' Contracts Encouraging Management Neutrality in Labor Organizing Activities

Program: Operations Support Services Division

Item Type: Action

Recommendation

Add a new provision to CalPERS' contracts with its contractors that supports and encourages management neutrality with respect to labor organizing activities.

Executive Summary

At the request of the State Treasurer, OSSD presented an agenda item to the Committee on February 14, 2017 (Attachment 1) regarding the potential application of the Responsible Contractor Program (RCP) to all CalPERS contracts. The agenda item contained background information on the RCP and identified the eight current CalPERS contract terms that support fair employment practices. CalPERS' contracting activity is currently governed by CalPERS' contracting policies and the California Public Contract Code.

At the May 16, 2017 Committee meeting, the Treasurer requested that we return with options for adding a provision to CalPERS' contracts addressing management neutrality in labor organizing activities, and enforcing labor neutrality. This agenda item presents those options.

Strategic Plan

This item is not related to the CalPERS strategic plan.

Background

CalPERS maintains contracting policies and processes that align with State contracting laws and regulations as prescribed in the Public Contract Code, Government Code, Military and Veterans Code, the State Administrative Manual, and the State Contracting Manual. State contracting law outlined by the Department of General Services provides specific terms and conditions required for all State contracts. As such, CalPERS' 33-page contract template contains 77 standard terms and conditions in addition to terms and conditions specific to investment and information technology-related contracts.

Of the 77 terms and conditions, eight directly support fair employment practices and encourage the development of small businesses and disabled veteran business enterprises. CalPERS is dedicated to promoting lawful behavior and decency with respect to workers employed by CalPERS' contractors and subcontractors, and believes that an adequately compensated and trained worker delivers a higher quality product and service, and therefore incorporates the following eight terms (further described in Attachment 1) into every contract:

- Sweatfree Code of Conduct
- Benefits for Domestic Partners
- Child Support Compliance Act
- Nondiscrimination
- National Labor Relations Board Certification
- Americans with Disabilities Act
- Drug-Free Workplace
- Small Business and Disabled Veteran Business Enterprise Participation Goal

In addition to these provisions, CalPERS always remains neutral in regards to employees' right to organize at their places of employment.

Analysis

In November 2008, the Board held a workshop on the RCP. The workshop included a discussion of the legal issues arising from the policy and its potential extension beyond its existing contours. Two separate law firms, Altshuler Berzon LLP and Steptoe & Johnson LLP, analyzed potential modifications to the RCP. The firms agreed that an attempt by CalPERS to require its Real Assets managers/delegates (except where CalPERS maintains a majority ownership interest in the underlying investment) to remain neutral in labor disputes would be preempted by the National Labor Relations Act (NLRA). The NLRA guarantees the right of most private sector employees to organize and engage in collective bargaining, and acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

In reaching their conclusions, both law firms relied in part on the then-recent case of *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008). In *Brown*, the U.S. Supreme Court invalidated a California statute requiring certain neutrality practices by private employers receiving more than a specified amount of state program funds. The law firm opinions, which are not privileged, are attached to this agenda item as Attachment 2 (along with a cover memo from the General Counsel and an opinion from fiduciary counsel).

In response to the Treasurer's recent request to revisit this issue, CalPERS engaged Steptoe to refresh its opinion in light of the passage of time and the possibility that the law had changed in the interim.¹ A June 7, 2017 attorney-client privileged memo from Steptoe has been provided under separate cover to the Board. In addition, a June 7, 2017 attorney-client privileged memo from fiduciary counsel familiar with the RCP has also been provided to the Board. Collectively, these memos lay out the permissible scope of the Board's discretion in this area.

The CalPERS team believes that with the exception of investment manager contracts, the Board does have discretion to add an aspirational provision to its contracts encouraging, but not requiring, management neutrality in labor organizing activities. While CalPERS has been on record for many years supporting management neutrality, this issue is not specifically addressed within any existing contract term. CalPERS could add language to all, or a subset of, new and renewing CalPERS contracts that makes explicit CalPERS' support for management neutrality in labor organizing activities.

¹ Altshuler was not asked to refresh its memo because CalPERS does not have a current contract with that firm.

Staff has developed a potential articulation of this support:

CalPERS recognizes the value of labor organizing and encourages the entities with which it contracts to demonstrate that they also value this principle by encouraging management neutrality in labor organizing activities.

To remain "neutral" means not to take any action or make any statement that will directly or indirectly state or imply any support for or opposition to the selection by the Contractor's employees of a collective bargaining agent, or preference or opposition to any particular union as a bargaining agent. Nothing in this section obligates or prohibits the Contractor from entering into private neutrality, labor peace or other lawful agreements with a labor organization seeking to represent or who currently represents the Contractor's employees.

As mentioned above, the CalPERS team does not recommend inserting such a term into contracts with CalPERS' investment managers. The Investment Office bases this recommendation on its recent experience in piloting the RCP's existing neutrality provisions; the potential that investment managers who have their own fiduciary duties would react adversely to such a provision; and INVO's continued reduction of managers to a more select number of strategic relationships.

Of course, there is always the option of not adopting either of these proposed contract provisions. In that scenario, CalPERS would continue to ensure that CalPERS' contracting is governed by its contracting policies and state law, including the eight existing contract terms that directly support fair employment practices.

Budget and Fiscal Impacts

Adding an aspirational neutrality provision to new and renewing CalPERS' contracts would require nominal resources.

Benefits and Risks

The benefits and risks of adding a neutrality provision either supporting or requiring management neutrality are laid out in Attachment 2 and in the two attorney-client privileged memos that have been provided to the Board under separate cover.

Attachments

Attachment 1 – FAC Agenda Item 10c, February 14, 2017

Attachment 2 – November 12, 2008 Memo from CalPERS General Counsel

Kimberly A. Malm

Chief, Operations Support Services Division

Douglas Hoffner

Deputy Executive Officer, Operations and Technology

