

M E M O R A N D U M

October 9, 1991

TO: William H. Hussmann
Chief Administrative Officer

VIA: Joyce R. Stern *Joyce R. Stern*
County Attorney

FROM: James L. Parsons, Jr. *James L. Parsons, Jr.*
Assistant County Attorney
Karen-Ann Melehy *Karen-Ann Melehy*
Assistant County Attorney

RE: OLO Report # 91-2, Feasibility of Contracting Out or Privatizing Elements of the Department of Liquor Control Operations

In response to your memorandum of September 25, 1991, and pursuant to Montgomery County Code Chapter 29A, Legislative Oversight, Section 29A-9(2), this Office provides the following comments concerning the above-referenced OLO report.

In our memorandum dated September 23, 1991, we provided legal opinions concerning the feasibility of contracting out or privatizing elements of the Montgomery County Department of Liquor Control ("DLC") operations. A copy of that memorandum is attached for your reference. As a supplement to the legal opinions contained in our memorandum of September 23, 1991, we would like to address several issues raised by the OLO report.

Technical Correction

On page ix of the report, in paragraph F(2), the report states that "[i]t is unknown whether the County can legally establish a Liquor Control Authority and require that surplus revenues be contributed to the General Fund." In our memorandum of September 23, 1991, we stated that the creation of DLC as an authority would require changes to state law. In creating the DLC as an authority under state law, the State Legislature could include language in the enabling legislation that requires that surplus revenues of the authority be contributed to the County's General Fund.

William H. Hussmann
Chief Administrative Office
October 9, 1991
Page 2

Privatization/Contracting Out

As stated in our September 23, 1991 memorandum, the County presently has the authority to contract out a portion of its operations, within certain limitations. However, full privatization or contracting out of DLC operations would require a change in state law.

Article 2B, Section 163 of the Annotated Code of Maryland states that each County liquor control board or department "shall have full power and authority within its county...(e)(1)...To make any and all contracts, rules and regulations which they may deem necessary or desirable to carry out the powers conferred upon them by" Article 2B. There are no provisions in Article 2B nor in the Montgomery County Code that expressly prohibit DLC from contracting out any portion of its operations.

However, privatization or contracting out of DLC operations could conflict with several existing provisions in Article 2B, depending on the activity to be privatized.

Article 2B, Section 159(c)(7) establishes DLC in the executive branch of the County government. County liquor dispensaries may sell any alcoholic beverages in sealed packages or containers. Section 161(a)(2). County liquor dispensaries are established at one or more locations as determined by the DLC Director with the approval of the County Executive. Section 161(d). Under Section 162(b), all licensees must purchase their alcoholic beverages from DLC.

Under Section 165(e), all moneys derived from the sale of alcoholic beverages must be deposited in a County bank account, and the funds are distributed in the same manner as other County funds. Section 165(e) requires that these funds be applied: first, toward the costs of establishing and operating the County dispensary system; second, to the maintenance of adequate working capital; and thirdly, the balance of the net proceeds must be deposited in the general funds of the County.

Finally, Section 1(a)(1) provides that the purpose of regulating the sale of alcoholic beverages is to "foster and promote temperance".

William H. Hussmann
Chief Administrative Office
October 9, 1991
Page 3

The foregoing provisions in Article 2B would prohibit full privatization or contracting out of any DLC operation in which the contractor would assume ownership of alcoholic beverages being held for resale to the general public or to licensees. Under existing state law, DLC would be required to retain title to all alcoholic beverages held for resale. DLC would also be required to maintain control over the pricing, promotion and selection of alcoholic beverages sold in the County. All funds derived from the sale of alcoholic beverages must be deposited in a County bank account and devoted exclusively to the purposes described in State law. Any privatization or contracting out that deviated from these principles may require the passage of state enabling legislation.

The granting of exclusive distributorship rights to private companies, or a loss of DLC control over selection, ownership, pricing, and/or promotion of alcoholic beverages, may also raise potential antitrust problems.

Procurement Issues

Chapter 11B of the Montgomery County Code and the Procurement Regulations issued thereto, Executive Regulation 130-85, would govern the contracting out of any DLC operations.

Pursuant to Chapter 11B and the Procurement Regulations, the County would be required to solicit and evaluate on a competitive basis, bids for contracting out of any DLC operations. The Procurement Regulations authorize various types of contracts, such as contracts with compensation being determined by a fixed price, cost reimbursement, or a contract with various incentives or penalties depending on performance. Procurement Regulations D.3.1, D.3.2, D.3.6. Contract awards may also be made to separate vendors of goods or services in separate geographic areas. Procurement Regulation D.3.4.a.

Following completion of the procurement process, DLC would be required to establish a permanent contract administration staff to oversee the contractors' performance. Contract administration includes direction to the contractor as required under the contract, monitoring contract performance to ensure acceptable quality of performance, and contacting other

William H. Hussmann
Chief Administrative Office
October 9, 1991
Page 4

county agencies such as the County Attorney's Office when problems arise during the course of performance of the contract. Procurement Regulation E.7.

Personnel Issues

Contracting out DLC's operations, with its resultant effect on merit system employees, would have potential personnel-related legal ramifications. Under Section 33-107 of the County Code, the County has the right to contract out any "job classification, department, operation, unit, or other division or service," provided that the County gives written notice to the employees' certified representative at least 90 days prior to signing the contract. Montgomery County Code (1984), §33-107(b)(17).

The OLO report recommends a "phase-in" of the contracting option "through a combination of attrition and transfer of retail employees to other stores, thus guaranteeing continuation of current employees in the County's merit system." Report at p. ix. While such a "phase-in" is desirable from the standpoint of maintaining current merit system employees, it could take years to complete. If a faster implementation is desired, the County might have to resort to eliminating the positions of the retail employees through a reduction in force. Any reduction in force would have to comply with the provisions of Article 27 of the Collective Bargaining Agreement between Montgomery County and the Montgomery County Government Employees Organization.

If we can provide any further assistance in this matter, please let us know.

Attachment

cc: Jerome I. Baylin, Director
Department of Liquor Control
Deborah Snead, Office of County Executive

JRS:JLP:KAM:ad:pb
0353.JLP:91.04617