

LEGAL MEMORANDUM

TO: Mike Applegarth – Sandy City Council Office Director
FROM: Tracy S. Cowdell, General Counsel for Sandy City Council
DATE: September 20, 2018
RE: City Council Authority to Contract Directly for Services

QUESTION PRESENTED

Does a city council in a council-mayor form of government have the authority to contract directly for services?

BRIEF ANSWER

A city council's authority to contract directly for services is dependent on whether the services to be contracted for involve the adoption of generally applicable rules in the implementation of public policy. Contracts with specific parties is largely an executive power, not a legislative one. Nevertheless, the council may adopt an ordinance stating the council may enter into contracts, as long as that ordinance specifies that the council is limited to entering contracts for a purely legislative purpose.

DISCUSSION

The Utah Constitution expressly divides governing powers among three core departments of government: the legislative department, the executive department, and the judicial department.¹ A similar separation of powers is also found at the municipal level. Specifically, in a council-mayor form of municipal government, the powers of a municipal government are vested in two (2) separate, independent, and equal branches of municipal government consisting of a council and a mayor.² The council is only vested with legislative powers, which are strictly limited to policy-making powers; the mayor is only vested with executive powers, which are strictly limited to policy execution powers.³ State code expressly describes specific powers that are delegated to a council and specific powers that are delegated to a mayor.

The Utah Supreme Court has held that “the legislative power . . . is the authority to make laws, but not to enforce them.”⁴ That legislative authority includes the power to “prescribe by ordinance the general rules to be followed by the executive branch in exercising its powers.”⁵ Essentially, city councils are limited to exercising their legislative authority through enacting ordinances, rather than by entering into contracts, unless expressly provided differently in statute.⁶ Enforcing laws is an executive act necessary to carry out legislative policies and is therefore deemed an act of administration that falls within the exclusive authority of a mayor.⁷ One of the most common tools a mayor may use to execute policies adopted by the city council is to contract with specific person(s) and/or entities to enforce those policies.⁸

The Court has further held that “government decisions to enter into a contract with a specific entity . . . are not legislative [because] they do not involve the adoption of generally applicable rules in the implementation of public policy. They are instead executive acts involving specific individual parties and accordingly are outside the bounds of the legislative power.”⁹

¹ See UTAH CONST. ART. V, § 1.

² See UTAH CODE ANN. § 10-3b-201.

³ See *Martindale v. Anderson*, 581 P.2d 1002, 1027 (Utah 1978).

⁴ *Id.* at 1027.

⁵ *Id.*

⁶ See UTAH CODE ANN. § 10-3-701.

⁷ See *Id.*

⁸ See UTAH CODE ANN. § 10-3b-202.

⁹ *Carter v. Lehi City*, 269 P.3d 141, 158 (Utah 2012).

Here, the Sandy City Council desires to directly enter into contracts for services for legislative purposes. Entering into a contract with a specific person(s) or entity may exceed the scope of the council's legislative authority under the *Carter* holding; however, if the Council determines that entering into such a contract involves the adoption of generally applicable rules in the implementation of public policy and does not have the effect of executing or enforcing those policies, then the Council likely may enter into such a contract.

In conclusion, if the Council desires to enter into contracts to implement its policies, it is likely outside of its legislative authority. If however, the policy and proposed contract are strictly related to legislative functions, both the policy and the contracts are enforceable. Hiring legislative consultants for the purpose of advocating for policy is arguably a legislative function. A carefully crafted policy and subsequent contracts related strictly to legislative functions will likely survive Constitutional muster.