



BGR Report

A Report and Position from the Bureau of Governmental Research

February 2002

Charter Amendment March 2, 2002 Ballot

Introduction

On March 2, 2002, Orleans Parish voters will be asked to decide whether the City Charter should be amended to require voter approval of decisions by the Sewerage & Water Board (S&WB) to enter into certain privatization contracts. Voter approval would be required in the case of any contract valued at more than \$5,000,000 that involves the privatization of any S&WB management or administrative function or drainage, sewer or water operation. The amendment would apply to privatization contracts of the S&WB only; it would not subject contracts of the City or any other governmental entity to referenda.

Technically, the proposed charter amendment provides that a contract cannot be validly executed until the decision to enter into it has been approved by the voters. The amendment directs the City Council to call an election after a contract has been approved by the S&WB but before it has been executed.

The proposition on the March 2 ballot is not a referendum on the water/wastewater privatization that is currently under consideration by the S&WB. It is a vote to determine whether the City Charter should be amended to require a referendum on that issue, as well as on any future

Home Rule Charter Amendment

Section 5-303. Privatization.

- (1) Before any contract(s) relating to privatization of any Sewerage and Water Board management or administrative function, drainage, sewer, or water operation may be validly executed, a decision to enter into any such contract(s) must be first approved by a majority of the electors of the City voting on the matter at an election which shall be called by the Council as follows: After approval by the Sewerage and Water Board but before execution of any such proposed privatization contract(s), the Council shall provide by ordinance that the proposed contract shall be published at length in the official journal not less than sixty days prior the election, and shall be submitted to the electors of the City at the first available election for members of Congress, Mayor of New Orleans, or Governor of Louisiana, if the date of such election is not less than ninety days after the effective date of such ordinance, or at a special election called for the purpose, the date of which shall be held on the first available election date not less than ninety days after the effective date of the ordinance. The foregoing is not applicable to any such proposed privatization contract(s) valued at \$5,000,000.00 (year 2001 U.S. dollars) or less.
- (2) The decision to enter into any such contract(s) for privatization approved by a majority of the electors of the City voting on same shall become effective at the time and under the conditions fixed in the proposed privatization contract(s) so approved by a majority of electors.



S&WB privatizations. If the charter amendment passes, a subsequent referendum will be held on the currently proposed privatization (assuming the S&WB decides to proceed with it). If the charter amendment fails, voters will not have an opportunity to vote on any S&WB privatization.

Background

Although the proposed charter amendment is drafted in general terms, it was apparently proposed in response to a specific situation: the S&WB's current search for a contractor to take over the management, operation, and maintenance of the S&WB's water and wastewater systems. The Times-Picayune has estimated that the proposed contract, which could run for 20 years, is worth over \$1 billion.

The proposed amendment has been characterized as a strategic move to delay or halt the current privatization process. That process has been moving ahead, at what many perceive as unseemly speed, despite growing hostility and suspicion that agendas other than the public interest are dictating the terms of the privatization arrangement. On January 2, 2002, the S&WB issued a formal Request for Proposals. The schedule contained in the RFP called for the selection of a contractor on March 20 and the execution of a contract on April 3. On February 20, the S&WB voted to delay any consideration by the board of the selection of a contractor until after the new administration takes office in May.

BGR has been highly critical of the proposed privatization process and has aggressively pushed for changes in both the process and the proposed contract to maximize benefits to the public. In its June 2001 report on privatization, BGR concluded that, while a properly executed privatization could result in significant savings, the proposed privatization should be undertaken only if serious deficiencies in the proposed procurement process

were addressed. In October 2001, BGR announced that it opposed the proposed privatization of the S&WB in its then-current form and would remain opposed until the S&WB conducted the privatization process in a manner that would maximize benefits for the citizens of New Orleans. Serious problems remain with the process and the contract.

Thus, BGR is sympathetic to attempts to improve or abort the current process of privatization. However, the proposed charter amendment must be analyzed in a broader context, since it covers transactions other than the proposed privatization and has broad implications for the conduct of local government. These issues, as well as legal and interpretive issues, are discussed below.

Low Threshold

A referendum on a privatization of the scope proposed by the S&WB would appear on initial examination to be reasonable, since the privatization would transfer to private hands, for a lengthy period of time, significant control of a monopoly service utilized by all residents. BGR notes that state law requires a referendum in analogous situations, including the sale, lease or granting of a franchise to operate a public utility by municipalities (other than the City of New Orleans), parishes, other political subdivisions, and taxing districts.

The proposed charter amendment casts its net far wider than major transactions, setting the proposed threshold for referenda at \$5 million. This number is extremely low for an entity with an annual operating budget of over \$112 million. It could subject to referenda an unknown number of contracts that do not compromise the powers of the S&WB or significantly affect its control over management, operations, and maintenance. For example, depending on the interpretation of the word "privatization" (see page 5), the existing contracts with U.S. Filter Operating Systems to operate the sewerage treatment plants and with

MWH, LLC to oversee rehabilitation of the sewer collection system might have triggered referenda had the charter amendment been in effect.

The low threshold further confounds the effective governance of the S&WB by introducing voters as a new group of micromanagers. It would seriously handicap the ability of the S&WB to improve performance through limited, restrained outsourcing of functions. Potential contractors may be reluctant to invest time and money in negotiating relatively small contracts under such circumstances.

Expenses of Referenda

In addition, the process established by the charter amendment could result in disproportionate expenses. A special election on a contract could cost the city as much as \$350,000. Publication of contracts, as required by the proposed charter amendment, could also cost significant amounts. For example, publication of the text of the draft contract for the proposed privatization (excluding voluminous schedules) would cost approximately \$10,000 for four newspaper pages of official-notice-sized type. (For text of the proposed contract, see www.swbno.org/rfq-rfp/coverpage.htm.)

Government by Referenda

The charter amendment, if passed, would mandate a referendum on the execution of privatization contracts by the S&WB. The wisdom of referenda has long been the subject of debate. Proponents argue that referenda increase interest in government and provide the most direct expression of the voters' intention. In addition, they maintain that the specter of a referendum can make decision makers more responsive to the public and less subject to the influence of special interests.

Opponents stress the negative side of referenda. Rather than encouraging accountability, referenda can provide politicians with an opportunity to "pass the buck" on difficult issues. In addition, by removing matters from the legislative arena and recasting them as propositions requiring simple yes or no votes, referenda reduce the opportunity for compromise or the formulation of alternative solutions to problems. Where the subject matter is extremely complex or technical, an informed vote might not be possible.

Referenda on S&WB privatization contracts would suffer from some of the negatives identified above. Few voters have the technical or financial expertise needed to analyze such contracts. The complex issues will be reduced to media soundbites. The difficulties of obtaining an informed vote are likely to be compounded by the fact that a contractor will have been chosen before a referendum is held. By way of example, the contractor chosen in the currently proposed privatization having already invested more than \$1 million in the pursuit of the privatization contract would have a strong incentive to fund the pro-privatization media campaign during the referendum. Opponents might have far more difficulty raising funds to disseminate their message.

With respect to responsibility and responsiveness, there are theoretical arguments on both sides. Neither of the two arguments that referenda increase the responsiveness of decision makers to public sentiment or that referenda lead to an abrogation of responsibility by decision makers seems to apply in the case of the current privatization proposal. The prospect of a public referendum does not appear to have altered the board's conduct with respect to that proposal. Board members continue to show little inclination to remedy the serious problems plaguing the current privatization proposal.

It might be argued that those interested in halting a privatization should address the matter by exerting pressure on the elected officials, including three city councilmen, who serve on the board. The counter-argument would be that, because the S&WB is controlled by the mayor and mayoral appointees, the board is more isolated from public pressure than an elected body would be. Thus, a referendum might be the only realistic way of providing the public with a voice in major decisions that will impact them for many years.

The proposed charter amendment could open the door to a flood of referenda. It would provide a precedent for a popular vote on matters currently addressed by local government or by independent governing entities operating in the New Orleans area, such as the Orleans Levee District or Orleans Parish School Board.

Legal Authority

The proposed charter amendment purports to give the voters of Orleans Parish veto power over actions of an independent, state-created entity. In doing so, it raises classic issues concerning the interplay of the home rule provisions of the Louisiana Constitution of 1974 and the police power of the State.

It is unclear that a vote pursuant to a referendum established by the City Charter could prevent the valid execution of a contract by the S&WB. The S&WB is an independent agency established under state law; it is not a city department, nor was it created by the City. The State in fact took the water and sewer responsibilities away from the City in 1899.

A number of judicial decisions support the legal autonomy of the S&WB. In 1994, the Louisiana Supreme Court concluded “that the SWB is an autonomous or self-governing legal entity with respect to the management of its business or function of providing water, sewerage and

drainage service to consumers in Orleans and other parishes. As such, the SWB is legally independent of the City, state and other governments in its source of revenues; the employment, deployment, direction and control of its work force; and the comprehensive management of its public utility operations.” (Roberts v. Sewerage and Water Board of New Orleans, 634 So.2d 341(La. 1994))

Ambiguities in the Amendment

The proposed amendment suffers from ambiguities that raise serious questions as to the amendment's scope and its impact on future operations. Those ambiguities include, but are not limited, to the following.

Ambiguity as to what is being approved. The proposed charter amendment states that “(b)efore any contract(s) relating to privatization may be validly executed, a decision to enter into any such contract(s) must be first approved by a majority of the electors.” The proposition goes on to require the City Council to adopt an ordinance providing for the publication of the proposed contract and its submission to the electorate.

It is unclear from the text of the proposition whether the electors are voting on specific contract language or a broader decision to enter into a contract. The distinction has important ramifications, especially with respect to amendments. If voters are approving specific contract terms, the S&WB's ability to amend the text, either before the contract is executed or during the life of the contract, could be seriously compromised. If the vote is interpreted as a vote on a decision to privatize, the S&WB arguably would have more flexibility to make amendments. In either case, the validity of such amendments may be open to question.

A need for amendments could surface even before the referendum. The Rules of the Civil Service Commission (CSC) provide that no decision to privatize “shall become binding and effective until approved by the Civil Service Commission.” (Rule III, Section 6.4) The CSC, which has filed one suit against the City over privatization of the Municipal Auditorium, could require changes in contract terms relating to employees.

One can safely assume that a 20-year contract for the management, operation, and maintenance of four treatment facilities and thousands of miles of pipe will have to be amended. The proposed new charter language provides no guidance on the impact of the referendum on such amendments.

Ambiguity as to what contracts are subject to referendum. The proposition speaks of contracts relating to privatization of the S&WB. The term privatization is not defined. The term is sometimes used to refer to the sale of government infrastructure; at other times it refers to outsourcing of functions or services. State law, discussing privatization in the context of fire protection services, refers to a “contract with a private company for provision of fire protection services.” Although not controlling, that concept would seem applicable by analogy, given the context in which the charter amendment was proposed.

The charter amendment would not require a referendum for “proposed privatization contract(s) valued at \$5,000,000 (year 2001 U.S. dollars) or less.” How one calculates value is not stipulated. Is it an annual or life-of-contract amount? Should the calculation be made by reference to the amount that the S&WB is paying the contractor, or should value be calculated net of expenses to the contractor? Should net present value be the measure? What inflation measure should be used to index the value of the contract? How should performance incentives be factored into a calculation of value? Does the value include extensions or solely the original contract amount for the base term of

the original contract? Are subcontracts to be included in determining value? In short, it might be very difficult to determine whether a referendum is required.

Other Issues

Flexibility in Emergencies. The proposed charter amendment makes no exception for future emergencies at the S&WB. Thus, it could seriously hamper the Board's ability to obtain outside assistance in responding to a catastrophic situation. For example, the proposed privatization contract contemplates situations in which the S&WB would have the right to terminate the private contract in the wake of a catastrophe, should the contractor be unable to perform. The proposed charter amendment would prevent the S&WB from hiring a replacement firm without going through a referendum.

Delays. The lengthy referendum process will delay implementation of any contract subject to the proposed charter amendment. The formalities required to adopt and give effect to an ordinance calling a referendum could take as long as two months. The minimum 90-day waiting period for an election on a privatization proposal commences only after the ordinance is effective. By way of example, the first available scheduled election date for holding a referendum on the current privatization proposal would be October 5, 2002.

Position

Although BGR is opposed to the currently proposed privatization and is sympathetic to efforts to improve or halt the privatization process, it does not support the proposed charter amendment for the following reasons:

Because of the relatively low threshold of \$5 million, the amendment could unduly restrict the flexibility of the S&WB to contract for services. It complicates the

efficient governance of the S&WB by introducing a new layer of micromanagement.

A referendum on a contract could restrict, or call into question, the S&WB's ability to implement necessary or favorable amendments in the future.

Because of ambiguities and lack of specificity in the amendment, it might be difficult to determine which contracts are subject to referenda.

Contracts, particularly technical, complex ones, are inappropriate subjects for referenda. Most voters lack the technical expertise to make an informed judgment.

The amendment would allow the S&WB's members to abrogate responsibility for the outcome of the privatization process.

The amendment might open the door to a flood of referenda on decisions now made by local government entities.

Those opposed to privatization have the option of exerting pressure on their elected officials and other members of the S&WB to halt the current process.