

MEMORANDUM

TO: BOARD OF TRUSTEES OF POWDER MOUNTAIN WATER AND SEWER IMPROVEMENT DISTRICT

FROM: ARI BRUENING

DATE: FEBRUARY 6, 2026

RE: OPERATIONAL INTEGRATION AND EFFICIENCY PROPOSAL

Introduction

You have requested advice related to a proposal to shift management of day-to-day operations of the Powder Mountain Water and Sewer Improvement District (the “District”) to a private or public contractor (a “Contractor”) through a contractual arrangement. This memorandum discusses various legal issues and risks for consideration as you evaluate this proposal.

A Special District’s Authority to Contract for Services

The Utah Code grants authority to a special district board of trustees to “contract for or employ professionals to perform work or services for the special district that cannot satisfactorily be performed by the officers or employees of the district.”¹ There does not seem to be any limitation on this authority, other than an implied limitation that the board can only outsource services that “cannot satisfactorily be performed” by officers or employees. To the extent the Board determines this to be the case with respect to services to be contracted—because of the need for increased efficiency and lower rates or for other reasons—we recommend that the Board explicitly document such findings in writing.

Board Oversight and Potential for Conflict of Interest

The District’s Board of Trustees (the “Board”) will need to retain control over policy-setting and other aspects of the organization. This is particularly important because it is our understanding that Powder Mountain (“Powder”) has expressed interest in serving as the Contractor. While such an arrangement with Powder would likely generate significant efficiencies, there is a risk that Powder, as the District’s largest customer, could from time to time act in its own interests to the detriment of other customers in its performance of services on behalf of the District.

¹ UCA § 17B-1-301(2)(f). Special districts are also granted the general power to enter into contracts under UCA § 17B-1-103(2)(l).

Someone making a claim of such self-interested action could target the Board for failure to fulfill their statutory and common law obligations, including implied obligations to exercise appropriate duties of care and loyalty. Therefore, we recommend that the District take appropriate steps to ensure the Contractor promotes the interests of all customers. These steps are recommended even if Powder is not the ultimate Contractor.

Specifically, we recommend the following steps:

- Retain Board oversight of strategy, budgeting and expenditures, auditing, capital facilities planning, fees and rates, taxes and assessments, bonding and debt, annexation, will-serve requests, developer exactions, policies, rules, and procedures;
- Require monthly operating reports and regular (at least quarterly) presentations to the Board;
- Retain the ability to cancel the contract with a relatively short period of notice, particularly for cause;
- Require the Contractor to indemnify the District for a wide variety of claims arising from the Contractor's actions;
- Require third-party engineer review of all Contractor engineering and construction;
- Structure the contract so that the Contractor has a financial incentive to keep costs low;
- Require the Contractor to carry adequate insurance; and
- Retain at least one District employee, or an independent contractor unaffiliated with the Contractor, to exercise day-to-day oversight of the Contractor's actions. To the extent the District wants to create an independent, embedded, day-to-day oversight function without incurring payroll expenses, we recommend against utilizing a Contractor employee reimbursed by the District and instead structuring that role either (1) through an independent engineering firm or similar professional advisor under a direct District contract or (2) through another governmental entity, on a contract basis.

District Financial Management

Utah Code requires that a special district appoint a district clerk and a district treasurer, who cannot be the same person.² “If required,” a board of trustees member other than the chair can be chosen to serve as clerk or treasurer.³ The clerk is to keep a record of proceedings, maintain financial records, and prepare checks or otherwise make arrangements for monetary transfers after proper authorization.⁴ The treasurer is the custodian of money and bonds, which includes managing deposits, receiving funds, collecting taxes and assessments, sending receipts for payment, and signing checks or authorizing transfers.⁵ The board of trustees must (a) approve all expenditures except for routine expenditures (payroll, utilities, supplies, etc.), which can be delegated to a district manager and reviewed at least quarterly, and (b) set a maximum amount above which purchases may not be made without the board’s approval.⁶

² UCA §§ 17B-1-631, 633.

³ UCA §§ 17B-1-631, 633.

⁴ UCA §§ 17B-1-631, 632, 635.

⁵ UCA §§ 17B-1-633-5.

⁶ UCA § 17B-1-643.

The code does not appear to have a prohibition on appointing a contractor to serve as clerk, treasurer, or manager, but we would recommend that at least one of the clerk and treasurer positions be held by an individual who is not a Contractor employee so as to retain the spirit of the separation of duties set forth in the code. This function could be provided by a Board member (other than the chair), a District employee, or a contractor not associated with the Contractor.

In addition, the Board should retain authority to establish the budget (although the Contractor could prepare a draft) and authorize expenditures, other than routine expenditures below a certain amount that are consistent with the adopted budget. All checks or electronic money transfers should require signature or approval from someone other than the Contractor. Annual audits should be conducted by an entity not associated with the Contractor.

Insurance

The District is required by state law to maintain liability and crime insurance, and we would advise also maintaining other types of insurance, such as director's and officer's insurance.⁷ This insurance should be on policies maintained by the District and in addition to the Contractor's insurance policies. The Contractor should be required to maintain appropriate levels of insurance, including liability, workers' compensation, and unemployment insurance.

Employment Law

An employment-law risk with outsourcing operations is that the District could be viewed as an employer of the Contractor's personnel for certain purposes (often called "joint employer" liability), which can expand the District's potential exposure for employment-related claims. Whether that risk materializes is fact-specific and depends largely on actual control over day-to-day supervision and essential employment terms, not labels in an agreement. Accordingly, to reduce the risk that the District is deemed a joint employer and therefore liable for wages, overtime, benefits, taxes, leave, discrimination, harassment, retaliation, wrongful termination, or other employment-related liabilities, the agreement and the parties' actual practices should reflect that the Contractor is solely responsible for its employees, including hiring and firing, promotions, discipline, performance management, scheduling, supervision, compensation, and benefits. The Board's oversight should be framed and implemented as oversight of contract performance and deliverables, not direct supervision of individual Contractor employees. Utah Retirement Systems benefits will not be available to Contractor employees by virtue of performing services for the District.

During a transition period, it is allowable to have a "secondment" arrangement in which the District's employees are assigned to work under the Contractor's day-to-day direction. If the parties pursue a secondment arrangement, the agreement should make clear that the District remains the employer of record for those employees and retains final authority over hiring, termination, discipline, compensation changes, and grievance administration, while the Contractor provides day-to-day direction subject to District

⁷ UCA §§ 17B-1-113, 303(7).

policies and applicable law. The agreement should also require the Contractor to follow District timekeeping, scheduling, and overtime pre-approval requirements for seconded District employees and to provide the District the information needed for payroll and benefit reporting.

The Contractor should be free, in its discretion, to make offers of employment to any current District employees. Any conversion to Contractor employment should occur only through voluntary offers and acceptance, with clear written disclosure that District-sponsored benefits (including Utah Retirement Systems) generally will not continue once the employee is no longer a District employee.

If, after the transition period, there are remaining District employees who have not transitioned to Contractor employment or otherwise moved on, the District will need to determine, consistent with District policies and applicable law, whether to continue the employment permanently or temporarily or cause a separation from employment.

Procurement Law

Utah Code generally requires use of a “standard procurement process,” which means one of the following procurement processes: bidding, RFP, approved vendor list, small purchase, or design professional.⁸ The appropriate process depends on the scope and value of the services and the District’s adopted procurement policies. In this instance, the RFP process would likely be the best fit because the District is contemplating an ongoing, integrated operations management services arrangement where the key differentiators are not just cost and efficiency but also qualifications, operational approach, internal controls, conflict mitigation, reporting and oversight structure, transition plan, and proposed contract terms, and an RFP provides a defensible framework for the Board to solicit, compare, and document best value proposals on those criteria.

There is, however, an exception from the “standard procurement process” requirement in the code if the governing body or its designee “determines in writing that . . . there is only one source for the procurement item.”⁹ If the District makes this finding, it is required to do so in writing, follow District policies, and comply with applicable notice and documentation requirements.¹⁰ Because the primary contender to serve as the Contractor could raise concerns about conflicts of interest, we recommend using an RFP process rather than a sole-source process so that the Board can evaluate all advantages and disadvantages of each proposing entity.

District policies likely also contain procurement requirements, but we have not yet been provided with a copy of such policies.

Laws Governing Public Agencies in Utah

⁸ UCA §§ 63G-6a-103(89), 409(2(b), 712(6).

⁹ UCA § 63G-6a-802(1).

¹⁰ UCA § 63G-6a-802(3).

Local government entities in Utah are required to comply with the Open and Public Meetings Act, the Government Records Access and Management Act, the Impact Fees Act, the Utah Procurement Code, and other laws. A private entity may not be familiar with the mandated processes and procedures, creating a risk of noncompliance that will impact the District. Strong Board controls and contractual commitments will be necessary. If the Contractor is a private entity, the District could require Contractor employees to undergo compliance training.

District Policies

We have not been provided with copies of District policies, and therefore our review has been limited to state law. We recommend a thorough review of District policies to understand their implications for the proposed arrangement.

Risks

The legal risks mentioned above create the potential for lawsuits, which could cause unwieldy delays and expenditures. Mismanagement and conflicts of interest could negatively impact the District even in the absence of litigation.

In addition to the legal risks discussed herein, there are undoubtedly other risks involved in the proposed arrangement, including public relations/perception and even the potential for state audits and legislative scrutiny.

Other Potential Options

It may be possible to structure the transaction in alternative ways that reduce some of the aforementioned risks while still achieving increased efficiency and reduced costs. Here are a few options:

- The District could switch from a model in which it does the engineering, which is then reviewed by Powder, to one in which Powder does the engineering, which is then reviewed by the District.
- The District could retain all or most of its employees and contract with another entity for engineering and construction services, either on an ongoing basis or one project at a time. It would be necessary for the District to retain an engineer to review the Contractor's work.

Should the Board be interested in exploring any of these or other options, additional evaluation will be necessary.

Conclusion

None of the statutes that we reviewed¹¹ appear to prohibit the proposed arrangement, although proceeding as proposed is not without risk to the District and, therefore, the Board. There are a number of steps, summarized above, that could reduce, but not eliminate, this risk.

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¹¹ Note that our review was limited to the statutes and issues included herein. We did not do an exhaustive review of all Utah law.