

STATE OF COLORADO

Colorado General Assembly

Kirk Mlinek, Director
Legislative Council Staff

Colorado Legislative Council
029 State Capitol Building
Denver, Colorado 80203-1784
Telephone (303) 866-3521
Facsimile (303) 866-3855
TDD (303) 866-3472
E-Mail: lcs.ga@state.co.us



Charles W. Pike, Director
Office of Legislative Legal Services

Office Of Legislative Legal Services
091 State Capitol Building
Denver, Colorado 80203-1782
Telephone (303) 866-2045
Facsimile (303) 866-4157
E-Mail: olls.ga@state.co.us

MEMORANDUM

March 23, 2004

TO: Richard Armstrong and Ron Stawicki

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #109, concerning the state of Colorado American Worker Protection Bill

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding your proposed initiative.

The purpose of this statutory review and comment requirement is to assist proponents in determining the language of their proposal and to make the public aware of the proposal. Our first objective is to be sure we understand your intent in proposing the amendment. We hope that the statements and questions in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be:

1. To require every state contract for the performance of services to contain provisions specifying that only citizens of the United States and permanent legal resident aliens in the United States shall be employed in the performance of services under the contract or any subcontract awarded under the contract

2. To state that the act shall take effect immediately.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. Do the proponents intend to amend the Colorado constitution or the Colorado Revised Statutes? The proposal is called a "Bill" and entitled "An Act concerning State contracts", so the language is apparently intended to be statutory. Is this the proponents' intent?
2. Would the proponents specify where in the constitution or statutes they wish to place the provisions of the proposed measure? For example, if the change is intended to be statutory, the proponents may wish to place the provision in an appropriate place in the state's Procurement Code, articles 101 through 112 of title 24, C.R.S., or in title 8, C.R.S., articles 18 through 19.7 of which contain provisions granting preferences in bidding on certain state contracts.
3. Section 1 (8) of article V of the Colorado constitution states that "The style of all laws adopted by the people through the initiative shall be, 'Be it enacted by the People of the State of Colorado'". Do the proponents wish to modify the enacting clause of the proposed measure, which currently states "Be It Enacted by the General Assembly of the State of Colorado", to comply with this requirement?
4. In standard drafting practice, changes to constitutional and statutory provisions are introduced by means of an "amending clause." An amending clause for the proposed measure might read as follows:

Article 101 of title 24, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION (or BY THE ADDITION OF THE FOLLOWING NEW SECTIONS, or BY THE ADDITION OF A NEW PART) to read:

The exact language of the amending clause would depend on whether the provisions of the proposed measure are drafted as a single new statutory section or multiple sections to be added to an existing article or as a new part of an article containing multiple sections. Would the proponents consider adding an appropriate amending clause in this form to the text of the proposed initiative?
5. Do the proponents intend the phrase "State of Colorado Worker Protection Bill" to be included in the text of the proposal? If so, this language might be placed in a section of the proposal giving the "short title" of the law. If, for example, the provisions of the proposed measure were placed in a new part of article 101 of title 24, the amending clause and standard short title section might

read as follows:

PART 5

PREFERENCE FOR AMERICAN SUPPLIERS

24-101-501. Short title. This part 5 shall be known and may be cited as the "American Worker Protection Act".

6. Do the proponents intend the sections entitled "SYNOPSIS" and "STATEMENT" to be a part of the proposal? If the proponents desire to include a statement of the purpose or intent of the proposed measure in its statutory provisions, such a statement might be included in a section containing a legislative declaration. For an example of a legislative declaration to assist in drafting such a section in the standard format, see section 24-1-101, C.R.S. If the proponents do not intend for this language to become a part of the statutes, would they consider removing these statements from the proposal?
7. The word "state" is not capitalized in standard drafting practice. Would the proponents consider putting it in lower case in the phrase "Every State contract" in section 1 of the text?
8. To be consistent with standard drafting practice, would the proponents consider changing "which" to "that" in section 1 of the text?
9. The proposed measure states: "This act shall take effect immediately." What do the proponents mean by "immediately"? Election day? Under section 1-40-123, C.R.S., an initiated measure takes effect after the secretary of state canvases the votes and after an official proclamation by the governor, but no later than 30 days after the votes have been canvassed. If the proponents want the proposal to take effect upon the governor's proclamation in accordance with this standard procedure, would they consider removing the phrase "This act shall take effect immediately"? If the proponents wish to have an effective date different from this standard effective date, the effective date clause would typically be in a separate section of the proposed measure so that the effective date language does not appear in the statutes or constitution. Would the proponents consider changing the proposal accordingly?

Substantive questions:

1. What does the phrase "State contract" mean in the proposed measure? Do the proponents intend for the proposed measure to apply only to contracts entered into by the state under the Procurement Code? Section 24-101-105, C.R.S., excludes certain state contracts from the application of the Procurement Code. Do the proponents believe it is desirable or necessary to create any exceptions to the requirement of the proposed measure?
2. Do the proponents intend the phrase "State contract" to apply to contracts entered into by political

subdivisions of the state, such as counties and other local governments?

3. The proposal applies to every "contract for the performance of services". What is the exact meaning of this phrase? Would the proposed measure apply to a contract to supply goods to the state? For example, would a contract for the purchase of office furniture be a contract for services under the proposal? What if the contract included both the purchase and installation of the office furniture?
4. The proposal applies to "permanent legal residents." Would employers who hire individuals who are lawfully present in the United States on a temporary work visa be prohibited from entering into a contract with a state agency? What if the employer has employees that are foreign nationals living overseas and only provide support on the service contract? Would the state be prohibited from entering into a contract with a multi-national corporation with offices in other countries employing foreign nationals if employees outside the country perform some work related to the contract, such as billing or other administrative support?
5. Will state agencies be required to verify that only U.S. citizens or legal residents are employed by the contractor or subcontractor in the performance of work under a state contract? What would be the effect on a state contract if, after entering into the contract, the agency learns that the contractor or a subcontractor employs individuals other than U.S. citizens or legal residents?
6. Section 24-30-1203, C.R.S., states that preferential treatment is to be provided to nonprofit agencies assisting people with severe disabilities when the products and services are determined to be a reasonable price. Title 8, C.R.S., also contains several articles creating bidding preferences for certain types of bidders, for example companies with their principal place of business in Colorado. How would the proposed measure interact with the preferences and restrictions in the current bidding process for state contracts?
7. Why does the proposed measure create a prohibition on the performance of contracts by certain persons rather than creating a bidding preference, for example in favor of companies that agree to employ only citizens or legal residents in the performance of the contract? What would happen if the state was unable to find a bidder for a particular contract that met the requirements of the proposed measure?
8. Do the proponents believe there are any circumstances in which it is appropriate for services under a contract with a state agency to be performed by persons who are not U.S. citizens or permanent residents? For example, if the state government sent a trade mission to a foreign country, would it be precluded from entering into any contracts with persons or companies in that country to provide services to the trade mission? Would a state university be prohibited from entering into an employment contract with a visiting professor from another country?
9. The proposed measure states that it "shall take effect immediately." Would it apply to existing contracts or only contracts entered into after the effective date? If it would apply to existing

contracts, do the proponents believe it would be consistent with section 10 of article I of the United States constitution ("No state shall . . . pass any . . . law impairing the obligation of contracts . . .") and section 11 of article II of the Colorado constitution ("No . . . law impairing the obligation of contracts . . . shall be passed by the general assembly.")? If the proponents intend the proposed measure to apply prospectively, would they consider adding an applicability clause, which might read: "This [section] shall apply to contracts entered into on and after the effective date of this [section]."?

10. Are the proponents aware of any federal treaties that may conflict with the proposed initiative? For example, Article III of the Agreement on Government Procurement ("Agreement"), to which the United States is a party, prohibits discrimination based on national origin in government procurement contracts. (Specifically, it reads in relevant part as follows: "[E]ach Party shall provide immediately and unconditionally to the . . . services . . . of other Parties . . . treatment no less favourable than that accorded to domestic . . . services".) On December 1, 1993, Governor Roy Romer committed the state of Colorado to be voluntarily covered by the Agreement. Do the proponents think that the Agreement is enforceable against the state of Colorado? Would the proposed measure violate the Agreement? Are the proponents aware that violating the Agreement could lead to sanctions against the United States, which is responsible for the state's commitment?
11. Section 8 (3) of article I of the United States constitution gives to Congress the power "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." As interpreted by the courts, this clause limits the authority of the states to regulate commerce in these areas. This limitation is called the "Dormant Commerce Clause". Will the proposed measure violate this provision, which is known as the "Dormant Foreign Commerce Clause" in the area of commerce with foreign nations?
12. Article XIV of the United States constitution states that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." Do the proponents believe the proposed measure is consistent with the Equal Protection Clause of the XIV Amendment?