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MEMORANDUM

January 21, 2008

TO: Jon Caldara and Dennis Polhill

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #59, concerning restrictions on campaign contributions from government sole-source contracts

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 the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained 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 amend the provisions of article XXVII of the state constitution governing campaign and political finance to prohibit the holder of a contract or contracts for a cumulative amount exceeding \$100,000 as indexed for inflation after 2010, awarded by a state or local government entity without competitive bidding (a "sole source government contract"), from making or causing to be made a contribution for the benefit of a political party or candidate for elective office during the term of the contract and for two years thereafter.
2. To direct the department of personnel to publish and maintain a summary of each sole source government contract, and to require the holder of a sole source government contract to report information about the contract to the department of personnel.
3. To require every sole source government contract awarded by the state or any political subdivision to contain provisions:
 - Prohibiting contributions by or on behalf of the contract holder for the benefit of a political party or candidate for elective office during the term of the contract and for two years thereafter; and
 - Disqualifying a contract holder who intentionally violates article XXVIII of the state constitution from holding a sole source government contract or public employment for three years.
4. To require a person who intentionally accepts an improper contribution to pay restitution to the local government that awarded the contract in the amount of its costs and expenses associated with the breach.
5. To impose similar liability on the bookkeeper of an entity that seeks or has a sole source government contract or a person acting on behalf of the government entity who knows of a contribution made in violation of article XXVIII but fails to notify the secretary of state or other appropriate officer.
6. To disqualify a person who makes a contribution in a ballot issue election from entering into a sole source government contract related to the ballot issue.
7. To specify that knowing violation of certain provisions of the measure by an elected official is grounds for removal from office and disqualification to hold any office of honor, trust or profit in the state and constitutes misconduct or malfeasance.
8. To give standing to registered voters of the state to enforce article XXVIII in court.

Comments and Questions

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

Technical questions:

1. The phrase "sole source" is sometimes hyphenated and sometimes not hyphenated in the text of the proposal. Also, the proposal refers both to "sole source government contract" and to "sole source contract". Would the proponents consider standardizing the term throughout the text?
2. Page 1, lines 4, 5, and 6: The language "who have entered into a sole source government contract or contracts, for a cumulative total of more than \$100,000, with the state or any of its political subdivisions" seems unnecessary, because it simply repeats language from the definitions of "contract holder" and "government contract". Would the proponents consider deleting this repetitive language?
3. Page 1, line 11 and elsewhere: The names of officials and agencies are generally not capitalized in the state constitution. To conform to this style, would the proponents consider spelling "executive director" and "department of personnel" in lower case throughout the proposal?
4. Page 1, line 24: The proposal requires all sole source government contracts to "have the provisions required in this article incorporated into the contract". Section 15 of the proposal requires parties to sole source government contracts to "contractually agree, for the duration of the contract and for two years thereafter, to cease making or causing to be made any contribution for the benefit of any political party or any candidate for any elected office of the state or any of its political subdivisions". Section 17 (3) requires the parties to a sole source government contract to agree that an intentional violation of the article makes the contract holder ineligible for such contracts for three years. Does the proposal require any other provisions to be included in sole source government contracts? For clarity, would the proponents consider specifying in section 17 (1) of the measure exactly which provisions must be in the contract, for example by cross-references to the sections containing the requirements?
5. Page 1, line 27: Section 17 (1) refers here to contributions made "in violation of this provision", while elsewhere the proposal refers to violations of "this article". The phrase "this article" presumably refers to all of article XXVIII, not just the new language to be added by the proposed measure. To what provision does the phrase "in violation of this provision" refer?
6. Page 2, lines 12 and 13: To aid clarity by placing all of the effective date provisions of article XXVIII together, would the proponents consider moving the language in section 18 to the existing section 13 of article XXVIII, perhaps as follows:

Section 13 of article XXVIII of the constitution of the state of Colorado is amended to read:

Section 13. APPLICABILITY AND EFFECTIVE DATE. The provisions of this article shall take effect on December 6, 2002 and be applicable for all elections thereafter; EXCEPT THAT

THE PROVISIONS OF THIS ARTICLE CONCERNING SOLE SOURCE GOVERNMENT CONTRACTS SHALL TAKE EFFECT ON DECEMBER 31, 2008. Legislation may be enacted to facilitate its operations, but in no way limiting or restricting the provisions of this article or the powers herein granted.

7. Page 2, lines 14 through 20: Sections 19 and 20 of the proposal are identical to existing sections 11 and 14 of article XXVIII, respectively. By including these sections in the measure, do the proponents intend to move the existing provisions to the end of article XXVIII, as amended by the proposal? If so, would the proponents consider adding the substantive provisions of the measure (currently numbered sections 15, 16, and 17) as sections 11, 12, and 13, followed by the language "Sections 11 through 14 of article XXVIII of the constitution of the state of Colorado are renumbered accordingly."?

8. Page 2, line 20: Would the proponents consider replacing the word "separable" with the word "severable"?

9. Page 2, line 21: "[The following to be inserted alphabetically into Article 28, § 2]"

a. To conform to standard drafting style, would the proponents consider changing this language to:

"Section 2 of article XXVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS to read:"?

b. The existing definitions in section 2 are numbered, not lettered. Would the proponents consider numbering the new definitions so as to place them alphabetically in the section, using decimals as necessary (for example, the definition of "contract holder" could be numbered (4.5), "immediate family member" could be (8.5), and so forth)?

c. To improve clarity by placing the definitions of the terms of art used in the measure before the provisions in which the terms appear, would the proponents consider placing the new definitions at the beginning of the proposal?

10. Page 2, line 23: For consistency with traditional drafting style, would the proponents consider changing "10%" to "10 percent"?

11. Page 2, line 27 and page 3, line 7: Why does the measure define the terms "government contract" and "sole source" separately? For clarity, would the proponents consider combining the definitions into a single definition of the term "sole source government contract", perhaps as follows?

"(14.5) "Sole source government contract means a contract awarded by the state or any of its political subdivisions, without using a public and competitive bidding process soliciting at least three bids, for amounts greater than one hundred thousand dollars, indexed for inflation according to the United States bureau of labor statistics consumer price index for Denver-Boulder after 2010. This amount is cumulative..."

12. Page 2, line 28: To use standard drafting style, would the proponents consider changing

"\$100,000" to "one hundred thousand dollars"?

13. Page 3, line 1: Would the proponents consider replacing the word "and" with "or"?

14. Page 3, lines 3 through 6: The term "making or causing to be made any contribution" is defined by reference to "any contract holder". The definitions in section 2 of article XXVIII apply to the entire article, yet by referring to a contract holder, this definition applies only to the provisions on sole source government contracts. While the exact phrase "making or causing to be made any contribution" is not used elsewhere in article XXVIII, section 3 (11) of the article refers to making contributions, and this provisions apply not only to contract holders but to all persons. To avoid confusion, would the proponents consider revising this definition, or perhaps deleting it and simply adding the appropriate language to section 15 of the proposal as follows?

"... shall contractually agree, for the duration of the contract and for two years thereafter, that a contract holder or an immediate family member of a contract holder shall not make, cause to be made, or induce by any means a contribution, directly or indirectly, on behalf of the contract holder for the benefit of any political party..."

15. Page 3, line 8: Would the proponents consider replacing the word "processes" with the word "process"?

Substantive questions:

1. What is the single subject of the proposed measure?

2. Section 15 of the measure refers to a "presumption of impropriety between contributions to any campaign and sole source government contracts". What is the basis of this presumption? Is it based on concerns over actual corruption in the awarding of government contracts, the appearance of improper influence created by contributions from sole-source contract holders to political candidates, or both? Is this presumption of impropriety intended to serve as a statement of the governmental interest justifying the restriction on contributions?

3. The proposal appears to prohibit a person who holds a sole source contract with any state or local government entity from making campaign contributions to all candidates for elected office of the state or any political subdivision of the state. Do the proponents believe that this restriction would be subject to the level of First Amendment scrutiny established by the U.S. Supreme Court for campaign contribution limits, under which a restriction is upheld if it "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms". *Buckley v. Valeo*, 424 U.S. 1 at 25 (1976). If so, do the proponents believe the measure meets this standard?

4. Section 15 of the proposal prohibits certain contract holders who have entered into sole source government contracts totaling more than \$100,000 from making contributions for the benefit of political parties and candidates for state and local office for the duration of the contract and for two years thereafter.

a. To clarify, do the proponents intend that the prohibition on the making of contributions by the contract holder end two years after the termination date of the contract?

b. To be consistent with the existing terminology of article XXVIII, should the word "candidate" on page 1 of line 8 be changed to "candidate committee"?

c. By prohibiting contributions only to political parties and candidates, would the proposal allow a contract holder to make a contribution to an issue committee (except as may otherwise be prohibited by section 17 (2) of the proposal), a political committee, or a small donor committee? Or is the language "for the benefit of" intended to include contributions to political committees and small donor committees? This is implied by section 17 (1), which imposes a penalty on a person who improperly accepts a contribution to "a candidate committee, political committee, small donor committee, political party, or other entity". To avoid ambiguity in the meaning of "for the benefit of ... any candidate", would the proponents consider specifying these entities in section 15? Or is the language intended to encompass contributions to entities beyond those currently defined in article XXVIII? Is this the purpose of the phrase "... or other entity" in section 17 (1)? What other entities might receive contributions in violation of this provision?

d. In the case of collective bargaining agreements, "contract holder" is defined as "the labor organization and any political committees created or controlled by the labor organization". The existing definition of "contribution" in article XXVIII excludes "a transfer by a membership organization of a portion of a member's dues to a small donor committee or political committee sponsored by such membership organization; or payments by a corporation or labor organization for the costs of establishing, administering, and soliciting funds from its own employees or members for a political committee or small donor committee." Are these provisions consistent?

5. Page 1, lines 29 and 30: Under the proposal, a person who improperly accepts a contribution is liable for "all costs and expenses associated with the breach, including costs and losses involved in securing a new contract if that becomes necessary". What costs and expenses would this include? In what circumstances would it become necessary to secure a new contract?

6. Page 1, lines 31 - 37 : The proposal imposes a duty on the bookkeeper of an "entity that seeks or has a sole source contract with a governmental entity [who] ... obtains knowledge of a contribution made or accepted in violation of this article" to notify the secretary of state or appropriate officer.

a. In what circumstances would a contribution by an entity that is only seeking a sole source government contract be a violation? Is this a reference to section 17 (2), under which a person who makes a contribution intended to influence a ballot issue election is ineligible for a sole source contract relating to the ballot issue?

b. Since this language refers to a contribution made or accepted in violation of this article, it apparently applies to contributions made in violation of any provision of article XXVIII, not just the provisions on sole source contracts. Is this the proponents' intent? If so, do the proponents believe this and the other provisions of the measure that apply to all of article

XXVIII raise issues regarding the single-subject requirement?

7. Page 1, line 36: What is the meaning of the phrase "contract liability"?
8. Page 2, line 1: Subsection 17 (3) disqualifies a contract holder who "intentionally violates this article" from entering into any sole source government contract for three years. This apparently refers to a violation of any provision of article XXVIII, not just the portions involving sole source contracts. Is this the proponents' intent? For example, if an officer of a company with a sole source contract with a local government made a contribution to a candidate for a statewide office that violated section 3 of article XXVIII in some way, would the company become ineligible for any sole source contract with any government entity in the state?
9. Page 2, line 6: Section 17 (4) prohibits elected officials who knowingly violate section 17 of the measure from holding offices "of honor, trust or profit" in Colorado.
 - a. To what offices does this phrase refer? This is the same phrase that appears in section 2 of article XIII of the state constitution regarding impeachments, but is its meaning sufficiently clear? Does the prohibition apply solely to elected offices, or would it also include any appointed offices?
 - b. If a violation is "grounds for ... disqualification to hold any office of honor, trust or profit", would a person found guilty of violating the section be automatically disqualified from office, or would it be necessary for a court or other entity to disqualify the person based on these grounds? Would the disqualification be permanent, or would the duration of the disqualification be determined by a court or other entity?
 - c. The standard in this subsection is "knowing" violation. Other provisions of the measure, including section 17 (1) and (3), refer to "intentional" violations. Do the proponents intend these terms to make the same distinction between specific intent offenses and general intent offenses as is described in section 18-1-501 (5) and (6), Colorado Revised Statutes?
10. Page 2, line 8: Is the statement that a knowing violation of section 17 by an elected official constitutes "misconduct or malfeasance" intended to impose criminal liability on the official under provisions such as part 4 of article 8 of title 18, Colorado Revised Statutes? Is this language intended to impose tort liability?
11. Page 2, line 12: Section 18 of the proposal states that its provisions shall take effect on December 31, 2008. Under section 1 (4) of article V of the state constitution, an initiated measure approved by the voters "shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed." Assuming it is possible under this provision for this measure to take effect after December 31, 2008, is it the proponents' intent to create a specific exception to the general rule of section 1 (4) of article V or to make the measure retroactive to December 31, 2008?
12. Page 2, line 22: Does the term "contract holder" include the employees of the non-governmental party to a sole source government contract?

13. Page 2, lines 29 and 30: The consumer price index is described in a slightly different way from the description in the other two provisions of article XXVIII that refer to this index, section 3 (13) and section 4 (7). Is this intentional? If not, would you consider using a similar description?

14. Section 20 (b) of the proposal requires that the \$100,000 threshold on sole source government contracts be indexed for inflation after the year 2010. On what date would the \$100,000 threshold first be adjusted for inflation? January 1, 2011? To clarify, if the Denver-Boulder Consumer Price Index is 5 percent for the calendar year 2010, would the amount of the threshold be adjusted follows?

- \$100,000 in calendar year 2009;
- \$100,000 in calendar year 2010; and
- \$105,000 in calendar year 2011?

15. Page 3, lines 7 and 8: Section 20 (e) of the proposal defines the term "sole source" as "any government contract that does not use a public and competitive bidding process soliciting at least three bids prior to awarding the contract". For a contract to be outside the definition, must a minimum of three bids simply be solicited? Or must a minimum of three bids be received prior to the awarding of the contract?