

Amendment 54

Communications and Technology Section
of the Colorado Bar Association

November 3, 2009



GREENBERG TRAURIG, LLP ■ ATTORNEYS AT LAW ■ WWW.GTLAW.COM

©2009. All rights reserved.

Colorado 2008 Ballot Measures

- Colorado was slated to have 18 measures on the November 2008 ballot.
- Hours before the October 2, 2008 deadline, union sponsors of four controversial amendments withdrew these amendments, announcing that they had struck a deal with business.

Colorado 2008 Ballot Measures

- 10 of the citizen initiated measures made the ballot. Only two of them passed.
- Amendment 50: allowed municipalities to extend hours of limited gaming operations, increase minimum bet.

Colorado Constitution

- Colorado 4th branch of government: Initiative process.
- One of the easiest states in the country to pass a constitutional amendment.
- Two proponents.
- Valid signatures of 5% of the total number of votes cast for the Secretary of State in prior election (76,047 signatures in 2008).

Referendum O

- Legislatively referred referendum attempted to change signature requirements for qualifying an initiated constitutional amendment for the ballot.
- Supporters included Gov. Ritter, Gov. Owens, Denver Metro Chamber, CML.
- Lost 52% to 48%.

Amendment 54

- The Colorado Clean Government sponsored initiative was championed as closing a loophole in Colorado election law by banning the practice of “pay to play” .
- Supporters included Clean Government Colorado and the Independence Institute.
- Opponents included Protect Colorado’s Future, Club 20, and various business groups.

Amendment 54 Results

- By the narrow margin of 51.21 percent -- enacted Amendment 54 to the Colorado Constitution.

Amendment 54 Text

Section 15 of Amendment 54 provides, in part, that contract holders shall contractually agree, for the duration of the contract and for two years thereafter, to cease making, causing to be made, or inducing by any means, a contribution, directly or indirectly, on behalf of the contract holder or on behalf of his or her immediate family member and for the benefit or any political party or for the benefit of any candidate for any elected office of the state or any of its political subdivisions.

Amendment 54 Definitions

An “immediate family member” includes

- any spouse, child, spouse’s child, son-in-law, daughter-in law, parent, sibling, grandparent, grandchild, stepbrother, stepsister, stepparent, parent-in-law, brother-in-law, sister-in-law, aunt, niece, nephew, guardian, or domestic partner. “Uncle” was not included as an “immediate family member.”

“State or any of its political subdivisions” includes

- the state of Colorado and its agencies or departments, as well as the political subdivisions within this state including counties, municipalities, school districts, special districts, and any public or quasi-public body that receives a majority of its funding from the taxpayers of the state of Colorado.

“Contract Holder”

A “contract holder” is

any non-government party to a sole source government contract, including persons that control ten percent or more shares or interest in that party; or that party’s officers, directors or trustees; or in the case of collective bargaining agreements, the labor organization and any political committees created or controlled by the labor organization.

Sole Source Government Contract Defined

- “Sole source government contract” is “any government contract that does not use a public and competitive bidding process soliciting at least three bids prior to awarding the contract.”
- Amendment 54 includes within this definition “collective bargaining agreements with a labor organization representing employees, but not employment contracts with individual employees.” Collective bargaining agreements qualify as sole source government contracts “if the contract confers an exclusive representative status to bind all employees to accept the terms and conditions of the contract.”

\$100,000 Threshold

- The amendment applies only to those sole source government contracts awarded by the state or any of its political subdivisions for amounts greater than one hundred thousand dollars.
- This amount is cumulative and includes all sole source government contracts with any and all government entities involving the contract holder during a calendar year.

State Database

Amendment 54 creates a state database, which lists sole source government contracts and the parties to each contract.

Technical guidance regarding such obligations can be found at

<http://www.colorado.gov/dpa/dfp/sco/contracts.htm>.

Contributions to Ballot Measures

Amendment 54 provides that any person who makes “any contribution intended to promote or influence the result of a ballot issue shall not be qualified to enter into a sole source government contract relating to that particular ballot issue.”

Elected Official Sanctions

Elected or appointed officials may be removed from office and disqualified to hold “any office of honor, trust or profit in the state” for knowing violations of sections 15 and 17(2) of the amendment.

Contract Holder Sanctions

The amendment requires the parties to agree that “if a contract holder intentionally violates” sections 15 and 17(2), the “contractual damages” must include the contract holder’s three-year disqualification from holding any sole source government contract “or public employment” with the state or “any of its political subdivisions.”

Other Sanctions

Any person who intentionally accepts contributions on behalf of a candidate committee, political committee, small donor committee, political party, or other entity, has engaged in corrupt misconduct and is required to pay restitution to the general treasury of the contracting governmental entity to compensate the governmental entity for all costs and expenses associated with the breach, including costs and losses involved in securing a new contract if that becomes necessary.

Ritchie v. Ritter (1/28/09)

The plaintiffs allege that Amendment 54 is unconstitutional because it impermissibly chills their constitutional rights to political speech and association in violation of the First and Fourteenth Amendments to the United States Constitution. The Plaintiffs sought a preliminary injunction, halting Amendment 54's implementation or enforcement, pending the outcome of this underlying civil action.

Dan Ritchie

He became chairman and chief executive officer of the Denver Center for the Performing Arts (“DCPA”), one of the nation’s largest cultural complexes, in January 2007. The DCPA has a sole source government contract with the City and County of Denver in excess of \$100,000 per year, as defined by Amendment 54. Mr. Ritchie has made political contributions to candidates for a variety of state and local elections.

Patrick Hamill

- Patrick Hamill is chairman and chief executive officer of Oakwood Homes. Oakwood Homes has sole source government contracts with local and political subdivisions, including the Green Valley Ranch Metropolitan District and the Denver Public Schools, in excess of \$100,000 annually.
- Mr. Hamill serves on the board the University of Denver, which has sole source contracts in excess of \$100,000 annually.

Charlie Brown

- Mr. Brown is a member of the Denver City Council, representing District 6. Mr. Brown also serves as a board member of Visit Denver, a private, nonprofit trade association that is responsible for marketing Denver as a convention and leisure destination. Visit Denver has a sole source government contract with the City of Denver in excess of \$100,000, to act as the official marketing agency for Denver.
- As a result, Mr. Brown cannot contribute to candidates for elected office, including his own campaign.

Matthew Dalton

Director and shareholder with the law firm of Grimshaw & Haring, P.C. Grimshaw & Haring provides legal services through sole source contracts with a cumulative value annually of more than \$100,000 to “special districts” subject to Amendment 54. Amendment 54 prevents him, his spouse, and his 21-year-old son (and distant relatives) from contributing to future political campaigns.

The Children's Hospital

The Children's Hospital is a sole source government contract holder under Amendment 54. It is involved in various community activities and advocates on behalf of ballot issues that affect the nonprofit sector.

As of May 2008, the Children's Hospital had 28 board members. Board members are contemplating resignation because of the amendment's ban on campaign contributions. Amendment 54 has made it more difficult to attract and retain community leaders to serve on the board of the Children's Hospital and thus more difficult for the hospital to govern itself and to raise money.

University of Denver

DU has sole source contracts with (1) the City of Denver for use in its Denver Preschool Program to provide scholarships to qualified applicants who are attending Fisher Early Learning Center; (2) the State of Colorado for use in its Child and Adult Food Care Program to pay part of the expenses of feeding 225 children each day at the Fisher Early Learning Center; (3) the Colorado Department of Human Services to provide mental health services to the indigent population; and (4) and the Denver Public Schools and Aurora Public Schools to provide program material and instruction costs. DU is governed by a 28-member Board of Trustees.

Under Amendment 54, the members of the Board of Trustees are also sole source contract holders. Board members are contemplating resignation because of the amendment's ban on campaign contributions. Amendment 54 has made it more difficult to attract and retain community leaders to serve on DU's board and thus more difficult for the university to govern itself and to raise money.

Procurement Codes

- Many states have adopted the Model Procurement Code, developed by the American Bar Association.
- The state and local governments in Colorado have differing procurement laws, but all are based on the Code's fundamental principles.

Exceptions to Competitive Bidding

The exceptions to bidding arose for practical reasons: there is only a sole source; bidding is time-consuming and an emergency cannot wait; suppliers of personal services to local governments such as water lawyers, bond counsel, and auditors often have a long history of working with the government.

Additional Witnesses

- Bob FitzGerald (Aurora City Council)
- Tami Door (Downtown Denver Partnership)
- Patrick Waak (Colorado Democratic Party)
- Dick Wadhams (Colorado Republican Party)

Preliminary Injunction Hearing

Following a two-day hearing and legal arguments, Denver District Court Judge Cathy Lemon issued a preliminary injunction finding that the plaintiffs have a high likelihood of succeeding on the merits of their claim that Amendment 54 is facially overbroad and unconstitutional. Wrote a 32-page written order (8/12/09).

First Amendment Standard of Review

- Generally, a limitation on campaign contributions must be “closely drawn to match a sufficiently important governmental interest”, which is a question of proportionality.
- Here, not a mere limitation, but an absolute ban, which penalizes individuals who serve on an organizational board merely because of the association with the entity.

Governmental Interest

- The only governmental interest identified in Amendment 54, is a “presumption of impropriety between contributions to any campaign and sole source government contracts.”
- Presumption is not evidence and cannot constitute adequate justification for burdens of speech and association.

No evidence of corruption

- No evidence presented of perceived or actual corruption in Colorado.
- Different from other states that have enacted more narrow pay to play legislation.

Constitutionally Overbroad

- Banned those subject to it from contributing not only to candidates for offices with decision-making authority over their contract, but to any candidate for any office at any level of government anywhere in Colorado, and to political parties.

Unconstitutionally Vague

“The vagueness of Amendment 54 does not allow those subject to it to assess the burden on their rights to free speech and association and make informed decisions before acting.”

Next: Colorado Supreme Court

Oral Argument scheduled for December 3rd.

For more Information Contact:

Doug Friednash

1200 17th Street, Suite 2400, Denver, CO 80202

FriednashD@gtlaw.com

303.572.6553



GREENBERG TRAURIG, LLP ■ ATTORNEYS AT LAW ■ WWW.GTLAW.COM

©2009. All rights reserved.