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VIA EMAIL & U.S. MAIL

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Dear John:

You have asked for our opinion on whether Amendment 54, the ballot measure adopted by the voters in 2008 that prohibits certain campaign contributions by holders of "sole source contracts," applies to franchise agreements between cable operators and local governments. The issue has arisen in the context of a demand by counsel for the City of Castle Pines North to include Amendment 54 language in the new franchise agreement with the City. Amendment 54 is presently in litigation. The outcome of that litigation may affect this analysis, so our views are subject to further clarification of Amendment 54 by the courts.

I. Overview

Amendment 54 is a citizens initiative adopted by the voters of Colorado in November of 2008. By its terms, it applies to all "sole source government contracts." *See* Colo. Const. art. XXVIII, § 15. Amendment 54 amends the campaign finance constitutional amendment initiated by Common Cause, and it is ostensibly a campaign finance measure.

Amendment 54 imposes a "contractual agreement" on "contract holders" of "sole source government contracts" prohibiting certain political contributions. "Sole source government contracts" can be either with the State or "any of its political subdivisions." The City of Castle Pines North, a municipality, comes within the definition of a "political subdivision." Colo. Const. art. XXVIII, § 2(14.6).

As concerns Comcast, if the franchise agreement were deemed to be a "sole source government contract" and otherwise subject to the regulation of Amendment 54, Comcast itself would be barred from "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 of any political party or for the benefit of any candidate for any

elected office of the state or any of its political subdivisions." Colo. Const. art. XXVIII, § 15. This prohibition would extend for the duration of the franchise agreement and two years hence.

If the franchise extension agreement were deemed a "sole source government contract," then Comcast would also be obligated to prepare a "Government Contract Summary." Colo. Const. art. XXVIII, § 16. This summary would require certain details of the contract, and Comcast would have to file it with the Executive Director of the Department of Personnel and Administration. *Id.*

It is important to note that the prohibition on political contributions does not appear limited to political contributions involving the particular jurisdiction involved, that is, in this case, the City. Such an expansive reading of Amendment 54 may or may not be appropriate. Nevertheless, we do not endeavor here to address the scope of Amendment 54 and its prohibitions if it were in fact applicable to the franchise agreement extension. Rather, our opinion is limited to our assessment of whether Amendment 54 is applicable in the first instance.

II. The Plain Language of Amendment 54 Suggests That it Is Not Applicable to Franchise Agreements

The starting point for interpreting an initiated constitutional amendment is the text of the measure itself, looking to determine voter intent in its adoption. "In assessing the intent of the voters, we look to the language of the text and accord words their plain and ordinary meaning." *Bruce v. City of Colorado Springs*, 129 P.3d 988, 992 (Colo. 2006). Before turning to the Blue Book, discussed below, in our view, the Cable Television Franchise Agreement ("Franchise Agreement") is not a "sole source government contract" under the plain and ordinary meaning of those terms.

As defined in Amendment 54, a "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." Because cable franchises are, by definition, non-exclusive, they should not be considered "sole source" for purposes of Amendment 54 – even if the franchise in fact only involves one cable company. A non-exclusive agreement likely would not be deemed to lack a "public" or "competitive" process as these terms are used in Amendment 54. *See* 10 McQuillin Mun. Corp. § 37:107 (3rd ed.) ("Competitive bidding requirements are . . . . designed to prevent fraud, collusion, favoritism and improvidence in the administration of public businesses as well as to insure that the public receives the best work or supplies at the most reasonable price practicable"). While the government entity at issue here did not necessarily "solicit" for cable franchisees as ostensibly required by Amendment 54, the non-exclusive nature of cable franchises would appear to render such solicitation unnecessary as franchise agreements are non-exclusive.

In addition, the Franchise Agreement is arguably not a "government contract" within the meaning of the Amendment. The existence and structure of any franchise agreement is mandated by law and exists to regulate and promote the growth of the cable system. 47 U.S.C. § 521. It is not a method by which the government buys or sells goods and services. It thus appears to fall outside of the scope of the term "government contract" as used in the

Amendment. *See* 2008 State Ballot Information Booklet (the "Blue Book") at 17 (discussing Amendment 54 in the context of the "purchase of goods and services" by state and local governments).

Furthermore, as discussed more expansively below while the agreement certainly is one between Comcast and the City, and while this particular franchise renewal did not arise out of a competitive bidding process per se, the Agreement is not a "sole source contract" under the plain and ordinary meaning of those terms. While this term does not appear to have been defined in any Colorado case, the term is used repeatedly in hundreds of federal cases in the government contract context. *See, e.g., Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 436 (5th Cir. 2008)(referencing an "award" of "non-competitive sole-source contracts"). The plain and ordinary meaning of a "sole source contract" is a contract for the sale of a good or service to a government entity through non-competitive means.

This analysis comports with the definition of "sole source procurement" in the Colorado Procurement Code, specifically C.R.S. § 24-103-205. "Sole source procurements" involve the "award" of a contract "for a supply, service, or construction item without competition." *Id.*

By contrast, the Franchise Agreement is not "selling" a good or service to the City. Indeed, it is the cable company that is paying the local government for access to public thoroughfares. By its terms, the Franchise Agreement authorizes Comcast to access public rights-of-way to construct cable television facilities and provide service to the City's residents. Given that the Franchise Agreement represents a situation diametrically different from what is commonly understood to b a "sole source contract," the plain and ordinary meaning of those terms does not include the Franchise Agreement.

This interpretation is further underscored by the provision of Amendment 54 that provides that: "[t]his provision [defining 'sole source contracts'] applies only to government contracts ***awarded*** by the state or any of its political subdivisions ***for amounts greater than one hundred thousand dollars*** indexed for inflation . . . ." Colo. Const. art. XXVIII, § 2(14.4) (emphasis added). The plain and ordinary meaning of these terms is that a "sole source contract" involves a government entity "awarding" a contract to a "contract holder" that will ***receive*** $100,000.00 or more as a result of having been "awarded" the "sole source contract." Not only do these terms ***not*** suggest that a "sole source contract" would involve a situation where the "contract holder" would be paying the government entity, such an interpretation would lead to an absurd result. *See Richmond American Homes of Colorado, Inc. v. Steel Floors, LLC*, 187 P.3d 1199, 1204 (Colo. 2008) ("We presume that the General Assembly intends a just and reasonable result when it enacts a statute, and we will not follow a statutory construction that leads to an unreasonable or absurd result.")

Moreover, by its terms, the Franchise Agreement is "nonexclusive." It is noteworthy that Amendment 54 itself speaks to an "award" of a "sole source government contract." Colo. Const. art. XXVIII, § 2(14.4). The "grant" of a nonexclusive franchise (per the terms of the Franchise Agreement) is not an "award" of a "sole source contract" under the plain and ordinary meaning of those terms. In this regard, it should be noted that the history of the cable industry involves

intense competition for the right to serve particular communities, a fact which further weighs against the Franchise Agreement being deemed "sole source."

III. The Language of the Blue Book Strongly Indicates That Franchise Agreements Are Not Regulated by Amendment 54

Setting aside the plain language of Amendment 54, there is no evidence that the voters intended that Amendment 54 apply to the Franchise Agreement between the City and Comcast.

> When interpreting a constitutional amendment, we should ascertain and give effect to the intent of those who adopted it. When, as here, the provision was adopted by popular vote, we must determine what the voters believed the language of the amendment meant when they approved it, by giving the language the natural and popular meaning usually understood by the voters.
> . . .
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> When interpreting a constitutional amendment, we may look to the explanatory publication of the Legislative Council of the Colorado General Assembly, otherwise known as the Blue Book. While not binding, the Blue Book provides important insight into the electorate's understanding of the amendment when it was passed and also shows the public's intention in adopting the amendment.

Dean v. Grossman, 80 P.3d 952, 962 (Colo. App. 2003). We believe the Blue Book is unequivocal that the scope of Amendment 54 does not address the Franchise Agreement at issue here.

First, the Summary and Analysis is clear that the amendment addresses only the situation where "[g]overnment entities ***purchase*** goods and services from private-sector vendors." Blue Book at 17 (emphasis added). The Blue Book provides definition to Amendment 54's use of the word "award" and makes it clear that it is a term of art limiting the types of "sole source contracts" at issue to ones involving a government entity "purchasing" a good or service from a vendor:

> **How are state government contracts awarded?** State law requires, with few exceptions, that vendors for state contracts be selected through a competitive bidding process. Separate rules govern small and emergency purchases. In some cases, a state agency may determine that only one good or service can reasonably meet the agency's need, and only one vendor can provide the particular good or service.

Id (underscoring added). The Blue Book thus tracks our analysis of the plain language of Amendment 54 discussed above; "sole source government contracts" are ones that involve the sale of a good or service to a government entity.

Second, the most apposite provision of the Blue Book that we believe offers compelling evidence that Amendment 54 does not apply to the Franchise Agreement appears in the list of

examples following the discussion of "how are state government contracts awarded" quoted above. There, an example is included that relates to "utility services" that may need to be purchased without competitive bidding, however, the example makes it very clear that the types of "utility services" that relate to a "sole source government contract" are ones that are "purchased" by the government entity. *Id.* ("where public utility services are to be purchased").[1] Applying the well established rule of *expressio unius exclusio alterius* (the inclusion of certain items implies the exclusion of others, *see Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001)), "sole source government contracts" would not include "utility services" that were not going to be "purchased" by the government entity.

In sum, the Blue Book is very clear that the types of "sole source government contracts" that are at issue under Amendment 54 are those that involve the "purchase" of a "good or service" by the government entity. The Franchise Agreement is not such an agreement.

IV. Constitutional Problems With Applying Amendment 54 to the Franchise Agreement

The constitutional problems with applying Amendment 54 to the Franchise Agreement at issue are beyond the scope of this opinion letter, however, a brief mention of those problems is called for. The Cable Act prohibits a cable operator from providing service without a franchise. 47 U.S.C. § 541(b)(1); *see* McQuillan Mun. Corp. 34:34 (3d ed). Such franchises are granted by governmental "franchising authorit[ies]" (47 U.S.C. § 522(10)). Because the Cable Act requires cable operators to enter into franchise agreements with governmental entities, if Amendment 54 were by its terms applicable to cable franchise agreements, it might be deemed to violate the First Amendment of the United States Constitution. *See* 51 Am. Jur. 2d Lobbying § 14 (noting that state regulations on lobbying must be "narrowly drawn so as to serve the state's compelling interests" to survive First Amendment scrutiny). In addition, because cable operators are ***required*** to enter into franchise agreements with franchising authorities, the effect of deeming such contracts "sole source" contracts would be to bar all cable operators from lobbying. At the very least, this was not the intention of the drafters. *See* Blue Book at 18 (identifying arguments in favor of Amendment 54 as promoting "civic trust and government transparency" and furthering "the efficient use of taxpayer dollars by promoting competitive bidding for government contracts").

V. If Language Is to be Added to Franchise Agreement with the City of Castle Pines North, The Language Should be Amended

The language proposed by the City's attorneys is far too suggestive that Amendment 54 "may" apply to the Franchise Agreement. For the reasons discussed, we believe there are strong arguments that it does not apply. Moreover, Amendment 54 is presently being litigated.

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[1] The Colorado Procurement Regulations track this analysis and identify as an example of a "sole source procurement" a situation where "public utility services are to be procured." Colorado Procurement Rule R-24-103-205-01(a)(iii).

If some language is deemed to be needed in the Franchise Agreement, we propose the following:

> Based upon a legal opinion by lawyers for Grantee, the parties do not believe that Amendment 54 is applicable to this Agreement. If, after litigation over the Amendment is concluded, the parties believe that additional language should be added to this Agreement to address Amendment 54, the parties agree to negotiate such language in good faith and amend the Agreement accordingly.

We believe that such language would satisfy any concerns about ignoring Amendment 54 at this time.

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We would be happy to answer any further questions you may have in this regard. This opinion is based upon our initial analysis of Amendment 54 and its applicability to the Franchise Agreement. It is for the sole use of Comcast and cannot be shared or used for any purpose not contemplated by the situation here: the application of Amendment 54 to franchise agreements similar to the one provided us.

Sincerely,

Richard Westfall

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