

July 24, 2009

Via email

The Honorable Bernie Buescher, Secretary of State
Bill Hobbs, Deputy Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290

Re: Supplement to comments made at rulemaking hearing dealing with Amendment 54 definitions (Proposed Rule 1.16)

Dear Secretary Buescher and Mr. Hobbs:

At the rulemaking hearing held on Wednesday, the Secretary held open the record until the close of business today. Please consider this letter to be a supplement to my remarks made at Wednesday's hearing.

You may recall that I posed this hypothetical question: "What would happen if the Department of Personnel & Administration adopted a standard that is different than the one adopted by the Secretary of State?" That question, as a hypothetical, is no longer relevant. The Department actually adopted such a standard months ago.

On January 1, 2009, the Department of Personnel & Administration specifically set forth its operative definition of a "sole source government contract." The **only** elements set forth in that definition are: (1) the "contract does not use a public and competitive bidding process soliciting at least three bids prior to awarding the contract;"; (2) the contract is [a]warded by the State or any of its subdivisions;" and (3) the cumulative amounts of all contracts is "greater than \$100,000..., indexed for inflation." Sec. 2.5, DPA Technical Guidance (attached hereto). This definition contains no precondition, like that in your Proposed Rule 1.16, that there be a "legal requirement or authority for competitive bidding."

If Section 2.5 of the DPA Technical Guidance were not clear enough, Section 3.4 of that document makes it plain that every single contract that meets the above tests is covered by Amendment 54. Sole source government contracts "include **any contracts** that satisfy the requirements of Section 2.5, including:... **All contracts**, including purchase orders." Sec. 3.4.1.1 (emphasis added); *see also* Colo. Const., art. XXVIII, sec. 2(14.4) (Amendment 54 applies to "any government contract..."). "Any" and "all" permit no implied exception. *Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 75 (Colo. 2008) (use of "any" in campaign finance provisions of the

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Constitution means "we are not free to imply limitations or qualifications that are not found in article XXVIII"); *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81, 91 (Colo. 1995) ("The dictionary definition and common usage of the word 'all' do not provide for an exception or exclusion that is not expressly specified"). Because the definitions in Amendment 54 and in the DPA Technical Guidance are plainly all-encompassing, no exceptions may be imputed to Amendment 54's application by means of this rulemaking. *See* Sec. 3.4.1.2 (Amendment 54 even applies to procurements that are not considered sole source procurements under the State Procurement Code).

Given the Department's broad definition and the narrower definition you have proposed, I have a somewhat different question than I posed to you earlier in the week. "Upon what authority should utilities and Medicaid providers (among others) rely when filing information with the Department of Personnel & Administration – the Department's rules that have been in place since the day Amendment 54 became effective or a different standard adopted by your office?" If the goal of this proceeding is to provide certainty to affected parties, the knowing creation of an inconsistent standard will achieve just the opposite result. I urge you not to create an obstacle to clarity and compliance by adopting this regulation.¹

Sincerely,



Mark G. Grueskin

MGG/aak

cc: Andrea Gyger

¹ The suggestion was made at the rulemaking hearing that your authority is triggered because Amendment 54 is a campaign finance provision. Yet, Judge Lemon found that the Section 16 of Amendment 54 – the sole surviving provision – is justified on a non-campaign finance rationale. "[T]ransparency is a listed purpose of Amendment 54 in the Blue Book.... [T]he court determines that Section 16 is closely drawn to serve the important state's interest of transparency in government contracting and exempts it from the operation of this preliminary injunction." Order at 26. The Secretary of State does not oversee government contracting; the Department of Personnel & Administration does. As such, there cannot be much question about which department has the legal authority to define the phrase in question.

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SOLE SOURCE CONTRACTS AND CAMPAIGN CONTRIBUTIONS

1. Authorities
2. Definitions
3. Sole Source Contracts
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6. Dollar Threshold Adjustment Process
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8. Effective Date and Applicability
9. Provision for Sole Source Government Contracts
10. Sole Source Government Contract Summary
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12. Next Steps

1. AUTHORITIES

Article XXVIII, Sections 2, 13, 15, 16, and 17, Constitution of Colorado (Campaign and Political Finance)

CRS §24-103-204 (Small purchases)

Procurement Code R 24-103-204-02 (Competition not required)

CRS §24-103-205 (Sole source procurement)

2. DEFINITIONS

2.1 Award of a sole source government contract – Notice by the State or any of the State's political subdivisions to award a contract with a contract holder. The amount of the award is equal to the final award amount. Awards also include amendments and any modifications to the original award.

2.2 Contract Holder

2.2.1 Non-governmental party to a sole source government contract,

2.2.2 Persons that control 10 percent or more shares or interest in a non-governmental party to a sole source government contract,

2.2.3 The officers, directors or trustees of a non-governmental party to a sole source government contract,

2.2.4 In the case of collective bargaining agreements, the labor organization and political committees created or controlled by the labor organization.

2.3 Immediate family member - 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.

2.4 Contractor – For purposes of the Technical Guidance and for Article XXVIII, "Contractor" as used in contracts shall have the same meaning as "Contract Holder" defined in Section 2.2.

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2.5 Sole source government contract for Article XXVIII

2.5.1 Elements

2.5.1.1 Government contract that does not use a public and competitive bidding process soliciting at least three bids prior to awarding the contract,

2.5.1.2 Awarded by the State or any of its political subdivisions,

2.5.1.3 For cumulative amounts greater than \$100,000 (one hundred thousand dollars), indexed for inflation (See Section 6), including all sole source government contracts with any and all governmental entities involving the non-governmental party during a calendar year.

2.5.2 Collective bargaining agreements

2.5.2.1 Sole source contracts also include collective bargaining agreements if the contract confers an exclusive representative status to bind all employees to accept the terms and conditions of the contract.

2.5.2.2 Employment contracts with individual employees are not sole source government contracts.

2.5.2.3 There is no dollar threshold for collective bargaining agreements.

2.6 State or any of its political subdivision - the State of Colorado and its agencies or departments and institutions of higher education, as well as the political subdivisions within the 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.

3. SOLE SOURCE CONTRACTS

3.1 Sole Source Government Contracts and Campaign Contributions - Contract holders of a sole source government contract as defined by section 2.2 above, 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 of any political party or for the benefit of any candidate for any elected office of the State or any of its political subdivisions.

3.2 Sole Source Language - Every sole source government contract by any political subdivision of the State shall incorporate Article XXVIII, section 15, into the contract. See Section 9, paragraph 1 of this Technical Guidance.

3.3 Contribution to Influence Ballot Issue – Any person who makes or causes to be made any contribution intended to promote or influence the result of an election on a ballot issue shall not be qualified to enter into a sole source government contract relating to that particular ballot issue. This language is included under Article XXVIII section 17 (2). See Section 9, paragraph 2 of this Technical Guidance.

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3.4 Sole Source Government Contract for Article XXVIII and Sole Source Procurement in the State of Colorado

3.4.1 Sole source government contracts for Article XXVIII include any contracts that satisfy the requirements of Section 2.5, including:

3.4.1.1 All contracts, including purchase orders.

3.4.1.2 Procurements that are not considered sole source procurements under the State of Colorado Procurement Code, such as for discretionary purchases. See CRS §24-103-204 (small purchases) and Procurement Code R 24-103-204-02. For State agencies and other entities that follow the State of Colorado Procurement Code and Rules these include:

3.4.1.2.1 Non-delegated agencies may purchase supplies or services up to a limit of \$1,000 without benefit of competition.

3.4.1.2.2 Group I and II agencies may purchase supplies up to a limit of \$10,000 and services up to \$25,000 without benefit of competition.

3.4.1.3 Procurements under procurement codes for the State's political subdivisions that may not be considered sole source, such as procurements for small purchases that are not competitively bid.

3.4.2 Based on Colorado statutes and the State of Colorado Procurement Code and Rules, sole source procurements may be awarded in certain circumstances. The resulting contract will constitute a sole source government contract under Article XXVIII when the cumulative amount of awards of these contracts exceeds \$100,000 (one hundred thousand) indexed for inflation during a calendar year. See CRS §24-103-205 (sole source procurement).

4. PENALTIES

4.1 Corrupt Misconduct and Restitution - Any person who intentionally accepts contributions on behalf of a candidate committee, political committee, small donor committee, political party, or other entity, in violation of Article XXVIII, section 15 has engaged in corrupt misconduct and shall 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.

4.2 Bookkeeper Restitution - If a person responsible for the bookkeeping for a contract holder, or if a person acting on behalf of the governmental entity, obtains knowledge of a contribution made or accepted in violation of Article XXVIII section 15, and that person intentionally fails to notify the secretary of state or appropriate government officer about the violation within ten business days of learning of such

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contribution, then that person may be contractually liable in an amount up to the above restitution.

4.3 Intentional Violation by Contract Holder - The parties to a sole source government contract shall agree that if a contract holder intentionally violates Article XXVIII, section 15 or section 17 (2), as contractual damages that contract holder shall be ineligible to hold any sole source government contract, or public employment with the State or any of its political subdivisions, for three years. The Governor may temporarily suspend any remedy under this section during a declared state of emergency.

4.4 Knowing Violation by an Elected or Appointed Official - Knowing violation of Article XXVIII, section 15 or section 17 (2) by an elected or appointed official is grounds for removal from office and disqualification to hold any office of honor, trust or profit in the state, and shall constitute misconduct or malfeasance.

5. REPORTING PROCESS

5.1 Contract holder - Each contract holder of a sole source government contract with any State agency or any of the State's political subdivisions shall promptly report the following information to the Department of Personnel & Administration when the cumulative amount of awards of these contracts exceeds \$100,000 (one hundred thousand) indexed for inflation during a calendar year:

5.1.1 Government Contract Summary – The contract holder shall submit the information in Section 10 for government contract summary.

5.1.2 Contract Holder Information – The contract holder shall submit the information in Section 11. In addition, the contract holder shall submit this information when there are changes in the information.

5.1.3 Method of Reporting – Each contract holder with a sole source government contract with any State agency or any of the State's political subdivisions shall promptly report the information in Section 10 and 11 using an internet-based reporting system.

5.2 Department of Personnel & Administration - The Department of Personnel & Administration shall promptly publish and maintain a summary of each sole source government contract submitted by non-governmental contract holders in which the cumulative amount of any and all sole source government contracts during a calendar year exceeds \$100,000 indexed for inflation.

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6. DOLLAR THRESHOLD ADJUSTMENT PROCESS

- 6.1 Overall – The initial dollar threshold of \$100,000 shall be indexed for inflation per the United States Bureau of Labor Statistics consumer price index (CPI) for Denver-Boulder-Greeley after the year 2012, adjusted every four years beginning January 1, 2012 to the nearest lowest \$25.
- 6.2 The United States Bureau of Labor Statistics CPI for Denver-Boulder-Greeley shall be measured for the year 2008.
- 6.3 For January 1, 2009 to December 31, 2012, the dollar threshold shall be \$100,000.
- 6.4 The United States Bureau of Labor Statistics CPI for Denver-Boulder-Greeley shall be measured for the year 2012.
- 6.5 The adjustment to the dollar threshold shall be calculated as follows:
 - 6.5.1 United States Bureau of Labor Statistics CPI for Denver-Boulder-Greeley in 2012 less the CPI for Denver-Boulder Greeley in 2008. The difference in these two CPI amounts shall be divided by the CPI for Denver-Boulder Greeley for 2008, and this percentage shall be the amount of the adjustment to the dollar threshold.
 - 6.5.2 The adjusted dollar threshold will be in effect for each subsequent four year period.
 - 6.5.3 The adjustment process will occur every four years following the year 2012, as described in this Section for the year 2012.

7. ENFORCEMENT

A registered voter of the state may enforce Article XXVIII, section 15 or section 17 (2) by filing a complaint for injunctive or declaratory relief or for civil damages and remedies, if appropriate, in the district court.

8. EFFECTIVE DATE AND APPLICABILITY

8.1 Effective Date – Amendment 54 amending Sections 2 and 13 and adding sections 15, 16, and 17 to Article XXVIII of the Colorado constitution shall take effect on December 31, 2008.

8.2 Applicability – This amendment shall be applicable to all sole source government contracts, including any modifications to existing sole source government contracts, entered into on and after December 31, 2008.

9. PROVISION FOR SOLE SOURCE GOVERNMENT CONTRACTS

State agencies and institutions of higher education shall add the provision for sole source government contracts on the next page for all sole source government contracts as defined under Article XXVIII.

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SOLE SOURCE GOVERNMENT CONTRACTS
AS DEFINED IN COLORADO CONSTITUTION ARTICLE XXVIII

This provision applies only to sole source government contracts and does not apply to any contract which used a public and competitive bidding process in which the State agency or institution of higher education solicited at least three bids prior to awarding the contract. Contractor certifies, warrants, and agrees that it has complied and will comply with Colorado Constitution Article XXVIII, including but not necessarily limited to the following prohibitions and obligations:

1. If during the term of the contract, contractor holds sole source government contracts with the State of Colorado and any of its political subdivisions cumulatively totaling more than \$100,000 in a calendar year, then for the duration of this contract and for two years after, contractor will not make, cause to be made, or induce by any means a contribution, directly or indirectly, on behalf of contractor or contractor's immediate family member(s) for the benefit of any political party or for the benefit of any candidate any elected office of the State or any of its political subdivisions; and
2. Contractor represents that contractor has not previously made or caused to be made, and will not in the future make or cause to be made, any contribution intended to promote or influence the result of a ballot issue election related to the subject matter of this contract; and
3. Contractor will satisfy contractor's obligations to promptly report to the Colorado Department of Personnel & Administration information included in the Government Contract Summary and the Contract Holder Information, regarding this contract and any other sole source government contracts to which contractor is a party; and
4. Contractor understands that any breach of this section or of Contractor's responsibilities under Colorado Constitution Article XXVIII may result in either contractual or constitutionally mandated penalties and remedies; and
5. A Contractor that intentionally violates Colorado Constitution Article XXVIII, Section 15 or 17(2), shall be ineligible to hold any sole source government contract, or public employment with the state or any of its political subdivisions for three years; and

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6. By execution of this contract, Contractor hereby confirms it is qualified and eligible under such provisions to enter into this contract.

For purposes of this clause, the term "contractor" shall include persons that control ten percent or more shares or interest in contractor, as well as contractor's officers, directors, and trustees. The term "immediate family member" shall include a 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.

10. SOLE SOURCE GOVERNMENT CONTRACT SUMMARY – The following is a sample form. To complete the actual form, go to:
<https://ids-online.colorado.gov/DPA/DFP/SCO/Amendment54/>

Sole Source Government Contract Summary	
To be completed by contract holder for each sole source government contract when the cumulative amount of these awards of these contracts exceeds \$100,000 (indexed for inflation every fourth year) during a calendar year	
Name of non-governmental party	
Taxpayer Identification Number for non-governmental party	
Address of non-governmental party - Street	
Address of non-governmental party - City	
Address of non-governmental party- State	
Address of non-governmental party - Zip	
If outside US, where outside US	
Brief description of nature of contract and goods and services performed	
Contract start date	
Contract end date	
Estimate amount of payment (Award amount)	
Rate of payment (e.g. average rate per hour)	
Sources of payment (Name of State agency or political subdivision that awarded sole source contract)	

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Describe renewal options if any	
Complete and submit this form and then complete Contract Holder Information	
Contract holder represents that the information provided on this form is accurate.	
Contract holder will re-submit this form when this information changes	

11. CONTRACT HOLDER INFORMATION – The following is a sample form. To complete the actual form, go to:

<https://ids-online.colorado.gov/DPA/DFP/SCO/Amendment54/>

Contract Holder Information	
<p>To be completed by contract holder for each sole source government contract when the cumulative amount of these awards of these contracts exceeds \$100,000 (indexed for inflation every fourth year) during a calendar year</p>	
Name of non-governmental party	
Taxpayer Identification Number for non-governmental party	
Names of persons and addresses who control 10% or more share or interest in the non-governmental party	
Names of persons and addresses who are the non-governmental party's officers, directors, or trustees	
For collective bargaining agreements	
Name of the labor organization	
Political committees created or controlled by the labor organization	
Contract holder represents that the information provided on this form is accurate.	
Contract holder will re-submit this form when this information changes	