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July 24, 2009

The Honorable Bernie Buescher
Colorado Secretary of State
1700 Broadway, Suite 250
Denver, CO 80290

Re: Comments Submitted Pursuant to Notice of Rulemaking
Dated July 21, 2009

Dear Secretary Buescher:

Please consider these written comments concerning the previously announced proposed rule by the Secretary of State regarding the definition of “sole source government contract” for the purposes of Amendment 54.

1. The Secretary of State has the duty and obligation to promulgate rules pursuant to Art. XXVIII, Sec. 9 “as may be necessary to administer and enforce any provision of this article,” including the provisions included in what is now known as Amendment 54. This rule-making authority includes the right and authority to define terms. Evans v. Independence Institute, OS 20050020 (Agency Decision Nov. 4, 2005) (enclosed). In sharp contrast to the broad delegation of authority granted to the Secretary of State, the authority granted to the Executive Director of the Department of Personnel and Administration is permissive, not mandatory, and is limited to the authority to “promulgate rules to *facilitate* this section,” referring to Section 16 of Amendment 54 concerning the development of a listing of the summaries of sole source government contracts. (emphasis added) “Facilitate” is not defined in either Amendment 54 or in the State Administrative Procedure Act. The Black’s Law Dictionary definition of “facilitate” is “to make easy or less difficult, or free from difficulty or impediment.” On its face the plain and ordinary meaning of “facilitate” does not include the power and authority to define a term, such as sole source government contract. The Executive Director of the Department of Personnel clearly has the authority to interpret provisions and define terms with respect to government purchases of goods and services pursuant to the Colorado Procurement Code, C.R.S. § 24-102-101, *et seq.*, but the gravamen of the issue of determining which contracts are subject to Amendment 54 includes contracts that are not subject to the State Procurement Rules. The Executive Director’s authority with respect to these contracts is limited to rules to “facilitate.”

Bernie Buescher, Secretary of State

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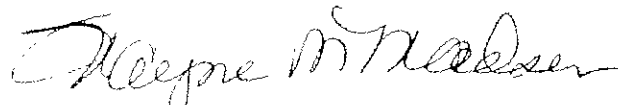
Accordingly, I would conclude that the Secretary of State has the jurisdiction and authority to conduct rule-making as it is the only entity with clear authority to define "sole source government contract" outside the Procurement Code. This is not a situation where there is full concurrent jurisdiction with the Executive Director of the Department of Personnel and Administration.

2. Any rule-making should be consistent with the preliminary injunction opinion.

3. Case law is clear that the Ballot Information Book ("Blue Book") from the Legislative Council of the Colorado General Assembly is certainly evidence of the intent of the electors. However, the Supreme Court has stated that the Blue Book is not binding. Tivolion Teller House, Inc. v. Fagan, 926 P.2d 1208, 122 (Colo. 1996). (emphasis added)

Thank you for the opportunity to submit these written comments and to provide oral testimony on the 22nd of July. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Shayne M. Madsen". The signature is fluid and cursive, with the first name "Shayne" being more prominent.

Shayne M. Madsen

SMM/sak

Enclosure