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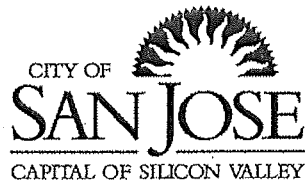

Memorandum

TO: COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE

FROM: RICHARD DOYLE
City Attorney

SUBJECT: **Assessment of Other California Cities that Restrict Contractors From Making Contributions and Constitutional Analysis of the City's Ability to Restrict Contributions from Contractors**

DATE: September 25, 2009

BACKGROUND

On January 13 and 27, 2009, the City Council discussed a proposal from Councilmembers Nora Campos, Nancy Pyle, Rose Herrera and Ash Kalra to review and consider additions to the Council's Public-Private Competition Policy. After these discussions, the Council directed staff to conduct outreach to stakeholders and facilitate a special Community and Economic Development Committee meeting.

Among other things, the City Attorney's Office was directed to analyze the following recommendation on a "pay-to-play" regulation:

> *No contractor responding to an RFP shall make a contribution to the campaigns of City of San Jose candidates or elected officials who will approve the contract from the period in which the RFP is issued until 6 months after a contract has been awarded.*

The CED Committee held meetings on March 12 and April 27, 2009. The Attorney's Office noted additional analysis was needed on the City's ability to legally restrict such contributions and advised that the Council could consider voluntary compliance or disclosure.

In addition, in a memo dated April 27, 2009, Councilmember Kalra recommended assessing the existing policies in California cities that restrict contractors responding to an RFP from making a contribution to the campaigns of candidates or elected officials who will approve the contract from the period in which the RFP is issued until 6 months after a contract has been awarded and amending the Competition Policy in accordance with those models.

ANALYSIS

1. Assessment of Other California Cities that Restrict Contractors from Making Contributions

The San Francisco Campaign and Governmental Conduct Code contains a prohibition on contributions from potential contractors to government officials whenever the contract has a total anticipated value of $50,000 or more. See § 1.126, Attachment 1. The prohibition lasts from the start of negotiations until either the end of negotiations or six months have passed from the date of contract approval. *Id.*

The Oakland Campaign Reform Act contains a similar prohibition on contractor contributions. See § 3.12.140, Attachment 2. Potential contractors are not allowed to make contributions to city officials "at any time between commencement of negotiations and either one hundred eight (180) days after the completion of, or the termination of, negotiations" for a contract. *Id.*

We also reviewed the campaign finance ordinances of the cities of Los Angeles, San Diego, Sacramento and Long Beach and did not find any other provisions restricting contributions from contractors.

2. Constitutional Analysis of the City's Ability to Restrict Contributions from Contractors

Restrictions on campaign contributions may impinge on First Amendment rights. To pass Constitutional muster, the restrictions must satisfy the general requirements set forth by the United States Supreme Court.

The U.S. Supreme Court has held that "contribution ... limitations operate in an area of the most fundamental First Amendment activities", and such limitations "impinge on protected associational freedoms." *Buckley v. Valeo,* 424 U.S. 1, 14 & 22 (1976). Burdens on contributions may only be sustained if the State demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.* at 25. The Supreme Court affirmed the *Buckley* standard of review in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). As set forth in the *Nixon,* the test for determining the validity of the amount of a limitation is whether the limit is "so low as to impede the ability of candidates to amass the resources necessary for effective advocacy." *Id.* at 397. A limit on contributions "need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights over-lap and blend; to limit the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control v. City of Berkeley,* 554 U.S. 290, 299 (1981).

a. California Decisions

When limits on contributions are not closely drawn, courts find them to be unconstitutional. For example, the California Supreme Court struck down a provision of the Political Reform Act in *Fair Political Practices Comm'n v. Sup. Ct.,* 25 Cal.3d 33, 45 (1979). In that case, the Court held that a total ban of all contributions by any lobbyist was not a "closely drawn" restriction and, consequently, violated the challengers' First Amendment rights of freedom of speech and association.

However, a new version of the same law was upheld in 2001. In *Institute of Governmental Advocates v. Fair Political Practices Commission,* 164 F. Supp. 2d 1183 (E.D. Cal. 2001), the court ruled on a facial challenge to the constitutionality of the provision that prohibits a direct contribution by a lobbyist to an elected state officer or candidate for elected state office, if the lobbyist is registered to lobby the governmental agency for which the officeholder works or for which the candidate seeks election.

The plaintiffs did not dispute that there is a sufficiently important state interest and the court did not closely analyze the state interest involved in the law. The plaintiffs only challenged that the means were not closely drawn to serve the State's interest. The court cited *Buckley* for the proposition that "the prevention of corruption and the appearance of corruption" is a constitutionally sufficient justification for a limit on contributions. Plaintiffs argued that the law was too similar to the one struck down in 1979 and urged the court to strike the law for the same reasons.

The court, however, found sufficient differences between the two provisions. Under the law, lobbyists are not banned from making all contributions; they are only prohibited from making contributions if the lobbyist is registered to lobby the office for which the candidate seeks election. That is, the ban only applies to those persons the lobbyist will be paid to lobby. Moreover, since the 1979 decision, the definition of lobbyist in the Political Reform Act has been narrowed, so the new law is more targeted than its predecessor. Furthermore, the "total" ban is acceptable because there is no evidence that candidates would be unable to seek office without the contributions. The lack of a time limitation on the ban was acceptable because legislators are, in effect, always "in session" because even when on recess, they are still considering new laws.

b. Similar Cases in Other Jurisdictions

In *Green Party of Conn. v. Garfield,* 590 F.Supp.2d 288. (D. Conn. 2008), a Connecticut District Court rejected constitutional challenges to a state law which banned contributions from contractors to elected officials. The Connecticut Campaign Finance Reform Act banned contractors with state contracts from contributing to, or soliciting contributions on behalf of, candidates for state office. The Green Party alleged the law violated its members' First Amendment rights. The court rejected the argument, emphasizing the importance of preventing the perception of corruption, as well as actual corruption, as a sufficiently important state interest to support contribution limits. *Id.* at

303. Accordingly, where the state can demonstrate that there is a perception of corruption among public officials, particularly when presented in conjunction with highly publicized episodes of actual corruption, it can successfully meet its burden of providing that it had a sufficiently important interest in enacting contribution limits. *Id.* at 304.

The court in *Green Party* reviewed polls and empirical evidence showing that a perception of corruption existed in the state. The court reasoned that because contractors derive significant income from state contracting jobs, with "any amount of money given from the very people whose livelihood depends on currying favor with policy makers and elected officials, the public trust in the system begins to erode." *Id.* at 308.

In contrast to the *Green Party* court in Connecticut, the New Jersey Supreme Court in *In re Earle Asphalt Company*, 198 N.J. 143 (N.J. 2009) glossed over the need for an empirical record when evaluating the constitutionality of campaign contribution ban challenged by state contractors. In that case, the court noted that the U.S. Supreme Court has not addressed the constitutionality of a statute that imposes targeted limitations upon political contributions by a class of contributors considered to pose a particularly serious threat to the government's interest in preventing "the actuality and appearance of corruption resulting from large individual financial contributions." *Id.* at 923 *(citing Buckley* at 26*)*.

In evaluating a ban on contractor campaign contributions, the *Earle Asphalt* court was swayed by the substantial discretion enjoyed by state officials in awarding contracts and that the ban would not unduly prevent officials from amassing the necessary funds to effectively run for office. The court did not identify any actual cases of corruption nor did it cite any polls indicating a perception of corruption. Instead, the court cited the campaign law's findings and declarations which merely stated that "[t]here exists the perception . . . "

This approach was also taken by the D.C. Circuit when it considered the constitutionality of an SEC rule prohibiting contributions by municipal securities professionals to those public officials from whom they obtained business. *Blount v. SEC* 61 F.3d 938 (D.C.Cir.1995). The court dismissed the lack of evidence demonstrating that pay to play practices were actually prevalent in the municipal bond business. The court stated that contributions "self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity." *Id.* at 944-45. The court concluded that "[a]lthough the record contains only allegations, no smoking gun is needed where ...the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." *Id.* at 945.

CONCLUSION

The City can place limitations on campaign contributions by contractors. While some courts have accepted lawmaker's findings or have been sufficiently persuaded by the mere likelihood of pay to play schemes, other courts have considered empirical evidence of actual corruption.

With respect to the time limitations, courts have considered total bans by lobbyists to be acceptable because legislators are always considering new legislation. The decisions considering limits on contributions from contractors do not discuss time limitations; however, two other major California cities have the same time limitations as proposed by Councilmembers Campos, Pyle, Herrera and Kalra.

RICHARD DOYLE
City Attorney

Attachments 1 and 2

cc: Honorable Mayor and City Council

Attachment 1

City and County of San Francisco Campaign and Governmental Conduct Code

SEC. 1.126. CONTRIBUTION LIMITS--CONTRACTORS DOING BUSINESS WITH THE CITY.

(a) Definitions. For purposes of this Section, the following words and phrases shall mean:

(1) "Person who contracts with" includes any party or prospective party to a contract, as well any member of that party's board of directors, its chairperson, chief executive officer, chief financial officer, chief operating officer, any person with an ownership interest of more than 20 percent in the party, any subcontractor listed in a bid or contract, and any committee, as defined by this Chapter that is sponsored or controlled by the party, provided that the provisions of Section 1.114 of this Chapter governing aggregation of affiliated entity contributions shall apply only to the party or prospective party to the contract.

(2) "Contract" means any agreement or contract, including any amendment or modification to an agreement or contract, with the City and County of San Francisco, a state agency on whose board an appointee of a City elective officer serves, the San Francisco Unified School District, or the San Francisco Community College District for:

(A) the rendition of personal services,

(B) the furnishing of any material, supplies or equipment,

(C) the sale or lease of any land or building, or

(D) a grant, loan or loan guarantee.

(3) "Board on which an individual serves" means the board to which the officer was elected and any other board on which the elected officer serves.

(b) Prohibition on contribution. No person who contracts with the City and County of San Francisco, a state agency on whose board an appointee of a City elective officer serves, the San Francisco Unified School District or the San Francisco Community College District,

(1) Shall make any contribution to:

(A) An individual holding a City elective office if the contract must be approved by such individual, the board on which that individual serves or a state agency on whose board an appointee of that individual serves;

(B) A candidate for the office held by such individual; or

(C) A committee controlled by such individual or candidate

(2) Whenever the agreement or contract has a total anticipated or actual value of $50,000.00 or more, or a combination or series of such agreements or contracts approved by that same individual or board have a value of $50,000.00 or more in a fiscal year of the City and County

(3) At any time from the commencement of negotiations for such contract until.

(A) The termination of negotiations for such contract; or

(B) Six months have elapsed from the date the contract is approved

(c) Prohibition on receipt of contribution. No individual holding City elective office or committee controlled by such an individual shall solicit or accept any contribution prohibited by subsection (b) at any time from the formal submission of the contract to the individual until the termination of negotiations for the contract or six months have elapsed from the date the contract is approved. For the purpose of this subsection, a contract is formally submitted to the Board of Supervisors at the time of the introduction of a resolution to approve the contract.

(d) Forfeiture of contribution. In addition to any other penalty, each committee that receives a contribution prohibited by subsection (c) shall pay promptly the amount received or deposited to the City and County of San Francisco and deliver the payment to the Ethics Commission for deposit in the General Fund of the City and County; provided that the Commission may provide for the waiver or reduction of the forfeiture.

(e) Notification.

(1) Prospective Parties to Contracts. Any prospective party to a contract with the City and County of San Francisco, a state agency on whose board an appointee of a City elective officer serves, the San Francisco Unified School District or the San Francisco Community College District shall inform each person described in Subsection (a)(1) of the prohibition in Subsection (b) by the commencement of negotiations for such contract.

(2) Individuals Who Hold City Elective Office. Every individual who holds a City elective office shall, within five business days of the approval of a contract by the officer, a board on which the officer sits or a board of a state agency on which an appointee of the officer sits, notify the Ethics Commission, on a form adopted by the Commission, of each contract approved by the individual, the board on which the individual serves or the board of a state agency on which an appointee of the officer sits. An individual who holds a City elective office need not file the form required by this subsection if the Clerk or Secretary of a Board on which the individual serves or a Board of a State agency on which an appointee of the officer serves has filed the form on behalf of the board.

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Proposition O, 11/7/2000; Ord. 141-03, File No. 030034, App. 6/27/2003; Ord. 228-06, File No. 060501, App. 9/14/2006; Amended by Proposition H, 6/3/2008)

(Derivation: Former Administrative Code Section 16.510-2; added by Proposition N, 11/7/95)

Attachment 2

Oakland Campaign Reform Act

3.12.140 Contractors doing business with the city of Oakland, the Oakland Redevelopment Agency or the Oakland Unified School District prohibited from making contributions.

A. No person who contracts or proposes to contract with or who amends or proposes to amend such a contract with the city for the rendition of services, for the furnishing of any material, supplies, commodities or equipment to the city or for selling any land or building to the city or for purchasing any land or building from the city whenever the value of such transaction would require approval by the City Council shall make any contribution to the Mayor, a candidate for Mayor, a City Councilmember, a candidate for City Council, the City Attorney, a candidate for City Attorney, the City Auditor, a candidate for City Auditor, or committee controlled by such officeholder or candidate at any time between commencement of negotiations and either one hundred eighty (180) days after the completion of, or the termination of, negotiations for such contract.

B. No person who contracts or proposes to contract with or who amends or proposes to amend such a contract with the Redevelopment Agency for the rendition of services, for the furnishing of any material, supplies, commodities or equipment to the Redevelopment Agency or for selling any land or building to the Redevelopment Agency or for purchasing any land or building from the Redevelopment Agency, whenever the value of such transaction would require approval by the Redevelopment Agency, shall make any contribution to the Mayor, a candidate for Mayor, a City Councilmember, a candidate for City Council, the City Attorney, a candidate for City Attorney, the City Auditor, a candidate for City Auditor, or committee controlled by such officeholder or candidate at any time between commencement of negotiations and either one hundred eighty (180) days after the completion of, or the termination of, negotiations for such contract.

C. No person who contracts or proposes to contract with or who amends or proposes to amend such a contract with the Oakland School District, for the rendition of services, for the furnishing of any material, supplies, commodities or equipment to the School District or for selling any land or building to the School District or for purchasing any land or building from the School District whenever the value of such transaction would require approval the School Board, shall make any contribution to a School Board member, candidate for School Board Directors or committee controlled by such officeholder or candidate at any time between commencement of negotiations and either one hundred eighty (180) days after the completion of, or the termination of, negotiations for such contract.

D. "Services" means and includes labor, professional services, consulting services, or a combination of services and materials, supplies, commodities and equipment which shall include public works projects.

E. For contributions to city officers other than School Board Directors, transactions that require approval by the City Council or Redevelopment Agency include but are not limited to:

1. Contracts for the procurement of services that are professional or consulting services exceeding fifteen thousand dollars ($15,000.00).

2. Contracts for the procurement of services exceeding fifty thousand dollars ($50,000.00), other than contracts for professional or consulting services.

3. Contracts for the furnishing of any materials, supplies, commodities or equipment exceeding fifty thousand dollars ($50,000.00).

4. Contracts for the sale of any building or land to or from the city or the Redevelopment Agency.

5. Amendments to contracts described in subsections (E)(1), (2), (3), and (4) of this section.

F. For contributions to School Board Directors, transactions that require approval by the School Board include but are not limited to:

1. Professional services and consulting contracts exceeding twenty-five thousand dollars ($25,000.00), including personal service agreements.

2. Contracts requiring School Board approval under Public Contract Code Section 20111.

3. Construction contracts exceeding twenty-five thousand dollars ($25,000.00) whether or not they are subject to the provisions of the Public Contract Code.

4. Contracts for the sale of any building or land to or from the School District.

5. Amendments to contracts described in subsections (F)(1), (2), (3), and (4) of this section.

G. "Commencement of negotiations" for city contracts occurs when a contractor or contractor's agent formally submits a bid, proposal, qualifications or contract amendment to any elected or appointed city officer or employee or when any elected or appointed city officer or employee formally proposes submission of a bid, proposal, qualifications or contract amendment from a contractor or contractor's agent.

H. "Commencement of negotiations" for Redevelopment Agency contracts occurs when a contractor or contractor's agent formally submits a bid, proposal, qualifications or contract amendment to any elected or appointed Redevelopment Agency officer or employee or when any elected or appointed Redevelopment Agency officer or

employee formally proposes submission of a bid, proposal, qualifications or contract amendment from a contractor or contractor's agent.

I. "Commencement of negotiations" for Oakland School District contracts occurs when a contractor or contractor's agent formally submits a bid, proposal, qualifications or contract amendment to any elected or appointed School District officer or employee or when any elected or appointed School District officer or employee formally proposes submission of a bid, proposal, qualifications or contract amendment from a contractor or contractor's agent.

J. "Commencement of negotiations" does not include unsolicited receipt of proposal or contract information or documents related to them, requests to be placed on mailing lists or routine inquiries for information about a particular contract, request for proposal or any information or documents relating to them or attendance at an informational meeting.

K. "Completion of negotiations" occurs when the city, the Redevelopment Agency or the School District executes the contract or amendment.

L. "Termination of negotiations" occurs when the contract or amendment is not awarded to the contractor or when the contractor files a written withdrawal from the negotiations, which is accepted by an appointed or elected City officer, Redevelopment Agency officer, City employee or Redevelopment Agency employee or an appointed or elected School District officer or employee.

M. The Oakland City Manager shall be responsible for implementing procedures for City of Oakland and Redevelopment Agency contracts to ensure contractor compliance with the Oakland Campaign Reform Act. A proposed or current contractor must sign and date the following statement at the time the contractor formally submits a bid, proposal, qualifications or contract amendment:

> The Oakland Campaign Reform Act limits campaign contributions and prohibits contributions from contractors doing business with the City of Oakland, the Oakland Redevelopment Agency or the Oakland Unified School District during specified time periods. Violators are subject to civil and criminal penalties.
>
> I have read Oakland Municipal Code Chapter 3.12, including section 3.12.140, the contractor provisions of the Oakland Campaign Reform Act, and certify that I/we have not knowingly, nor will I/we make contributions prohibited by the Act.
>
> Business Name _____
> Date _____
> Signature _____

The signed and dated statement must be received and filed by the City Clerk at the same time the proposal is submitted. Contracts may not be awarded to any contractors

who have not signed this certification. The City Clerk shall keep an updated list of current contractors available for inspection.

N. The Oakland Superintendent of Schools shall be responsible for implementing procedures for Oakland School District contracts to ensure contractor compliance with the Oakland Campaign Reform Act. A proposed or current contractor must sign and date the following statement at the time the contractor formally submits a bid, proposal, qualifications or contract amendment:

> The Oakland Campaign Reform Act limits campaign contributions and prohibits contributions from contractors doing business with the City of Oakland, the Oakland Redevelopment Agency or the Oakland Unified School District during specified time periods. Violators are subject to civil and criminal penalties.
>
> I have read Oakland Municipal Code Chapter 3.12, including section 3.12.140, the contractor provisions of the Oakland Campaign Reform Act, and certify that I/we have not knowingly, nor will I/we make contributions prohibited by the Act.
>
> Business Name _____
> Date _____
> Signature _____

The signed and dated statement must be received and filed with the School District at the same time the proposal is submitted. Contracts may not be awarded to any contractors who have not signed this certification. The School District shall keep an updated list of current contractors available for inspection.

O. A person who contracts with the City, the Redevelopment Agency or the School District for the rendition of services, for the furnishing of any material, supplies, commodities or equipment to the City, the Redevelopment Agency or the School District, or for selling any land or building to the City, the Redevelopment Agency or the School District or for purchasing any land or building from the Redevelopment Agency or the School District, whenever the value of such transaction would require approval by the City Council, the Redevelopment Agency or the School Board, and who violates subsection A of this section, shall be subject to the enforcement provisions of Article VII of this Act.

P. Elected city officeholders, candidates for city office and their controlled committees shall include a notice on all campaign fundraising materials equivalent to eight point roman boldface type, which shall be in a color or print which contrasts with the background so as to be easily legible, and in a printed or drawn box and set apart from any other printed matter. The notice shall consist of the following statement:

> The Oakland Campaign Reform Act limits campaign contributions by all persons (OMC §§ 3.12.050 and 3.12.060) and prohibits contributions during specified time periods from contractors doing business with the City of Oakland, the

Oakland Redevelopment Agency or the Oakland Unified School District (OMC § 3.12.140, paragraphs A., B., and C.).

(Ord. 12158 (part), 1999)