



BOISE CITY ATTORNEY'S OFFICE

MAYOR: David H. Bieter | BOISE CITY ATTORNEY: Robert Luce

May 24, 2017

Lynda Lowry
Director of Finance and Administration
Office of the Boise City Clerk
City Hall
VIA HAND DELIVERY

RE: Certificate of Review: Proposed Initiative Amending the City Purchasing Code

Dear Director Lowry:

A proposed initiative petition ("Initiative") was filed with your office on April 11, 2017. As initially filed, it lacked the necessary number of verifiable signatures and was refiled on April 24, 2017, with the requisite signatures. Pursuant to Idaho Code ("I.C.") § 34-1801B, the Boise City Attorney's Office ("City Attorney") reviewed the Initiative and prepared the following advisory comments. Given the strict statutory timeframe for review, the City Attorney's review only identified areas of concern and does not provide in-depth legal analysis. Further, under the review statute (I.C. § 34-1809(1)(b)), the Initiative petitioners are free to accept or reject the City Attorney's recommendations. The City Attorney's advisory comments do not include any analysis of the potential impacts of the Initiative, nor does it offer an opinion on any policy issues that may be raised by the Initiative.

I. BALLOT TITLE

Following the filing of the Initiative, the City Attorney will prepare a short and a long ballot title. The ballot titles will impartially and succinctly state the purpose of the proposed measure without being argumentative or creating prejudice for or against the measure. The petitioners may submit proposed ballot titles for consideration by the City Attorney. Proposed ballot titles must be consistent with the standard set forth above.

II. MATTERS OF FORM

After reviewing the Initiative for form and style pursuant to I.C. § 34-1809(1)(c), the City Attorney recommends the following revisions:

First, the Initiative states that it amends "Subsection 1-11-03(B) of Boise City Code." However, the Initiative does not include the full text of Subsection B of Boise City Code ("B.C.C.") § 1-11-03; rather, the text of Subsection (B)(1) is omitted. The full text of B.C.C. § 1-11-03(B) should be presented to the potential signors of this measure.

Second, the syntax and grammar in the Initiative's proposed amendment to B.C.C. § 1-11-03(B)(2)(f)(4) is flawed. The word "than" is missing from the phrase "totaling in number not less [sic] one-thousand (1,000)," Additionally, this proposed Subsection colloquially states "one-hundred and eighty" rather than the proper "one hundred eighty." Overall, this proposed Subsection is disjointed and should be rewritten.

Third, all the amendments included in the Initiative must be shown in legislative format, i.e., striking through all words to be removed from the ordinance and underlining all words to be inserted to ensure that potential signors see and understand all the amendments proposed by the Initiative petition. See I.C. § 50-902. The Initiative neither clearly strikes through Subsection letter "e," which it intends to delete, nor underlines new Subsection letter "g," which it intends to insert. As a result, existing the B.C.C. § 1-11-03(B)(2)(e) appears to be proceeded by an *exempli gratia* ("e.g.").

Fourth, the Initiative's proposed amendments to B.C.C. § 1-11-03(B)(2)(f)(4) include the term "City residents," without a corresponding definition. The City Attorney recommends adding a definition for the term "City residents."

Fifth, the Initiative imprecisely uses the words "petitioner" and "person" in its amendments to B.C.C. §§ 1-11-03(B)(3) and (4). In B.C.C. § 1-11-03(B)(3), the inserted phrase "or deny a petition request" relates to a petition for suspension or debarment. In B.C.C. § 1-11-03(B)(3)(b), the inserted phrase "suspended, or denied person or organization," appears to refer to the petitioner seeking the suspension or debarment of a City contractor. The ambiguity is compounded in B.C.C. § 1-11-03(B)(4), where the Initiative inserts the phrase "or denied person and/or petitioner." This inexact use of "petitioner" and "person" should be clarified.

III. SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

The Initiative seeks to amend B.C.C. § 1-11-03(B) to allow citizen groups to petition for the suspension or debarment of City contractors (including vendors and contract bidders) based on failure to comply with the City's policies and regulations governing socially responsible investing and business practices. The amendments proposed in the Initiative also broaden the grounds for debarment and suspension of potential bidders and contractors on Boise City projects. The proposed amendments also create a right of appeal for petitioners seeking debarment or suspension. Upon reviewing the Initiative for substantive issues, pursuant to I.C. § 34-1809(1)(a), the code amendments proposed in the Initiative are likely unconstitutional, possibly pre-empted by state statutes, and likely unenforceable in part.

A. Unconstitutional: Proposed Amendments to B.C.C. §§ 1-11-03(B)(2)(b) & (c).

The proposed amendments to B.C.C. §§ 1-11-03(B)(2)(b) and (c) are likely unconstitutional because they remove certain qualifiers from the grounds for suspension or debarment, thereby eliminating the nexus between the justification for suspension or debarment and the City's procurement process. Without the required nexus, there is an increased risk of a court finding that a decision to suspend or debar a contractor is arbitrary and capricious.

Existing B.C.C. § 1-11-03(B)(2)(b) authorizes suspension or debarment if the contractor has a conviction for specified crimes that indicate a lack of business integrity or honesty "which currently, seriously, and directly affects responsibility as a City contractor." Similarly, B.C.C. § 1-11-03(B)(2)(c) authorizes suspension or debarment of a contractor convicted under City, state, or federal antitrust statutes "arising out of the submission of bids or proposals." The Initiative seeks to amend B.C.C. §§ 1-11-03(B)(2)(b) and (c) respectively, to remove the qualifying phrases "which currently, seriously, and directly affects responsibility as a City contractor" and "arising out of the submission of bids or proposals." The proposed change presents at least two constitutional concerns.

First, suspension or debarment action under the Initiative appears to exceed the police powers of the City. "[M]unicipalities may exercise only those powers expressly granted to them or necessarily implied from the powers granted." See *State v. Freitas*, 157 Idaho 257, 264 (Ct. App. 2014). An ordinance enacted pursuant to the police powers granted to Idaho cities by Article XII, Section 2, of the Idaho Constitution must not be unreasonable or arbitrary. See *Ciszek v. Kootenai County Board of Commissioners*, 151 Idaho 123, 131 (2011) (citation omitted). The Initiative eliminates the nexus between a conviction and the City's duty to manage the procurement process. Without that nexus, suspension or debarment decisions would be vulnerable to challenge as being arbitrary and capricious.

Second, the Initiative's proposed amendments to B.C.C. §§ 1-11-03(B)(2)(b) and (c) may violate due process. To support a claim for either procedural or substantive due process, there first must be a deprivation of a property or liberty interest. *See Golden Days Schools, Inc. v. State Dept. of Educ.*, 83 Cal.App.4th 695, 704 (Cal. Dist. Ct. App. 2000). A citizen does not have a right in the legal sense to do business with the government, and consequently does not have a property interest in the right to bid on a contract. *Id.* at 704-06 (citation omitted). However, government suspension or debarment of a contractor implicates a liberty interest when such action formally or automatically excludes a contractor from work on a category of future public contracts or government employment opportunities. *See Id.* at 707 (citation omitted). The limiting language in existing B.C.C. §§ 1-11-03(B)(2)(b) and (c) establishes a nexus between the convictions that are the bases for suspension or debarment and the City's procurement processes. Without the existing limits on City suspension or debarment of contractors, there is an increased risk of a court finding that the grounds for suspension or debarment are arbitrary and capricious.

B. Pre-empted: Proposed Amendments to B.C.C. § 1-11-03(B)(2)(e).

The proposed amendment to B.C.C. § 1-11-03(B)(2)(e) adding non-conformity with the City's policies and regulations regarding socially responsible investing and business practices as a cause for suspension or debarment may be pre-empted by state law. Ordinances enacted under the City's constitutional grant of police power must not conflict with other general laws of the state. *Freitas, supra*, 157 Idaho at 264.

Boise City, as a political subdivision of the state of Idaho, must comply with state laws pertaining to purchasing by political subdivisions. Title 67, Chapter 28, of the Idaho Code sets forth detailed and specific procurement processes and procedures that govern the purchase of public works construction, personal property, and non-exempt services. Per I.C. § 67-2801, the Idaho Legislature recognized the following objectives of local government procurement: efficiency, cost-effectiveness, economy, quality and local presence of vendors.

The Initiative seeks to amend B.C.C. § 1-11-03(B)(2)(e) to require contractors to comply with the City's policies and regulations governing socially responsible investing and business practices which is outside the listed objectives of local government procurement as set forth in I.C. § 67-2801. As such, this proposed additional requirement on City procurement contracts may be outside of the City's police powers. Additionally, many of the City's existing policies and regulations that govern its investments and business practices would either be nonsensical or impossible for contractors to comply with, thus rendering this proposed amendment ineffectual.

C. Unconstitutional and Unenforceable: Proposed Amendments to B.C.C. § 1-11-03(B)(2)(f).

The proposed amendment to B.C.C. § 1-11-03(B)(2)(f), which seeks to authorize individuals and citizen groups to directly petition for the suspension or debarment of City contractors, is likely unconstitutional as it implicates the same arbitrary and capricious concerns discussed above. Moreover, it runs contrary to both the Idaho Constitution and state statutes, and may be unenforceable.

As drafted, the Initiative makes the City Clerk's receipt of a verified petition a valid cause for suspension or debarment. The petition to debar or suspend must include a clear and plain description of the reason supporting suspension or debarment. The Initiative however, fails to include guidelines on appropriate debarment or suspension grounds. As previously covered in Section A above, a nexus is required between a suspension or debarment and a reasonable basis for such action. *See Matter of JIS Indus. Serv. Co.*, 502 A.2d 75, 76 (N.J. Super. Ct. App. Div. 1985). Without a nexus, the debarment or suspension will be subject to review by a court under the arbitrary and capricious standard. The proposed amendment of B.C.C. § 1-11-03(B)(2)(f) lacks the necessary nexus.

Additionally, the proposed language of B.C.C. § 1-11-03(B)(2)(f)(4) is contrary to both the Idaho Constitution and state statutes. Though there are no cases directly on point, the general maxim is that only qualified electors of majority age may vote, sign petitions, or circulate petitions for signatures in Idaho. *See ID. CONST.* art. VI, § 2 (Only individuals who

are at least eighteen years old, reside in the state and county where they are going to vote, and are registered to vote as required by law, may vote); I.C. §§ 34-1801B(6), 34-1805 and 34-1807 (only persons at least eighteen years old, and are qualified electors may sign petitions for initiative or referendum, and only persons at least eighteen years old may circulate such petitions for signatures); *see also, e.g.*, I.C. § 23-917 (only qualified electors may sign petition for local option).

Petition signatures must be verified to ensure that all signors are qualified to sign. *See* I.C. §§ 34-1801B(13) and (14); 34-1802(2) and (3) (Petitioners for initiative or referendum must have the county clerk verify all the petition signatures); *see also, e.g.*, I.C. § 23-917 (In a local option petition, the affected City government shall determine the sufficiency of such petition and determine if the petition has the required number of signatures from qualified electors). The proposed amendments to B.C.C. § 1-11-03(B)(2)(f)(4), which allow persons who are "City residents," rather than qualified electors, and minors ages 16-17 years old to sign petitions for suspension or debarment not only depart from the general rule of who is qualified to sign petitions in Idaho, but also create an untenable situation for the City.

The proposed amendments to B.C.C. § 1-11-03(B)(2)(f) refer to the petition as being "verified," but fail to provide any verification process for the petition signatures. The gravity of the harm associated with suspending or debaring a contractor reasonably requires verification of all signatures on a petition to debar or suspend. Just as a City has a compelling interest in preserving the integrity of its electoral process, it has an interest in preserving the integrity of its internal processes. *See, Cf., Daien v. Ysursa*, 711 F.Supp.2d 1215, 1233 (D. Idaho. 2010). It would be extremely difficult to veritably impossible for the City to verify the signatures of minors and individuals who are merely City residents. The term "City resident" is not defined and consequently fails to be a valid qualifier for petition signators. Currently, the county clerk's elections office maintains the signatures of registered voters, making it easy to verify signatures of those who sign other types of petitions, because they must be qualified electors (i.e. registered voters). Under the proposed amendment, the City must verify all signatures on petitions to suspend or debar a contractor without being given any tools to accomplish this requirement. If a statute is such that it is "impossible to comply with its provisions, it will be held to be of no force and effect." *See George v. Quincy O. & G.K.R. Co.*, 167 S.W. 153, 156 (Kan. Ct. App. 1914) (quoting *People v. Briggs*, 193 N. Y. 457, 459 (N.Y. 1908)).

D. Unconstitutional: Proposed Amendments to B.C.C. §§ 1-11-03(B)(3)-(4).

The proposed amendments to B.C.C. §§ 1-11-03(B)(3)-(4) contained in the Initiative likely are unconstitutional because they violate due process. Under existing B.C.C. § 1-11-03(B)(3), the City's Purchasing Agent is required to issue a written decision to suspend or debar. The decision must state the reasons for the decision and provide the suspended or debarred party notice of its right to an administrative review. Existing B.C.C. § 1-11-03(B)(4) states that a suspended or debarred individual or organization may appeal a suspension or debarment decision to the City Council within fourteen days of receipt of the decision.

The Initiative seeks to amend B.C.C. § 1-11-03(B)(3) to require the Purchasing Agent to issue a written decision to a petitioner if the Purchasing Agent denies such petition request. The Initiative also seeks to amend B.C.C. § 1-11-03(B)(3)(b) to require that a "denied person or organization" be informed of his right to appeal the Purchasing Agent's decision. As discussed above, it is unclear who is the "denied person or organization" in this amended Subsection. Use of the phrase "denied person and/or petitioner" in the Initiative's amendments to B.C.C. § 1-11-03(B)(4) creates further ambiguity by authorizing the "denied person and/or petitioner" to appeal the Purchasing Agent's decision to deny. It is, however, unclear who is the "denied person" if it is not the "denied petitioner."

Vague and overbroad ordinances are subject to challenges under the due process clause of the Fourteenth Amendment. *See Greyned v. City of Rockford*, 408 U.S. 104 (1972); *Turner v. Municipal Code Violations Bureau of City of Rochester*, 997 N.Y.S.2d 876, 877 (N.Y. App. Div. 2014) ("[A]n impermissibly vague ordinance is a violation of the due process of law"). Although most decisions invoking the "void for vagueness" doctrine deal with criminal statutes and

ordinances, the doctrine applies equally well to civil ordinances. See *Cowan v. Board of Commissioners of Fremont County*, 143 Idaho 501, 513, (2006) (citation omitted.) "However, greater tolerance is permitted when addressing a civil or non-criminal statute as opposed to a criminal statute under the void for vagueness doctrine." *Id.* (citation omitted.) "[T]he principal inquiry is whether the law affords fair warning of what is proscribed." *Id.* (quoting *Village of Hoffman Estates v. The Flip Side, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982)). Based upon this line of authority, the Initiative's amendments to B.C.C. §§ 1-11-03(B)(3)-(4) likely fail this simplified standard of inquiry.

IV. CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioners via a copy of this Certificate of Review, deposited in the U.S. Mail to Idahoans for Social Responsibility, 616 E. Jefferson Street, Boise, Idaho 83712.

Sincerely,

A handwritten signature in black ink, appearing to be 'R. Luce', with a long horizontal stroke extending to the right.

Robert Luce, Boise City Attorney

Analysis by:
Jennifer Pitino
Deputy Boise City Attorney