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FEATURED ARTICLE

CALIFORNIA LEGISLATURE EMPLOYS POLITICAL FAVORITISM RATHER THAN COMPETITIVE BIDDING IN AWARDING STATE CONTRACTS

By Ronald A. Zumbrun

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." - James Madison, Federalist No. 51.

The framers of our government viewed the legislative branch as the one most likely to encroach upon the powers of the other branches of government. To this end, specific procedures were established delineating each branch of government's ability to act.

The California Legislature provides a perfect example of this need. In response to the January 2001 ramming of a big rig truck into California's State Capitol and the September 11, 2001, terrorist attacks, our Legislature decided to act to ensure the safety of the Capitol building and members of the Legislature. Hence, the \$6.8 million Capitol Park Safety and Security Improvement Project was conceived.

In 1975, I had represented the Sacramento Builder's Exchange in challenging the California Legislature's decision to administer and direct the \$66 million Capitol Restoration Project designed to renovate California's State Capitol. The litigation lasted several years. While we won the major legal issues, we were unable to reach the contracting issues because "the records were missing."

The current Capitol Securities Project provokes *déjà vu*. The Legislature is out of control again. The annual budget bill, approved by the governor, appropriated monies to the California Department of General Services to administer and oversee the construction of the Capitol Security Project. General Services is a primary state agency and has substantial expertise in this field.

A construction project including vehicle barriers was developed in full compliance with State Contract Act requirements, including competitive bidding. However, matters soon changed.

In early 2005, the Senate Rules Committee instructed General Services to use an all-union work force. General Services explained that it was governed by the State Contract Act and that an all-union or all-non-union requirement would violate competitive bidding requirements. The Legislature then designated itself to handle the bidding, prequalification, award, and payments to the successful bidder (to be reimbursed by General Services). That the Legislature had no experience in such matters was of no consequence: the Legislature dropped competitive bidding and employed a prequalification process that was limited to a short list of selected union contractors.

In December 2005, The Zumbrun Law Firm submitted Legislative Open Records Act (LORA) requests seeking to discover how the Legislature usurped the Department of General Services and inserted the "all-union work force" language. The Legislature provided only the contract for the project. A request to General Services produced near-full disclosure as to how legislators took over the contract but there were no documents indicating any meeting or vote of the Legislature or its committees nor any indication of who was behind those schemes.

A lawsuit followed alleging violation of the LORA and seeking a taxpayer injunction preventing further such practices. Under the State Contract Act, the Legislature is exempt from competitive bidding requirements, but the monies for the project were appropriated to the Department of General Services, not to the Legislature. The Department of General Services is bound by competitive bidding requirements.

The lawsuit contends that the Legislature cannot perform core functions of the executive branch, such as contracting and administering construction projects under the State Contract Act, without violating the California Constitution's separation of powers provision. Furthermore, General Services did not have the authority to give its appropriation to the legislative rules committees without the approval of the entire Legislature and the governor.

The Sacramento County Superior Court eventually ruled on November 30, 2006, that the Legislature has the freedom to do as it wishes and upheld the Legislature's conduct. The trial court also ruled that language in LORA relieves the Legislature from having to disclose internal or external documents communicating with the public.

On August 8, 2007, our law firm filed its opening brief on appeal. The issues raised are interesting and far-reaching.

The appeal addresses the Legislature's interpretation of LORA and challenges the Legislature's administration of the construction contract and the "all-union work force" requirement.

At the final hearing in the trial court, the Legislature produced committee records and contended that they reflected a closed "safety and security" meeting in which the project was approved. The Legislature provided no public notice before holding its closed sessions, as it is constitutionally and statutorily obligated to do. When legislators hold closed sessions without public notice, any member in attendance is subject to misdemeanor liability. Thus, either the Legislature violated LORA, or its members are guilty of misdemeanors.

It is noteworthy that federal monies are available to reimburse states for security projects provided that there is no favoritism toward union or non-union contractors. Our legislators chose not to apply for such funds because "the federal conditions of such grants were too cumbersome."

In 2004, California voters amended our state Constitution by initiative and declared that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." This right of access "to information concerning the conduct of the people's business...is a fundamental and necessary right of every citizen in this state." The law "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." All citizens are guaranteed "a constitutional right to know what the government is doing, why it is doing it, and how."

The Court of Appeal is expected to determine what records or writings must be "open to public scrutiny" and to resolve whether the legislative activities have resulted in a misuse of taxpayer money and resources.

The California Supreme Court has often stated that statutes requiring competitive bidding for public contracts are for the purpose of fostering competition and guarding against favoritism, improvidence, extravagance, fraud and corruption.

California has a national reputation for honesty and integrity in administering state construction projects. The State Contract Act imposes strict requirements for pre-qualifying bidders and awarding contracts to the lowest qualified bidder.

By maneuvering to avoid these salutary requirements, the Legislature risks opening the state treasury to the requisitions of political favorites.



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