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## CHALLENGE TO LEGISLATURE'S CONTRACTING PRACTICES PROCEEDS TO COURT OF APPEAL

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"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.)

Indeed, the framers of our government viewed the legislative branch as most likely to encroach upon the powers of the other branches of government. To this end, our forefathers took great pains to establish specific procedures 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 Capitol Park Safety and Security Improvement Project was conceived. The construction project was initially estimated to cost \$6.8 million.

The annual budget bill, approved by the Governor, appropriated monies to the California Department of General Services

for the purpose of administering and overseeing the construction of the Capitol Security Project. The Department of General Services is a primary state agency under the State Contract Act and has substantial expertise in this field. A construction project including vehicle barriers was developed in full compliance with the State Contract Act requirements, including competitive bidding. However, matters soon changed.

The Senate Rules Committee, Assembly Committee on Rules and Joint Committee on Rules represented the Legislature. In early 2005 the Senate Rules Committee representative told the Department of General Services that they wanted the project performed using an all-union work force. General Services explained that it was governed by the State Contract Act and an all-union or all-nonunion requirement would violate competitive bidding requirements. Therefore, the Legislature directed the Department of General Services to allow the Legislature to handle the bidding, prequalification, selection of contractor, and the payments to the successful bidder (to be reimbursed by General Services). The fact that the Legislature had no experience in such matters was of no consequence. The

Legislature then dropped any form of competitive bidding and chose a short list of contractors to bid. The prequalification process was limited to selected union contractors.

In December 2005, The Zumbun Law Firm submitted Legislative Open Records Act (LORA) requests seeking information on how the Legislature managed to usurp the powers of the Department of General Services to administer the bidding for this project. The Legislature responded to the LORA requests by providing only the contract for the project. A similar request to the Department of General Services resulted in almost a full disclosure as to how the legislators took over the contract administration and implemented the "all-union work force" requirement.

However, there were no documents indicating any meeting or vote of the Legislature or its committees authorizing the Legislature to take over the administrative responsibility of bidding, prequalification and selection of the successful bidder. There is no record to indicate any authorization for the "all-union workforce" provision and no record to show who was behind these schemes. The Legislature operated contrary to the protections set forth in the State Contract Act and thereby denied California taxpayers their right to receive the highest quality of work at the lowest cost.

A lawsuit followed for violation of the LORA and for a taxpayer injunction preventing such unlawful contracting practices by the Legislature. The suit acknowledged that under the California State Contract Act the Legislature was exempt from the competitive bidding requirement. However, the monies for the project were appropriated to the Department of General Services, not the Legislature. The Department of General Services is bound by the State Contract Act's

requirements for contracting and administering state construction projects.

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 law prohibits any such delegation of discretionary powers.

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

An appeal is now before the California Court of Appeal, Third Appellate District, in Sacramento. On August 8, 2007, the Zumbun Law Firm filed its opening brief against the Legislature. The issues raised are interesting and far-reaching.

Initially, the appeal addressed the Legislature's interpretation of LORA and whether the Legislature's action of looking only to its Rules Committee files to locate responding documents. The LORA requests were also served on each individual Rules Committee member at the Capitol and their district offices.

At a June 2, 2006, hearing on the LORA issue, the trial court ruled that if "a record responsive to the request that is not subject to any privilege or exemption resided in the files of a member, it is deemed to be in the constructive custody of the Rules

Committee and would have been produced in response to the demand. Absent evidence to the contrary, the Court must presume that an ‘official duty has been regularly performed’ and that ‘the law has been obeyed.’” In a subsequent proceeding, the legislative leadership indicated that in fact they only looked at the committee files and not the individual members’ files. This is an issue before the court of appeal.

Not only is there an absence of records and authorization concerning the Legislature’s maneuvering, but the budget, with the written approval of the Governor, appropriated the monies for the project to the Department of General Services – not to the Legislature. Accordingly, the fact that the Legislature is normally exempt from the State Contract Act is immaterial. There certainly was the belief by the Governor, and initially by the Legislature, that competitive bidding as required by the State Contract Act would be utilized by the Department of General Services.

During oral argument before the trial court, the Legislature argued that the appropriation had actually been made to the Legislature. If that is true, where did General Services get the money to reimburse the Legislature?

At the final hearing, the Legislature produced new committee records and contended that the records reflected a closed safety and security meeting in which the project was approved. The Legislature also provided other records that previously had not been produced. However, the Legislature never provided any public notice before holding such closed sessions, as it is constitutionally and statutorily obligated to do. When the Legislature holds closed sessions without prior public notice, any member in attendance is subject to misdemeanor liability. Thus, either the

Legislature violated LORA, or its members are guilty of misdemeanors.

In its November 30, 2006 ruling, the trial court further concluded that the Legislature did not violate our state Constitution because the Legislature is permitted to hold closed sessions “to consider matters affecting the safety and security” of the Legislature and its members.

Yet even if we were to assume that the act of bidding a construction project to a “union only” shop is so closely tied to the “safety and security” of the Legislature as to authorize closed session meetings, such could only be done after proper public notice. That was not done here.

In 2004, California voters by initiative (Proposition 59, popularly known as the Sunshine Amendment) amended our state Constitution 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.”

This fundamental and necessary right of access provided in Proposition 59 is reinforced by its further constitutional command that 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.”

Under these principles, the parties are debating as to what records or writings must be “open to public scrutiny” except where protected by privacy laws or other protections applicable to certain confidential or legal communications. The court of

appeal will provide guidance in these areas. The court will also resolve whether the legislative activities have resulted in a misuse of taxpayer money and resources. If so, the Court can finally enjoin future conduct such as the Legislature exceeding its jurisdiction and taking over the administration of construction projects normally within the jurisdiction of the Department of General Services while ignoring the statutory protections of the State Contract Act.

As the California Supreme Court often has stated: The provisions of statutes requiring competitive bidding in the letting of public contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work at the lowest price practicable. These provisions are enacted for the benefit of property holders and taxpayers, not for the benefit or enrichment of bidders, and should be so construed and administered as to

accomplish such purpose fairly and reasonably with sole reference to the public interest.

California has a national reputation for honesty and integrity in administering state construction projects. A major reason for this reputation is the State Contract Act and its strict requirements for prequalifying bidders and awarding contracts to the lowest qualified bidder. Regrettably, that is not the case when the California Legislature improperly interjects itself into major projects affecting or relating to our State Capitol.

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