The People’s Business:
Disclosure of Political Spending by Government Contractors

By Elizabeth Kennedy & Adam Skaggs

American voters have a right to know who is spending money to influence elections and curry favor with their elected officials. As the U.S. Supreme Court noted in its 2010 decision in *Citizens United*, the disclosure of political spending “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”1 As more money pours into our political system on the heels of *Citizens United*, which enabled corporations to spend directly from their treasury funds to influence elections, it is more important than ever that all political spending be done in the open.

Transparency in political spending is particularly important when the spending is done by those who seek to do business with the government—and to receive taxpayer dollars through public contracts. Without sunlight on political spending by those competing for government contracts, the public cannot detect if potential contractors are providing financial support to those in charge of the government’s business decisions in order to increase the likelihood of receiving public contracts. Disclosure of contractor political spending promotes accountability, and guarantees that the federal government contracting process is free from pay to play corruption and political favoritism.

The Obama administration, commendably, is poised to take a crucial step toward clean and accountable government spending. It has drafted an executive order that would increase transparency in the federal contracting process by requiring companies bidding on contracts to disclose their political spending.

The draft executive order will bring transparency and accountability to the public contracting process. It will prevent corruption and save taxpayers millions, if not billions, of dollars. Without transparency, corruption in the contracting process can lead to sweetheart deals that benefit the recipient of the contract and the recipient of political contributions at the expense of taxpayers. With the amount of money flowing into our elections exploding—much of it in the form of secretive, undisclosed spending—the need for the executive order is acute.

Large majorities in both houses of Congress recognized the toxic problem of secret political spending and voted last year to go far beyond what the draft executive order requires, by requiring comprehensive disclosure of all political spending, even by entities not seeking federal contracts. The proposed transparency bill, the DISCLOSE Act, passed the House and netted 59 votes in the Senate, ultimately falling a single vote shy of the 60 needed to defeat a filibuster. Comprehensive disclosure legislation remains a vitally important goal to ensure that the deep-pocketed special interests seeking to dominate our elections do not succeed in capturing our democracy. But in the

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face of legislative intransigence it is important—and entirely appropriate—for the executive to exercise the full extent of its more limited authority by bringing disclosure to those who would do business with the government.

**Hundreds of billions of taxpayer dollars are at stake.**

Transparency in political spending by government contractors is necessary to protect the integrity of the federal contracting process, and to ensure that we do not have a pay-to-play system in which taxpayer dollars are doled out in exchange for political payments. Too often, as discussed below, politics and procurement are linked, and that betrays both the public trust and the public fisc. The proposed executive order will solve this problem.

According to its critics, the draft executive order will inject politics into the contracting process, and will allow the administration to compile a Nixonian “enemies list” to blacklist companies that back administration critics. These cynical arguments are fundamentally misguided. They ignore the fact that, as it is, politicians typically know who is donating and benefiting from political spending—and therefore, who to reward with lucrative contracts. The only people who don’t know are the American people. With disclosure, they will be able to monitor contracting—and prevent corruption.

Given the amounts at stake, this is crucial. Hundreds of billions of dollars are handed out in federal contracts every year, many of them with little to no meaningful competition—belying the argument that competitive bidding provides sufficient protection against pay-to-play corruption. A 2007 report from Representative Henry Waxman, *More Dollars, Less Sense*, reported that more than half of annual federal procurement spending—over $200 billion in new contracts—was awarded without full and open competition, and about half of that amount, $103 billion, was spent on no-bid contracts, which have no competition at all. Moreover, in 2006, of contracts that were putatively awarded through “full and open competition,” a full $47.7 billion worth of contracts were awarded after the government received only a single bid. The Waxman report also found evidence of significant waste, fraud, abuse or mismanagement in contracts with a cumulative total of $1.1 trillion.

Federal agencies spent about $535 billion in fiscal 2010 on government contracts. According to the Sunlight Foundation’s Paul Blumenthal, thirty-three of the forty-one companies listed in the top one hundred campaign contributors in the past two decades are recipients of federal contracts. With

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2 MAJORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, 110th CONG., MORE DOLLARS, LESS SENSE: WORSENING CONTRACTING TRENDS UNDER THE BUSH ADMINISTRATION, at i (Comm. Print 2007), available at http://oversight-archive.waxman.house.gov/features/moredollars/moredollars.pdf. The 2007 report also found that “[t]he top six recipients of federal contracts are Lockheed Martin, Boeing, Northrop Grumman, Raytheon, General Dynamics, and Halliburton. Collectively, they received $99.9 billion in 2006, 24% of all federal procurement spending.” Id. at 5.

3 Id. at 8.

4 Id. at 11.

this many dollars at stake, it is crucial to take every step to ensure that any opportunities for fraud, waste, or corruption are foreclosed.

The history of contracting scandals shows that the risk of corruption is high.

Without transparency to discourage political favoritism, there is a serious threat of corruption. Multi-million dollar federal contracts have been exchanged for gifts and bribes. Moreover, for years big campaign contributors have been rewarded with Congressional earmarks. As reported in the New York Times, a report from a Congressional ethics committee “acknowledged that there was a ‘widespread perception’ among recipients of earmarks in the private sector that giving political donations to members increased their chances of getting earmarks.” Commenting on an attempt to reform the earmark process, Congressman David Obey said “It will be far more open and transparent than during the ‘good old days’ when a committee chairman would simply pick up the phone and instruct government agencies to fund member requests behind the scenes with no transparency, no fingerprints, and no public accountability.”

A lengthy series of pay-to-play scandals in analogous state contracting processes underlines the serious danger of corruption in government contracting:

- In New Jersey, the state awarded an almost $400 million contract to privatize automobile inspections to the sole bidder, Parsons Infrastructure & Technology Group, Inc., in a process where Parsons emerged as the only bidder. A subsequent investigation concluded that the company had adopted a “political strategy” to win the contract through campaign contributions and lobbying: entities that made up the Parsons corporate family contributed more than half a million dollars to candidates and political committees. In the end, at least $200 million of taxpayer money was wasted in the pay-to-play boondoggle.

- In 2004 Former Connecticut Governor John Rowland resigned after allegations that he had received over $100,000 worth of campaign contributions and gifts from state contractors in exchange for helping to arrange state contracts—he pled guilty and went to prison. His successor, Governor Jodi Rell, a Republican, led efforts to enact a law prohibiting state

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9 These scandals are discussed at greater length in a memorandum produced by Public Citizen. See Memorandum from Craig Holman, Public Citizen, to Spencer Overton, Principal Deputy Attorney General, Office of Legal Policy, U.S. Department of Justice, RE: Case record on pay-to-play restrictions strengthening the competitive bidding process for highway contracts, PUBLIC CITIZEN (Jan. 13, 2010), available at http://www.citizen.org/documents/Pay to Play memo.pdf.

government contractors, and their principals, from making contributions to candidates and political parties.\(^\text{11}\)

- Investigations into the costliest public works project in history, Massachusetts’ Big Dig, showed that the contractor and its principals had contributed $225,000 to government officials, who then helped the company avoid much needed scrutiny as they racked up a final price-tag estimated at around $22 billion.\(^\text{12}\)

- In Illinois, former Governor Rod Blagojevich was impeached and is being re-tried on charges of engaging in pay-to-play practices.\(^\text{13}\) The Illinois legislature had overridden his veto to pass a ban on contributions from contractors to government officials who administer the contracts. According to testimony at his first trial, Blagojevich was concerned with raising as much as possible before the law became effective.\(^\text{14}\) The legislature was spurred to action after the previous Governor, George Ryan, was jailed for exchanging state business for money and gifts, with the prosecutor noting “He might as well have put up a ‘For Sale’ sign over [his] office.”\(^\text{15}\)

- Dr. Roland Zullo of the University of Michigan studied contractor contributions in Wisconsin from 1991-2000, and found that contributions were timed with contracting decisions; that donation activity peaked in the months when contracts were approved; and that “patterns of political giving reflect strategic expenditures during the negotiation phase” of the procurement process.\(^\text{16}\) An earlier study by Dr. Zullo uncovered a relationship between the size of state highway construction projects awarded to certain contractors, and the magnitude of their donations, supporting the perception that political contributions allow a select group of contractors to dominate government contracting and undermine the competitive bidding process.\(^\text{17}\)


\(^{14}\) Mike Robinson and Michael Tarm, Alonzo Monk: Obama Stopped Blagojevich Senate Deal with Emil Jones, HUFFINGTON POST (June 10, 2010), http://www.huffingtonpost.com/2010/06/10/alonzo-monk-obama-phone-c_n_608220.html.


The draft executive order ensures that political favoritism does not corrupt the government contracting process.

The draft order would have a widespread impact on dark political spending by bringing to light the flow of contractor money in politics in at least two crucial ways.

First, the draft order would require public disclosure of donations to third party groups where the contractor knows or expects that the money will be used to influence elections. Under existing regulations (as explained, below), a contractor may funnel money, anonymously, through a third party group that uses it for electioneering without revealing the source of the funds. Disclosure of contributions to third party groups (other than to Political Action Committees, which already disclose their donors) represents a more comprehensive and thorough disclosure of political spending than is currently required. This will eliminate the possibility that those competing for federal contracts seek payback based on political spending that is veiled from the public—even if it is acknowledged with a wink to those who control government contracts.

Second, the draft order would shed light on political spending by individuals associated with federal contractors. Under current law, although the contracting entity itself is barred from making certain expenditures or contributions, officers and directors, or subsidiaries and parent companies can make these same expenditures and contributions. Some of this information is reportable by the recipients, but even this reporting does not necessarily reveal the connections to the contractor. The draft executive order says that disclosure shall include all contributions or expenditures to, or on behalf of, candidates, parties or committees made by the bidding entity, and expands the scope of disclosure to cover the contractor’s officers and directors, and its subsidiaries and affiliates. This enables a much greater understanding of a contractor’s full involvement in influencing elections and currying favor with elected representatives.

The draft executive order augments existing federal protections against pay to play corruption.

Protecting against the dangers of pay-to-play corruption is nothing new, even on the federal level. The Securities Exchange Commission (SEC) issued a rule last year barring contributions from those seeking to do business with public pension funds, to protect the funds from corruption. When it was announced, Chair of the SEC Mary Shapiro explained:

An unspoken, but entrenched and well-understood practice, pay to play can also favor large advisers over smaller competitors, reward political connections rather than management skill, and—as a number of recent enforcement cases have shown—pave the way to outright fraud and corruption…. Pay to play practices are corrupt and corrupting…. They harm beneficiaries, municipalities and honest advisers. And they breed criminal behavior.18

18 Mary L. Schapiro, Chairman, SEC, Opening Statement at the SEC Open Meeting (June 30, 2010), available at http://www.sec.gov/news/speech/2010/spch063010mls.htm. Investment advisers and others seeking to do business with the funds are now banned from donating to officials who influence the process of choosing the investment fund’s advisors. This reform is clearly in the interest of investors in those public funds, who want their funds administered by advisors chosen based on merit, and it is in the interest of the general public, who deserve to be represented by officials who are not on the take. The need for this pay to play rule was demonstrated by the major corruption scandal involving former New York Comptroller Alan
This problem of pay-to-play on the federal level was first addressed in 1994. The SEC approved one of the first effective pay-to-play restrictions in the nation, which effectively banned campaign contributions from bond dealers to municipal officials responsible for awarding government contracts to handle municipal securities. The SEC concluded that these pay-to-play practices cost taxpayer’s money by “fostering a selection process that excludes those firms that do not make contributions, causes less qualified [contractors] to be retained, and undermines equitable practices in the municipal securities industry.”

Congress has also recognized that pay-to-play practices are corrupt and corrupting, and has passed legislation to prohibit federal contractors from making certain contributions or expenditures directly to a candidate or political party, or for any political purpose. Nonetheless, existing rules governing political spending by government contractors, and disclosure rules generally, have not kept up with the changing landscape of money in politics. As the 2010 elections demonstrated, those who want to influence our elections without leaving their names are able to shield their spending through third party groups which are not required to disclose their donors to the public. The draft executive order would require contractors to disclose their contributions to third party groups when that money will be used to influence elections, which will enhance the goals of transparency and accountability.

Opponents of the order argue that it is unnecessary because of the ban on direct contractor contributions. But despite the contribution ban, there are several avenues through which contractors can engage in favor-seeking through political spending. First, they may set up political action committees, which, in turn, can make direct contributions and expenditures on behalf of candidates. This political activity is disclosed, however, because PACs disclose their contributors and expenditures, limiting concerns implicated by secretive, undisclosed spending.

In addition, there are loopholes that allow contractors to spend money, secretly, to influence elections. As a result, there is no public accountability for any resulting political favors that this spending might purchase. Among the existing loopholes in the regime that discourages pay-to-play spending by contributions are the following:

- A contractor may give to a group that runs advertisements expressly advocating a candidate’s election or defeat without coordinating with the candidate. These advertisements, referred to as “independent expenditures,” are run by non-candidate groups and include statements like “Vote for Smith,” “Vote against Jones,” or “Defeat Miller.” Federal law and FEC regulations bar contractors from making contributions or expenditures for any political

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Hevesi, who pled guilty in 2010 to taking $1 million in gifts for him and associates in exchange for giving the contract to manage $250 million in pension investments to a friend’s firm.

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20 See generally Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995).


purpose or use. However, groups that run these ads don’t have to disclose their underlying donors unless those donors ear-mark their contributions as being specifically “for the purpose of” paying for the ads. All any donor wanting to remain anonymous has to do, then, is to hand over a check to a group that will run these ads without expressly stating that the check is “for the purpose of” running the ads. Very few contributors ever earmark their contributions in this way, because it is entirely unnecessary: Both the donor and the recipient understand what the money will be used for without the contributor having to say so explicitly. This use of third party groups that do not disclose underlying donors is the primary way that so much dark money flowed into the 2010 election. Given this loop-hole, it is possible that a federal contract seeker or contractor could contribute to groups that spend money to advocate the election or defeat of a candidate without disclosure or accountability.

- After \textit{Citizens United}, contractors can spend their company’s money directly to influence elections through advertisements that are aired close to an election and clearly identify a candidate—but that do not expressly urge viewers to vote for or against that candidate by using magic words like “elect” or “defeat.” These ads, known as “electioneering communications,” typically air on the eve of an election and urge voters to do things like “Call Senator Smith and ask why she refuses to defend our children.” Under current law, contractors can spend treasury funds directly on these types of advertisements, though they must disclose that spending. A corporation will not have to disclose such spending, however, if it simply contributes to another organization that will use the company’s money to pay for these advertisements—as long as the donor does not earmark their support “for the purpose of” paying for the electioneering communications. Thus, any contract seeker or federal contractor can easily avoid disclosure simply by donating to a third party organization that will run these ads with the tacit—but unspoken—desire that the donation be used for electioneering.

In short, although contractors are barred from making direct contributions to political parties and candidates, under existing law they are able to funnel their company’s money to third party groups that they know will spend the money to influence elections—and there is no requirement that this flow of money be exposed to the light of day. And while the third party groups that take contractor money to pay for independent expenditures or electioneering communications themselves must

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\item 25 The political activity of contractors is regulated through the Federal Election Campaign Act (FECA) and the regulations the FEC developed in accordance with the Act. “Electioneering communications” are not defined in FECA or the implementing regulations, and contractors therefore are not subject to any special FEC rules regarding electioneering communications. (Electioneering communications were defined (and regulated) only in the Bi-partisan Campaign Reform Act (BCRA) of 2003.) \textit{Citizens United} allowed corporations to spend money independently to influence elections directly from their treasuries and struck down the restrictions on corporations engaging in electioneering communications. Thus, while contractors are still subject to independent expenditure restrictions, they are allowed to spend their treasury money on electioneering communications restrictions. See Statement of Cynthia L. Bauerly, Chair of the FEC, \textit{Reporting Requirements and the Treatment of Federal Contractors Under the Federal Election Campaign Act and FEC Regulations: Written testimony before House Committee on Oversight and Government Reform and the House committee on Small Business, House of Representatives}, 112th Congress, 5 (2011), \textit{available at} http://www.fec.gov/members/bauerly/statements/bauerly_statement_05_10_2011.pdf.
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disclose their identities, these groups do not have to disclose their underlying donors unless those donors explicitly earmark their contributions for the purpose of making independent expenditures or electioneering communications. Very few do, with the inevitable result that much political spending by companies receiving billions of dollars in government contracts occurs in the dark, with no accountability or public scrutiny. This opens the door to corruption and the appearance of corruption. The draft executive order would close these loopholes so that contractors who use these avenues to spend money to influence elections and curry favor with elected officials must do so in the light of day.

Many States have enacted rules to protect against pay-to-play corruption and the appearance of corruption, and these States have not seen the politicized contracting that critics warn about.

The experience of numerous States with pay to play laws defeats the argument that disclosure of spending goes too far and risks politicizing the contracting process. Many jurisdictions both require that political spending by contractors be disclosed, as the draft executive order would accomplish, and then go much further by banning contractor contributions in order to protect against corruption and the appearance of corruption. None of these states have seen heightened politicization of the contracting process—or the compilation of contracting black lists—as critics of the draft executive order warn would take place were there transparency of political spending around federal contracting.

Connecticut, South Carolina, West Virginia, Hawaii, and Illinois have outright bans on contributions by the contracting entity or its principals.26 Other states have chosen to clean-up and protect their contracting process by imposing contribution limits on contractors. New Jersey, Ohio, and Kentucky have limits on the amounts that a contracting entity, and sometimes its principals, can contribute.27 All of these states also require disclosure. There are two states that require only disclosure of campaign contributions, and some which require disclosure from all government contractors and bans on others:

- Maryland requires public contractors to disclose their campaign contributions, and does not otherwise limit them. There is a two year “look back” provision—they must report their contributions for the prior 24 months at the time of the contract award, and must then file semi-annual reports.28 Maryland’s law applies to contracts over $100,000 and where contributions to a candidate are over $500.29 Importantly, it covers contributions by the contracting entity’s officers, directors, and partners.30


27 Id. at 5–6, 9–10.

28 MD. CODE, ELEC. LAW §§ 14-104(b)(1)(i), 14-104(b)(2)(i).

29 Id. at §§ 14-101(b), 14-101(g)(1).

30 Id. at § 14-105(a)-(d).
• Rhode Island also only requires reporting of campaign contributions, also for two years prior to the contract date.\textsuperscript{31} It covers the contracting entity, its principals and their family members, and parent or subsidiary companies of the contractor.\textsuperscript{32}

• New Mexico requires only disclosure from all prospective government contractors for the two years prior to submitting an offer for a competitive contract.\textsuperscript{33} The state does have some pay-to-play bans: contributions are banned during the negotiation period for no-bid contracts;\textsuperscript{34} casino contractors are also banned from making contributions.\textsuperscript{35}

• Pennsylvania requires businesses that have been awarded no-bid contracts to disclose all political contributions by its officers, directors, partners, and many other covered persons.\textsuperscript{36} Pennsylvania also bans political contributions by those who wish to contract with the state's municipal pension system.\textsuperscript{37}

• California has rules requiring only disclosure of campaign contributions for some of its public pensions\textsuperscript{38} and its lottery system,\textsuperscript{39} and does not otherwise limit or ban them.

Importantly, all these anti-corruption rules stand on firm constitutional footing. Not only has disclosure of political spending been upheld in a long line of Supreme Court cases, including \textit{Citizens United}\textemdash which upheld disclosure by a near unanimous, 8-1 vote—a total ban on contributions by contractors, and its principals, was upheld by the Second Circuit Court of Appeals last year.\textsuperscript{40}

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  \item R.I. GEN. LAWS § 17-27-2.
  \item R.I. GEN. LAWS § 17-27-1(7)(i).
  \item N.M. STAT. §§ 13-1-191.1(B), 13-1-112(A)(3).
  \item Id. at §13-1-191.1(E).
  \item Id. at § 11-13-1.
  \item 25 PA. CONS. STAT. § 3260a.
  \item Id. at 53 PA. CONS. STAT. § 895.703-A(b).
  \item See, e.g., CAL. GOV’T CODE § 20152.5, CAL. EDUC. CODE § 22363.
  \item CAL. GOV’T CODE § 8880.57(b)(7).
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By bringing sunlight to the political spending of government contractors, the Obama administration’s draft executive order will give the public and watchdog groups a powerful tool to ensure that corruption in government contracting does not corrode the legitimacy of the federal government. Doing so will save taxpayers money and not only fight corruption, but prevent the appearance of corruption and political favoritism that undermines confidence in the government. Significantly, a long and unbroken chain of U.S. Supreme Court precedents has upheld disclosure of political spending, and the draft executive order stands on rock-solid constitutional ground. President Obama should sign the order without delay.