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TRUSTWORTHINESS IN PUBLIC CONTRACTING: BACK TO BOSS TWEED? CF&I STEEL V. BAY AREA RAPID TRANSIT DISTRICT

I. Introduction

Public contracting statutes were enacted throughout the United States in the aftermath of nineteenth-century Boss Tweed scandals in New York City, in which millions of dollars in public projects were steered to political allies of City Hall.[1] Within the recent past, union and labor groups have lobbied, with little fanfare and at times successfully, to repoliticize the procurement process by amending public contracting statutes to define "responsible" bidders as those that are "trustworthy." Trustworthiness is defined as requiring compliance with applicable laws and regulations, such as those concerning labor and environmental laws, that are unrelated to the quality of the bidder's ***238** work or its ability to perform.[2] In the regulatory state, any significant business entity can be found arguably out of compliance with some federal, state, or local regulation. Consequently, through selective enforcement of the trustworthiness standard, contracting agencies can steer contracts to politically favored bidders, resulting in higher costs to the taxpayers and potentially inferior-quality work. In *CF&I Steel L.P. v. Bay Area Rapid Transit District*,[3] Judge William Alsup struck down one such effort as preempted by federal law. Other theories, including the target company's constitutional due process and equal protection rights, that were not addressed in Judge Alsup's opinion also may be employed in an attempt to keep politics out of public contracting.

II. Competitive Bidding Statutes

A. *Purpose of Competitive Bidding Laws*

The highly process-oriented exercise of public contracting exists for a reason. Perhaps the most infamous example of the evils that these processes are intended to deter involved the Tammany Hall political machine of nineteenth-century New York City and its most notorious leader, William Marcy ("Boss") Tweed (1823-78). By steering contracts to firms in exchange for kickbacks

or personal interests in the projects, Boss Tweed and his cronies were able, for example, to transform a $250,000 courthouse construction project into an $8 million one.[4] The Brooklyn Bridge was constructed only after a $65,000 bribe to Tammany Hall and an offer to its leaders of stock in the New York Bridge Co. at an eighty percent discount.[5] Against this background,[6] the public contracting laws were "designed to protect the public fisc by preventing public officials from awarding contracts uneconomically on the basis of special friendships. Such friendships might be based on mutual fondness, bribery, political co-partisanship, racial/ethnic affinity, or any combination of these."[7] Similarly, as formulated by the California Supreme Court, "[t]he competitive bidding requirement is founded upon a salutary public ***239** policy declared by the legislature to protect the taxpayers from fraud, corruption, and carelessness on the part of public officials and the waste and dissipation of public funds."[8]

In California and elsewhere,[9] these purposes are enshrined in the express language of the public contracting statutes. For example, section 100 of the California Public Contract Code states that the public contracting statutes are intended

> ...
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> (b) [t]o ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds.
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> (c) [t]o provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices.
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> (d) [t]o eliminate favoritism, fraud, and corruption in the awarding of public contracts.[10]

As demonstrated by this authority, public contracting laws seek to prevent two general dangers: (1) the moral risk in a democracy of public dollars being directed to certain entities for reasons of favoritism, political "co-partisanship," "collusion," and the like; and (2) the practical concern that public dollars not be wasted—that there be "active competition so that the [Government] may receive the most advantageous contract."[11] Therefore, the

> basic objective [of the bidding process] is to give all interested parties an opportunity to deal with the Government on an equal basis—with the Government (theoretically at least) reaping the benefits of full and open competition. Therefore, there is little room for considering the intangible merits of a potential contractor or of its particular goods or services— award of the contract must be made (if at all) to the responsible bidder who submits the lowest responsive bid.[12]

Ordinary consumers are free to buy from whomever they wish for reasons of favoritism, religion, political viewpoint, or any of the other bases for private action that are impermissible for government entities. Private consumers are free to spend more money to acquire products from favored manufacturers, a concept that forms the basis of the multibillion-dollar advertising industry. However, under the public contracting laws, government agencies may not be so profligate with public funds. Lowest-responsible-bidder laws mandate that contracts be awarded "economically."[13]

***240** These laws recognize that under the public contracting statutes, contracting decisions are not to be made in meetings between special interest groups and politicians in a proverbial "smoke-filled room." That is, the selection of the lowest responsible bidder cannot be dependent on the ability to conduct the loudest public relations campaign. Rather, the lowest responsible bidder is the party that can timely deliver a product meeting all specifications at the lowest expense to the taxpayers.

B. ***Recent "Trustworthiness" Amendments***

In 1999, the California Legislature enacted a new code section to define a responsible bidder as one that has "demonstrated the attribute of trustworthiness, *as well as* quality, fitness, capacity and experience to satisfactorily perform the public works contract."[14] Although seemingly innocuous, the highlighted language discloses an important fact about the statute: The "trustworthiness" criterion is in addition to and different from the bidder's actual ability to perform the contract. This much can be determined from its plain language. However, the legislature did not define the trustworthiness requirement.

Similarly, an amendment to the Federal Acquisition Regulations (FAR) approved by the Clinton administration but rescinded by the Bush administration in late 2001[15] would have required contractors to "[h]ave a satisfactory record of integrity and business ethics including satisfactory compliance with federal laws, including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws."[16]

Why should this be of concern? Because, as discussed above, without strict controls, public contracting quickly becomes a political process.[17] Steering public contracts toward favored entities by manipulating the concept of "responsibility" is not a novel idea.[18] Indeed, the use of a political litmus test for public contracting is highly analogous to the dismissal of public employees during the McCarthy era for allegedly belonging to politically disfavored "communist" organizations. In this context, the Court of Federal Claims defined a blacklist as follows: "A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or ***241** those among whom it is intended to circulate; as where a trades-union 'blacklists' workmen who refuse to conform to its rules."[19]

The public comments in reaction to the Clinton administration's FAR trustworthiness amendments identified just these sorts of concerns:

> (1) The language in the rule was vague and subjective, raising a risk of abuse, and perhaps leading to inconsistent application of law;
>
> (2) The proposal seemed more of a punitive measure than one designed to protect the Government's interest;
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> (3) The proposal appeared to permit contracting officers to give undue weight to unsubstantiated allegations;
>
> (4) The proposed rule appeared to modify the causes for debarment.[20]

A blacklist of companies deemed to be politically "untrustworthy" suffers from a number of serious legal flaws in addition to being suspect for the reasons identified in the public comments to the proposed FAR amendments. The *CF&I Steel* case highlights some of these flaws.

III. Background of the *CF&I Steel* Case

The factual background of the *CF&I Steel* case demonstrates the harm that special interest lobbying can do to the public contracting process when the effort evolves from a public relations campaign into an attempt to impose a political trustworthiness requirement on contractors.

CF&I Steel took place as a result of a long-running dispute between CF&I Steel and the United Steelworkers of America (USWA). In 1993, CF&I Steel purchased the assets of a century-old steel mill in Pueblo, Colorado, after the previous owners declared bankruptcy. The mill is one of two significant U.S. producers of rail used in public transit projects. CF&I Steel invested "over $200 million in the mill to modernize it and return it to profitability,"[21] thereby saving hundreds of union jobs. CF&I Steel and USWA were parties to a collective bargaining agreement that was entered into in 1993 and lasted until 1997.[22] Shortly after the agreement expired, USWA went on strike.[23] After three months, USWA unconditionally offered to return to work.[24] CF&I Steel did not reinstate all of the strikers, however, because it chose not to lay off replacement workers who had endured harassment and violence by USWA—actions that the National Labor Relations ***242** Board (NLRB) later found to be unfair labor practices.[25] Instead, USWA members were rehired as openings arose. About one-half of the workforce at the CF&I Steel mill are union members.[26]

One of CF&I Steel's long-time customers is the San Francisco Bay Area Rapid Transit District (BART).[27] In early 1999, BART purchased rail from CF&I Steel for its West Bay Extension project to the San Francisco Airport.[28] In May 1999, USWA was invited by BART's employee unions to meet with BART management. USWA suggested to BART that CF&I Steel's rail quality was substandard, creating a potential safety hazard, and also alleged that CF&I Steel had violated labor laws and occupational health and safety law and regulations. USWA also raised issues about whether CF&I Steel could guarantee that its rail would meet the federal Buy American Act requirements.[29] After USWA and its allies suggested that BART buy rail from a competitor, "on August 2, 1999, the Board of Supervisors of the City and County of San Francisco passed a resolution urging BART to boycott [CF&I Steel]."[30]

However, BART staff, operating independently of this political pressure, conducted quality tests of the CF&I Steel rail. "Based upon the results of the independent tests ..., BART's general manager advised the BART Board that the rail acquired from [CF&I Steel] for the West Bay Extension was 'acceptable' and met BART's specifications."[31] BART also provided documentation of its quality assurance audit to USWA. BART further advised USWA that it had "obtained no evidence that [CF&I Steel] rail failed to meet Buy America requirements."[32] However, USWA and its allies continued to suggest that the rail might be a safety hazard.

As a result of this political pressure, BART's president and general manager held a private meeting with USWA representatives and an official of the San Francisco Labor Council. At this meeting in the fall of 1999, BART's management agreed to present a resolution to the BART board, its legislative body, on the subject of CF&I Steel rail. In return, USWA would cease its demands for testing information and other activities to raise questions about rail quality.[33] At a meeting in November 1999, USWA and BART officials discussed the substance of a proposed resolution. USWA was provided with ***243** at least one draft.[34] "Certain early drafts of the resolution primarily indicated support for the goal of organized labor. [USWA], however, wanted the resolution to name [CF&I Steel] specifically and to include a ban on purchasing [CF&I Steel] rail."[35]

Finally, on December 2, 1999, the BART Board of Directors passed Resolution No. 4740, which provided in relevant part:

> BE IT FURTHER RESOLVED, that, to the extent allowed by law, the District refrain from purchasing replacement rail from [CF&I] Steel Mills, or any supplier utilizing [CF&I] Steel Mills' rail, or any supplier determined to

> be in significant violation of Federal fair labor standards and/or Occupational Safety and Health Administration standards.[36]

BART provided CF&I Steel with no notice of the potential resolution. Instead, two weeks after the resolution was passed, BART's president sent a letter to CF&I Steel's CEO indicating that "the district has now decided to use alternate suppliers to the extent allowed by law."[37] The letter also referred to "concerns over foreign content" and alleged OSHA violations by a CF&I Steel affiliate.[38]

CF&I Steel subsequently filed suit in federal court. The matter at stake was more than one of principle. BART was scheduled to buy nearly 3,000 tons of replacement rail in FY 2002, representing approximately $3 million in revenue for CF&I Steel.

> In 1999, BART represented approximately seventy-three percent of [CF&I Steel's] public-transit district rail sales [and] public transit sales represent from five to ten percent of [CF&I Steel's] overall rail business. From 1997 through 1999, the dollar volume of public-transit sales was from $2.1 to $4.9 million, representing from four to nine thousand tons of rail.[39]

CF&I Steel asserted three legal theories against the resolution, the bases for which are discussed below: (1) federal preemption, (2) violation of CF&I Steel's right to due process, and (3) violation of CF&I Steel's right to equal protection of the law.[40]

IV. Legal Bases to Challenge a Political Trustworthiness Requirement

A. *Preemption by Federal Labor Laws: The Machinists and* Garmon *Preemptions*

As *CF&I Steel* demonstrates, federal law may preempt efforts to impose trustworthiness requirements in public contracting that are unrelated to a contractor's ability to do the job. This is particularly likely if the trustworthiness ***244** requirement is used to favor one side to a labor dispute or to impose a penalty for perceived labor law violations beyond or different from federal requirements.

The federal courts have developed a two-pronged preemption doctrine to guard against state and local efforts to influence the labor issues governed exclusively by federal law. Such efforts may violate the principle of the *Machinists* preemption,[41] as articulated in *Golden State Transit Corp. v. City of Los Angeles*,[42] because they constitute a "thumb on the scale" in the balance of economic weapons between management and labor set by federal law. Alternatively, to the extent that the state or local government would add additional penalties to those imposed by the federal regulators, they may violate principles of the *Garmon*[43] preemption expressed in *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*[44] For cases arising in the Ninth Circuit, these doctrines must be applied through the filter of the Ninth Circuit's decision in *Alameda Newspapers, Inc. v. City of Oakland*,[45] which discusses these issues at some length.

1. *Machinists* Preemption

In *Golden State*, the leading case on the *Machinists* preemption, the U.S. Supreme Court held that the City of Los Angeles could not condition renewal of a taxi franchise on the taxi company's settlement of a labor dispute, despite the trial court's conclusion that franchise renewal was only a peripheral or incidental concern of labor policy.[46] The Court held that the city's

actions were barred by "*Machinists* preemption,"[47] which "precludes state and municipal regulation 'concerning conduct that Congress intended to be unregulated.'"[48] The Court explained that the *Machinists* preemption recognizes that

> certain areas intentionally have been left "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140, 96 S. Ct., at 2553, quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S. Ct. 373, 377, 30 L.Ed.2d 328 (1971). The Court recognized ***245** in *Machinists* that "Congress has been rather specific when it has come to outlaw particular economic weapons," 427 U.S. at 143, 96 S. Ct. at 2555, quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498, 80 S. Ct. 419, 421, 4 L.Ed.2d 454 (1960), and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance "between the uncontrolled power of management and labor to further their respective interests." *Machinists*, 427 U.S. at 146, 96 S. Ct. at 2556, quoting *Teamsters v. Morton*, 377 U.S. 252, 258-259, 84 S. Ct. 1253, 1257-1258, 12 L.Ed.2d 280 (1964). States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, see 427 U.S. at 147, 96 S. Ct. at 2556, unless such restrictions presumably were contemplated by Congress.[49]

Therefore, the Court concluded that the City of Los Angeles could not regulate the taxi company's resolution of a strike.[50]

In *Alameda Newspapers*, the City of Oakland demonstrated its support for a union engaged in a dispute with the *Oakland Tribune* by passing a written resolution to support the union as well as an oral resolution to stop municipal advertising in the paper and to cancel the city's thirteen subscriptions. The Ninth Circuit had little difficulty finding the written resolution to be merely symbolic. With regard to the oral debarment resolution, the court formulated the inquiry as whether municipal officials can be compelled by federal preemption "to act in a manner that contravenes their civic consciences—at least in cases in which their action would not have some 'real effect' or practical economic impact on the employer that is either different from that as an ordinary consumer or is otherwise governmental in nature."[51] In a footnote, the court indicated that it was not deciding whether the city's action would be preempted if "its actions served to change the economic balance" between management and labor.[52]

The Ninth Circuit stressed that regulatory power would likely be found when

> a City may be exercising the aggregate purchasing power of its citizens—for instance, when the City buys a product to be used on behalf of its citizens that they have no need to buy for themselves—garbage trucks, fire hoses, or a police dispatch system. Then, it might be possible to argue that the City through its power of the purse is able to exercise what is effectively regulatory power. Similarly, it might be argued that the City's conduct is potentially regulatory when the City purchases an unusually large quantity of a given product. In such cases, the City, drawing on its powers to tax and spend, is acting in a manner that a typical consumer cannot; so its conduct might be argued to be both coercive and governmental in nature.[53]

Therefore, the regulatory nature of the procurement may be shown in the alternative either by the character of the product or by the "quantity of [the] given product."[54]

***246** Continuing the analysis, the court in *Alameda Newspapers* found that the city did not "wield any economic power" because it was a "wholly insignificant" advertising customer and advertising revenue from the city was "minuscule or de minimis."[55] The economic impact of the city's own subscriptions did not even reach the minuscule level.[56] However, in the same paragraph that the court appeared to use a de minimis test for preemption, it also stated:

> There is not a shred of evidence in the record to suggest that the City of Oakland was in any way a substantial or significant advertiser or that its advertising approached in volume that of any of the City's major businesses, such as department stores, theater chains, or automotive dealers.[57]

Alameda Newspapers goes on in its discussion of the *Machinists* preemption to find that the city participated in the boycott as an "ordinary consumer, in a manner that had at very most a minuscule effect upon the *Tribune*."[58] After discussing the *Garmon* preemption, the court reiterates that the city's actions did not have a "substantial impact or indeed anything other than a de minimis impact."[59] The court then concludes its preemption argument with a statement that the oral resolution had no "real" effect.[60]

The discussion of the *Machinists* preemption in *Alameda Newspapers* throws more heat than light on the application of the doctrine. However, the most reasonable reading of the decision's various adjectives suggests that any "real" impact that is not "de minimis" or "minuscule" should be considered to be "substantial" and thus regulatory and subject to preemption. In *CF&I Steel*, the trial court interpreted *Alameda Newspapers* to mean that "a state or municipality may refuse to purchase from a boycotted business without triggering [the] *Machinists* preemption, so long as the refusal has no 'real effect' or economic impact."[61]

The real effect test was satisfied and the BART resolution was preempted under the *Machinists* doctrine because the court in *CF&I Steel* found that

> While BART is not one of Rocky Mountain's primary customers, its $3 million contract cannot be called "minuscule," even as compared to gross revenues of $292 million in 1999.
>
> Moreover, if all transit districts were to debar Rocky Mountain for its alleged violations of federal law, as the Steelworkers seek, the price to Rocky Mountain would be five to ten percent of its revenues. The debarment is not a mere "symbolic gesture."[62]

***247 2. *Garmon* Preemption**

In *Gould*, the leading case on the *Garmon* preemption, the U.S. Supreme Court struck down a Wisconsin statute forbidding state procurement agents from purchasing "any product known to be manufactured or sold by any person or firm included on the list of labor-law violators."[63] The Court found that the purpose of the statute was to deter labor law violations and rejected as irrelevant Wisconsin's argument that the statute was "an exercise of the State's spending power rather than its regulatory power."[64] The Court explained that by enacting the National Labor Relations Act (NLRA), "Congress largely displaced state regulation of industrial relations."[65] Accordingly, principles of federalism and preemption operate to prevent states from regulating conduct that is prohibited or allowed under the NLRA.[66] The state sought to justify the statute as an exercise of its spending power rather than as a regulation.[67] The Court found this rationale to be "a distinction without a difference ... because on its face the debarment statute serves plainly as a means of enforcing the NLRA."[68] Moreover, the conclusion that the Wisconsin statute was preempted by the NLRA was "made all the more obvious by the essentially punitive rather than corrective nature" of the statute.[69]

The *Gould* Court also expressed a concern about the aggregate effect of state sanctions supplementing federal remedies:

> Because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations in precisely the same way as would a state statue preventing repeat labor law violators from doing any business with private parties within the State. Moreover, if Wisconsin's debarment law is valid, nothing prevents other States from taking similar action against labor law violators. Indeed, at least four other States already have passed legislation disqualifying repeat or continuing offenders of the NLRA from competing for state contracts. Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the "integrated scheme of regulation" created by Congress.[70]

Similarly, in *Gade v. National Solid Waste Management Ass'n*,[71] the U.S. Supreme Court held that "a state law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the Act."[72] *Gade* contains ***248** an instructive discussion of the extent to which "dual impact" state regulations, i.e., those with a legitimate purpose in addition to regulating worker health and safety, are preempted by OSHA. The challenged regulations were Illinois training standards for handlers of hazardous waste, an area that OSHA also regulated.

The *Gade* Court applied the standard developed in *English v. General Electric Co.*[73] to evaluate these regulations.[74] The issue in *English* was whether federal nuclear safety regulations preempted the petitioner's state law claim for intentional infliction of emotional distress. The plaintiff alleged that a nuclear plant had terminated her in retaliation for her complaints about violations of nuclear safety regulations.[75] The *English* Court held that the test was as follows: "[F]or a state law to fall within the preempted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels."[76] Applying this standard, the *Gade* Court held that OSHA preempted the training requirements, despite Illinois's argument that the state training requirements furthered the separate and legitimate state goal of public health and safety.[77] Like the Court in *Gould*, the *Gade* Court also stressed the negative impact of duplicative state actions on the uniform application of the federal regulatory program.[78]

In *Alameda Newspapers*, the court cited *Gould* for the proposition that a municipality "cannot impose a separate penalty on companies that have violated the NLRA."[79] The plaintiff in *Alameda Newspapers* argued that because the city's written resolution discussed the plaintiff's "anti-labor conduct," the city was penalizing it for engaging in unfair labor practices.[80] However, the Ninth Circuit found that "the [City] council did not accuse [the plaintiff] of engaging in unfair labor practices."[81] The court concluded that "[t]he evidence suggests only that the [City] Council strongly disapproved of [the plaintiff's] conduct —not that it thought it violated federal law."[82] The Ninth Circuit said that the written resolution merely showed "moral support for workers by expressive or symbolic conduct" and had no actual effect.[83]

In contrast, in *CF&I Steel*, the BART resolution on its face debarred CF&I Steel and any other that the "supplier determined to be in significant violation of federal fair labor standards and/or Occupational Safety and Health ***249** Administration standards."[84] Therefore, the court held that "[t]he resolution singles out Rocky Mountain for [] punishment. *Gould* is on point. BART may not add its own penalties for conduct that is even arguably covered by the NLRA."[85]

In response to the argument that the loss of BART as a customer was "de minimis" to CF&I Steel, the court noted that there was no de minimis exception to the *Garmon* preemption.[86] In *Gould* itself, the government contracts at issue represented approximately $10,000. The court also rejected as irrelevant that the BART resolution debarred "labor law violators as a class" and not only CF&I Steel.[87] Finally, the court rejected BART's argument that CF&I Steel had shown no subjective intent on

BART's part to "deter violations of federal labor law or to penalize violators of those laws."[88] The court held that *Gould* remained dispositive because the unambiguous effect of the BART resolution was to impose such additional penalties.[89]

3. Market Participant Exemption

Although not discussed in the district court's opinion in CF&I Steel, BART attempted to fit its resolution within the "market participant" exception to preemption delineated in *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts and Rhode Island, Inc.*[90]

In *Metropolitan District*, the state agency, as permitted for the construction industry under NLRA section 8(f), entered into a union prehire agreement for a local sewer project.[91] A nonunion construction trade group alleged that the agreement fell outside section 8(f) and was preempted by federal labor laws.[92] The U.S. Supreme Court initially discussed the *Garmon* preemption, noting that it "'prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.'"[93] The Court distinguished *Gould*, which involved "a state agency's attempt to compel conformity with ***250** the NLRA," and found no such intent in the prehire agreement at issue.[94] The Court also held that the prehire agreement involved the government as proprietor rather than as regulator because the agreement was made to preserve the labor peace necessary for completion of the specific sewer project at issue.[95] Distinguishing *Golden State*, the Court held that *Golden State* could have been decided differently if the license nonrenewal had been made to avoid "serious interruptions in ... services" rather than to align the city with the union in the labor dispute.[96]

In *Metropolitan District*, the Court's analysis of the *Garmon* preemption is instructive. Under the *Garmon* preemption, as interpreted by both *Gould* and *Metropolitan District*, it is not the size of the government procurement that is determinative. Instead, if federal law either explicitly or implicity forbids state and local governments to achieve the goals, then local action is preempted. Consequently, the market participant exception provided little assistance to BART in *CF&I Steel*.

B. *Due Process*

Although the court in *CF&I Steel* did not reach the theory, CF&I Steel also asserted that BART's resolution violated its due process rights under the Fourteenth Amendment.[97] As discussed above, the BART resolution was enacted as a consequence of ex parte discussions between BART and union officials and without any notice to CF&I Steel.[98] CF&I Steel contended that this resolution violated a long line of government contract precedents holding that, before a contractor can be debarred, the contractor is entitled to a hearing and an opportunity to rebut the allegations.[99]

Under the seminal case of *Board of Regents of State College v. Roth*,[100] and its government contract progeny, *Old Dominion Dairy Products, Inc. v. Secretary of Defense*,[101] the stigmatizing effect of the charges leading to a debarment implicates a protected liberty interest and thereby triggers the protections of procedural due process. In *Roth*, a state university professor's contract was not renewed based, the plaintiff alleged, upon his public criticism of the ***251** university administration.[102] The U.S. Supreme Court held that the contract nonrenewal did not implicate the plaintiff's Fourteenth Amendment liberty interest because

> [t]he State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For

> "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the [G]overnment is doing to him, notice and an opportunity to be heard are essential."[103]

Thus, the Court found no "stigma or other disability" imposed upon the plaintiff from the nonrenewal.[104]

In contrast, in *Old Dominion*, although the plaintiff was found to be non-responsible based upon alleged overbilling, the D.C. Circuit, quoting *Roth*, held that the attack on the plaintiff's integrity implicated protected liberty interests:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the Government [was] doing to him, notice and an opportunity to be heard are essential."
>
> ....
>
> We hold that the present case parallels the situation anticipated by the Supreme Court in *Roth*, and that a due process liberty right was violated. To rule otherwise would drain *Roth* of meaning, something that the Supreme Court has taken pains not to do.[105]

The court agreed that damage to reputation alone is insufficient in the defamation context to invoke a constitutionally protected liberty interest but held that *McGrath* and other blacklist cases were "much more applicable to the present case."[106] The court therefore concluded:

> The point need not be repeated further. Contrary to the position of the Government here, it is clear that the opinion in *Paul v. Davis* supports the claim of [the plaintiff] in this case. For, as amply detailed earlier, it is precisely the "accompanying loss of government employment" and the "foreclosure from other employment opportunity" which is the injury resulting from the Government defamation complained of in this case. As a result, we hold that a liberty interest recognized by the Fifth Amendment is implicated in this case.[107]

Similarly, in the Ninth Circuit's *Vanelli* decision in *Vanelli v. Reynolds School District No. 7*,[108] the plaintiff was terminated as a high school teacher ***252** on the basis of alleged "offensive conduct."[109] Citing *Roth*, among other authority, the court held that

> [a]ppellant's interest in liberty is similarly implicated if a charge impairs his reputation for honesty or morality. The procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment or the alteration of some right or status recognized by state law:[110]

The decisions discussed above suggest that, unless the procuring agency notifies the contractor of the potential debarment and provides an opportunity to rebut the charges, a responsibility resolution probably violates the contractor's procedural due process

rights. That is, if the agency believes the contractor is untrustworthy, it must publicly and objectively justify this decision. Any debarment without this kind of protection would violate a contractor's protected due process rights.

C. *Equal Protection*

Another constitutional theory asserted but not decided in *CF&I Steel*[111] is an equal protection "class of one" claim, a doctrine developed primarily in the Seventh Circuit and affirmed by the U.S. Supreme Court. This theory holds that a governmental entity cannot act in a vindictive or irrational manner against a disfavored entity.[112] Its application to politically motivated procurement boycotts is straightforward.

In the seminal Seventh Circuit case of *Esmail v. Macrane*, the plaintiff alleged that he had been denied renewal of a liquor license because he had campaigned against the mayor and engaged in other actions that led to a "deep-seated animosity" toward him by city officials.[113] The plaintiff was not in any protected class, and so the local government argued that it was simply engaging in "selective prosecution" of alleged violations of liquor laws.[114] Under these circumstances, explained Chief Judge Posner,

> [t]he denial of equal protection is alleged to lie in the mayor's having denied Esmail's two license applications in 1992 on the basis of trivial or trumped-up charges while "maintain[ing] a policy and practice of routinely granting new liquor licenses as well as renewing existing licenses requested by persons who had engaged in the same or similar conduct, ... for the sole and exclusive purpose of exacting retaliation and vengeance against Esmail.[115]

***253** Chief Judge Posner observed that "this is an unusual kind of equal protection case, though not an unprecedented kind."[116] The court noted that the action was not for retaliation for the plaintiff's exercising First Amendment rights but simply "an orchestrated campaign of official harassment directed against him out of sheer malice."[117] Chief Judge Posner further explained that the theoretical basis for the claim is that

> equal protection does not just mean treating identically situated persons identically. If a bad person is treated better than a good person, this is just as much an example of unequal treatment as when a bad person is treated better than an equally bad person or a good person worse than an equally good person. That has been understood since Aristotle invented the antecedent of our concept of equal protection more than two millennia ago. If the liquor dealers enumerated in Esmail's complaint committed worse infractions than he was charged with but were left off with lighter or no sanctions, this was unequal treatment. It would not in itself establish a claim under the equal protection clause, because nonactionable selective prosecution produces exactly such inequalities. The distinctive feature here, which the district judge did not discuss, is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor.[118]

Therefore, the court held that the plaintiff had pled an equal protection violation and could prevail if he proved "that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective."[119]

Similarly, in the Seventh Circuit's decision in *Olech v. Village of Willowbrook*,[120] the plaintiff alleged that the municipality had demanded a larger easement for road construction than would otherwise have been the case and refused to facilitate water service to the plaintiff in retaliation for his success in an earlier lawsuit against the municipality.[121] Chief Judge Posner framed this issue as follows:

> The Village does not deny that it has a legal obligation to provide water to all its residents. If it refuses to perform this obligation for one of the residents, for no reason other than a baseless hatred, then it denies that resident the equal protection of the laws. And that is sufficiently alleged.[122]

Judge Posner described the burden that the plaintiff would have to meet as follows:

> [B]ear in mind that the "vindictive action" class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant. If the defendant would have taken the complained-of action anyway, even if it didn't have the animus, ***254** the animus would not condemn the action; a tincture of ill will does not invalidate governmental action.[123]

In affirming the Seventh Circuit's decision in *Olech*, the U.S. Supreme Court noted in a brief per curiam opinion that there was nothing novel about "a class of one."[124] "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[125]

The Court held that, even absent evidence of "subjective ill will," the plaintiff had stated a claim that there was no rational basis for the municipality's action.[126] It therefore did not reach the theory of vindictively motivated government conduct. Justice Breyer, in a concurring opinion, expressed concern that zoning decisions necessarily involve differential treatment and instead stressed that "in this case respondent had alleged an extra factor as well—a factor that the Court of Appeals called 'vindictive action,' 'illegitimate animus,' or 'ill will.'"[127]

Thus, whether approached under the Seventh Circuit vindictiveness standard or the U.S. Supreme Court majority's application of the traditional rational basis test, a procurement boycott based solely on a desire to appease a union or other interest group or to make a political statement could be subject to challenge. Even if the government entity attempts to construct a rational basis for its decision after the fact, the court may examine whether this basis is pretextual.

For example, in *CF&I Steel*, BART argued on summary judgment that the labor dispute might affect product quality. However, CF&I Steel showed that BART's quality auditors found the CF&I Steel rail to meet BART's specifications.[128] BART also argued that its policy preference not to do business with CF&I Steel was a valid rational basis for disparate treatment of CF&I Steel. Although the district court in *CF&I Steel* did not rule on the equal protection theory, a rationalization that is contrary to the facts known to the agency or that is based upon political favoritism is unlikely to pass muster under the Fourteenth Amendment.[129] Thus, depending upon the record before the contracting agency, a debarred contractor may have a plausible argument ***255** that a politically motivated blacklist violates its constitutional equal protection rights.

D. *Other Theories*

Although not asserted in *CF&I Steel*, a contractor subject to blacklisting for lack of "trustworthiness" may have other tenable theories. For example, local governments may have no immunity from the antitrust laws if they are acting as commercial market participants or in direct violation of state policy.[130] If, as in *CF&I Steel*, the blacklist is the result of secret meetings with union lobbyists, the resolution may violate open meetings laws.[131] However, remedies for such violations will likely be limited to an order barring the agency from future violations.[132]

V. Conclusion

It is an unfortunate fact of the twenty-first century that politics is once again being injected into government contract decisions. However, state or local government action disqualifying a contractor as "untrustworthy" because of alleged labor law or worker safety violations unrelated to the contractor's ability to perform is subject to challenge under federal law. These federal remedies help to preserve the integrity and transparency of the public contracting process.

Footnotes

a1 *Scott J. Kaplan is a partner in the Portland, Oregon, office of Stoel Rives LLP. He was one of the attorneys representing CF&I Steel in* CF&I Steel v. Bay Area Rapid Transit District. *The author acknowledges the assistance of his partner Charles F. Adams. The views expressed in this Article do not necessarily reflect those of Stoel Rives LLP or any of its clients*.

1 Frank Anechiarico & James B. Jacobs, *Purging Corruption from Public Contracting: The "Solutions" Are Now Part of the Problem*, 40 N.Y.L. Sch. L. Rev. 143, 145 (1995).

2 One such effort, the Clinton administration's attempt to rewrite the Federal Acquisition Regulations (FARs) to codify this position, was withdrawn in the face of congressional opposition. 30 O.S.H. Rep. (BNA) 30, at 689 (July 27, 2000).

3 No. C00-00529-WHA (Cal.), 2000 WL 1375277 (N.D. Cal. Sept. 19, 2000).

4 Anechiarico & Jacobs, *supra* note 1, at 145.

5 Jane Morley, *Master Builders: The Brooklyn Bridge—Historic Span Founded on Family Drama*, Design-Build, Dec. 2000, *available at* http:// www.designbuildmag.com (insert "Brooklyn Bridge" in search box) (last visited Dec. 26, 2001).

6 This is not to say that public contracting laws have eliminated corrupt practices in public contracting. Although they are perhaps not as overt as the Tammany Hall abuses, the *Providence Journal* recently pointed out that such corruption remains alive and well in, for example, Rhode Island, New Jersey, and Chicago. Peter C.T. Elsworth, *On Corruption, R.I.'s Record Speaks for Itself*, Providence J., Apr. 8, 2001, *available at* http://www.projo.com/cgi-bin/include.pl/extra/plunder/stories/20010408side.htm.

7 Associated Gen. Contractors v. San Francisco Unified Sch. Dist., 616 F.2d 1381, 1391 (9th Cir. 1980) (citing Miller v. McKinnon, 124 P.2d 34, 37-38 (Cal. 1942)).

8 *Miller*, 124 P.2d at 37-38; *see also* Gen. Eng'g Corp. v. Virgin Islands Water & Power Auth., 805 F.2d 88, 94 (3d Cir. 1986) ("The primary purpose of a competitive bidding statute is to protect against fraud, collusion, and favoritism in the issuance of public contracts.").

9 *See, e.g.*, Or. Rev. Stat. § 279.005 (1998).

10 Cal. Pub. Cont. Code § 100 (West 2001).

11 Paul v. United States, 371 U.S. 245, 253 (1963).

12 Donald P. Arnavas & William J. Ruberry, Government Contract Guidebook § 3-2 (2d ed. 1994).

13 *E.g.*, Cal. Pub. Cont. Code § 20221 (West 2001); *accord* Associated Gen. Contractors v. San Francisco Unified Sch. Dist., 616 F.2d 1381, 1391 (9th Cir. 1980).

14 Cal. Pub. Cont. Code § 1103 (West 1999) (emphasis added).

15 Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 66 Fed. Reg. 66, 984 (Dec. 27, 2001) (rescission of 65 Fed. Reg. 40,830 (June 30, 2000)).

16 Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 40,830; 40,833 (June 30, 2000).

17 *See* Anechiarico & Jacobs, *supra* note 1, at 143.

18 Matthew Cosenza, *Adverse Effects of the "Lowest Responsible Bidder" Clause in Public Contracts*, 98 Dick. L. Rev. 259 (1993).

19 Estate of Braude v. United States, 35 Fed. Cl. 99, 105 n.8 (1996) (quoting Black's Law Dictionary 170 (6th ed. 1990)).

20 65 Fed. Reg., *supra* note 16, at 40,830.

21 CF&I Steel, L.P. v. Bay Area Rapid Transit Dist., No. C00-00529-WHA (Cal.), 2000 WL 1375277, at **1-2 (N.D. Cal. Sept. 19, 2000).

22 *Id.* at *2.

23 *Id.*

24 *Id.*

25 *Id.*; United Steelworkers of America, and Its Locals 2102 and 3267 and New CF&I, Inc., and Oregon Steel Mills, Inc., dba CF&I Steel, L.P., National Labor Relations Board, Division of Judges, San Francisco Branch Office, Case Nos. 27-CB-3780, 27-CB-3982, 27-CB-4003 (Aug. 2, 2000) (ordering CF&I to cease and desist in unfair labor practices).

26 CF&I Steel, L.P. v. Bay Area Rapid Transit Dist., No. C00-00529-WHA (Cal.), 2000 WL 1375277, at *2 (N.D. Cal. Sept. 19, 2000).

27 *Id.* at *1.

28 *Id.*

29 *Id.* at *2.

30 *Id.*

31 *Id.* at *3.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at *4.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at *5.

41 Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) (holding that the NLRA preempts state law in regulating the use of economic pressure by management and labor to further their own interests).

42 475 U.S. 608 (1986) (holding that a city conditioned a taxicab franchise renewal in a way that intruded on the collective bargaining process).

43 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (preventing states from providing remedies for conduct prohibited by the National Labor Relations Act).

44 475 U.S. 282 (1986) (holding that a state is preempted by federal labor laws from adding the penalty of debarment to regulatory action taken by the federal agency).

45 95 F.3d 1406 (9th Cir. 1996).

46 *Golden State Transit Corp.*, 475 U.S. at 612, 618-19.

47 *See* Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

48 *Golden State Transit Corp*, 475 U.S. at 614 (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 749 (1985)).

49 *Id.* at 614-15.

50 *Id.* at 618.

51 Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1416 (9th Cir. 1996).

52 *Id.* at 1416 n.15.

53 *Id.* at 1417.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 1418.

59 *Id.* at 1420.

60 *Id.*

61 CF&I Steel, L.P. v. Bay Area Rapid Transit Dist., No. C00-00529-WHA (Cal.), 2000 WL 1375277, at *9 (N.D. Cal. Sept. 19, 2000).

62 *Id.*

63 Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc., 475 U.S. 282, 284 (1986) (quoting Wis. Stat. § 16.75(8) (1980)).

64 *Id.* at 287.

65 *Id.* at 286.

66 *Id.*

67 *Id.* at 287.

68 *Id.*

69 *Id.* at 288 n.5.

70 *Id.* at 288-89.

71 505 U.S. 88 (1992).

72 *Id.* at 107.

73 496 U.S. 72 (1990).

74 *Gade*, 505 U.S. at 107.

75 *English*, 496 U.S. at 72.

76 *Id.* at 85.

77 *Gade*, 505 U.S. at 109.

78 *Id.* at 100.

79 Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1418 (9th Cir. 1996).

80 *Id.* at 1418.

81 *Id.* at 1418-19.

82 *Id.* at 1419.

83 *Id.*

84 CF&I Steel, L.P. v. Bay Area Rapid Transit Dist., No. C00-00529-WHA (Cal.), 2000 WL 1375277, at *8 (N.D. Cal. Sept. 19, 2000).

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 507 U.S. 218, 229 (1993). *See also* Dillingham Constr., N.A., Inc. v. County of Sonoma, 190 F.3d 1034, 1037 (9th Cir. 1999) (discussing market participant exception).

91 *Metro. Dist.*, 507 U.S. at 218.

92 *Id.* at 223.

93 *Id.* at 225 (quoting Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc., 475 U.S. 282, 286 (1986)).

94 *Id.* at 228-29.

95 *Id.* at 227.

96 *Id.*

97 CF&I Steel, L.P. v. Bay Area Rapid Transit Dist., No. C00-00529-WHA (Cal.), 2000 WL 1375277, at *5 (N.D. Cal. Sept. 19, 2000).

98 *Id.* at *3.

99 *See* Erickson v. United States *ex rel.* Dep't of Health & Human Servs., 67 F.3d 858, 862-63 (9th Cir. 1995); Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773 (9th Cir. 1982); Old Dominion Dairy Prods. v. Sec'y of Defense, 631 F.2d 953 (D.C. Cir. 1980); Transco Sec., Inc. v. Freeman, 639 F.2d 318 (6th Cir. 1981); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); LaCorte Elec. Constr. & Maint., Inc. v. County of Rensselaer, 574 N.Y.S.2d 647 (N.Y. Sup. Ct. 1991); Dep't of Labor v. Titan Const. Co., 504 A.2d 7 (N.J. 1985).

100 408 U.S. 564 (1972).

101 *Old Dominion*, 631 F.2d at 953.

102 *Roth*, 408 U.S. at 568.

103 *Id.* at 573 (citation omitted).

104 *Id.*

105 *Old Dominion*, 631 F.2d at 963, 964 (emphasis omitted) (quoting *Roth*, 408 U.S. at 573).

106 *Id.* at 965.

107 *Id.* at 966.

108 667 F.2d 773 (9th Cir. 1982).

109 *Id.*

110 *Id.* at 777-78 (footnotes omitted); *accord* Finkelstein v. Bergna, 924 F.2d 1449, 1452 (9th Cir. 1991); Brady v. Gebbie, 859 F.2d 1543, 1552 (9th Cir. 1988); Davis v. Oregon State Univ., 591 F.2d 493, 498 (9th Cir. 1978).

111 CF&I Steel, L.P. v. Bay Area Rapid Transit Dist., No. C00-00529-WHA (Cal.), 2000 WL 1375277, at *5 (N.D. Cal. Sept. 19, 2000).

112 Olech v. Vill. of Willowbrook, 160 F.3d 386, 387-88 (7th Cir. 1998).

113 Esmail v. Macrane, 53 F.3d 176, 177-78 (7th Cir. 1995).

114 *Id.* at 178.

115 *Id.*

116 *Id.*

117 *Id.* at 179.

118 *Id.*

119 *Id.* at 180.

120 160 F.3d 386 (7th Cir 1998).

121 *Id.* at 387-88.

122 *Id.* at 388 (Posner, C.J.).

123 *Id.* (Posner, C.J.).

124 *Olech*, 120 S. Ct. at 1074.

125 *Id.*

126 *Id.* at 1075.

127 *Id.* (quoting Olech v. Vill. of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998)).

128 CF&I Steel, L.P. v. Bay Area Rapid Transit Dist., No. C00-00529-WHA (Cal.), 2000 WL 1375277, at *3 (N.D. Cal. Sept. 19, 2000).

129 *See* Romer v. Evans, 517 U.S. 620, 633-35 (1996) (neither legitimate nor rational basis for Government to "singl[e] out a certain class of citizens for disfavored legal status" when effort is a "classification of persons undertaken for its own sake"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-48 (1985) (desire to harm politically unpopular group, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable," does not constitute a rational basis).

130 This rule is known as the *Parker* doctrine after Parker v. Brown, 317 U.S. 341 (1943).

131 *E.g.*, Cal. Gov't Code §§ 11120 et seq. (West 2001).

132 *See* Cal. Govt. Code §§ 59460, 59460.1 (West 2001).

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