February 20, 2019

VIA E-MAIL ONLY

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Berkeley City Council
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Re: Sanctuary City Contracting Ordinance – response to February 14 staff memo

Dear Honorable Mayor and City Councilmembers:

I write on behalf of our Sanctuary City Contracting Ordinance coalition of almost 500,000 people, including thousands of Berkeley voters, in response to your city manager's February 14, 2019 memo wherein she discusses the presumed difficulties her administration will face if the ordinance is implemented. The arguments presented in the memo are mostly without merit, highly speculative, and lacking in factual support. Indeed, the 'objections' are contradicted by Berkeley's own policies and procedures and past performance.

I appreciate that the memo confirms what we have been saying for over a year – there are at most 1-2 contracts at issue (Microsoft, WestLaw) in Berkeley, and we have been informed that those contracts will not be expiring any time soon. City Hall has plenty of time to come up with a solution, should the two contracts even come into play[1].

As there appears to be some remaining confusion over what is a rather short and simple ordinance, let me attempt to further explain how the ordinance works:

- Contract forbearance would apply only to companies that are engaged in providing ICE with "data broker", or "extreme vetting" services, as defined in the ordinance. This is one of the most critical aspects of the ordinance because it dramatically narrows the scope of the bill and the restrictions on city contracting.

[1] The memo erroneously claims that IBM is subject to the ordinance. We are aware of no existing contract between ICE and IBM for "data broker" or "extreme vetting" services. Unless the City Manager can demonstrate otherwise, this erroneous claim must be ignored.

- **The scope of work or itemized list of services in the contract between the vendor and ICE will determine** whether the contract falls within one of these two defined categories, thereby making the vendor ineligible for municipal monies.

  Ex: Among their many revenue streams, Lexis is a data broker. Lexis also sells a legal research tool. However, Lexis does not have an existing contract with ICE to provide data or extreme vetting services, so they are **eligible** *for a City of Berkeley contract award if this ordinance was enacted today.*

  Ex: Amazon presently sells ICE website/data hosting. Amazon has unsuccessfully attempted to sell ICE facial recognition software analytics, which would fall under "extreme vetting services." Since Amazon currently only provides hosting to ICE, they are **eligible** *for a City of Berkeley contract award under the proposed ordinance, as things stand today.*

- As large corporations and data behemoths likely provide both informational services as well as unrelated products, the controlling factors will be 1) the scope of work provided, 2) whether it meets the definition of "data broker" or "extreme vetting" services, and 3) if those services are provided to ICE (rather than an intermediary).

  Ex: Microsoft wants to sell computers to the City of Berkeley. Microsoft also has an existing contract with ICE that provides, among other things, data processing and artificial intelligence capabilities that fall both under "data broker services" and "extreme vetting services." Microsoft would be **ineligible** *to sell computers to the City of Berkeley in this scenario.*

  Ex: Salesforce wants to sell its CRM product to the City of Berkeley. Salesforce has a contract with CBP for its "Salesforce Analytics and Community Cloud" products. Upon closer review of the contract's specific services, the services are limited to employee management and human resources tasks, internal to CBP. Salesforce would be **eligible** *to sell to the City of Berkeley in this scenario, as neither CBP nor "employee management and human resources" services are at issue under the proposed ordinance.*

  Ex: There is no Party A to Party B to Party C applicability. Using the Microsoft example above – Intel sells microprocessor chips to Microsoft, and Intel also desires to sell servers to the City of Berkeley. Intel has no contract of its own with ICE. Microsoft's **ineligible** *status with the City of Berkeley does not affect Intel, and Intel is* **eligible** *to sell to the City of Berkeley in this scenario.*

February 14, 2019 City Manager's memo

Legal Research

Ms. Williams-Ridley claims that if the ordinance is adopted, the City's "ability to do legal research" would be "significantly obstruct[ed]", due to interference with an existing contract with Thomson-Reuters for its WestLaw legal research tool, generally considered the best of class.

The memo fails to acknowledge there are other competitors besides Lexis, which may wind up on our master contract list of ineligible vendors at some point. However, unless Ms. Williams-Ridley can establish that Lexis has an existing contract with ICE for "data broker" or "extreme

vetting" services, Lexis is **not** ineligible under this ordinance[2]. The research tool provided by Lexis is very sophisticated and robust, and costs far less than WestLaw. It is a reasonable alternative, one used by millions of legal professionals across the country.

More importantly, we have been informed that the WestLaw contract with the City of Berkeley has three years left on it. Adoption of the ordinance at the February 26 council meeting will have great symbolic value, but might not ever practically impact your WestLaw contract. If this ordinance is needed as a long term defensive strategy against xenophobia, our country has far larger problems than having to switch between software programs. We see this ordinance as a short term defensive play necessary until we get rid of Trump's xenophobic policies. In three years, WestLaw might not have a contract with ICE. Ours is not the only public shaming/divestment campaign in the country. Berkeley has plenty of time to resolve an issue that won't come to fruition for 3 more years.

Significantly Increase Costs and Staff Workload

Your city manager goes on to argue that the ordinance will significantly increase costs and staff workload, and hinder the City's ability to collect revenue. Notably, zero factual support is provided for these allegations, and they are contradicted by Berkeley's own history on like matters.

It is also unclear what is meant by hindering the ability to collect revenue. There is no investment prohibition (stricken by council at the first introduction), and it is unclear how we would "collect revenue" on contracts that we are awarding, where we pay vendors for services. The memo also erroneously claims that staff time and costs may increase due to the need to "terminate the contracts." The ordinance does **not** interfere with existing contract rights, nor does it attempt to. It prohibits the renewal, extension, or awarding of new contracts, but existing contracts may be maintained through the end of their term (and beyond, if the waiver is granted).

1. "Daily review of all purchases by all departments for compliance with the ordinance would be staff time intensive."

We agree this would be staff time intensive if true, but if the suggestion is that the ordinance requires such a thing, you are being misled. There is no such requirement in the ordinance, and it is nonsense to suggest that "all purchases" are contracts, and therefore subject to this ordinance. Below is the prohibition as stated in the ordinance:

> *No officer, employee, department, board, commission, City Council, City Manager, or other entity of the City **shall enter into a new, amended, or extended contract or agreement** with any Person or Entity that provides ICE with any "Data Broker" or "Extreme Vetting" services… (emphasis added)*

The daily purchase of office supplies at a local store, online purchases at Amazon, etc. is not "enter[ing] into a new, amended, or extended contract…" We have provided you with our master list of contracts subject to this ordinance, and as the Berkeley draft of our model is by far the

[2] It's not for want of trying – Lexis has lost out to Thomson-Reuters on the contracts now making Thomson-Reuters ineligible here. However, unless someone has a contract that we have been unable to find, and has not been reported, we believe Lexis **is eligible** for city contracts as of now (and thus no need to separately address its CopLogic product). Although WestLaw and Lexis are considered #1 and #2 respectively in the legal research field, there are dozens of competing products, at far lower prices. Likewise – Amazon and Salesforce are not yet on our master list of ineligible vendors, because they are not providing services to ICE that meet the definition of 'data broker' or "extreme vetting.'

most narrow, the bar is set the lowest as to adoption[3]. If possibly having to decide on a WestLaw contract in three years is too problematic to enact this ordinance, Berkeley should no longer be called a "City of Refuge".

2. Other potential impacts: "City's reliance on data from other agencies using the same data brokers."

There is no Party A to Party B to Party C applicability under this ordinance – just because an ineligible vendor is doing business with an eligible vendor does not make the eligible vendor ineligible. What governs is the contracting party (ICE) and the scope of services provided (data broker/extreme vetting). If Party A is providing those services to ICE and also selling widgets to Intel, does that automatically make Intel ineligible for a city contract? No. Only the existence of a contract between ICE and Intel for data broker/extreme vetting services would.

Furthermore, government agents/agencies are expressly excluded from the definition of "Person or Entity", so government criminal justice databases are not at issue.

3. Daily monitoring for community member complaints/to ensure proper investigations occurs/Staff development of solicitation and contracting certification procedures and tools to determine compliance/the need to provide hearings for barred companies.

The above objections are all belied by the simple fact that this ordinance presents an old concept, only with a new target. Berkeley has been on the forefront of socially responsible investing and boycotts for decades, including its Nuclear Free Zone (includes an investment prohibition), Oppressive States, and the Border Wall Contractor Prohibition, the latter of which was adopted in March 2017 (includes a divestment requirement). We find no evidence of the City Manager's inability to comply with these existing measures. We find no evidence in the last couple years' worth of agendas where she made a formal request to be relieved from compliance, presented any analysis of harm to the City's finances or otherwise, nor requested additional staff due to an overwhelming burden of compliance. The existence and longevity of some of these restrictions defeat the arguments raised in the memo, which as noted above, are not supported by any facts.

It is also untrue that staff will need to develop new procedures and tools. As stated above, this is not a new concept, and your existing trade restrictions have already created these tools and procedures. For example, see the attached "Nuclear Free Zone Disclosure Form", "Oppressive States Compliance Statement for Personal Services", and a sample "Personal Services Contract", at paragraphs 12-13. The work has already been done, and merely needs less than an hour of re-purposing to insert or incorporate the "Sanctuary City Contracting Ordinance" by name.

I can assure you, having done the research on both topics myself, and having the led the legal challenge to Oakland's Domain Awareness Center over its own anti-nuclear weapons contracting ordinance, that there are **more** vendors subject to Berkeley's Nuclear Free Act, than the proposed Sanctuary City Contracting Ordinance. The city manager isn't raising a fuss about nuclear weapons contractors.

In a strange and fortuitous twist, due to the declaration under penalty of perjury, for once most of the compliance burden shifts to the vendor instead of staff. This point should not be dismissed easily. The vendor bears most of the weight of compliance, and the public also bears responsibility for bringing to the city manager's attention contracts that may be at issue during the RFP stage. The threat of a fine and perjury penalty is a great burden shifter.

[3] Other versions include additional federal immigration agencies, and "detention facility support" services.

Berkeley already has appeals hearings in place (blight, nuisance, garbage fees, zoning, Nuclear Free Zone Act). Both the attached declarations work under the same threat, penalty of perjury.

Ask yourself how many times during the course of your service at City Hall has Berkeley been sued under the Nuclear Free Zone act? How many extra full time staff did you have to dedicate to ensure its compliance? How many debarment hearings have been held under it? Berkeley's own history demonstrates that the city manager's objections are without merit, and that existing staff and procedures are adequate and sophisticated enough to ensure compliance with this ordinance.

Consistency

The Berkeley City Council has enthusiastically enacted these other protective measures, which due to their investment and/or divestment provisions are actually more cumbersome than the proposed ordinance before you. We ask that you consider the terrifying times we are in, as we watch children snatched from their mother's arms, as Yemeni mother Shaima Swileh attempted 28 times to get a waiver to the Muslim Ban, just to visit Children's Hospital in Oakland and hold her dying son one last time before taking him off life support, as DACA parents refuse to let their kids apply for financial aid or medical care, due to federal agencies involvement and collection of their data. We ask that you remember your claim to be a City of Refuge, and that you make that status meaningful.

Sincerely,

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Attachments

cc: George Lippman