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October 25, 2013

HAND DELIVERED AND E-MAIL

Alderman Joe Davis, Sr.
2nd Aldermanic District
Room 205 – City Hall

Re: A substitute ordinance repealing the minimum levels of participation of minority and women business enterprise in City contracts/CI File 130303

Dear Alderman Davis:

You asked us to review a file that is pending before the Community & Economic Development Committee, which would repeal certain provisions of Chapter 370 of the Milwaukee City Charter to comply with a stipulation and order in the federal lawsuit challenging Chapter 370's minority and women business provisions. It is our understanding that there is a proposal to limit eligibility in the remaining Small Business Enterprise program to businesses located in Milwaukee.

In our opinion, as discussed below, it would not be legal to insert such a requirement into the proposed revisions to Chapter 370 at this time, unless and until there is a determination that the legislated participation levels for construction, commodities, and professional services are attainable using only Milwaukee businesses, and until findings are made to support this type of preference for local businesses. We recommend, in addition, that there be an analysis of the interplay between such a requirement and the existing Local Business Enterprise Program, which was adopted by the Common Council.

Because the City is required by court order to repeal certain portions of Chapter 370 "within a reasonable time," it is our recommendation that the Council adopt the deletions originally proposed, and separately address whether it is possible to retain some locality requirement in Chapter 370, or to explore revisions to the City's existing Local Business Enterprise Program.

We note that Chapter 370 will still allow a business to prove disadvantage by, in part, showing it is located in a City of Milwaukee enterprise zone.

The City has had Disadvantaged/Emerging Business programs for over 20 years. They were never designed as local business preference programs. The findings supporting these programs did not include the factors that would be necessary to support a local business preference. More to the point, the participation percentages inserted in those programs were based on the availability of DBEs and EBEs, not limited to businesses within the City of Milwaukee. It may be that the participation percentages would have been lower if the programs had been limited to City businesses.

When Chapter 370 was adopted it included race and gender-based preferences. Case law requires that those types of programs be "narrowly tailored," and so, based on the disparity study commissioned by the City, Chapter 370 had to be restricted to businesses in the area from which most of our contractors are drawn. That is why it had included a provision that eligible businesses had to be located in the four-county area. This should now be removed.

In brief, in order to adopt a local business preference, there must be legislative findings justifying the reasons for its necessity in order to satisfy the Equal Protection Clause of the United States Constitution. In addition, every ordinance must be rational. Thus, the participation percentages in the ordinance would have to be examined to ensure that they are achievable. The law disfavors creating a windfall situation, where one or two contractors are able to essentially "name their price" because they are the only available companies to perform the necessary work. Percentage requirements should be based on the availability of qualified contractors. *See*, e.g. *Coral Construction Co. v. King County,* 941 F.2d 910 (9th Cir. 1991). To do otherwise may be anti-competitive, which is directly contrary to the stated goal of Chapter 370 - to foster competition. It is also contrary to the concept of public bidding laws, which have the "overriding" purpose of cost-effectiveness, getting "the most reasonable price practicable," and protecting against "insufficient competition." *Aqua-Tech, Inc. v. Como Lake Protection and Rehabilitation District*, 71 Wis. 2d 54 (1976), *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 885 P.2d 934 (S.Ct. Cal. 1995), and many other cases.

Finally, the City has already adopted a Local Business Enterprise Program, which allows the City in many cases to award a contract to a City-based business even if

it is not the low bidder. There is a safeguard built into the LBE program to ensure that the City taxpayers do not pay too much in excess of the low bid. Presumably, this is the policy option the Common Council preferred for a local business incentive.

In conclusion, without additional targeted findings and a re-evaluation of the participation percentages, should the program be limited to City businesses, we would not be able to affirm that the revised ordinance was legal and enforceable. We recommend complying with the revisions that are required by the City's court stipulation, and deferring discussion of changes in the essential nature of the program to a later date.

Very truly yours,

GRANT F. LANGLEY
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Deputy City Attorney

LUB:bl

c: Alderman Willie C. Wade
Mr. Jim Owczarski

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