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July 18, 2011

Alderman James A. Bohl, Jr.  
City Hall, Room 205

Re: What is the Legality & Enforceability of CCFN 101245 – Change in Local Business Enterprise Preference

Dear Alderman Bohl:

On July 7, 2011, you asked about the impact of the State budget bill, (now 2011 Wisconsin Act 32), on the legality and enforceability of the ordinance proposed in Common Council File Number 101245. As we explain below, some alterations will need to be made to the draft in light of Act 32.

As you are aware, Act 32 created Wis. Stat. § 66.0901(1m), which provides:

- (1m) METHOD OF BIDDING.** (a) Except when necessary to secure federal aid, whenever a political subdivision lets a public contract by bidding, the political subdivision shall comply with all of the following:
1. The bidding shall be on the basis of sealed competitive bids.
  2. The contract shall be awarded to the lowest responsible bidder.
- (b) Except when necessary to secure federal aid, a political subdivision may not use a bidding method that gives preference based on the geographic location of the bidder or that uses criteria other than the lowest responsible bidder in awarding a contract.

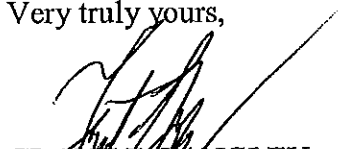
Under the Act, “political subdivision” includes cities. Wis. Stat. § 66.0901(1)(bm). A “public contract” is defined in § 66.0901(1)(c), as “a contract for the construction, execution, repair, remodeling or improvement of a public work or building or for the furnishing of supplies or material of any kind, proposals for which are required to be advertised by law.”

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As we read § 66.0901(1m)(b), it appears that the City may not use the Local Business Enterprise (LBE) preference currently provided in Chapter 365 when it lets a public contract by bid. This is because the LBE ordinance is clearly "a bidding method that gives preference based on the geographic location of the bidder." This prohibition would include, but not be limited to, the road and sewer projects you referenced in your opinion request. Moreover, the prohibition would apply, not just when DPW lets a public contract by bid, but also when other departments let public contracts by bid, (for instance, when DCD lets public contracts using Housing Infrastructure Preservation Fund monies). The LBE preference may still be applied to public contracts that are not legally required to be bid, (for instance, engineering services that the City typically procures using a request for proposals), or to contracts let by the Purchasing Director, (for the procurement of goods and services, which do not constitute "public contracts" as that term is defined in the statute). We have advised the Legislative Reference Bureau of the effect of Act 32 on the City's LBE ordinance, and they will be working to amend the ordinance to ensure it complies with State law.

As for the impact of Act 32 on your proposal in CCFN 101245 to amend the LBE preference to increase the preference to 10% and to require an LBE to meet the otherwise lowest bid in order to be awarded the contract, the same analysis applies. In light of Act 32, CCFN 101245 could not legally be drafted to apply to public contracts let by bid, however, it could still be applied in all other contracting situations currently envisioned in Chapter 365. Depending on how LRB proposes to amend Chapter 365, the draft of CCFN 101245 may or may not need to be altered. Our office will be happy to work with you and the LRB in effectuating any necessary changes. If you have any further questions or concerns, please feel free to contact the undersigned.

Very truly yours,



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