Statement of

The Wisconsin Underground Contractors Association

to the

FINANCE COMMITTEE

LRB08185-3, Community Benefits Ordinance

Friday March 20, 2009, Milwaukee City Hall

Wisconsin Underground
Contractors' Association Inc.

The Wisconsin Underground Contractors Association was formed in 1937. It represents about 150 member firms doing water, sewer, tunnel, utility construction and related services. Our member firms have worked for the city for decades.

The Wisconsin Underground Contractors Association is located at 2835 N. Mayfair Road, Suite 22, Milwaukee, WI 53222.
Telephone 414/778-1050. Fax 414/778-0647, website www.wuca.org

Since our last testimony dated March 2, 2009 attached, we found two items of interest relative to this legislative proposal to provide a 5% bid advantage for Milwaukee area domiciled firms, an increase in residency requirements, and an increase in Emerging Business Enterprises (EBE).

1) In a letter dated January 20, 2004 from W. Martin Morics, City Comptroller to the Common Council it states that the requirements of this type ordinance will **increase the cost to private residential developers 8% to 14% and therefore increases the cost of development.** The letter goes further and states that the requirements of the ordinance will...**inhibit tax base growth.** A copy of the letter is enclosed.

2) In a letter dated November 11, 2008 from the City Attorney to the mayor, there is important language on the top of the very last page. The City Attorney, after explaining that they could avoid a challenge to the 40% hiring requirement by exempting out of state employees, states:

"We further caution that this approach may have the undesired result of permitting a contractor to employ all out-of-state workers and no City residents on a City-funded project." The point being that an Illinois or Michigan contractor does not have to hire any Milwaukee residents to be in compliance with this new ordinance. A copy of that letter is also enclosed.

We continue to be *opposed* to the proposed ordinance for the following reason:

1. Regarding the 5% bid advantage for Milwaukee domiciled construction firms, there is only one water & sewer contracting firm in the city. Consequently, that firm will become a *sole source vender* or *broker.* Because the profit margin is currently 1 to 3%, the odds are good that the Milwaukee firm with the 5% bid advantage will win many public work contracts over other area contractors. Compound that bid advantage up to $50,000 on each contract, the resulting cost of public works construction will be higher for the taxpayer. This is money that could have been used for other city services.

2. As stated in our March 2, 2009 testimony, our water & sewer crews are only 5 or 6 people per job working in a deep trench with heavy vehicle traffic in an urban environment. When the city increases the demand for the hiring of *unemployed* or *unskilled* residents, those residents are at a safety risk. Our current workforce is highly trained pipe layers and skilled machine operators. It would be a shame if one resident is injured or killed due to the residency requirements of this ordinance.

3. We already subcontract 18% of our work to emerging business enterprises to include trucking, material purchase, barricades, insurance and more. We have nothing more to subcontract other than our actual work.

We ask that you <u>exclude</u> water & sewer contractors from this proposed ordinance because there is only one sole source contractor in the city to take advantage of the 5% bid preference. That the increased hiring requirement raises real safety concerns. Finally because there is nothing more to subcontract to EBE firms over the current 18% requirement.

3/3/09 CC Mtg.
Ald Witkowski
Hand out

City of Milwaukee

Office of the Comptroller

W. Martin Morics, C.P.A.
Comptroller

John M. Egan, C.P.A.
Deputy Comptroller

Michael J. Daun
Special Deputy Comptroller

Anita W Paretti, C.P.A.
Special Deputy Comptroller

January 20, 2004

To the Honorable Members
of the Common Council
City of Milwaukee
City Hall – Room 205
Milwaukee, WI 53202

Dear Council Members:

I am writing to express my concerns regarding file #031050, a Community Benefits ordinance creating a number of programs and requirements related to private sector development in Milwaukee. At the outset, there is no argument that Community Benefits are desirable. The issue is not whether you are for or against Community Benefits, the issue is whether this file will achieve these ends.

Clearly, the provisions of the ordinance are well intentioned, however, my primary concern is the ordinance's adverse impact on development, and consequently, the City's property tax base.

The proposed ordinance extends to Park East and potentially other private developments the wage, hiring, training and recruitment requirements the City now requires for public works projects. A Real Estate Development Advisory Committee notes that the union or "prevailing wage" requirements of the ordinance will add 8% to 14% to the cost of private residential development and a study by Irgens LLC, a local developer, indicates a 20% to 35% increase in additional costs that are typically part of a public development subsidy package for private commercial development projects. While certain developments may proceed within Milwaukee regardless of these added costs, other projects will certainly be lost to other communities. The ordinance, therefore, will increase the cost of development in the City and inhibit tax base growth. Rather than placing additional requirements in a "one-size-fits-all" fashion on Park East and potentially other developments involving City assistance, the City should focus on applying requirements on a project-by-project basis, applying provisions where City assistance and the economics of the project can support such measures.

In addition, the ordinance will have a specific negative impact on development financed through Tax Incremental Districts (TIDs) to the extent that it is extended to other TID projects. TID financing is the primary means by which the City finances development. These districts issue debt to make improvements paid off over time through property taxes imposed on the incremental value of these districts. Prior to establishment, each TID must pass an economic feasibility study; that is, it must be determined that the costs financed through debt will be fully recovered over the lifetime of

the TID. Since the ordinance increases development costs, if passed, there will be less TID financed development.

Finally, although a fiscal note was issued, it did not estimate the costs associated with potential lost development that will occur as a result of this ordinance. This is the most significant fiscal risk associated with this file, and should, therefore, be thoroughly reviewed and examined. I am, therefore, recommending the ordinance be referred back to committee so the impact of lost development can be more closely studied and incorporated as part of the fiscal note.

If there are any questions regarding the issues raised in this letter, or if we may be of any further assistance, please feel free to contact me.

Very truly yours,

W. MARTIN MORICS
Comptroller

WMM:CK:mm:jrw
REF: PD-6714W.DOC

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Assistant City Attorneys

November 11, 2008

Mayor Tom Barrett
City Hall
200 East Wells Street
Milwaukee, Wisconsin 53202

ATTN: Leslie Silletti, Research and Analysis Manager

Re: Expansion of Unemployed Residents Preference Program, MCO § 309-41

Dear Mayor Barrett:

By letter dated October 13, 2008, you asked whether the City of Milwaukee can expand the geographic boundaries of the unemployed residents preference program ("RPP") to include the entire city, for projects that include direct financial assistance from the City.

The Privileges and Immunities Clause[1] applies not only to resident preferences for public works projects but also to resident preferences for construction projects funded in part or in whole with municipal funds or funds administered by a municipality. *United Bldg & Constr. Trades Council v. Camden* ("*Camden*"), 465 U.S. 208 (1984) [2]. This is so because the Privileges and Immunities Clause analysis, unlike the Commerce Clause, is focused on the infringement of a fundamental individual right rather than the action or role of the municipality. *Camden*, 465 U.S. at 219-220. It does not matter that the agreements are "voluntary."

[1] Art. IV, § 2 of the U.S. Constitution ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States").

[2] *See also Hudson County Bldg & Constr. Trades Council v. Jersey City*, 960 F. Supp. 823 (D.N.J. 1996) (Privileges and Immunities Clause scrutiny applies to ordinance requiring that recipients of "economic incentives," including tax abatement or exemption, grants or loans, and below market sales, make a good faith effort to hire 51% residents); *Utility Contractors Ass'n v. City of Worcester* ("*Worcester*"), 236 F. Supp. 2d 113 (D. Mass. 2002) (striking 50% resident preference applying to any construction project or public work costing more than $25,000 and funded in whole or in part by city funds or funds administered by the city).

That said, it is our opinion that we could only defend in good faith the following methods for expanding the RPP boundaries:

1. If sufficiently justified by unemployment data establishing that the city-wide unemployment situation has significantly worsened in comparison to the unemployment rates for the nation, Wisconsin, Milwaukee County, and the metropolitan area, we could defend in good faith an expansion of the RPP boundaries to the City limits, provided further that participation continues to be limited to City residents who meet the definition of "unemployed" in the RPP ordinance, MCO § 309-41.

2. Because the Privileges and Immunities Clause protects against discrimination against citizens of another state, the City could exclude hours worked by out-of-state residents from the definition of "worker hours" in MCO § 309-41-2-a. This is the approach used in the City of Cleveland's "Fanny M. Lewis Cleveland Resident Employment Law" ("Cleveland Ordinance"), enclosed for your convenience. This option would most likely survive scrutiny under the Privileges and Immunities Clause, but may permit a contractor to employ all out-of-state workers and no City residents or to limit the number of in-state residents on a City-funded construction project while allowing unlimited numbers of out-of-state workers. In other words, we would be giving a preference to City residents and Illinois residents, while denying that preference to Wisconsin residents.

3. The City could adopt a program similar to MPS' Communities in Need program (COIN), which does not discriminate in favor of City residents and is therefore not subject to Privileges and Immunities scrutiny. However, it does provide a preference for all unemployed or underemployed individuals who meet certain criteria.

Federal and State Court Review of Resident Preference Ordinances

As we have explained in several previous opinions, virtually all resident preference programs reviewed by federal and state courts have been struck down as violative of the Privileges and Immunities Clause. We are aware of only one case, a 1985 Wyoming Supreme Court decision, in which a resident preference statute or ordinance was held valid. *State v. Antonich*, 694 P.2d 60 (Wyo. 1985).

In *Camden*, the United States Supreme Court held that resident preference ordinances discriminate against out-of-state residents in the exercise of a fundamental privilege: the opportunity to seek employment with a private employer. 465 U.S. at 221-22. However, the Privileges and Immunities Clause is not absolute; it does not preclude discrimination against out-of-state residents where there is a "substantial reason" for the discriminatory treatment. *Id.* at 222.

To establish a "substantial reason" for discrimination against out-of-state residents, a municipality must demonstrate that non-residents "constitute a peculiar source of the evil at which the [ordinance] is aimed." *Id.* at 222 (citation omitted). Further, the degree of discrimination must be closely related to the reason for the discriminatory treatment. *Id.* at 222; *Hicklin v. Orbeck*, 437 U.S. 518, 528 (1978) (striking statute because, among other reasons, the preference was afforded to all residents regardless of employment status rather than being "closely tailored to aid the unemployed the Act is intended to benefit.").

The City of Camden tried to justify its 40% resident preference goal by citing "grave economic and social ills," including depletion of the city's tax base caused by "spiralling [sic] unemployment," and a sharp drop in residents and local businesses. The Court summarized the city's argument as follows:

> The resident hiring preference is designed, the city contends, to increase the number of employed persons living in Camden and to arrest the "middle class flight" currently plaguing the city. The city also argues that all nonCamden [sic] residents employed on city public works projects, whether they reside in New Jersey or Pennsylvania, constitute a "source of evil at which the statute is aimed." That is, they "live off" Camden without "living in" Camden.

Id. at 222.

The Supreme Court did not rule that such reasons can never justify a resident preference. The Court remanded the case for lack of a record, noting:

> Every inquiry under the Privileges and Immunities Clause "must be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures." (citation omitted). This caution is particularly

> appropriate when a government body is merely setting conditions on the expenditure of funds it controls.

Id. at 222-23.

Despite the Supreme Court's language quoted in the paragraph above, in *W.C.M. Window Company, Inc. v. Bernardi*, the United States Court of Appeals for the Seventh Circuit (the appeals court that would review a Milwaukee ordinance, if challenged) applied the "substantial reason" test in a restrictive manner, requiring evidence of costs and benefits to satisfy the "substantial reason" test. 730 F.2d 486, 497 (7th Cir. 1984) ("there must be *some* evidence of the benefits of a residents-preference law in dealing with a problem created by nonresidents..."). The Seventh Circuit refused to assume the benefits of Illinois' resident preference law, stating that the effects of allowing nonresident labor on public construction projects were not at all "as clear as those of allowing carriers of Bubonic plague to enter the state without quarantine." *Id.* at 498. The court noted the absence of evidence of the following factors: the unemployment rate in Illinois' construction industry; what that unemployment costs Illinois; whether unemployment would be significantly increased if nonresidents were allowed to work on public works projects; and whether the costs, in higher unemployment or public aid, from allowing nonresident labor on public works projects are likely to exceed any cost savings in public construction from hiring nonresident workers. *Id.* at 498.

Since the adoption of MCO § 309-41 in 1991, federal and state courts have continued to strike down resident preference ordinances and statutes. *A.L. Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865 (3rd Cir. 1997) (striking a requirement that only Pennsylvania residents be hired on commonwealth-funded public works projects); *Worcester, supra* n.2; *Utility Contractors Ass'n v. City of Lowell*, 2001 WL 34059083 (Mass. Super. 2001) (trial court decision striking ordinance that required 33% resident labor on city-funded construction projects). However, none of the court decisions, pre- or post-1991, involved a preference that was limited to *unemployed* residents.

An Expansion of the RPP Boundaries to Include the Entire City

With this overwhelmingly unfavorable body of court decisions in mind, our office carefully constructed MCO § 309-41 to identify unemployment as an "evil" the city would suffer if too many nonresidents worked on City construction projects. At the time of the ordinance's adoption in 1991, a city-wide preference was not justifiable as the city's unemployment rate was not high and was actually lower

than the national unemployment rate. The legislative findings cite the following 1990 unemployment rates: City of Milwaukee (4.9%); Milwaukee County (4.1%); metropolitan area (3.8%); State of Wisconsin (4.4%); United States (5.4%). We advised that the RPP boundaries should consist of the portions of the city experiencing the greatest concentration of unemployment: the Special Impact Area (16.7%). The boundaries were expanded in 1993 to include the CDBG area, which had a 1990 unemployment rate comparable to the Special Impact Area.

The city's unemployment figures, on a city-wide basis, have not previously justified a city-wide resident preference program. We could defend a city-wide RPP ordinance that limits participation to "unemployed" residents as currently provided in MCO § 309-41 only if unemployment data indicates that the city-wide unemployment situation has significantly worsened to the point that it reflects a significantly worse unemployment rate than that of the nation, Wisconsin, Milwaukee County, and the metropolitan area. Statistics that demonstrate that Milwaukee's unemployment problem is worse than other large urban communities would also help to defend a city-wide preference.

Data would need to be established on the record and at a public hearing to justify an expansion of the RPP boundaries to the City limits. In addition to reliable statistics, the 1991 legislative findings made by the Common Council would need to be updated to reflect current conditions. We stress that MCO § 309-41 has never been challenged in court.

W.C.M. Window remains good case law and is binding on the City of Milwaukee. However, given possible evidence of Milwaukee's deteriorating unemployment situation, there is a basis for arguing that *W.C.M. Window* can be distinguished from the City's ordinance so as not to preclude the expansion of the ordinance to a city-wide preference. First, Milwaukee's ordinance is more closely related to the City's objective of aiding unemployed residents. Unlike MCO § 309-41, Illinois' state-wide preference was not limited to the unemployed or those in job-training programs.

Second, there is arguably a lesser *degree* of discrimination against nonresidents under the Milwaukee ordinance's 25% resident preference than under Illinois' 100% resident preference. *See Toomer v. Witsell*, 334 U.S. 385, 396 (1948) ("the inquiry in each case must be concerned with whether such reasons [for discriminatory treatment] do exist and whether the degree of discrimination bears a close relation to them."). The Illinois statute excluded nonresidents from working on any state, municipal, or other governmental unit public works project

unless the contractor certified that no Illinois workers were able and available to perform the particular work. *W.C.M. Window*, 730 F.2d at 489. The Seventh Circuit noted that the consequences for nonresidents under Illinois' statute were "much greater" than those of Camden's 40% resident preference. *Id.* at 497. *But see Worcester*, *supra* n.2 (striking 50% preference).

Third, the State of Illinois made absolutely no findings in support of the severity of the state's unemployment problems and the benefits of the preference law. *W.C.M. Window*, 730 F.2d at 497-98.

Please note that we informally advised your staff last year that we could defend an expansion of the current RPP boundaries to include those census tracts outside the CDBG area that have unemployment rates comparable to the average unemployment rate in the CDBG area. It is our understanding that this approach did not significantly expand the pool of potential residents. We understand that unemployment data is only available at the census tract level at the time of the decennial Census.

We also considered whether the City could expand the RPP boundaries to include non-CDBG census tracts that had 2000 Census unemployment rates lower than the CDBG average but that nonetheless had high poverty statistics. This approach would move the City away from the objective of addressing the "evil" of unemployment (which can arguably be attributed, in part, to non-Milwaukee residents working on City-funded projects while Milwaukee residents remain unemployed). In light of the case law summarized above, this approach would not likely survive scrutiny under the Privileges and Immunities Clause. *Worcester*, 236 F. Supp. 2d at 119-120.

Excluding Out-of-State Workers from the Definition of "Worker Hours"

The City could revise the unemployed resident preference ordinance to exclude out-of-state workers from the definition of "worker hours" in MCO § 309-41-2-a. We believe that this approach would likely survive a Privileges and Immunities Clause challenge and is the approach used in the Cleveland Ordinance.

The Cleveland Ordinance provides a 20% resident preference on any construction project which receives public subsidies of $100,000 or more in the form of city funds, privileges, credits, or funds administered by the city. The Cleveland Ordinance excludes from its definition of "Construction Worker Hours" the number of worker hours performed by out-of-state residents. Stated another way,

the Cleveland Ordinance requires that contractors ensure that 20% of the work hours *performed by Ohio residents* are worked by Cleveland residents. Thus, the discrimination against non-Cleveland residents is limited to Ohio residents, not out-of-state residents protected by the Privileges and Immunities Clause.

The Privileges and Immunities Clause prohibits discrimination against *out-of-state* residents, not state residents who do not live in the City of Milwaukee. Wisconsin residents disadvantaged by a City of Milwaukee resident preference ordinance have no claim under the Privileges and Immunities Clause. *Camden*, 465 U.S. at 217. Further, corporations, whether in-state or out-of-state, have no claim under the Privileges and Immunities Clause. *J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745, 749 (7th Cir. 1993).

The Sixth Circuit Court of Appeals recently rejected an argument that the Cleveland Ordinance violated a federal regulation prohibiting discrimination against the employment of out-of-state labor on federally funded highway projects. *City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007). The court held that the Cleveland Ordinance "does not operate to discriminate against the employment of labor from another State," reasoning as follows:

> If a contractor wishes to employ any Ohio construction workers, 20% of the hours performed by those Ohio workers must be worked by Cleveland residents. But if a contractor wishes to employ all out-of-state labor, it can do so without employing *any* Cleveland residents. The [ordinance] thus might disadvantage Ohio-based labor. But the [ordinance] has no effect whatsoever on the "employment of labor from any *other* State, possession, or territory of the United States."

Id. at 848 (emphasis in original) (citations omitted). The court noted Cleveland's "apparent attempt to avoid conflict with the Privileges and Immunities Clause by restricting the reach of this ordinance to Ohio residents only." *Id.* at 833.

We caution that the court was analyzing whether the Cleveland Ordinance discriminated against out-of-state residents in violation of a federal regulation rather than the Privileges and Immunities Clause and caution further that Sixth Circuit decisions are not binding on the Seventh Circuit. We further caution that

this approach may have the undesired result of permitting a contractor to employ all out-of-state workers and no City residents on a City-funded project.

The City Could Adopt a COIN Program

In addition, as we have advised your office and several aldermen over the years, the City could adopt a program similar to the Milwaukee Public Schools' Communities in Need program (COIN). Under the COIN program, MPS requires its contractors to hire a certain percentage of employees living in households that are below the poverty level. Workers outside of the city are eligible if they live in an area where the median income is below a certain level. Because the COIN program does not discriminate in favor of City residents, it is not subject to review under the Privileges and Immunities Clause.

We would be happy to continue to work with your staff to implement legally defensible ways to increase resident employment on City-funded construction projects. If you have any comments or concerns or require any additional information, please do not hesitate to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney

THOMAS D. MILLER
Assistant City Attorney

Encl.
TDM:tdm
1077-2008-3205:138789v3

DATE: MARCH 2, 2009

TO: COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE

FROM: TIM SHEEHY, PRESIDENT

RE: COMMUNITY PARTICIPATION ORDINANCE

On behalf of the Metropolitan Milwaukee Association of Commerce (MMAC) I would like to express our concern over the proposed Community Participation Ordinance (CPO). While the goals of this proposed ordinance are commendable, we believe that provisions in the ordinance actually work in conflict with those goals and will place Milwaukee business and workers at a competitive disadvantage in an increasingly competitive economic atmosphere.

We agree that getting the almost 90,000 residents in the city of Milwaukee over the age of 25 who do not have a high-school degree the education, training, and skills to participate in a meaningful way in our economy is an imperative for raising their quality of life. As the supporting information for this proposed ordinance notes, it is also of significant value in improving the city's fiscal position, and our overall per capita income.

In or outside this challenging economic environment, however, development projects in the city of Milwaukee will compete for capital with projects throughout the region, state, and other markets in the U.S. Two provisions in the proposed ordinance will work against the goal of growing employment for disadvantaged or unskilled workers, while attracting more capital to projects in the city. The combination of requiring a prevailing wage mandate and 40% participation by "unemployed residents or residents at a disadvantage" serve to both drive up the cost of development projects, while driving down the ability to manage a project's risk.

The goal of leveraging city support for a project by improving the skills and work experience of its residents is sound. Its application in this proposed ordinance is at best impractical, and more likely to work against the outcome of a better trained and skilled constituency by reducing the flow of investment into city projects. This proposed ordinance would turn investors and developers into instant job training programs as a requirement for doing business in the city. While development projects utilizing city financing can and should serve as tools for developing a better skilled and trained population, this proposal far overreaches what is practical or even feasible in a project.

We are sure you hear specific examples related to the improbable challenge of financing and constructing a project with 40% of the workforce untrained and unskilled for the job requirements in a given project. A more sensible solution would lie with requiring a portion of the city/private sector financing package be set aside with the city's Workforce Investment Board to actually put in place some "employment skills" necessary to work on these projects their by building the pool of capable city residents.

Thank you for your thoughtful attention to these concerns. I urge you to help support Milwaukee jobs and small businesses by opposing this ordinance as currently drafted.

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Statement of

The Wisconsin Underground Contractors Association

to the

COMMUNITY & ECONOMIC DEVELOPMENT COMMITTEE

For a hearing on LRB08185-3, Community Benefits Ordinance

Monday March 2, 2009, Milwaukee City Hall

Wisconsin Underground
Contractors' Association Inc.

The Wisconsin Underground Contractors Association was formed in 1937. It represents about 150 member firms doing water, sewer, tunnel, utility construction and related services. Our member firms have worked for the city for decades.

The Wisconsin Underground Contractors Association is located at
2835 N. Mayfair Road, Suite 22, Milwaukee, WI 53222.
Telephone 414/778-1050. Fax 414/778-0647, website www.wuca.org

Statement of Richard W. Wanta
WUCA Executive Director
March 2, 2009

WUCA appreciates the opportunity to share our thoughts relative to this proposed ordinance that among others things provides a bid preference of 5% for Local Business Enterprise (LBE), increases the residency requirement for public works construction from 25% to 40%, and increases the requirement for Emerging Business Enterprises (EBE) requirement from 18% to 25% of total dollars. In combination, we believe that these three components will discourage contractors from bidding water & sewer construction in the city of Milwaukee.

Representing only the water & sewer segment of the Milwaukee area construction industry, we wanted to make comments as it relates to this proposed ordinance.

Local Business Enterprise Preference

We are *opposed* to the idea for the following reasons:

1. The last time we looked in a Milwaukee telephone book, there was only one major sewer and water contractor domiciled in the city. That firm already gets a great deal of municipal work adding up to tens of thousands of dollars annually under the current competitive bid system of awarding the contract to the lowest responsible bidder. If you allow an additional 5% bid preference, you give an already successful Milwaukee water & sewer contractor a huge bid *advantage* that is unfair to the others that have consistently met your resident and EBE requirements for the past 10 years.

   Plus what is in your proposed ordinance to stop the lone local preferred *sole source* contractor with all this extra work from becoming a *broker* and subbing the work to others? He could just sit there at his desk, do no actual construction, and have all the competition go through him for a Milwaukee water & sewer job. How is this in the best interest to the city?

And what is the logic behind the bid preference as the preferred contractor has no financial reason to lower their bid?

2. This same city chased major water and sewer contractors out of the city decades ago because aldermen and their constituents did not want to look at our heavy construction equipment (back hoes, front end loaders), concrete pipe, pumps, other construction materials, and shop trailers stored every day in their neighborhoods. They did not want to hear all the noise of heavy equipment starting up at 6 a.m. in the morning, most every morning, to get the equipment to the various jobsites or deal with all the dirt on neighborhood streets on a daily basis. The larger contractors need a minimum of 10 acres of land for their construction yard.

3. Also does the city recognize that the federal government will not allow you to use this new *federal stimulus money* for bid preferences? This stimulus money came from state and federal taxpayers. And this community is using low-interest federal money under the Clean Water Fund and Drinking Water Fund. **We call your attention to U.S. Environmental Protection Agency regulations, Section 40, CFR 31.36, page 362 (vii) (2) that states in part..."prohibits the use of statutorily or administratively imposed State or Local geographic preferences in the evaluation of bids or proposals...**" Did the aldermen get a legal opinion on this section of the EPA bid regulation? This item alone would suggest that you defer this proposed ordinance back to the city attorney for review and additional comment.

We are of the opinion that Milwaukee cannot discriminate against other state contractors when they are helping to pay for your water & sewer projects. We see from the monthly Wisconsin DNR reports that Milwaukee is indeed using state and federal tax dollars on current municipal water & sewer work. Again, you cannot use a dime of this stimulus money to subsidize local domiciled contractors.

4. The industry profit margin is maybe 1% or 2%, too slim to allow anyone a 5% bid preference. It has been that way for many years due to a very competitive market place. Some contractors have no profit margin at all during these tough economic times in order to get a job just to keep their people employed. Over the past 18 months, you have seen 10 bidders on a water & sewer project in various municipalities resulting in great taxpayer savings. This proposed 5% bid preference would far exceed the profit margin on the vast majority of current city water & sewer jobs.

   This is nothing but a windfall for the preferred contractor. A gravy train perhaps for the Milwaukee domiciled firm at higher cost to the taxpayer. This extraordinary special bid preference proposed significantly reduces municipal contracting opportunities for all area small businesses and creates an environment in which water & sewer contractors cannot compete on a level playing field in this community.

5. One gets the impression from reading this ordinance that suburban contractors should be punished and that a good punishment is a bid preference or advantage for Milwaukee domiciled firms. The city seems to forget that since passage of your original Ordinance 360 many years ago, water & sewer contractors have met or exceeded your resident preference and EBE programs. Instead of praise, this proposed ordinance wants to chase contractors out of town. This is the same water & sewer contractor group that donated $400,000 to area charities over 20 years to such charities as the Ronald McDonald House, Child Abuse Prevention Fund, and the Make-A-Wish Foundation. Just last year our industry segment donated over $30,000 to the Wisconsin MAW Foundation for seriously ill children. No other industry segment has been more generous over the past 20 years to area charities in our effort to help area charities than WUCA member firms.

6. When government shows preference to local firms versus suburban, you walk a fine line. What will stop Wauwatosa, West Allis, Glendale, and others from doing the same thing with respect to contractor preference? Should this ordinance pass, other communities could and would pass reciprocal laws. Those suburban aldermen will say, Milwaukee if you discriminate against our people, we will discriminate against yours... by exactly the same bid-preference percentages.

7. We believe that this proposal will create more problems than it solves. The majority of contractors will not bid because they are at a *disadvantage*. The city runs the risk of losing great competitive prices during these slow times and the taxpayers will pay more for water & sewer construction. The lack of competition will financially hurt the city.

   How can the city even afford a 5% bid preference? We thought that the city was strapped for cash. If you are paying more than needed for water & sewer construction due to a bid preference, there will be less money for street maintenance, police overtime pay, squad cars, and other items in this community.

   Assume that the preference cost the city $50,000 on one project. That $50,000 could have purchased two squad cars. Now compound that on all water & sewer jobs awarded with a 5% bid preference and you are talking big money. Just losing one bidder on water & sewer work outweighs any savings with the 5% preference.

8. Also will you be changing the city charter to disregard the low responsive bidder? We believe that the charter currently requires award to the lowest responsible bidder. Your predecessors wrote that policy 100 years ago to avoid craft, corruption, or favoritism in the award of city contracts. If you are now going to show favoritism, you will need to change the city charter.

9. This ordinance gives the impression that only Milwaukee residents are unemployed. As of today, there are 1900 unemployed operating engineers throughout the state. There are numerous unemployed journey workers in all trades.

10. Does the city recognize that it cost a lot of money to put a bid together for the city? How long do you think contractors will spend their hard earned money bidding your work when someone else has a bid advantage? It may take awhile, but eventually no one will bid your water & sewer work.

    The city should encourage competition...to save the taxpayers money. The whole concept of giving a bid preference is a *political* decision versus a practical one. This is truly anti-business and unfair!

11. With this proposed ordinance, Milwaukee will be *isolated* when preferential treatment is given to a few. You will be *discriminating* against businesses outside your borders. A bid preference is counter productive as it hurts the community rather the helping it. Milwaukee will get no where with this isolationist attitude.

12. We believe that his proposed ordinance is an unconstitutional restraint of free trade. There is no inherent evil when a suburban or out of state contractor bids your work. The city cannot ignore the fact that over 10 years, our contractor members have had or added a great deal of Milwaukee residents to their payrolls. Consequently, there is no justification for this *remedial* legislation to create a bid preference for Milwaukee domiciled firms.

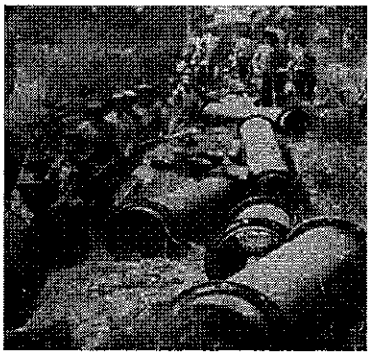
    We ask that you delete the bid preference provision of this ordinance!

Resident Preference Program Quota Increase

A typical water & sewer crew is only five or six people (three or four laborers and two operating engineers). Current city of Milwaukee law requires 25% of work hours be done by unemployed Milwaukee residents now. That is two unemployed, *unskilled*, and *untrained* people on the 5 or 6-person crew. Under current law, we cannot add an additional person to a crew because our bid would be too high and we would lose the contract due to the higher price estimate. *Currently there is no line item in the specifications for the additional crew member.*

Your new residency proposal requires contractors to provide names, addresses, and gender information *before* commencing work. All this information must be notarized or employees must submit an affidavit. All these new paperwork requirements are required *before* starting a job.

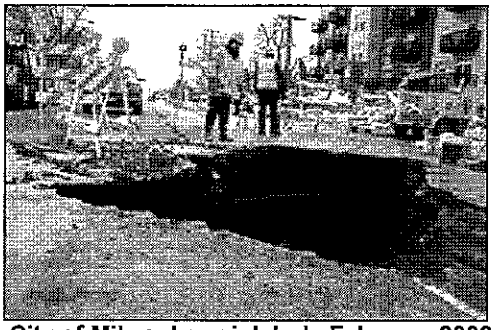
This is not the 1940's when water & sewer contractors had 20 laborers on a job digging a trench with hand tools. Our small workforce is highly trained and skilled.



1940's construction

Years ago, water & sewer contractors raised *safety* concerns about the current ordinance because it required two unemployed residents be placed in a deep trench to lay water or sewer pipe with little or no formal training. Your current resident preference requirement puts more untrained and unskilled laborers at risk to their personal safety.

Imagine for a minute if it was you going from the safety of your environment into a deep trench with no skills or proper safety training. Water & sewer construction is very dangerous work. You have to fear a cave-in, methane gas, cars and buses near your work area that vibrate the ground. A water & sewer trench is no place for an unskilled or untrained resident. You saw on TV the other day the big sink hole on Locust Street due to a sewer collapse.



City of Milwaukee sink hole February 2009

Would you want to go from your home into that trench without proper safety training and work skills? We train our workforce at the established training schools in DeForest, Wisconsin and Coloma, Wisconsin. Locations were they cannot hurt themselves or others. We do not put new employees on heavy construction equipment in major intersections.

And don't think for a minute that we would use that unskilled and untrained resident or apprentice on a backhoe or front end loader in a major urban area. They could kill themselves, fellow workers, and the public. Imagine a project outside this city hall. Would you want an unskilled back hoe operator on that machine outside your window?

We believe that the city is already pushing the safety envelope with the current 25% resident requirement. We are of the opinion that you should not raise the resident preference proposal to 40% as water & sewer work is hazardous and dangerous. It would be a tragedy if even one worker afforded employment solely by reason of the residency requirement suffered serious injury or death on the job, which would reflect poorly on both the city and the contractor.

As in the past, we are on record warning the city about our safety concerns when using unemployed and unskilled workers in trenches while working in Milwaukee streets and intersections.

On this issue, we get no credit when we use our existing Milwaukee trained and skilled residents in area suburbs.

We ask that you do not increase the residency requirement.

If the city was serious about employing residents on public works, the city would create a *sustained* program of construction. It would include funding over 10 to 20 years to do partial combined sewer separation to get rain water out of the existing sanitary sewer system, repair and repave streets and alleys, landscaping, and curb and gutter work in the central city. Only then could we provide *long term* employment for central city residents with proper training opportunities of people for work in all area communities. The laborers and operating engineers union have excellent instructors and training facilities to make this all happen. Both training sites in partnership with the city and area water & sewer contractors could provide the skills needed for city residents to perform work. You can view the two schools on the Internet. We have a link to their websites on our website www.wuca.org

But to make this long-term employment opportunity happen, it would require a sustained, properly funded program of public works construction. Not the same miniscule DPW budget that we have seen these past 10 years in Milwaukee.

We asked Milwaukee Congresswoman Gwen Moore twice in the past year to seek a federal demonstration grant of maybe $20 million for the central city but nothing came of our suggestion.

Emerging Business Enterprise Goal Increase

As stated, we have met or exceeded your EBE requirements for over 10 years since passage of Ordinance 360. Yet instead of praise, we get another increase in hiring more subcontractors. This proposed ordinance increases the requirement from 18% to 25% of total dollars spent on water & sewer construction. Well you have pushed us too far with this new proposal for the following reason:

With the existing ordinance we already subcontract the trucking, materials, landscaping, fuel, barricades, temporary lighting, insurance, street reconstruction, and other activities to EBE firms. Now with an EBE increase you are really suggesting that the sub *do our work of digging the trench and placing the pipe.* Already under current law, we have nothing left to subcontract! We are not the building contractors who can hire multiple subcontractors to build a roof, hang windows, or lay carpet. We are digging trenches and laying water & sewer pipe! Are you suggesting that we hire subs to place a tent over the trench?

On a related topic, we note that there is no measure of success or failure of your existing EBE program as these firms never seem to graduate from their position. Who have you graduated out of the EBE program in the past 25 years? Some of these existing EBE firms have more annual receipts than the prime contractors.

The city never rewards majority firms consistent with their success over 10-years in hiring the firms you require. How do you pass remedial legislation against prime contractors when they met or exceeded your existing EBE goals?

How can you penalize us when area employers and their unions conduct annual career days to bring more people into the construction industry? These annual career days have been conducted over the past 20 years with the next one scheduled for March 24, 2009. Hundreds of students attend that annual event to bring young people in to the construction trades.

Career Day 2008

To date, the city is indifferent to our concerns. If we state that the EBE goals are too high and we fail to meet the numbers, our bid is not opened. There is no flexibility. The goal is a quota.

You do not publicly report your findings about the success of these past residency and EBE programs nor allow time for private industry to respond. Maybe twice in 20 years have we been invited to these committee meetings when this topic is discussed. This is no different today as the suggestion is that this committee vote and forward it Common Council tomorrow for a final vote. No due diligence, no time for all the aldermen to read it.

In summary, we are strongly opposed to a bid preference of any kind. We believe that the current residency ordinance is already unfair, and that we cannot do more in the EBE area as we have nothing more to subcontract. We ask that you vote no on this proposed ordinance.

Thank you for the opportunity to testify.