February 11, 2004

Ms. Cheryl Oliva, Purchasing Director
Department of Administration
Business Operations Division
200 East Wells Street, Room 601
Milwaukee, WI 53202

Re: EBE Participation Requirements

Dear Ms. Oliva:

By letter dated December 29, 2003, you asked whether an Emerging Business Enterprise (EBE) participation requirement may be placed in specifications if only one EBE is certified for a particular service or commodity. We assume you refer to a situation where a prime contractor is required by you to subcontract a portion of the contract performance to an EBE, but only one EBE that is qualified to perform that function is eligible under the City's EBE program.

There is nothing in Chapter 360, MCO, The Emerging Business Enterprise Program, that would specifically preclude you from inserting an EBE requirement in such a situation.

We have discussed this with you previously, and have identified certain policy issues. For example, the sole eligible EBE can "name its price" and receive a windfall; that is, the EBE can charge any rate it desires, driving the cost up for the prime contractors and, most likely, the City. In addition, the sole eligible EBE could quote a lower price to one prime contractor – or only quote a price to one prime contractor – thereby determining the successful contractor. We have discussed the alternatives of using outreach to encourage development of EBEs in a particular trade before placing requirements in specifications, or using a best–efforts provision in these instances.

We also have discussed this issue with staff of the Department of Public Works, who have indicated that, in general, an EBE requirement is placed on all contracts that are subcontractable and where there is at least one EBE. If the lack of sufficient EBEs would result in bid prices that

are too high, or information is received challenging the integrity of the bid process, all bids would likely be rejected.

With this background in mind, we turn to your question, which is whether it is legal to place an ironclad EBE participation requirement in a contract when there is only one qualified EBE.

The Common Council expressed two purposes in Chapter 360: 1) to assist and protect the interests of disadvantaged individuals and small businesses in order to encourage full and open competition; and 2) to enhance opportunities for disadvantaged individuals to successfully compete in a free market as independent business owners. Section 360-02, MCO. The ordinance requires departments to utilize EBEs, consistent with law, for 18% of the total dollars annually expended on certain types of contracts. Section 360-06-1. Obviously, there may be some contracts, due to the nature of the service, the ability to subcontract, or the availability of EBEs, for which a percentage of 18%, or any percentage at all, is inappropriate. The ordinance requires departments to identify categories of contracts where EBE participation is appropriate. Section 360-06-1-e. It also permits the departments waivers from the annual 18% requirement, if 18% is not attainable. Section 360-05-11.

The City Charter, sec. 16-05-2-b, directs that all purchases exceeding $30,000 be purchased from the lowest responsible bidder determined in accordance with Chapter 360. Similar language is contained in Chapter 7 of the Charter relating to the Department of Public Works, although the threshold is $25,000. The courts of this state have held that the purpose of competitive-bidding laws is to "prevent fraud, collusion, favoritism and improvidence in the administration of public business, as well as to insure that the public receives the best work or supplies for the most reasonable price practicable." *Aqua-Tech, Inc. v. Como Lake Protection and Rehabilitation District*, 71 Wis. 2d 541, 550, 239 N.W.2d 25, 29 (1976). The cost-effectiveness of public work has been described as the "overriding" purpose of public-bidding statutes. *James Cape & Sons Co. v. Mulcahy*, 672 N.W.2d 229 (Ct. App. 2003). Other courts have stated that one goal of competitive-bid laws is to protect against "insufficient competition." *See Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 885 P.2d 934 (Sup. Ct. Cal. 1995).

The Ninth Circuit Court of Appeals has ruled that preference programs are not to result in windfalls, and that the percentage requirement must "be determined individually on each contract according to the availability of qualified MBEs." In that case, the Court stated that there must be a waiver system that accounts, in part, for the availability of MBEs. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

We cannot say with certainty that a court would find, for a transaction in which you are legally obligated to use competitive bidding, that it is illegal to require bidders to subcontract with what, in essence, is a designated subcontractor. But, for the reasons described above, a court might make such a determination, particularly if there is no waiver provision in the contract, and if you

did not take into account the availability of EBE subcontractors when setting the EBE percentage for that particular contract.

Very truly yours,

GRANT F. LANGLEY
City Attorney

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Deputy City Attorney

LUB:bl
c: Mr. Mariano Schifalacqua

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