

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
LINDA ULISS BURKE
VINCENT D. MOSCHELLA
Deputy City Attorneys



THOMAS O. GARTNER
BRUCE D. SCHRIMPF
ROXANE L. CRAWFORD
SUSAN D. BICKERT
STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOUREN
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MICHAEL G. TOBIN
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HEIDI WICK SPOERL
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G. O'SULLIVAN-CROWLEY
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MEGAN T. CRUMP
ELOISA DE LEÓN
ADAM B. STEPHENS
KEVIN P. SULLIVAN
BETH CONRADSON CLEARY
THOMAS D. MILLER
Assistant City Attorneys

January 26, 2007

Alderman Tony Zielinski
City Hall, Room 205

Re: An Ordinance Relating to Procurement of Various Items
Common Council File Number 061257

Dear Alderman Zielinski:

By correspondence dated January 19, 2007, you forwarded to this office a draft ordinance related to the procurement of various items and asked for our review. It is our opinion that, with incorporation of language suggested below, the draft ordinance is legal and enforceable.

The draft ordinance repeals and recreates MCO § 310-17, "Procurement of Items of Apparel," often referred to as the "Clean Clothes" ordinance. This office issued a March 24, 2003 legal opinion in which we concluded that, with suggested changes, the "Clean Clothes" ordinance was legal and enforceable. In that opinion, we emphasized that the City's role as a market participant under the ordinance precluded a challenge under the Commerce Clause of the United States Constitution. That same principle applies to the draft ordinance.

The draft ordinance changes the "Clean Clothes" ordinance in two key ways. First, the draft ordinance applies to procurement of not only apparel contracts in excess of \$5,000 but also to procurement of "[n]on-apparel items, materials, supplies and equipment in excess of \$30,000." Second, the draft ordinance changes the manner in which the non-poverty wage requirement is calculated for foreign manufacturers.

With regard to the extension beyond apparel, we recommend the inclusion of clarifying language to avoid a potential preemption problem. Wisconsin's "prevailing wage" statute, Wis. Stat. § 66.0903 applies, with some exceptions, to workers employed in the "manufacturing...of materials, articles, supplies, or equipment on the site of a [public works] project that is subject to [Wis. Stat. §

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66.0903] or from a facility dedicated exclusively, or nearly so, to a [public works] project that is subject to [Wis. Stat. § 66.0903].” Wis. Stat. § 66.0903(4). To avoid a challenge on preemption grounds, we recommend that the draft ordinance include language in MCO § 310-17-3-a-2 specifically excluding “items, materials, supplies and equipment manufactured pursuant to a public works project contract subject to Wis. Stat. § 66.0903.”

With inclusion of the suggested language, it is our opinion that the draft ordinance is legal and enforceable. If you have any further questions or concerns, please do not hesitate to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney

THOMAS D. MILLER
Assistant City Attorney

TDM:tdm

c: Barry Zalben, Legislative Reference Bureau
Ronald D. Leonhardt, City Clerk

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