CITY OF MILWAUKEE

Form CA-43

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
Deputy City Attorney

THOMAS E. HAYES
PATRICK B. McDONNELL
CHARLES R. THEIS
Special Deputy City Attorneys

WILLIAM J. LUKACEVICH
NICHOLAS M. SIGEL
JOSEPH H. McGINN
BEVERLY A. TEMPLE
THOMAS O. GARTNER
LINDA ULISS BURKE
BRUCE D. SCHRIMPF
ROXANE L. CRAWFORD
THOMAS C. GOELDNER
SUSAN D. BICKERT
HAZEL MOSLEY
HARRY A. STEIN
SCOTT G. THOMAS
STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA HOUREN
TANYA J. NUNN
JOHN J. HEINEN
MICHAEL G. TOBIN
M. JOSEPH DONALD
DAVID J. STANOSZ
MARY M. RUKAVINA
KATHRYN M. WEST
SUSAN E. LAPPEN
Assistant City Attorneys

OFFICE OF CITY ATTORNEY

800 CITY HALL
200 EAST WELLS STREET
MILWAUKEE, WISCONSIN 53202-3551
TELEPHONE (414) 278-2601
FAX (414) 226-8550

April 3, 1990

Mr. John R. Bolden, Commissioner
Department of Public Works
Room 516, Municipal Building

Re: Disadvantaged Business Enterprise
Provisions in DPW Contracts

Dear Commissioner Bolden:

By letter dated March 28, 1990, you transmitted to our attention letters from the Wisconsin Underground Contractors Association (WUCA) and the Wisconsin Asphalt Pavement Association. You ask us to comment on the concerns raised in those letters concerning the Disadvantaged Business Enterprise (DBE) provisions which are proposed to be included in DPW specifications.

We have already reviewed the pertinent specification provisions. We will address the comments provided by the two associations; because the letters are repetitive, we will address them by subject, and not the order in which they are presented in the letters.

1. 18% requirement

WUCA alleges that the 18% goal is arbitrary and excessive and does not take into account the contractor's ability to perform.

Chapter 360, Milwaukee Code of Ordinances, requires the City departments to achieve 18% DBE utilization this year. DPW is required to set an appropriate percentage for each type of contract it lets: for some contracts 50% may be appropriate; for others 0% may be appropriate. The point which should be clarified for WUCA is that this percentage will be determined by

the availability of DBEs and the ability and extent to which a prime contractor can subcontract on a particular type of job. After discussions with WUCA contractors, at which their ability to subcontract was discussed, it was determined that, as a general rule, an 18% requirement would be appropriate.

WUCA is correct when it points out that a lack of qualified DBEs should result in a lower percentage, or no DBE requirement at all. In addition, if a requirement proves impossible or difficult to meet, an addendum can be issued deleting or changing that requirement.

2. Bid responsiveness

WUCA emphatically challenges any deviation from the strict "low bid" procedure. However, DPW derives its entire contracting authority from the City Charter, which has been amended to require the Commissioner to determine the lowest responsible bidder in accordance with the directives of the DBE ordinances. § 7.14, Charter.

3. Waivers

The waiver provisions in Ch. 360 relate to departments that are requesting waivers from the requirement in the ordinance that they achieve 18% DBE participation annually. § 360-05-11 and 12, MCO. If a DBE participation percentage is made a material element of bid responsiveness in a competitive bidding situation, the requirement cannot be "waived;" an addendum can be issued to all prospective bidders or, in some cases, the job can be rebid.

4. Certification of DBEs

WUCA poses some questions concerning certification of DBEs. WUCA can be informed that the procedures have changed since the new Ch. 360 was adopted so that the requirements of the new ordinance are met.

5. Prime contractors as DBEs

Both associations diasgree with permitting a prime DBE to meet the DBE requirements itself. There is no question that Ch. 360 permits this, and that its goals are met when any DBE performs City work. Section 360-06, states that DBEs must be used for 18% of total dollars annually expended, "through prime contracts or subcontracts." In fact, Judge Crabb of the Federal District Court, the Western District of Wisconsin, in Milwaukee County Pavers Assoc. v. Fiedler (Decision issued 3-6-90), stated that a state requirement that DBE primes use DBE subcontractors served no purpose under the federal DBE program; the goal of the program revolves around the total dollars spent. On page 47 of her slip decision, Judge Crabb stated "It is only when the prime contractor is not a disadvantaged business that the status of subcontractors becomes relevant." The judge noted, as do WUCA and the asphalt pavers, that there is a possibility that prime DBEs could act as "fronts;" however, both the federal and Milwaukee programs require the DBE to perform a "commercially useful function." This could be made clearer in the specifications, if the associations so desire.

6. Default of a DBE subcontractor

Both associations have a valid point concerning the situation that a prime contractor faces if its DBE subcontractor does not perform. Under your proposed specifications, the prime must find a new DBE and absorb any additional costs. This appears to place a prime who use DBEs in a worse position than other contractors, who are free to substitute subcontractors to their fiscal advantage. We suggest a reasonable approach, which would require the prime to substitute another DBE only if the cost is comparable.

7. Training Credits

The suggestion is made that the training credit program be deleted. Section 360-05-5 requires that such incentives be provided with respect to City contracts, and that such a training credit be applied in determining the amount of the bid "as

appropriate." This is a strong directive to the contracting departments and cannot be unilaterally "deleted." However, if you determine, for example, that there are insufficient certified training programs currently available, utilization of the incentives may be inappropriate.

We do not address the comments that are more administrative in nature. For example, the request is made that the low bidder be given three days to provide documentation of its DBE participation. Matters such as these are within your discretion.

Very truly yours,

GRANT F. LANGLEY
City Attorney

LINDA ULISS BURKE
Assistant City Attorney

LUB:bal