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July 21, 2006

Alderman Mike McGee, Jr.
Sixth Aldermanic District
Room 205, City Hall

Re: Proposed Change to Chapter 360, Milwaukee Code of Ordinances/ Emerging Business Enterprise Program

Dear Alderman McGee:

On July 17, 2006, you asked this office to review proposed changes to Chapter 360, MCO, concerning the Emerging Business Enterprise Program. You have indicated that this matter is on the agenda of the Community and Economic Development Committee for Tuesday, July 25, 2006. We have reviewed your letter and the draft provided by the Legislative Reference Bureau. While much of the proposal appears legally acceptable, we have asked the Chair of the Committee to hold the matter for at least one cycle for our review.

You identify four main changes to the current ordinance and program: 1) a new category of disadvantage; 2) a redefinition of "small business concern"; 3) a new section specifying EBE percentages required for certain contracts and departments; and 4) enhanced appeal and review rights.

Disadvantage Resulting From Discrimination

We see no legal objection to including this as a category of disadvantage, as long as it is administered in a race-neutral fashion, and as long as there are no presumptions of discrimination based on race. The current ordinance withstood a federal court challenge because it was race-neutral. Because your proposal includes a wide variety of classifications, not just race, and requires evidence of actual discrimination, we believe it would also pass judicial scrutiny.

Small Business Concern

Your proposal creates a maximum size for a small business concern. This is a policy decision; it would be legal and enforceable.

Percentage Requirements

Your proposal in this regard is a significant change from the current program. Now, contracting departments must use EBEs for 18% of the total dollars annually expended on most types of contracts. § 360-06-1. By ordinance, the departments are required to identify which types of contracts are suitable for an EBE participation percentage (some contracts may not lend themselves to subcontracting) and, if suitable, an appropriate participation percentage is included (there may be no EBE available for that type of work, or just one EBE). § 360-06-4-e. In practice, the departments confer with the EBE manager before setting a percentage. That percentage need not be 18%; it could be lower or higher, depending on the type of work and the availability of EBEs. A department can request a waiver from the requirement of 18% annual participation, by asking the manager of the program or, ultimately, the Common Council.

Your proposal alters the structure of the program by requiring each contracting department to utilize EBEs to "meet or exceed" a specific percentage of total dollars expended on each contract. In other words, your proposal sets the minimum participation percentage that must be included in each contract, not an annual dollar amount. For example, you would require a minimum of 25% EBE participation on each construction "prime contract." You would also require 25% EBE participation on the total annual departmental expenditure for all construction contracts.

We see no legal difficulty in increasing participation percentages, if they are achievable. We do have other concerns about this portion of your draft.

1. This new system contradicts section 360-06-4-e, described above, in which the departments set the percentages for their contracts.

2. We understand from LRB that your intent is to require the minimum specific percentage for each City contract by category. For example, a minimum of 25% of each construction contract must be expended on EBEs, subject to the waiver provisions of the ordinance. We further understand that you want a department's total annual expenditure on construction contracts to be 25%, should a department obtain a wavier from placing the minimum on a number of its contracts. We believe that this draft is confusing, if that indeed is your intent, and we will take the opportunity to work with LRB to clarify and fine-tune the language.

3. As you know, the current ordinance does not require a specific EBE percentage per contract, just an annual departmental percentage. This gives the departments, working with the EBE office, the flexibility to evaluate the opportunity for subcontracting in a particular contract, and the actual availability of EBEs in that field of

endeavor. Under your draft, it seems that a department would have to formally request a waiver from the required percentage for each contract whenever it believes that the percentage required by your ordinance is inappropriate. If the EBE administration does not agree, the department would have to seek review from the Council. As a policy matter, consideration must be given to whether this is the most efficient contracting process, and whether the possible time delays are acceptable.

From a legal perspective, it is essential that the appropriate percentage be determined on a contract-by-contract basis so that there is adequate competition and to avoid "windfalls" in instances where there is only one EBE. (See opinions of this office, 11/25/05, 2/11/04, 4/3/90, attached).

Certification Standards and Procedures

We have no legal concerns about the proposed certification procedures, notice, and list. There may be policy concerns regarding staffing levels to perform the increased workload, but we do not speak to those.

We do have significant concerns about portions of the appeal and review procedures in your draft.

Your draft grants the "right" of review and appeal as follows:

1. Review and appeal of adverse certification decisions.

2. An EBE would be entitled to review and appeal of the decisions of departments removing or reducing the involvement of that EBE as a subcontractor.

3. An EBE would be entitled to review and appeal of a decision of a private contractor on a City contract to remove or reduce that particular EBE, even if the contractor is meeting its requirements by using other certified EBEs.

4. An EBE could seek review or reconsideration of a decision by a department to deny a contract to a qualified EBE.

Your draft provides that an application for administrative review must be submitted to the EBE administration manager, who must proceed in accordance with sec. 320-11-1 and 320-11-2, Milwaukee City Charter. These sections adopt Chapter 68 of the Wisconsin Statutes, which creates an administrative review process. Sections 320-11 and 320-11-2 require all agencies to conduct initial administrative reviews of their own determinations upon filing of a proper written request.

It appears from your changes that you want the EBE manager to conduct reviews of not only his own determinations, but also to review contracting decisions of other departments and private contractors. This implies that the EBE manager could direct a

department to award a contract to a certain bidder, or to tell a private contractor with whom it must continue to subcontract. This is beyond the EBE manager's legal authority and, in some respects, conflicts with the Milwaukee City Charter.

Also, according to your draft, an applicant or EBE can appeal a decision of the EBE manager. These appeals, under your draft, would be heard by a Common Council committee, transcribed, and then ultimately heard by the full Council, with the City Attorney's involvement. Therefore, under your draft, the Common Council would be hearing appeals from EBEs who are refused certification or revoked, from EBEs who are dissatisfied with the amount of work they are getting under a contract, and EBEs who are unhappy that they were not awarded a contract. These would be inexpensive appeals for the EBEs to pursue – unlike court action, which is now their recourse – and so there may be a fair number of appeals. In addition, contract awards may be delayed.

In contrast, the current Charter and ordinances:

1. EBEs may appeal certification determinations to the Administrative Appeals Board.

2. The Charter provides that any bidder on a DPW contract may appeal a determination made under the EBE ordinances to the Public Works Contract Appeals Committee, comprised of the Chair of the Economic Development Committee, a member of that committee, and the director of administration. § 7-14-2-b.

3. The Charter provides that any appeals of recommendations for contract awards made by the City Purchasing Director are heard by the Purchasing Appeals Board. § 16-05-2.5

The Charter provides that the Commissioner of Public Works and the Purchasing Director have the power to award contracts subject only to the Charter appeal provisions described above. These Charter provisions cannot be overridden by an ordinance, such as this proposal.

In addition, we have serious concerns about dictating to a private contractor which EBE it must use, and for what portion of the work. It is very important for liability and contractual reasons that our contractors remain, legally, independent contractors. We do not tell them who to hire or fire, only that they must achieve a certain EBE participation percentage. For the EBE manager, and ultimately the Common Council, to evaluate issues involving a private contractor's dissatisfaction with the performance of a subcontractor, or its retention of a different EBE contractor, is fraught with peril.

Sanctions

The draft adds suspension of an EBE from participation in future City contracts as a sanction for submitting false information to the EBE office. This is legally permissible; denial of future contracts is already a sanction. However, we have previously opined that debarment from contracting requires a due process hearing. As a result, section 309-33, MCO, has been amended to provide for debarment for violation of Chapter 360.

Again, in order to work with LRB and you, as sponsor of this proposal, we will be asking the Community and Economic Development Committee to hold this matter for at least one cycle.

Very truly yours,

GRANT F. LANGLEY
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LUB:bl

Enc.

c: Ald. Joe Davis, Sr.
Mr. Ron Leonhardt
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