CITY OF MILWAUKEE

Form CA-43

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November 22, 2005

Ms. Cheryl Oliva, City Purchasing Director
Department of Administration
Room 601, City Hall

Re: Maximum percentage of EBE participation

Dear Ms. Oliva:

You asked for our opinion concerning the maximum Emerging Business Enterprise (EBE) participation requirement that can be placed on a City contract. You indicate that, under Chapter 360, MCO, contracting departments are required to expend, on an annual basis, 18% of contracting dollars on EBEs. On some contracts 18% cannot be achieved; on others it is possible to get higher levels of participation. The ordinance contemplates waivers for departments that cannot achieve 18% participation.

There are no specific percentage parameters set forth in the Charter ordinances relating to EBE participation other than the annual goal.

Section 7-14-2-b of the Milwaukee City Charter states that all contracts awarded by the Commissioner of Public Works must be awarded to the lowest responsible bidder "determined in accordance with any applicable city ordinances relating to the participation of emerging business enterprises . . . ." Similar language is found in § 16-05-2-b of the Charter, relating to procurements made by the division of business operations. Thus, it is clear that the City must award its contracts competitively, to low bidders, and that these low bidders are identified by applying Chapter 360's provisions.

The City's EBE program is found in Chapter 360, MCO. As we have mentioned in the past, its specifically-stated purpose is to assist and protect the interests of disadvantaged individuals and small businesses "in order to promote full and open competition in this city," and to enhance opportunities for disadvantaged individuals "to successfully compete." § 360-02.

The requirements of the EBE program were adopted to "increase the level" of EBE participation in city contracts. Each contracting department must, consistent with law, utilize EBEs for 18% of the total dollars, "through prime contracts or subcontracts," annually expended on various types of procurements. § 360-06-1. Each department must, among other duties, report the dollar percentage and dollar amount of those "contracts and subcontracts" awarded to emerging business enterprises. § 360-06-c-2.

We have previously indicated that, under Chapter 360, a department is required to set an appropriate percentage for each type of contract it lets in order to achieve the 18% requirement annually, and that sometimes percentages above and below 18% may be appropriate (opinion dated 4/3/90, attached.) While there is no explicit prohibition against inserting a percentage of 100% on a particular contract, there is also no specific authorization for a set-aside program wherein only EBEs will be allowed to bid.

It is our opinion, therefore, that a higher percentage requirement, even up to 100%, may be utilized on a particular contract, only if it is necessary to meet a department's 18% goal. However, we also have strongly advised that the availability of sufficient EBEs to guarantee the competitive nature of the procurement process must be considered (opinion dated 2/11/04, attached.) In Wisconsin, the courts insist 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) (emphasis added). The cost-effectiveness of public work has been described as the "overriding" purpose of public-bidding statutes.

Therefore, in order for the implementation of the EBE percentage requirement to be viewed as "consistent with law," as Chapter 360 requires, extreme caution must be taken to ensure that cost-effectiveness is promoted, and that favoritism is absent. The determination of an "appropriate" percentage must be made on a contract-by-contract basis and must: be designed to achieve these goals; promote the purpose of fostering city-wide competition expressed in the

EBE ordinance's purpose section; and must avoid "windfalls" and the appearance of steering contracts to designated businesses, thereby weakening the integrity of the competitive-bid system.

Very truly yours,

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LUB:bl
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