

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: December 20, 2011

**MEMORANDUM**

TO: Mayor Paul Soglin

FROM: Michael P. May  
City Attorney

RE: Central Library Project Bids

As you know, the bids for the Central Library Project (CLP) were opened on December 9, 2011. The City received five bids. The bids came in below the amount the City had budgeted for the project. Three of the five bids were deemed nonresponsive by the City's Department of Civil Rights (DCR).

One bidder, J.P. Cullen, immediately retained legal counsel and contacted our office upon learning that its low bid had been found nonresponsive by the City, for failing to demonstrate it had made sufficient good faith efforts to meet a goal of 20% SBE/DBE participation. The result was that the contract would be awarded to the second lowest bidder, J.H. Findorff. Cullen indicated it would challenge the award of the bid to Findorff on the basis that Cullen was the "lowest responsible bidder" under state law, sec. 62.15, Wis. Stats. Cullen also indicated that it would challenge the SBE/DBE program utilized by the City to find that its bid was not responsive.

The City has for years had a Small Business Enterprise (SBE) program, authorized in sec. 39.02, MGO, which sets an overall goal that 10% of the City's public works funds shall be expended on certified SBEs. The SBE program encourages the use of small businesses in city public works contracting. The City does not have a Disadvantaged Business Enterprise (DBE) program of its own, but does use the DBE program when using federal funds that require the DBE program. This is primarily transportation projects, including Madison Metro Transit, funded with federal money.

The SBE program offers an advantage for small businesses without regard to racial or gender preferences. The DBE program does provide an advantage for businesses owned by women and minorities. When the City uses the DBE program under a federal mandate, the City is considered to be an agent of the federal government, and any challenge to the program must be a challenge to the federal program.

In the case of the Library bidding, the City took the federal DBE program and grafted it on to the City's SBE program, and increased the goal from 10% to 20%. See the Resolution Approving Plans and Specifications for the Central Library Project, Legistar No. 23149 (approved August 2, 2011). However, the City – unlike the federal

government -- never took the steps necessary to justify a DBE program on the local level, leaving the City open to the possibility of a successful legal challenge.

Since the decision in *Adarand Constructors, Inc v. Pena*, 515 U.S. 200 (1995), such DBE programs have been subject to strict scrutiny under the equal protection clause of the 14<sup>th</sup> Amendment to the U.S. Constitution. The Courts require a study justifying the DBE programs on a local level, and that the programs be narrowly tailored to remedy past discrimination. See, e.g., *Builders Assoc. of Greater Chicago v. Cook County*, 256 F. 3d 642 (7th Cir. 2001); *Rothe Development v. U.S. Department of Defense*, 262 F. 3d 1306 (Fed. Cir. 2001); *Northern Contracting Inc. v. State of Illinois*, 473 F. 3d 715 (7th Cir. 2007); Lynn Ridgeway Zehrt, *A Decade Later: Adarand and Croson and the Status of Minority Preferences in Government Contracting*, 21 Nat'l. Black Law Jnl. 1 (2009).

The City has not undertaken these steps, making the use of the DBE program in locally funded projects subject to a challenge, and a likely successful challenge. If J.P. Cullen went to court, it could delay the CLP for some time. It makes more sense for the City to fix this problem itself.

#### Recommendation.

After consultation with the City Engineer and the City's Department of Civil Rights, we are jointly recommending that the City reject all bids and re-bid the CLP, without using the DBE program; the project would be re-bid using the SBE Program only. The City has the legal right to reject all bids and re-bid any public works project, sec. 62.15(5), Wis. Stats., and the City expressly reserves this right in its bid specifications.

The City Engineer believes that the CLP bidding process can be done with a minimal delay, perhaps up to 45 days, meaning that construction could begin by the end of March, 2012.

Assuming the City wishes to develop a DBE program that will be legally sufficient under the court rulings noted above, the DCR, with advice from the City Attorney, should work to develop such a DBE program.

Let me know if you have any questions.

CC: Rob Phillips  
Lucia Nunez  
Norman Davis  
Anne Zellhoefer