

CITY OF MADISON, WISCONSIN

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| REPORT OF: | City Attorney, Michael P. May | PRESENTED | <u>10/3/2006</u> |
| | | REFERRED | _____ |
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| TITLE: | Proposed Local Preference Purchasing Policy | REPORTED BACK | _____ |
| AUTHOR: | Anne Zellhoefer, Assistant City Attorney | ADOPTED | _____ POF _____ |
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TO THE MAYOR AND COMMON COUNCIL:

On August 1, 2006, the Common Council adopted amended Resolution No. RES-06-0701 entitled "A study to determine the ability and efficacy of a local preference purchasing policy for the City of Madison." This Resolution directed the Office of the City Attorney to provide a legal analysis of the City's authority to implement a local purchasing preference policy.

State and Local Law

Currently the City does not have a policy that limits or specifies a source for its purchased goods and supplies; the City's Purchasing Manual and code of ordinances are silent on the matter. In addition, since there is no state law that limits municipalities' purchase of goods or services, the City may adopt a local purchasing preference policy for the purchase of its own goods and supplies without violating state law. (Note: Sec. 62.15(1), Wis. Stats., requires that all City public works construction estimated to cost over \$25,000 must be let by contract to the lowest responsible bidder. A local preference policy that was to apply to public works construction contracts would be contrary to this statute, and therefore our discussion in this Report will be limited to the City's purchase of goods and supplies.)

Federal Law

Many City agencies (Metro and Police, for example) and the CDA Housing Operations Unit purchase goods and supplies using federal funds. Often the use of federal funds is encumbered with federal purchasing regulations and guidelines which specifically prohibit the recipient's use of statutorily or administratively imposed in-state or local geographic preferences in the evaluation of bids and proposals. If enacted, a City local purchasing preference policy must not be inconsistent with applicable federal laws and regulations when federal funds are expended by the City. The City would need to examine any restrictions imposed by federal law and regulations.

Constitutional Law

Legal challenges have been brought against several state and municipal home preference laws under the Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause of the U.S. Constitution.

The dormant, negative aspect of the Commerce Clause prohibits states and local governments from protecting local economic interests by curtailing the movement of articles of commerce into or out of the state or locality. There is, however, a well-recognized exception to this principle: when the state or locality is acting as a "market participant," rather than a market regulator, it is not subject to the restraints of the Commerce Clause, and it may favor its own citizens over others. This market participant doctrine stands for the proposition that when a local government enters the private market and expends its own funds, it may act as a private party, and since a private party could adopt a local preference policy and not offend

the Commerce Clause, so too could a local government adopt such a preference policy. *J.F. Shea Co. v. City of Chicago*, 992 F.2d 745, 749 (7th Cir. 1993). The market participant doctrine is limited to circumstances when the City is a party to the contract and is expending its own funds. It would not be applicable to circumstances where the local regulations would apply to the expenditure of funds other than the City's. If the City wishes to apply a purchasing preference policy to purchases made using non-City funds or to impose a policy on parties other than direct vendors to the City, the City would be a market regulator and subject to the Commerce Clause prohibitions.

Under the Privileges and Immunities Clause, states are prevented from discriminating against the citizens of other states. The reach of the Privileges and Immunities Clause is limited to government actions affecting out-of-state residents; in-state residents are not protected. A local government preference policy, which would discriminate against both in-state and out-of-state residents, is nonetheless subject to the Privileges and Immunities Clause with regard to the discrimination against out-of-state residents. The protections afforded by the Clause, however, do not extend to corporations, but only to individual persons. *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 492-93 (7th Cir., 1984). In most cases, a Privileges and Immunities Clause challenge to a purchasing preference policy adopted by the Council would likely fail for lack of standing since most of the City's vendors are corporations or companies, and not individual citizens entitled to the Clause's protection. However, to the extent an individual owned a business, that person could bring a challenge under the Privileges and Immunities Clause.

Nonetheless, if standing were not an issue, in order to survive a Privileges and Immunities Clause challenge, a local purchasing preference policy must either: (i) not burden a fundamental privilege (like employment), or (ii) if it does burden a fundamental privilege, there must be a substantial reason for the difference in treatment and the discrimination practiced against nonresidents must bear a substantial relationship to the government's objective. The economic benefits listed in Resolution No. RES-06-0701 may not be sufficient, without further supportive data, to withstand a Privileges and Immunities challenge if a fundamental privilege like employment is at issue.

Equal Protection

Under the Equal Protection Clause, no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Sec. 1. An equal protection analysis only requires strict scrutiny of a legislative classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Regarding government contracts, the Supreme Court has stated that, "like private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, to determine with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). This principle, as articulated in *Perkins*, leaves little room for an equal protection challenge where no suspect class is involved. Therefore, the Equal Protection Clause of both the Wisconsin and U.S. constitutions likely poses no obstacle to the City's proposed enactment of a local purchasing preference policy.

Conclusion

The City is authorized to enact a local purchasing preference policy pursuant to its police powers. No state statute preempts such a policy, and the U.S. and Wisconsin constitutions would not likely prohibit a policy if it is limited to the City's purchase of goods and supplies as a market participant, although we do have some concern about structuring the policy to avoid a challenge under the Privileges and Immunities Clause. Particular federal laws and regulations must be analyzed if the policy is to also apply to the expenditure of federal funds by the City.

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