

LEGISTAR #38877 – Version 1

DRAFTER'S ANALYSIS: This ordinance creates a requirement for many City contractors and recipients of city financial assistance to “Ban the Box” in their hiring practices, as required by Resolution No. RES-14-00679 adopted in 2014. The concept of “banning the box” means that an employer will not ask any questions on a job application about an applicant’s criminal or police record - the “box” to check for crimes or law violations is removed from application forms, to allow a qualified person to be considered for a job without being prematurely screened out of the process. The City of Madison has already “banned the box” from its own applications, interview and hiring practices for positions other than police and fire, per RES-14-00679 and the report accompanying that resolution.

Applicable contractors must:

- Remove from job application forms any questions, check boxes, or other inquiries regarding arrest or conviction history.
- Refrain from asking an applicant verbally, or in writing, about their arrest or conviction record until after a conditional offer of employment is made to the applicant in question.
- Refrain from conducting a formal or informal background check, using private or publicly available means of obtaining arrest or conviction information about an applicant until after a conditional offer of employment is made to the applicant in question.

In this ordinance, “arrest or conviction record” refers to both criminal and civil arrests, charges, and convictions, using existing definitions for “Arrest Record” and “Conviction Record” in Sec. 39.03, MGO. This ordinance does not supersede the application of the “substantially related” exception to employment discrimination under Wis. Stat. § 111.335 or Sec. 39.03 but shifts its application until after a conditional offer of employment is made.

This ordinance would apply to public works contractors, subcontractors who are required to be pre-qualified, service contracts over \$25,000, including those generated by the Community Development Division, and contracts for City financial assistance over \$25,000, including TIF, grants, etc. Exemptions include purchases of goods, emergency contracts, contracts with other units of government, certain real estate transactions and relocation agreements, contracts for net cash, sole source services, agreements related to borrowing, contracts mandated by law, pre-existing contracts, and renewals that are determined by the Mayor to be essential for city operations and not available from another contractor, if the contractor to be renewed is not willing to comply.

The ordinance will apply to contracts executed, extended, or renewed after January 1, 2016. It will not be retroactively applied. Applicable contracts will contain language requiring the contractor to comply, post notices, and cooperate with investigations. The ordinance allows for investigation by complaint and includes penalties for noncompliance. Job positions where a law or licensing authority requires screening for criminal and arrest records will be exempt. Contractors identified by the City as subject to the Vulnerable Populations Resolution adopted on May 21, 1996 (Substitute Resolution No. 53,279) will also be exempt.

Mandatory language requiring contractors to Ban the Box will be included in applicable contracts, similar to the Affirmative Action and Equal Benefits contract language. This ordinance also adds Ban the Box compliance to the prequalification process for Public Works contractors and subcontractors. This is to allow for streamlined enforcement for subcontractors who must ban the box – certain development agreements require the developer or recipient of city funding to use of prequalified contractors and subcontractors. By including Ban the Box in the prequalification process, city staff will monitor compliance rather than the developer or prime contractor.

This ordinance also adds credit rating agencies to the list of contractors exempt from the Equal Benefits ordinance, to be consistent with both the new ban the box policy and a recent change to the Affirmative Action ordinance.

The Common Council of the City of Madison do hereby ordain as follows:

1. Section 39.08 entitled ""Ban the Box" in City Contracting" of the Madison General Ordinances is created to read as follows:

"39.08 "BAN THE BOX" IN CITY CONTRACTING.

(1) Statement of Purpose. The purpose of this ordinance is to ensure that contractors doing business with the City of Madison provide equitable opportunities for qualified applicants to be considered for job openings without being prematurely eliminated from consideration based on a history of arrest or conviction which may be irrelevant to the job position. The Common Council of the City of Madison finds that the use of City funds should support employers who make hiring decisions based on relevant work qualifications consistent with this ordinance. Among other things, the Council finds that the ability to be considered for a job, receive an interview, and to be offered a job will improve access to family-supporting employment and assist in reducing recidivism in the criminal justice system. The Council finds that the requirements of this ordinance will ensure that City funds are used responsibly with contractors who reflect values that the City shares while also meeting requirements that public construction contracts be awarded to the lowest responsible bidder. The requirements of this ordinance are for the protection and welfare of the public in the performance of all public contracts.

(2) Definitions. In this section:

"Applicant" means any person who completes and submits the necessary information to an employer to apply for a job.

"Application form" means the initial paperwork or information form, whether in paper or electronic format, required by an employer to commence the process of applying for a job.

"Arrest and conviction record" For purposes of this ordinance, "arrest record" shall have the meaning given in Sec. 39.03(2), MGO and "conviction record" shall have the meaning given in Sec. 39.03(2).

"Background check" means the process of checking an applicant's arrest and conviction record, through any means.

"Ban the Box" is the phrase used to describe the concept of removing questions regarding arrest and conviction record from job applications and the job interview process. For purposes of this section, the phrase refers only to the requirements of this section.

"City financial assistance" for purposes of this ordinance means any grant, cooperative agreement, loan contract or any other arrangement by which the City provides or otherwise makes available assistance in an amount exceeding twenty-five thousand dollars (\$25,000) in the form of:

1. Funds;
2. Services of City personnel;
3. Leases of real property for less than the fair market value, or for reduced consideration;
4. The sale and lease of, and the permission to use (on other than a casual or transient basis) other City property (other than real property) or any interest in such property, the furnishing of services without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by the sale, lease or furnishing of services to the recipient;
5. "City financial assistance" includes, but is not limited to, capital revolving fund loans, redevelopment contracts, economic

development agreements, revenue or loan agreements with an eligible participant or authorized developer under Wis. Stat. § 66.1103, contracts with developers or other entities authorized by Wis. Stat. § 66.1105(3)(e).

6. "City financial assistance" does not include public works contracts, supply procurement contracts, professional service or other service contracts as defined herein, contracts of insurance or guaranty, or collective bargaining agreements.

"Conditional offer of employment" is an offer of employment made to the final candidate, conditioned upon the outcome of a background check.

"Developer" means any person who has entered into a contract for the construction of public improvements that will be accepted by the City, or a subdivision agreement under Sec. 16.23, MGO.

"Person" means any individual, partnership, joint venture, corporation, limited liability company or partnership, trust, association, or other entity that may employ individuals or enter into contracts.

"Pre-qualified" means a contractor or subcontractor who has met the applicable prequalification requirements of Sec. 33.07(7), MGO.

"Pre-qualified Public Works Subcontractor" means a subcontractor on a Public Works Contract who is required to meet prequalification requirements prior to commencing work by Sec. 33.07(7)(l).

"Public Works Contract" means any contract meeting the definition of "public contract" in Wis. Stat. § 66.0901(1), if the value of such contract requires it to be let to the lowest responsible bidder under Wis. Stat. § 62.15.

"Recipient of City Financial Assistance" means any person, including that person's successors, assignees and transferees, who enters into a contract with the City to receive City Financial Assistance as defined in this ordinance.

"Service Contract," for purposes of this ordinance, means: any contract with the City for the provision of services to any City department or agency with a budget under the control of the Common Council, that has a value exceeding twenty-five thousand dollars (\$25,000); including but not limited to "Contracts for Purchase of Services" and contracts administered by the Community Development Division (CDD) with a value exceeding twenty-five thousand dollars (\$25,000).

"Service Contractor" means any person who enters into a Service Contract with the City, including any successors, assignees, or transferees.

(3) "Ban the Box" Requirements.

(a) Applicability. This ordinance shall apply to the following types of contracts and contractors:

1. Types of Contracts. Service Contracts (including CDD contracts), contracts for City Financial Assistance, Public Works Contracts, and any other city contract that requires the use of prequalified contractors or subcontractors; subject to the exemptions in Sec. 39.08(3)(c) herein.
2. Contractors. Service Contractors (including CDD contractors); Recipients of City Financial Assistance, their contractors, and any subcontractors if required to be prequalified; Public Works contractors and Pre-qualified Public Works Subcontractors; contractors or subcontractors under a Developer agreement if required to be prequalified; and any other prequalified contractor or subcontractor of a party who has a contract with the city.

(b) Requirements. All contractors listed in sub. (3)(a).2. above ("Contractors"), shall:

1. Remove from all job application forms any questions, check boxes, or other inquiries regarding an applicant's arrest and conviction record, as defined herein.

2. Refrain from asking an applicant in any manner about their arrest or conviction record until after conditional offer of employment is made to the applicant in question; and city contract form as the base and attached the West order form
 3. Refrain from conducting a formal or informal background check or making any other inquiry using any privately or publicly available means of obtaining the arrest or conviction record of an applicant until after a conditional offer of employment is made to the applicant in question.
- (c) Exemptions. The following contracts are exempt from the requirements of this ordinance:
1. Contracts for the purchase of goods or supplies only.
 2. Contracts necessitated by or resulting from an emergency and thus will not permit the delay required to assure compliance with this ordinance including contracts executed as an emergency services contract under Sec. 4.26(4)(c).
 3. Contracts With Other Municipalities. For purposes of this ordinance, "municipalities" shall include all units of government listed in Wis. Stat. § 66.0301, inclusive of future amendments.
 4. Contracts with the State of Wisconsin, the University of Wisconsin, and the Area Board of any Vocational, Technical and Adult Education District.
 5. Contracts with the United States of America and individual agencies of the U.S. government.
 8. Contracts for the sale or purchase of real property, and relocation-related contracts, except those that fall under the definition of City Financial Assistance herein. Relocation-related contracts are contracts for City payment of the costs of the relocation or modification of another person's facilities required when the City acquires a real property interest or modifies a railroad crossing, usually arising out of a relocation order, transportation project plat, or order of the Commissioner of Railroads.
 9. Contracts under which the City receives net cash, including, but not limited to contracts where the City leases real property, and sells or leases goods or services for cash; except contracts with the City's depository banks, which shall not be exempt.
 10. Agreements with bond underwriters, financial institutions, and credit rating agencies, where the agreement relates to the City's borrowing.
 11. "Sole Source" Service Contracts. A contract may be exempt from this ordinance if the services are determined to be available from only one person or firm under Sec. 4.26(4)(a)2., MGO, or a consultant who has provided services in this past under Sec. 4.26(4)(a)7. and the procedures in Sec. 4.26(4)(b) are followed.
 12. Contracts Mandated by Law. A contract the City must make as a requirement of a statute, regulation or other law.
 13. Pre-Existing Contracts. Contracts to which this ordinance would apply that were in effect prior to the date this Sec. 39.08 first takes effect.
 14. Renewals. A renewal or extension of a contract to which this ordinance applies that was executed prior to the date this Sec. 39.08 first takes effect, if the contractor is providing a service or work that in the opinion of the Mayor is essential to the operations of the City and not available from any other contractor or is not feasible to award to another contractor due the timing of

the renewal. Examples include renewal of a support or maintenance contract for proprietary software that was purchased prior to the date this ordinance first takes effect, or an extension of time or change order on a contract signed prior to the date this ordinance first took effect.

- (4) Exempt Job Positions. The requirements of this ordinance shall not apply when:
- (a) Hiring for a position where certain convictions or violations are a bar to employment in that position under applicable law.
 - (b) Hiring a position for which information about criminal or arrest record, or a background check is required by law to be performed at a time or in a manner that would otherwise be prohibited by this ordinance, including a licensed trade or profession where the licensing authority explicitly authorizes or requires the inquiry in question.
 - (c) The contractor is identified by the City as being subject to the Vulnerable Populations Resolution adopted by the Common Council on May 21, 1996 (Substitute Resolution No. 53, 279.) Such contractors are exempt from the entirety of this ordinance.

To be exempt under subs. (a) or (b), the contractor has the burden of demonstrating that there is an applicable law or regulation that requires the hiring practice in question, if so, the contractor is exempt from all of the requirements of this ordinance for the position(s) in question.

- (5) Mandatory Contract Language. All contracts to which this ordinance applies shall include the following language:

“Ban the Box - Arrest and Criminal Background Checks” (Sec. 39.08, Madison General Ordinances). For purposes of this section, “Arrest and Conviction Record” includes, but is not limited to, information indicating that a person has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority. “Conviction record” includes, but is not limited to, information indicating that a person has been convicted of a felony, misdemeanor or other offense, placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority. “Background Check” means the process of checking an applicant’s arrest and conviction record, through any means.

For the duration of this Contract, the Contractor shall:

- 1. Remove from all job application forms any questions, check boxes, or other inquiries regarding an applicant’s arrest and conviction record, as defined herein.*
- 2. Refrain from asking an applicant in any manner about their arrest or conviction record until after conditional offer of employment is made to the applicant in question.*
- 3. Refrain from conducting a formal or informal background check or making any other inquiry using any privately or publicly available means of obtaining the arrest or conviction record of an applicant until after a conditional offer of employment is made to the applicant in question.*
- 4. Include information about this ordinance, using language provided by the City, on its job application forms, application website and electronic application forms, so that all applicants and current employees may view the information.*
- 5. Require any contractors or subcontractors utilized under this contract that are required to be prequalified with the*

City of Madison under Sec. 33.07(7), MGO to comply with this section and Sec. 39.08, MGO.

6. *Comply with all other provisions of Sec. 39.08, MGO."*

(6) Monitoring and Enforcement.

- (a) Notice. While the contract is in effect, all contractors shall include information about this ordinance on its job application forms, application website and electronic application forms. The information shall be in a format provided by the City and shall include the requirements of this ordinance, the complaint procedure, and obligation to produce records upon request of the City.
- (b) Complaints. Any person may file a complaint with the City of Madison Department of Civil Rights that a contractor is in violation of the terms of the contract or this ordinance. The Department of Civil Rights shall receive complaints and investigate the merits of such complaints, with assistance from the contracting city agency.
- (c) Record-Keeping and Production of Records. All contractors shall keep full and accurate records sufficient to determine compliance with this ordinance and shall provide upon the City's request access to all records relevant to compliance with this ordinance. Contractors shall provide such records to the office of the Department of Civil Rights within ten (10) business days of the date requested in writing and shall permit the City access during normal business hours to the above records, as well as access to persons who may have information relevant and necessary to ascertain compliance with this ordinance, within ten (10) business days of the date requested in writing. The City's request for records shall inform the contractor of the basis for the request.
- (d) Violation, Remediation and Sanctions. The City shall inform the contractor if a complaint has been filed under this ordinance or a violation has been determined to exist, and in addition to examining the contractor's records, the City may discuss the violation with the contractor. The purpose of the discussion is to encourage the contractor to change its practices to achieve compliance. The City may at its sole option prescribe appropriate measures for the contractor to take in order to comply with the Ordinance and may agree, in writing, to a compliance plan which shall be incorporated as an amendment to the contract. If the Contractor fails to comply with this ordinance as made applicable through the contract, the City at its option may do any or all of the following:
 - 1. Cancel, terminate, suspend or non-renew the contract in whole or in part.
 - 2. Declare the contractor ineligible for further City contracts and/or disqualify the contractor from bidding or submitting proposals on City contracts or applying for city financial assistance.
 - 3. Recover on behalf of the City from the contractor 0.5 percent of the contract award price for each week that such party fails or refuses to comply, in the nature of liquidated damages, but not to exceed a total of five percent (5%) of the contract price, or five thousand dollars (\$5,000), whichever is less.
- (e) Submission of False Information. Any person who has been found by the City to have submitted any false, misleading or fraudulent information to the City regarding compliance with this ordinance during the term of this contract or an investigation of a complaint under this ordinance may be subject to any of the above sanctions.

- (f) No Waiver. Nothing in this subsection shall be construed as a waiver or limitation of the City's remedies under an existing contract or other remedies available at equity or at law.
 - (g) No Private Cause of Action. This ordinance does not create a private right of action by or on behalf of any employee or applicant for employment based on a complaint that the Contractor has violated this ordinance or the contractor's agreement with the City. This ordinance is not intended either to expand or to limit rights provided by other local, state or federal equal employment or employment discrimination laws, including Sec. 39.03. Any claim for employment discrimination must be pursued through the appropriate, separate proceeding with the authority having jurisdiction over such claims.
- (7) Effective Date and Applicability to Existing Contracts. This ordinance shall take effect on January 1, 2016, and apply to contracts executed, extended, or renewed by the City on or after that date. No existing contract to which this ordinance applies shall be extended or renewed on or after January 1, 2016, unless the requirements of this ordinance are incorporated into the contract, or it is exempt hereunder. This ordinance will not apply to Pre-qualified Public Works Subcontractors and any other contractor or subcontractor required to ban the box based on pre-qualified status under this ordinance, until the first time they seek or renew pre-qualification status under Sec. 33.07(7)(l) after January 1, 2016. However, the ordinance will apply to prime contractors on City Public Works contracts entered into on or after January 1, 2016.
- (8) Penalty. In addition to any of the sanctions set forth elsewhere in this ordinance, any person who violates any portion of this ordinance or fails to comply with any of its requirements shall, upon conviction hereof, be subject to a forfeiture of not less than one-hundred dollars (\$100) and not more than one thousand dollars (\$1,000), plus applicable costs. Each day or portion thereof that such violation continues shall be considered a separate offense. Prosecution of a forfeiture action for a violation of this ordinance shall not preclude imposition of other sanctions listed above, or elsewhere in these ordinances, nor shall the imposition of such sanctions be construed as a limitation on prosecution."

2. Paragraph 10. of Subdivision (c) entitled "Exemptions" of Subsection (3) entitled "Equal Benefits Requirement" of Section 39.07 entitled "Equal Benefits" of the Madison General Ordinance is amended to read as follows:

"10. Agreements with bond underwriters, and agreements with financial institutions, and credit rating agencies, where the agreement relates to the City's borrowing."

3. Paragraph 14. of Subdivision (k) entitled "Required Certifications" of Subsection (7) entitled "Best Value Contracting" of Section 33.07 entitled "Board of Public Works" of the Madison General Ordinances is created to read as follows:

"14. Comply with the City's Ban the Box Ordinance, Sec. 39.08."

EDITOR'S NOTE: Under Sec. 39.03(2), **Arrest record** includes, but is not limited to, information indicating that a person has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority.

Under Sec. 39.03(2), **Conviction record** includes, but is not limited to, information indicating that a person has been convicted of a felony, misdemeanor or other offense, placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority.