CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
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February 9, 2012

Honorable President and Members
of the City Council of Baltimore
c/o Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 12-0009R – Informational Hearing -
Local, Small and Disadvantaged Business Purchasing Preferences for Baltimore

Dear President and City Council Members:

You requested that the Law Department review for form and legal sufficiency City Council Bill 12-0009R. The bill is for the purpose of inviting representatives from City agencies concerned with purchasing and economic development to appear before the Council to discuss how the City can best leverage its purchasing expenditures to encourage the growth of local, small, and disadvantaged businesses.

Council Bill 12-0009R is an appropriate expression of the Council's decision to consider and determine issues related to the economic development of local, small and disadvantaged businesses. *See Inlet Assocs. v. Assateague House Condominium Assoc.*, 313 Md. 413, 428 (Md. 1988) (explaining that a resolution is "'an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance....'") (quoting McQuillin Mun. Corp. § 15:2 (3rd Ed.)).

Local Preferences

Any City policy that treats local residents differently than nonlocal residents is subject to scrutiny under the Privileges and Immunities, Equal Protection and Commerce clauses of the U.S. Constitution and Supreme Court precedent. Each clause involves subjecting the laws to varying degrees of scrutiny embodied in different tests which often produce different results. This, at least in part, explains the conflicting results of courts analyzing local preferences in various forms all over the country; some upholding local preference laws and some not. The result often depends on which clause (Equal Protection, Commerce or Privileges and Immunities) is asserted. Although local hiring programs have been implemented in various forms in some cities and states, federal courts have made it clear that any government policy which directs or even merely encourages a preference based on residency for City funded work would violate the Privileges and Immunities Clause of the Constitution. *United Building and Const. Trades Council v. Camden,* 465 U.S. 208, 220 (1984). The Supreme Court has held that

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"'one of the privileges which the [Privileges and Immunities] Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.'" *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 65 (1988). This prohibition of discrimination based on residency extends to local governments as well. *Camden*, 465 U.S. at 214.

Many local preference laws in other jurisdictions have not been challenged under the Privileges and Immunities Clause, but this does not reflect their legal sufficiency; only that they have not been challenged. Any discrimination against workers based on residence would only survive scrutiny if a court found that nonresidents were the cause of the local unemployment rate that the law sought to rectify. Obviously, many factors contribute to the unemployment rate of local workers, making a hiring preference based on residence for public work virtually legally indefensible. *See, e.g., Utility Contractors Ass'n v. City of Worcester,* 236 F. Supp. 2d 113, 115 (D. Mass. 2002) (City of Worcester enacts a "Residency Requirement Ordinance" requiring all private contractors on public works projects to have at least a 50% local work force. The court held that the ordinance violated the Privileges and Immunities Clause. "While it is troubling to see this important project delayed, and to upset the expectations of Worcester residents, the law gives me no choice. The cases could not be clearer. The constitutional issues could not be more significant....An injunction must issue."); *see also Supreme Court of Virginia v. Friedman,* 487 U.S. 59 (1988); *see, e.g., A.L. Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865 (3rd Cir. 1997) (Pennsylvania law requiring contractors to hire only Pennsylvania workers on public works projects struck down as violating Privileges and Immunities Clause).

Therefore, due to the expansive reading of the Privileges and Immunities Clause in *Camden,* any policy giving a preference for a business defined as "local" would likely violate the Privileges and Immunities clause, because it is arguably an "effort to bias employment decisions in favor of [City] residents."

Challenges to local preference laws based on the Privileges and Immunities Clause have been consistently successful, but courts often dismiss those claims on standing, leaving the Commerce Clause or Equal Protection claims, which are often defeated in this context by the market participant exception and a rational justification for the law. The result is that the local preference is upheld, despite the likelihood that it violates the Privileges and Immunities Clause. *See, e.g., Smith Setzer & Sons v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994) (upholding a legislatively enacted program which gave South Carolina vendors a slight preference in the bidding process for certain types of state procurement on the basis that the state was acting as a market participant and was therefore excepted from the Commerce Clause challenge and dismissing the Privileges and Immunities claim on standing); *J.F. Shea Co. v. City of Chicago,* 992 F.2d 745 (7th Cir 1993) (court dismisses Privileges and Immunities claim on standing and upholds Chicago's two percent bidding preference for local businesses on market participant exception to Commerce Clause); *Galesburg Construction v. Bd of Trustees*, 641 P.2d 745 (Wy. 1982)(Privileges and Immunities Clause dismissed for lack of standing, resident bidder preference upheld under Equal Protection analysis).

Obviously for a policy to be legally sufficient there must be a viable legal defense for all three of these types of challenges (Equal protection, Commerce Clause and Privileges and Immunities). While a local preference policy could be defended against the Commerce Clause

and Equal Protection challenges, the Privileges and Immunities challenge would likely prove insurmountable.

Some aspects of local preference programs have not been directly addressed by the Supreme Court, leaving many unanswered questions. These include: first, whether a direct preference for businesses rather than a requirement that businesses hired by the City use local workers is a legally significant difference under the Privileges and Immunities Clause, secondly, whether a slight preference versus a *requirement* of local hiring is a legally meaningful distinction and finally, whether the preference has to be in the form of an ordinance to be unconstitutional.

However, the Court in *Camden* notes in its opinion that the *Camden* law was changed from a quota to a "goal" with which developers and contractors must make 'every good faith effort' to comply." *Camden,* 465 U.S. at 214. This made no difference to the Court which held that "a city's efforts" to discriminate against nonresidents violated the Clause. This expansive reading suggests that a preference based on residence, no matter how slight, would be unconstitutional.

Another legal restriction that could impede a local preference program is that many federal grants contain language forbidding local preferences. If the project involved federal funds, this could render the preference void and the federal agency could withhold the funding for the project. *See City of Cleveland v. Ohio*, 508 F.3d 827 (6th 2007).

Retaliatory actions by other jurisdictions are another downside to local preferences: for example, Maryland has a retaliatory law which penalizes bidders residing in states which have preference rules. Md. Ann. Code, Art. 24, § 8-102 (2011). Both Virginia and Pennsylvania have retaliatory laws which could penalize Baltimore businesses seeking work in those states if a local preference program was enacted.

"Small and Disadvantaged" Preferences

Creating a program which gives preferential treatment to small and/or "disadvantaged" businesses creates another classification that is subject to Constitutional challenge. The Equal Protection Clause prohibits governments from denying the "equal protection of the laws" to any group of people. Any statutory classification resulting from a vendor preference law must, therefore, satisfy at least a rational basis review to be legally sufficient. In other words, if the law is enacted in furtherance of a rational purpose, it will survive an Equal Protection challenge. *Smith Setzer & Sons, v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir 1994). Therefore, if a program was enacted to give a purchasing preference to a small or disadvantaged business, the program's purpose must be clearly articulated with supporting data that the program would benefit those businesses and the local economy. The scope of the law should also be clearly defined, with careful consideration given to which businesses qualify as "small" or "disadvantaged."

A program giving preference to local (and small) businesses restricts the Board of Estimates' authority to award contracts and determine the fiscal policy of the City. Section 11(a) of Article VI of the Charter states that "The Board of Estimates shall be responsible for awarding contracts and supervising all purchasing by the City as provided in this section and elsewhere in

the Charter." A program giving preferences to businesses based on factors like residence and size would interfere with the authority of the Board of Estimates by dictating which bidders are qualified to work on certain projects. The City Council cannot by ordinance alter the authority granted in the Charter to the Board of Estimates. Furthermore, such programs could have a negative impact on the ability of minority businesses to bid on City work, decreasing the effectiveness of the MWBE law.

A vendor preference program would also interfere with the Charter's requirement that contracts be awarded to the lowest responsible bidder. Although there is an exception to the lowest responsible bidder standard in the Charter in Section11(g)(1)(vi), which states that "notwithstanding the competitive bid provisions of this Charter, the Board of Estimates may adopt rules and regulations that establish uniform procedures for providing, on a neighborhood service, neighborhood public work, or neighborhood public improvement contract, limited bid preferences to responsive and responsible bidders who are residents of, or have their principal places of business in, that neighborhood," this exception was provided by Charter amendment and lies within the discretion of the Board of Estimates.

Conclusion

There are legally defensible strategies designed to boost the local economy and many of these have been explored and some implemented by the City. For example, the creation of job linkage and training programs which are organized and run through a partnership with developers, community groups and the City could be effective and legally sound.

In sum, although on the surface it appears that courts are inconsistent with regard to local preference laws, a closer look reveals that most courts have generally avoided the Privileges and Immunities analysis by denying those claims based on standing and upholding the laws on Equal protection or Commerce Clause grounds. Courts which address the Privileges and Immunities challenges consistently strike these laws down. In other words, while a local vendor preference would likely survive a Commerce Clause or Equal Protection challenge, if a challenger could obtain standing to assert a Privileges and Immunities claim, the policy would likely be struck down.

Other legal limitations and disadvantages to local vendor preferences include federal restrictions in federal grants and retaliatory laws in other jurisdictions.

Furthermore, even if a local business preference could withstand a constitutional challenge, giving preferences based on factors other than the lowest responsible bidder interferes with the Board of Estimates authority and the Charter mandated procurement process.

The Law Department approves Council Bill 12-0009R for form and legal sufficiency.

Very truly yours,

Ashlea H. Brown
Assistant Solicitor

cc: Angela Gibson, City Council Liaison, Mayor's Office
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