



DEPARTMENT OF LAW  
CITY OF CHICAGO

September 22, 2020

**Via E-Mail Delivery**

Members of the City Council:

I write in my capacity as Corporation Counsel and one who is responsible for mitigating financial risk to you and the City of Chicago. My team and I closely monitor City Council committee proceedings and some recent events have caused concern. Therefore, I want to reiterate certain rules that must be followed in order for individual members of the Council to fulfill your obligations as fiduciaries to the City.

When a proposed transaction comes before a committee for consideration, members are of course authorized and encouraged to ask robust and detailed questions about the transaction in order to both inform, and provide a basis for, a vote on the matter. This is all fair game and to be expected.

Nonetheless, there are a number of practices that are not appropriate and indeed could expose the member and/or the City to liability. These practices should be avoided. They include:

1. **Dictating the inclusion or exclusion of particular vendors:** While members certainly can inquire about and as appropriate express concern about particular vendors that may be part of a particular transaction, members may not demand the inclusion or exclusion of particular vendors or categories of vendors such as by race or ethnic origin in order to secure their vote. Nothing in the Municipal Code or other applicable law would vest the power in a City Council committee to dictate whom should be part of a transaction even if this contract were subject to the statutory requirements applicable to City contracts. Moreover, in the instance where, for example, a transaction is presented in which individual companies have formed clear contractual plans or binding alliances a member's demand for the inclusion of a different vendor or exclusion of a planned vendor could be an interference with those contractual relations and thus actionable against the member and/or the City in a civil court action. Therefore, I strongly caution against any actions or comments that appear as a demand for the inclusion or exclusion of any vendor by name or race or ethnicity to a particular transaction.
2. **Increasing M/WBE Percentages:** As you are aware, M/WBE participation percentages on any particular transaction must be in compliance with the City's stated

goals. As mandated by law, these goals are set in any particular transaction in accordance with the availability of vendors in the local marketplace. The availability is determined by a disparity study conducted by subject matter experts. As a result, I strongly urge members to avoid trying to unilaterally amend the terms of a deal, and specifically the set M/WBE goals. Certainly, if members have questions about how the goals were determined, measures to ensure compliance and related questions – all of those kinds of inquiries fall within the heartland of members' oversight responsibilities. However, what is not appropriate and could result in legal liability is "on the fly" attempts to re-write City law and impose new requirements on a transaction during a committee hearing. Those kinds of actions are not appropriate and are legally difficult to justify. The "on the fly" amendments could ultimately imperil the entire M/WBE program which the city works very hard to maintain.

Let me re-emphasize my concern in another way: there is a significant difference between: (1) asking questions in a committee hearing, intending to become better informed on a matter up for consideration in that committee, or even making suggestions as to whether a particular proposal can be amended in certain respects, consistent with established City law, versus (2) insisting that a proposed ordinance be drastically and fundamentally amended through the imposition of compelled concessions unrelated to that ordinance, as a pre-condition for committee approval. The former is defensible; the latter is difficult to justify.

In sum, a City Council committee, or any member of the City Council, that seeks to undercut or dismantle a proposed transactional ordinance by adding new requirements during a hearing, particularly of the kind referenced in this letter, creates litigation risk to the City and to the individual committee participants. In the event litigation ensues and individual committee members are named, there is no assurance that the City would be able to represent or indemnify them. Pursuant to well-established law, in litigation a municipality can only defend and indemnify an elected officer for actions taken: (1) in good faith and (2) falling within the scope of that officer's duties. It is uncertain whether the above described efforts in committee satisfy either of those prongs.

If you have any questions about this or any other matter, please do not hesitate to contact me or any member of the Legal Counsel Division. Thank you in advance for your assistance going forward.

Sincerely,



Mark A. Flessner  
Corporation Counsel