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Via Email

RE: Proposed Ordinance 18-060

Based on recent conversations with Ms. Duncan, I understand there are discussions to create a sub-committee to review bids from contractors/builders/etc. for City projects. This sub-committee would rank bid submissions based on a set of qualifications and then send that ranking to the Mayor. The Mayor would then negotiate with the top-ranking contractor/builder/etc; but, if an agreement could not be reached, the Mayor would then negotiate with the second ranked bid, and so on. Like Ms. Duncan and I discussed several weeks ago, this appears to be allowable under the law but not necessarily the wisest course of action. Here's why:

As a fundamental matter, a city council is a legislative body, which is responsible for the passage of law. In that capacity, each council member has "legislative immunity." This means, generally speaking, a city council member is immune from suit for an action he or she took in their legislative capacity. That legislative immunity, however, does not apply to council members when they engage in non-legislative matters. A prime example is when a city council votes to terminate an employee. By doing so, the city council is acting administratively. And, because it has acted in a non-legislative capacity, each council member loses its legislative immunity and is subject to suit for wrongdoing as part of the termination. One quick point, legislative immunity is not the same as absolute immunity. Cities and city officials do not have absolute immunity; the focus of this letter is on the waiving of legislative immunity.

I am fairly certain the waiving of this legislative immunity would occur in situations like the one being proposed. Please do not misunderstand, I am not saying that any lawsuit would be successful; I am only saying that city council members serving on the subcommittee would lose their legislative immunity and would thus be subject to a lawsuit. As you know, a contractor/builder who does not get the contract can sue and claim that all sorts of wrongdoing prevented him or her from getting that contract. In situations where the council members had no role in the granting of that contract, which

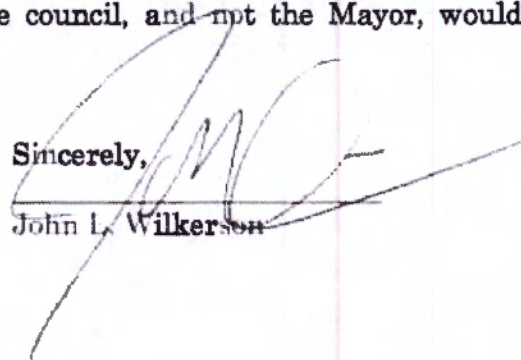
is most often the case, the city would only be subject to that lawsuit. The city council members would not be subject to suit both because they were not involved in the awarding of the contract and because they would have legislative immunity. However, if the council begins to involve itself in the bidding process like proposed, councilmembers are waiving their immunity and opening themselves up to liability. For instance, if the subcommittee of councilmembers ranks a contractor/builder low and then the contractor/builder does not receive the bid because of that low ranking, the contractor could then sue a city council member in their individual capacity. And, because the members were not acting in their legislative capacity, they would not have legislative immunity and the suit would proceed.

In addition, I am not terribly comfortable with the council involving itself in matters reserved for the Mayor, at all. Again, while city councils have broad discretion to act as they wish, negotiating and entering into contracts are powers reserved for the Mayor. By involving itself so deeply in that process, I fear the council will muddle the separation of powers. For that reason, too, I do not believe that the city council involving itself in this process is wise.

After my initial conversation with Carol, I reviewed proposed ordinance 18-060. I have additional concerns after reading that proposed ordinance beyond what I discussed above. First, section 7 of the ordinance mandates that the City Engineer "shall negotiate a contract . . ." I will note, again, that the Mayor has the ultimate authority to enter into contracts. While I believe the Mayor could delegate this authority to his designee, 18-060 mandates that the City Engineer - and not the Mayor - *shall* negotiate contracts. I'm concerned this would usurp the Mayor's authority. The Mayor has the authority to enter into contracts, and even though he can delegate authority to a designee the city council cannot do that for him.

Second, I have concerns with section 9 thru 13 of the ordinance; but, most of those concerns have been addressed in the preceding paragraphs. However, after reviewing 18-060 more closely, there is one additional concern I must point out. In section 13, the city council is given the authority to approve or not approve contracts. While that is a concern because the Mayor, and not the council, has the authority to enter into contracts; the major concern with this provision is that 18-060 gives the power to the council to return a rejected contract "to the Mayor with instructions on changes to the contract..." This means, essentially, the city council can tell the Mayor what terms he should agree to when negotiating the contract. I'm concerned this, too, would usurp the Mayor's authority to enter into contracts because the council, and not the Mayor, would be dictating the terms of contracts.

Sincerely,


John L. Wilkerson