CITY OF SOMERVILLE, MASSACHUSETTS
LAW DEPARTMENT

March 24, 2024

Via Email: mmclaughlin@somervillema.gov

Matthew McLaughlin
Ward One City Councilor
City Council, City Hall
Somerville, MA 02143

Re: Somerville for Palestine Ballot Initiative

Dear Councilor McLaughlin:

You have requested an opinion from this office on the ballot initiative sent to you on 3/21/2025 in an email from Somerville For Palestine.

Pursuant to state law, if the City Council "shall not approve said petition at least ninety days before said election, then the question may be so placed on said ballot when a petition signed by at least ten per cent of the registered voters of the city… requesting such action is filed with the registrars, who shall have seven days after receipt of such a petition to certify the signatures. Upon certification of the signatures, the city or town clerk shall cause the question to be placed on the ballot at the next regular municipal election held more than thirty-five days after such certification." Mass. Gen. Laws Ann. c. 53, § 18A. The statute does not distinguish between the situation where the Council takes no action or denies the petition.

I have also attached a previous memo regarding the proposed substance of the citizen petition.

I hope this is helpful. Let me know if you need anything further.

Sincerely,

Cynthia Amara
City Solicitor

cc: Kimberly Well, City Clerk

CITY OF SOMERVILLE, MASSACHUSETTS
LAW DEPARTMENT

November 5, 2024

Via Email: mmclaughlin@somervillema.gov

Matthew McLaughlin
Ward One City Councilor
City Council, City Hall
Somerville, MA 02143

Re: Enacting an Ordinance Prohibiting the City from entering new contracts based on their affiliation with Israel

Dear Councilor McLaughlin:

You have asked whether the City may enact an ordinance prohibiting the City from entering new contracts with organizations doing business with Israel and/or based on their political affiliation with Israel. In my opinion, based on the risk of invalidity on the grounds of federal preemption, violation of the First Amendment, and violation of G. L. c. 30B, such ordinance is likely invalid.

With respect to organizations doing business with Israel, in Crosby v. National Foreign Trade Council, 530 U.S. 363, 373-74 (2000), the United States Supreme Court unanimously ruled that a Massachusetts purchasing law prohibiting state agency trade with any corporation doing business with Burma was preempted by federal Burma sanctions contained in the Federal Operations Appropriations Act. The Court, applying conflict preemption, found that the state law served as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as it "undermines the intended purpose and 'natural effect' of at least three provisions of the federal Act, namely its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma." Id. at 373-374.

Furthermore, in Odebrecht Constr., Inc v. Prasad, 715 F.3d 1268 (2013), the Eleventh Circuit held that a Florida state law that sought to prevent the state and local governments from awarding public contracts to companies with business connections to Cuba violated federal law for three reasons: it applied more broadly, punishing more companies and more conduct than under federal law; it provided for much more severe penalties than under federal law; and it

undermined the President's capacity to direct diplomatic discussions and impose sanctions on Cuba. Id. at 1281.

Crosby and Odebrecht Constr. do not address whether a local sanctions ordinance is lawful in the absence of Congressional authorized sanctions or enactments. However, although it is arguable that a local sanctions ordinance could be adopted where there is Congressional silence on topic, in my opinion, it is more likely than not that a local sanctions ordinance is prohibited by law, on the grounds that it intrudes into the field of federal foreign affairs power and/or Foreign Commerce Clause which is entrusted to the President and Congress. See American Insurance Association v. Garamendi, 539 U.S. 396 (2003) (where state law is challenged as intruding into the federal foreign affairs power, executive agreements or statements might preempt any state action, despite a lack of specific agreement language showing the intent to do so); Zschernig v. Miller, 389 U.S. 429, 432 (1968) (Although federal government had not exercised its power in the area, the inquiries required by the state statute would result in "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress").

With respect to political affiliations with Israel, a First Amendment analysis is implicated for a new independent contractor. In Oscar Renda Contracting, Inc. v. City of Lubbock, Tex., 463 F.3d 378 (5th Cir. 2006), the Fifth Circuit held that the First Amendment protects an independent contractor whose bid has been rejected by a City in retaliation for the contractor's exercise of freedom of speech, even if the contractor had no pre-existing commercial relationship with that City. However, there is a split of authority within Circuits. In McClintock v. Eichelberger, 169 F.3d 812 (3rd Cir. 1999), the Third Circuit refused to extend the constitutional First Amendment protections to independent contractors who alleged their First Amendment rights were violated because their bid was rejected in retaliation for their support of the political opponents of the public officials who awarded the contract.

In an Arizona District Court case, The Yadin Co. v. City of Peoria, 2007 WL 63611, "the Court conclude[d] that the better reasoned view [than McClintock] on this issue is the one more recently presented by the Fifth Circuit in Oscar Renda Contracting, Inc.."

In my opinion, it is more likely than not that a bid rejection based on political affiliation with Israel would violate the First Amendment, because Oscar Renda Contracting, Inc. is the better reasoned view.

The enactment of an ordinance prohibiting contracts with organizations doing business with Israel or having political affiliations with Israel also triggers an analysis for a potential conflict with G.L. c. 30B. The purpose of bidding statutes such as Chapter 30B is to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally. Phipps Products Corp. v. Massachusetts Bay Transportation Authority, 387 Mass. 687, 691-692 (1982); Datatrol, Inc. v. State Purchasing Agent, 379 Mass. 679, 696 (1980). Competitive bidding serves the dual goals of obtaining the

most favorable contract while ensuring fair competition. Cataldo Ambulance Service, Inc. v. Chelsea, 426 Mass. 383, 389 (1998).

Based on inquiry to both the Inspector General's office and the Attorney General's Bidding Unit as to whether such ordinance would conflict with G. L c. 30B, neither office has identified a conflict. While it is arguable that an ordinance would frustrate the purposes of G. L. c. 30B, I believe it is more likely than not that the ordinance does not conflict with G. L. c. 30B on the grounds that 30B statutory criteria are not limited to merit-based determinations.

Overall, given the three potential bases for invalidation set forth above, in my opinion, the ordinance is likely invalid.

Sincerely,

David P. Shapiro
Deputy City Solicitor

Cc: Mayor Katjana Ballantyne
Angela Allen, Chief Procurement Officer