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November 8, 2013

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To: Honorable Supervisors of the Milwaukee County Board

Re: File 13-785

At the November 7, 2013, meeting of the County Board, File 13-785 was referred to this office for an assessment of legal issues raised in the file.

### **BACKGROUND**

Dr. Ruben Anthony was requested by the Director of the Department of Administrative Services (DAS) to take on an interim role to lead the Community Business Development Partners (CBDP). Dr. Anthony and the DAS Director on behalf of the County signed an employment service contract on July 24, 2013. He began work on July 29, 2013, the same day the former CBDP Director departed.

It was later discovered that the proper form of contract in this instance would have been a professional services agreement with Dr. Anthony's corporation under Milwaukee County Ordinance (MCO) 56.30. A professional services contract was signed by Dr. Anthony on behalf of his corporation and the DAS Director on behalf of the County on September 12, 2013.

Both contracts included an hourly rate of \$125 per hour. Between July 29, 2013, and September 12, 2013, Dr. Anthony worked about 30 hours a week and provided 192 hours (\$24,000) of service. He submitted invoices for a total of \$24,091.16, covering his time and some expenses. MCO 56.30(9) provides that "no work shall be performed by any professional services contractor unless or until a written contract has been executed and signed by all appropriate officials."

In a proposed resolution for the Board's consideration, the Director of DAS requested that MCO 56.30(9) be waived and that payment be made in the amount of \$24,091.16.

Sufficient funds to cover that payment are available in the 2013 budget. Dr. Anthony continues to work under the September 12, 2013, contract.

#### QUESTIONS PRESENTED

**1. Would a court find that a valid contract exists between the County and Dr. Anthony covering work performed between July 29, 2013 and September 12, 2103?**

Most likely, a court would find a contract exists. Dr. Anthony negotiated with a high-ranking county official to provide services beginning July 29, 2013. In such a case, the legal principle is well established:

Where a third party reasonably believes, based on the principal's conduct, that an agent has authority to act in a particular transaction, the principal is bound by the agent's acts within the scope of his apparent authority.

*Hollingsworth v. American Finance Corp.*, 86 Wis.2d 172, 181, 271 N.W.2d 872, 877 (1978). Where an entity “has clothed an officer or director with an apparent authority to act for it in a particular business transaction and third parties have relied upon such apparent authority, the corporation will be bound by the acts of the agent.” *Diederich v. Wisconsin Wood Products*, 247 Wis. 212, 218, 19 N.W.2d 268, 271 (1945). *See also Bullen v. Milwaukee Trading Co.*, 109 Wis. 41, 85 N.W. 115 (1901) (court syllabus) (“If a person, acting in good faith, contract[s] with a corporation upon the strength of the apparent authority of those acting in its behalf, and the corporation receive[s] the benefit of the contract, it is bound, regardless of whether its agents had actual authority in the premises or the contract was within the scope of its corporate powers”).

In other words, if a potential contractor reasonably believes that the County has provided a County official with authority to issue the contract in question, the contract would be considered valid.

To be sure, “[w]hether the principal is bound by the agent’s acts requires a case-by-case inquiry” into whether acts by the principal or agent were reasonably relied upon by the contractor. *Hollingsworth*, 86 Wis.2d at 183, 271 N.W.2d at 877. It could be argued, for example, that a contractor dealing with the County is required to become familiar with the County ordinances and should bear the risk of acting contrary to them. However, it seems more likely in this case that a court would find that Dr. Anthony was reasonable in assuming that the July 24 contract offered to him was valid.

**2. Would Dr. Anthony be able to pursue a claim even if a court found that there was no valid contract before September 12, 2013?**

If a court found there was no actual contract before September 12, 2013, Dr. Anthony could still pursue compensation under at least two additional legal theories – unjust enrichment and *quantum meruit*.

Unjust enrichment means an entity “cannot commit the rank injustice of enriching itself by retaining the fruits of a contract and then repudiate it.” *American Express Co. v. Citizens’ State Bank*, 181 Wis. 172, 194 N.W. 427, 431 (1923). The elements Dr. Anthony would need to show to succeed in a claim based on unjust enrichment are: (1) he conferred benefit on the County through the work he provided, (2) the County knew of the benefit, and (3) it is inequitable for the County to accept or retain the benefit without paying its value. See *Ramsey v. Ellis*, 168 Wis. 2d 779, 784-85, 484 N.W.2d 331, 333 (1992). “[D]amages in an unjust enrichment claim are measured by the benefit conferred upon the defendant.” *Id.*

Alternately, Dr. Anthony could pursue a claim in *quantum meruit*. *Quantum meruit* means “as much as he deserves.” “[R]ecovery in *quantum meruit* is based upon an implied contract to pay reasonable compensation for services rendered.” *Ramsey*, 168 Wis. 2d at 785, 484 N.W.2d at 333.

While, again, there may be factual issues that could be raised to challenge either of these theories or the amount that could be recovered under them, it does appear that one or the other of these claims could prove useful to Dr. Anthony.

**3. Is there a violation of MCO 56.30(9) that precludes payment of Dr. Anthony?**

MCO 56.30(9) establishes an ordinance violation if a professional services contractor performs work before a contract has been signed by appropriate officials. However, the County Board has waived the ordinance in similar situations. For example, at the same November 7 meeting where Dr. Anthony’s situation was discussed, the Board included an ordinance waiver and authorized a contract where work had been performed before the contract was approved or in place. See File 13-787 (Nov. 7 Agenda Item 11) (approving \$256,000 contract retroactive to May 30, 2013 and waiving MCO 56.30(9)).

A court could view the practice of making waivers and payments in other files as further evidence that the County had the ability to compensate Dr. Anthony for the work he performed, and that there would not be any reason to treat him differently.

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As always, please be sure to contact us with any questions or comments.

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