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Date: August 5, 2015

To: Chairman Lipscomb, Sr.

From: Paul Bargren *PB*
Corporation Counsel

Re: WHEAP Contracts

You asked what will happen next with the WHEAP contracts and also whether this is likely to set a precedent for treatment of other contracts in the future.

In short, as explained in more detail below:

- The Department of Health & Human Services is going to issue 2015-16 energy assistance program contracts to UMOS and Community Advocates on an emergency basis and then bring the contracts to the County Board for approval in the September cycle.
- In my view, the circumstances that led to this situation were unique to this contract this year and should not be seen as precedential.

Background

Each year, DHHS receives Wisconsin Home Energy Assistance Program funds and contracts with one or more local agencies to provide services under the program. For many years, the sole or lead contractor has been the Social Development Commission. This year, DHHS asked that contractors provide better service to consumers at more sites throughout the County. An RFP including those requirements was issued in February 2015. Four proposals were received on March 27 and scored by a review panel of community members and county staff not associated with the contracting or RFP process. On April 29, based on the scores of the review panel, DHHS announced its intent to award contracts to UMOS and Community Advocates. SDC was not selected for a contract.

On May 6, 2015, SDC appealed the decision per Chapter 110 of the county Ordinances. An appeal panel heard SDC's appeal on June 30, 2015. The appeal panel, on a 2-1 vote, instructed DHSS to assemble a diverse scoring panel and re-score the RFP responses. The new panel met and, while scores differed somewhat, the overall results were the same. DHSS moved ahead to award the contracts to UMOS and Community Advocates and urged adoption at a special County Board meeting July 15.

The County Board's Finance Committee laid the proposal over, however, before recommending approval on July 23. At the meeting of the County Board on July 30, however, the proposal was

amended so as to explicitly reject the UMOS and Community Advocates contracts (\$658,839 and \$1,400,181, respectively) and to recommend that DHSS extend the current SDC contract for six months, obtain a “public vetting” of the expanded service model including surveys and public hearings, and issue a new RFP incorporating the best ideas for improving service delivery. The amended provision was adopted by the Board on a vote of 12-5. The Executive has not yet acted to sign or veto the measure and need not do so until just before the next Board meeting on September 24, barring a special Board meeting in the meantime.

Legal Standards

Two county purchasing ordinances make provision for emergency contracts. MCO § 32.28 authorizes a department head to enter into contracts “[w]hen immediate action is required to preserve property or protect life, health or welfare of persons.” MCO § 56.30(1)(b)(3)(b) states that “county board approval may be waived” for services contracts where “immediate action is required to preserve property or protect life, health and welfare of persons.”

Neither ordinance is clear on whether Board approval is required after the fact for emergency contracts. The question is answered by statute, however, which trumps ordinance in any event.

As a result, regardless of the county’s emergency contract ordinances, county board approval is required by state statute for contracts of this size. Statute sec. 59.52(31)(c) states that, as a matter of law, any contract over \$300,000 “may take effect only if it is approved by a vote of the [county] board.”

Analysis

Under the circumstances, DHHS properly identified an emergency. This contract, although it recurs yearly, is on a tight deadline imposed by state and federal requirements. The contract is also subject to federal requirements, such as a one-year contract length and providing services 12 months a year, 24/7. Also, as DHHS had explained, waiting until after the September Board meeting to begin work would have put this year’s program at risk. For example, information about the new service location needs to be printed and circulated and arrangements made to hire employees. DHHS normally begins work on the program in July. DHHS also had questions about whether SDC could obtain a lease extension after December 31 for the sites it planned to use. Given the program requirements and timing, DHHS felt compelled to declare an emergency and move forward with contracts that had already been vetted through the RFP process.

Relying on the existing RFP process was proper. Issuing an extension to a designated incumbent without the benefit of bids or other standard competitive pricing techniques would also have been, in my view, an unsuitable sole source procurement in these circumstances. By relying on the RFP process to issue the contracts on an emergency basis, DHHS honored the integrity of the public procurement procedures.

While it may be jarring for the Board to reject two large contracts only see them issued administratively a few days later, this appears to have been a unique circumstance in which DHSS felt it had no options if it wanted WHEAP to be available for heat and light aid for some 20,000 residents this winter. Having taken this emergency step, DHSS nonetheless will return to the Board for contract approval. This does not appear to be a situation that will be duplicated, so the unusual actions here would not appear to set a precedent for general contract matters.