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Date: June 8, 2017

To: Honorable Supervisors of the County Board

cc: County Clerk George Christenson (c/o Janelle Jensen)
County Executive Chris Abele
Interested Parties

From: Margaret Daun, Corporation Counsel
Colleen Foley, Deputy Corporation Counsel
Paul Kuglitsch, Deputy Corporation Counsel

Re: Referral of File No. 17-385

At its May 25, 2017 meeting, your honorable body referred File No. 17-385 to the Office of Corporation Counsel (OCC) and the Committee on Finance and Audit for a written explanation regarding the ABM Industry Groups, LLC janitorial services contract and how it does **not** qualify as a multi-year contract. File No. 17-385 is as follows:

From the Milwaukee County Comptroller, Office of the Comptroller, providing an informational report regarding Contract Notifications received during the month of March 2017 pursuant to Sections 44.09(e), 46.09(8), and 56.30(8) of the Milwaukee County Code of General Ordinances. (INFORMATIONAL ONLY UNLESS OTHERWISE DIRECTED BY THE COMMITTEE)

The above-referenced informational report includes summaries of contracts related to public works, professional services, purchase of services, among other things. As part of its monthly reports, the Comptroller's Office notes the length of the contracts and whether the contracts require County Board approval or not. (17-385 Revised Attachment 3 – Main (05/09/17)). If County Board approval is not required, the Comptroller identifies the category under which the contracts are exempt. (*Id.*; see also 17-385 Attachment 1 – Exemptions (noting the types of exemptions)).

One of the contracts included in the informational report is a non-professional janitorial services contract between Milwaukee County and ABM Industry Groups, LLC. (17-385 Revised Attachment 3 – Main (05/09/17) at 3; see also 17-385 ABM Industry Groups Info). The contract has a base term expiring on December 31, 2017 with 4 option periods, each 12 months in length. (17-385 ABM Industry Groups Info at 1). Pursuant to paragraph 3, *Dates of Performance*, the County must provide ABM written notice 45 days prior to the end of the base term or any option period to exercise an option. (*Id.*). The contract may also be terminated at any time if the County

Board fails to appropriate funding necessary to complete the contract. (*Id.* at 6). In its report, the Comptroller correctly noted that the contract was exempt from County Board approval under Exemption Type “C.” (17-385 Revised Attachment 3 – Main (05/09/17) at 3).

Exemption Type “C” exempts from County Board approval contracts under the jurisdiction of the County Executive. (17-385 Attachment 1 – Exemptions). The exemption narrative also explains that “[g]enerally a contract that uses funds from a future fiscal year which has not yet been adopted will require County Board approval...” (*Id.*, see also Wis. Stat. § 59.60(12)). These types of contracts are referred to as multi-year contracts.¹ There is no dispute that the ABM Contract falls under the Executive’s jurisdiction; however,

Your honorable body is asking why the ABM Contract is not a multi-year contract requiring County Board approval.

In our March 3, 2017 opinion on the conflicts created by Act 55, at page 8, footnote 7, the OCC noted:

As to whether a contract is considered to be encumbering future fiscal years and/or a multi-year contract and potentially under the purview of section 59.60(12), the OCC looks beyond any labels or other stylings of a contract to assess the likely and intended term of the contract. Thus, a contract that automatically renews would be considered a multi-year contract. If a contract only has an option to renew (whether it requires the consent of both parties or mere notice by one party), so long as the initial term and the renewal term was each a year or less, it would not be considered a multi-year contract. After a contract is in effect, an option to renew may or may not itself be considered a multi-year contract, depending on the length of the option term. The OCC strongly advises against drafting contracts with terms that provide for “automatic” renewals contingent upon sufficient appropriations because this complicates contract administration as it may become unclear whether dollars appropriated to the relevant department were intended to cover a particular contract or were for other purposes. Finally, an otherwise multi-year contract is not somehow arguably “transformed” into a single-year contract for purposes of section 59.60(12) simply because an option to terminate the contract exists. Exceptions to these guidelines may be considered on an ad hoc basis.

This portion of the opinion was founded on basic principles of contract law, prior analyses by the OCC, administrative law, and the case law described further below.

Option Contracts are not Multi-Year Contracts

The Code of Federal Regulations, the U.S. Court of Federal Claims, the U.S. Court of Federal Appeals, the Armed Services Board of Contract Appeals, and the Civilian Board of Contract Appeals have conclusively decided that option contracts are not multi-year contracts.

¹ In his May 16, 2016 memo to the Committee on Economic and Community Development, former Corporation Counsel Paul Bargren informed the committee that “[c]ontract funding required over more than [one] budget year is also subject to Board approval, even for non-parks land. Wis. Stat. § 59.60(12).”

- Option contracts have a base term with one or more option periods,² whereas multi-year contracts cover a period of time greater than a year.³
- Option contracts require the consent of one or both parties to extend the base term or any option period,⁴ whereas multi-year contracts continue in effect for the entire multi-year term unless otherwise cancelled.⁵
- Under an option contract, the government is required to purchase the supplies or services during the base term only, whereas under a multi-year contract the government is required to purchase the entire multi-year procurement unless the contract is cancelled or the funds are not made available.⁶
- A standard option provision obliges the contractor to perform additional work if the government chooses to exercise the option, but it does not create a legal obligation on the part of the government to exercise the option and require the work.⁷
- If the government chooses to not exercise the option, the contract is cancelled.⁸

The ABM Contract is an Option Contract – not a Multi-Year Contract

As noted by the OCC in its March opinion, the contractual provisions themselves are more important in determining the type of contract than is the contract's characterization as an option or multi-year contract. (March 3, 2017 OCC opinion at 8, n.7). In Wisconsin, the interpretation of a contract presents a question of law that courts review independently. *Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki*, 2001 WI 51, ¶ 8, 243 Wis. 2d 305, 627 N.W.2d 444. The primary

² 48 C.F.R. § 2.101 (definition of Option); see also *Innovative (Pbx) Tel. Servs., Inc. v. Dep't of Veterans Affairs*, 08-1 B.C.A. ¶ 33854 (Apr. 30, 2008).

³ 48 C.F.R. § 17.103 (definition of Multi-Year); In *Appeal of Varo, Inc.*, ASBCA No. 13739, 70-1 BCA ¶ 8099, at 37, 627, the Armed Services Board of Contract Appeals specifically stated that “[a] multi-year [contract] is not a variant of the option procedure, but rather is a contract binding the government to purchase the entire multi-year procurement quantity unless (i) the requirement is cancelled, or (ii) the funds for the items are not made available” (citation omitted).

⁴ See also n. 2, *infra*.

⁵ *Appeal of Varo, Inc.*, ASBCA No. 13739, 70-1 BCA ¶ 8099, at 37, 627.

⁶ *Varo, Inc.*, ASBCA No. 13739, 70-1 BCA ¶ 8099, at 37, 627; *Beta Sys., Div. of Velcon Filters, Inc. v. United States*, 16 Cl. Ct. 219, 228 (Cl. Ct. 1989) (commenting that [t]he fact that the requirements for the years after the first year in a multi-year contract are unfunded does make a multi-year contract an option contract... The contract binds the government to purchase the entire multi-year procurement quantity and to fund the successive years.”); see also *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1183 n. 2 (Fed. Cir. 1988).

⁷ *Hi-Shear Tech. Corp. v. United States*, 53 Fed. Cl. 420, 435–36 (Fed. Cl. 2002), *aff'd*, 55 Fed. Cl. 418, (Fed. Cl. 2003), and *aff'd*, 356 F.3d 1372 (Fed. Cir. 2004).

⁸ See e.g., *Int'l Tel. & Tel., ITT Def. Commc'ns Div. v. United States*, 453 F.2d 1283, 1293 (Ct. Cl. 1972).

goal of contract construction is to determine and give effect to the parties' intention at the time the contract was made. *Id.*, ¶ 12. It is well established that if the terms of the contract are plain and unambiguous, it is the court's duty to construe the contract according to its plain meaning even though one of the parties may have construed it differently. *Id.* A contract is ambiguous if it is susceptible to more than one reasonable construction. *Kohler Co. v. Wixen*, 204 Wis. 2d 327, 335, 555 N.W.2d 640 (Ct. App.1996).

There can be no dispute that the ABM Contract is an option contract. Paragraph 3 of the contract, *Dates of Performance*, provides as follows:

The term of this Contract shall be from May 1, 2017 through December 31, 2017, or until such time as either party notifies the other of its termination, as provided herein. This Contract may be extended for four (4) additional one-year terms upon written notification from County forty-five (45) days prior [to] the expiration of the then current term.

The language of the ABM Contract is unambiguous. The base term of the contract is 8 months, "from May 1, 2017 through December 31, 2017" with four option periods, each 12 months in length. The County has the unilateral right to exercise the options. If the County chooses to exercise an option, it must do so by providing ABM written notice 45 days before the end of the base term or any additional option period. If the County chooses to not exercise the option, the contract is cancelled at the end of the base term or additional option period. Based upon the plain language of this contract, there can be no dispute that the ABM Contract is an option contract—not a multi-year contract.⁹

Further, because the ABM Contract is an option contract, the County is only required to purchase ABM's services during the base term, which expires December 31, 2017. Therefore, the provisions of Wis. Stat. Section 59.60(12) that require County Board approval for contracts funded with appropriations from future fiscal years do not apply.¹⁰

⁹ In *Innovative (Pbx) Tel. Servs., Inc. v. Dep't of Veterans Affairs*, 08-1 B.C.A. ¶ 33854 (Apr. 30, 2008), the Civilian Board of Contract Appeals (CBCA) heard an appeal from a contractor who took the position that its contract with the Department of Veterans Affairs (VA) was a multi-year contract. The contract had a base term of one year with nine option periods, which the VA had the option of exercising. If an option was exercised, the contractor was obligated to provide extra equipment and maintain the telephone system for the period of the option at the already agreed upon prices set forth in schedules contained in the contract.

The CBCA noted that, like in Wisconsin, it is well established "that the language of a contract must be given that meaning that would be derived from the contract by a reasonable [sic] intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). When the contract language is unambiguous, a court's inquiry ends, and the plain contract language controls. *Textron Defense Sys. v. Widnall*, 143 F.3d 1465, 1469 (Fed. Cir. 1998).

Under the standard option clause language contained in the contract, the CBCA found that the VA, at its discretion, had a broad, unilateral right either to exercise the option for the first option period or not to exercise it. The CBCA, therefore, decided that based upon the plain language of the contract "there was no compelling evidence to support an argument that this was a multi-year contract." *Innovative (Pbx) Tel. Servs., Inc.*, 08-1 B.C.A. ¶ 33854 (Apr. 30, 2008).

¹⁰ If the department chooses to exercise an option, e.g. FY 2018, then the County will be obligated to fund the additional option term and the department must show the Comptroller's Office that it has funds available before any

Daisy-Chaining

For contracting purposes, daisy-chaining refers to entering into the same contract with the same vendor on a recurring basis. Typically, the contract is an annual contract whereby each year the contract is *newly* executed. Daisy-chaining applies only to those contracts that are subject to the required County Board review process under Wis. Stat. Section 59.52(31)(c). Wisconsin Stat. Section 59.52(31)(c) provides that “[a]ny single contract, or *group of contracts between the same parties* which generally relate to the same transaction, with a value or aggregate value of more than \$300,000, to which a county is a party and which satisfies any other statutory requirements, may take effect only if it is approved by a vote of the board” (emphasis added). Therefore, once the aggregate value of daisy-chained contracts exceeds \$300,000, County Board approval is required.

Daisy-chaining, however, does not apply to contracts under the jurisdiction of the County Executive. Pursuant to Wis. Stat. Section 59.52(31)(e), contracts entered into by the Executive under Wis. Stat. Section 59.17(2)(b)3. are not subject to the County Board review process under Wis. Stat. Section 59.52(31)(c). Wisconsin Stat. Section 59.17(2)(b)3. provides that the County Executive can exercise the authority that the Board would otherwise have under Wis. Stat. Section 59.52(6) for non-park property. Wisconsin Stat. Section 59.52(6) says, among other things, that the authority the Board had (and which is now given to the Executive) is to improve, equip, operate, and maintain all buildings on non-park property. The ABM Contract falls within this classification. The contract is for janitorial services at certain facilities maintained by DAS-FM. It is not related to park property and is directly related to Milwaukee County property. Therefore, under the exemption provided in Wis. Stat. Section 59.52(31)(e), the ABM Contract is not subject to the County Board review process under Wis. Stat. Section 59.52(31)(c).

payments are issued. See Wis. Stat. § 59.255(e). However, pursuant to paragraph 16 of the contract, *Unrestricted Right of Termination by County*, if the County Board decides not to appropriate funding for completion of the contract, the contract is cancelled.

Both the department and the County Board should be mindful that a failure to exercise an option or a failure to appropriate funding may give rise to a breach of contract claim if the failure to exercise the option or appropriate the funding was in bad faith. See *Ho v. United States*, 49 Fed. Cl. 96, 107 (2001), *affd*, 30 Fed. Appx. 964 (Fed. Cir. 2002).