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To: Honorable Supervisors of the  
Committee on Transportation, Public Works and Transit and  
Committee on Economic and Community Development

From: Paul Bargren  
Paul D. Kuglitsch

Date: November 25, 2013

Re: Residency goals in public contracts

On October 29, 2013, members of the Committee on Transportation, Public Works and Transit referred several questions to this office regarding the residency goals in Milwaukee County public contracts and potential conflict with federal or state law. On November 7, 2013, the Committee on Economic and Community Development joined in the referral.

Based on the questions of the committee and resulting research, we are able to offer several additional thoughts on the topics raised.

### **Background information**

In July 2013, the Audit Services Division provided its most recent evaluation of compliance by contractors in achieving percentage goals of gross payroll paid to Milwaukee County residents.

In its October 7, 2013, response to the audit report, the Architecture, Engineering & Environmental Services Section set out several steps taken to improve compliance but also noted information from this office that identified the potential statutory conflicts.

The residency goal is found in a May 31, 1995 resolution of the County Board stating that the Board

does hereby support a goal of achieving and maintaining 50% Milwaukee County residency on County public works construction projects whereby 50% of the salaries to be paid to workers on County construction projects go to Milwaukee County residents.

Annual reports by Audit and public works officials are required.

AE&ES establishes a residency goal for each project before the requests for bids are issued and, if the goal is less than 50%, documents the reasons why a goal of less than 50% was recommended. Contractors who bid must submit an affidavit acknowledging the residency goal provisions of the contract. Once the project is underway, each contractor invoice must include required residency forms or the invoice will not be processed. AE&ES is in the process of improving its methods for verifying payroll residency data.

AE&ES issues a warning letter to contractors who appear to be falling short of 50% on a given project. The letter requires the contractor to respond immediately with a strategy to improve performance before the project is complete.

A contractor who fails to achieve the project's residency goal is issued a letter warning that if the contractor fails to meet the residency goal on a future contract, the County will take one or more of the following actions:

- 1 – Withhold payment on the contract.
- 2 – Terminate or cancel the contract, in whole or in part.
- 3 – Consider possible debarment of the contractor from bidding for a period of up to two years.
- 4 – Any other remedy available to the County at law or in equity.

According to AE&ES, there have not been any instances in which there has been a second failure by a contractor to achieve a residency goal. AE&ES also points out there is a relatively small pool of contractors willing to bid on County projects and appears to believe there is some chance that no bids will be received on some projects if contractors view residency requirements as too harsh.

Notably, the US Department of Transportation prohibits use of “geographical preferences in the evaluation of bids or proposals” in projects using DOT funds. 49 CFR § 18.36(c)(2). Therefore, Milwaukee County does not use or enforce residency requirements in USDOT-funded projects. The federal prohibition on residency requirements applies to most or all public works contracts at General Mitchell International Airport, Congestion Mitigation and Air Quality Improvement (CMAQ) Program projects, and transit projects.

For illustration, the County awarded 44 contracts for a total of \$72.6 million in the first 10 months of 2013. That included \$47.7 million in 16 airport contracts and \$24.9 million in 28 non-airport contracts. Of the 44 contracts awarded, 26 included a 50% residency goal. Numbers appear to vary quite a bit from year to year, but these are representative.

### **Questions from supervisors**

1. What, if any, are the effects of Wis. Stat. §§ 66.0901(1m)(a)2 and (1m)(b), including the requirement that a public contract be awarded to the “lowest responsible bidder”?
2. What steps are available to Milwaukee County, within the law, to force or persuade contractors to use County residents on County-funded work?
3. What enforcement mechanisms are available to the County where contractors do not meet the goal?

Each of these is addressed in turn.

#### **1. What, if any, are the effects of Wis. Stat. §§ 66.0901(1m)?**

To summarize, while § 66.0901(1m) speaks to the residency of the contractor on a public works project, it does not address the residency of the contractor's employees. Other provisions in the state statutes continue to authorize the County to impose employee residency goals or requirements on public works projects where not barred by federal restrictions.

Section 66.0901(1m) states:

**(1m) METHOD OF BIDDING.** (a) Except when necessary to secure federal aid, whenever a political subdivision lets a public contract by bidding, the political subdivision shall comply with all of the following:

1. The bidding shall be on the basis of sealed competitive bids.
2. The contract shall be awarded to the lowest responsible bidder.

(b) Except when necessary to secure federal aid, a political subdivision may not use a bidding method that gives preference based on the geographic location of the bidder or that uses criteria other than the lowest responsible bidder in awarding a contract.

In sub. (1m), "political subdivision" is a defined term that includes counties. *See* § 66.0901(1)(bm). "Public contract" is also a defined term and "means a contract for the construction, execution, repair, remodeling or improvement of a public work or building or for the furnishing of supplies or material of any kind, proposals for which are required to be advertised by law." § 66.0901(1)(c). *See also* § 59.52(32), making county public works contracts greater than \$25,000 subject to § 66.0901.

The first relevant point is found in sub. (1m)(b), where the statute prohibits a bidding method that gives preference based on "the geographic location of the bidder." We understand this provision was included to counter a City of Milwaukee requirement that had given preference to contractors located in the City. The requirement addresses only the *bidder's* residency, and not the residency of the bidder's *employees*. There are no reported court decisions construing this language, and it is not ambiguous. Therefore, it can be taken at face value, and it does not prohibit an employee-based provision like the County's.

Support for a residency goal or requirement is also found in § 59.01, the general grant of powers to counties, which includes the power "to make such contracts ... as are necessary and proper to the exercise of the powers and privileges granted" to the County. A residency goal or requirement can be viewed as a contract provision that is "necessary and proper" to advance County interests.<sup>1</sup> And even though counties are now specifically prohibited from imposing

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<sup>1</sup> A counter argument could be made based on the sort of statutory construction approach some have used to interpret, for example, Act 14. The statutes originally specifically allowed counties and municipalities to issue RFPs including requirements for employee residence and "other such matters ... require[d] for the protection and welfare of the public." *See, e.g.*, 70 Wis. Op. Atty. Gen. 64 (1981 WL 157229). However, Chapter 66 has been rewritten to limit such language only to municipalities, excluding counties. *See* § 66.0901(2), (6). One could argue this was a decision by the legislature to prevent counties from including residence or "other such matters" in bids. However, § 66.0901(1m) is more recent, addresses residency, and does so in Courthouse, Room 303 • 901 North 9<sup>th</sup> Street • Milwaukee, WI 53233 • Telephone: 414-278-4300 • FAX: 414-223-1283

residency provisions for their own employees, *see* § 66.0502 (effective July 2, 2013), the County’s ability to exercise “organizational or administrative” home rule powers, *see* § 59.03(1), still lends support for including residency provisions in public contracts.

The second relevant point in § 66.0901 is the requirement to award the bid to the “lowest responsible bidder.” However, this term refers to more than financial responsibility and can fairly be read to include factors such as employee residency that are not otherwise barred by statute. Wisconsin courts have ruled that governments letting bids have wide discretion in determining which bidders are “responsible.” *See Aqua-Tech., Inc. v. Como Lake Park & Rehabilitation Dist.*, 71 Wis.2d 541, 549 (1976); *Menzl v. City of Milwaukee*, 32 Wis.2d 266 (1966); *D.M.K., Inc., v. Town of Pittsfield*, 2006 WI App 40, ¶ 13, 290 Wis. 2d 474, 711 N.W.2d 672. Consistently, Milwaukee County Ordinance states:

The concept of lowest responsible bidder includes the definition of two (2) terms - responsible and responsive. The term "responsible" refers to the bidder's integrity and reliability. Bidders who have the structure and ability to perform as promised and to stand behind what they deliver to the county are responsible bidders. The term "responsive" refers to the bidder's ability to meet the contract requirements.

MCO 43.03(2). Criteria for determining the lowest responsible and responsive bidder include “[d]emonstrated ability to comply in situations where the award is contingent on special considerations subject to the nature of the contract,” such as residency goals. *See* MCO 43.03(3)(e).

Although there is no Wisconsin case on point, courts elsewhere have expressly found that evaluation of the lowest responsible bidder can take into account the bidder’s compliance with affirmative action hiring requirements that are made part of the project. *See Associated General Contractors of California, Inc., v. City and County of San Francisco*, 813 F.2d 922, 943 (9th Cir. 1987) (upholding local business preference in bidding). *See also Southwest Washington, Nat'l Electrical Contractor Ass'n v. Pierce County*, 100 Wash.2d 109, 115, 667 P.2d 1092, 1096 (1983) (“the word ‘responsible’ [includes] a legislative intent that ‘the social responsibility of the contractor should also be a concern’ ”), quoting *S.N. Nielsen Co. v. Public Bldg. Comm’n*, 410 N.E.2d 40 (Ill. 1980); *Appeal of Associated Sign & Post, Inc.*, 485 N.E.2d 917, 924 (Ind. Ct. App. 1985) (“examination of a bidder's affirmative action plans or proposals” is justified “when determining who is the lowest responsible bid”); *Wallace C. Drennan, Inc., v. Sewerage & Water Bd. of New Orleans*, 798 So. 2d 1167, 1174 (La. Ct. App 2001) (upholding a DBE goal as part of “responsible bidder” determination).

The final relevant point in sub. 1(m) is that it waives its own requirements as necessary for a political subdivision to obtain federal aid on a project. Therefore if (contrary to the DOT standards, for example) a contractor residency requirement is a condition of obtaining federal aid, the residency requirement can be imposed. We are not aware of any federal programs that impose a local contractor residency requirement.

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such a way as not to limit the County’s ability to impose an employee residency condition in contracts.

**2. What steps are available to Milwaukee County, within the law, to force or persuade contractors to use County residents on County-funded work?**

Under the analysis of Wis. Stat. § 66.0901, above, Milwaukee County can continue to use the residency goals found in the May 31, 1995, Resolution to promote the use of county residents as contractor employees on county-funded public works projects. Modifying the resolution to impose this as a requirement rather than a goal would also be a possibility. In that case, in order to meet constitutional demands, significant data would need to be collected to create the required legal justification for the requirement, since it discriminates against out-of-county employees. The data would need to show that the requirement is properly tailored to address inequities. If the Board wishes to continue the residency goal or to create a residency requirement, we would recommend that it be adopted into ordinance rather than relying only on the 1995 resolution.

**3. What enforcement mechanisms are available to the County where contractors do not meet the goal?**

Because residency is a goal, not a requirement, some caution needs to be exercised in addressing it. The best approach is to consider past performance, because Wisconsin's Court of Appeals has found that concern about performance of past contracts is grounds for finding that a contractor is not a responsible bidder on a new contract. *D.M.K.*, 2006 WI App 40, ¶ 19 (upholding town's "ultimate finding that [contractor] was not a responsible bidder" based on "numerous legitimate concerns about [the contractor's] performance of prior contracts"). Therefore, a contractor who has failed to meet the residency goal on one or more past contracts could be excluded from future bidding.

More immediate remedies might be too drastic. For example, to break a contract in mid-job or to refuse to pay a contractor for work performed could lead to breach of contract claims against the county that could be difficult to defend, given that the 50% residency is a goal rather than a firm requirement. At a minimum, to be enforceable, specific progress requirements and specified penalties for failing to meet them would need to be incorporated into the contracts, rather than simply stating generally that payment might be withheld.

1 By Supervisors Krug and Diliberti

2 AN AMENDED RESOLUTION

3 WHEREAS, Milwaukee County annually awards millions of dollars in public works  
4 contracts for construction and major maintenance projects which have been approved by  
5 the County Board during the annual budget process; and

6 WHEREAS, firms which receive public works contracts from Milwaukee County  
7 through a competitive bidding process or as a result of a Request for Proposal review  
8 process employ hundreds of workers to complete the projects; and

9 WHEREAS, the impact of Milwaukee County public works contracts on the local  
10 economy could produce a significant employment benefit to the area if a number of the  
11 workers employed by firms doing projects for the County were Milwaukee County  
12 residents; and

13 WHEREAS, it would be beneficial to strive to achieve a goal of 50% of County  
14 construction work being done by workers who live in Milwaukee County; now, therefore

15 BE IT RESOLVED that the Milwaukee County Board of Supervisors does hereby  
16 support a goal of achieving and maintaining 50% Milwaukee County residency on County  
17 public works construction projects whereby 50% of the salaries to be paid to workers on  
18 County construction projects go to Milwaukee County residents; and

19 BE IT FURTHER RESOLVED, that the Director of Public Works in cooperation with  
20 the Department of Audit shall report annually in February to the Transportation and Public  
21 Works Committee on the previous year's percentage of Milwaukee County residents  
22 working on County construction projects.

23 **FISCAL NOTE:** Adoption of this resolution will not require an expenditure of funds but  
24 an expenditure of staff time will be required to compile the annual  
25 reporting information.

26 AM.RES  
27 May 31, 1995