



## OFFICE OF CORPORATION COUNSEL

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PAUL BARGREN  
Corporation Counsel

MARK A. GRADY  
COLLEEN A. FOLEY  
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ  
MOLLY J. ZILLIG  
ALAN M. POLAN  
JENNIFER K. RHODES  
DEWEY B. MARTIN  
JAMES M. CARROLL  
PAUL D. KUGLITSCH  
KATHRYN M. WEST  
JULIE P. WILSON  
Assistant Corporation Counsel

Date: April 17, 2015

To: Madam Chair and Honorable Supervisors

cc: County Clerk Czarnecki

From: Paul Bargren *PB*  
Corporation Counsel

Re: Matters Referred to Corporation Counsel

At its meeting of March 26, 2015, acting pursuant to Milwaukee County General Ordinance 1.15, your honorable body referred Item 70, File 15-98, to me on the questions set out below.<sup>1</sup> One question addresses the legal relationship between the Milwaukee Art Museum and the County. The remaining three questions deal with Requests for Proposals (“RFPs”), including the RFP described in File 15-98. My responses follow a brief background section.

### **Background**

The operative proposal in File 15-98 is Parks, Energy & Environment Committee Substitute Resolution 2, recommended for adoption by the Committee.

The Substitute would authorize the Department of Administrative Services – Procurement to issue an RFP for the O’Donnell Park parking operation and another RFP “for the redevelopment of the entire O’Donnell Park Parcel,” subject to the parks-only restriction on the northern half of the parcel. Notably, the development RFP would seek not just the highest sale price for the land “but rather should seek development proposals which will provide the greatest future benefit in jobs, tax base and image for the community, green space[ ] and green design, as well as, a fair price.”

Thus it appears responses to the development RFP could vary widely in what they might offer the County in return for acquiring O’Donnell. Just as an example, one proposer might offer a high cash purchase price, one might offer substantial job development, and another might offer a signature private, taxable skyscraper. All would be responsive to the RFP.<sup>2</sup>

A related File, File 15-260, that was laid over by the Board on March 26, 2015, had identified the Milwaukee Art Museum as a potential preferred acquirer of O’Donnell Park.

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<sup>1</sup> Meeting tape 2:38:51 – 2:58:54.

<sup>2</sup> Other requirements would be expected to be met in all responses, such as minimum levels of DBE participation and resident hiring.

## Questions Referred

### I. **WHAT IS THE LEGAL RELATIONSHIP BETWEEN THE MILWAUKEE ART MUSEUM AND MILWAUKEE COUNTY?**

Milwaukee Art Museum, Inc. (“MAM”) is organized as a non-profit, charitable corporation, separate and apart from Milwaukee County. Per its by-laws, it is governed by a Board of Trustees. Up to 64 Trustees are elected by MAM members or are otherwise affiliated with the Museum and two Trustees are County Board members, currently Supervisors Jursik and Weddle. Not all spots are filled. The 2013 MAM Annual Report showed 48 current Trustees.

The County built the Saarinen Building as a war memorial. It opened in 1957 with parts of it housing what is now the Art Museum. MAM paid then for certain improvements to the building. Milwaukee County War Memorial, Inc., (“WMC”) is the prime tenant and manager. WMC is also organized as a non-profit, charitable corporation, governed by 15 Trustees; two are appointed by the County Board (currently Matthew Flynn and Bill Christofferson), and one is a County Board member, currently Supervisor Weishan.

In 1975, MAM built and paid for the Kahler Addition to the Saarinen Building and then donated the Kahler Addition to the County.

In 1996, the County (through WMC), agreed to provide guaranteed funding to MAM for seven years to support MAM’s fundraising for the Calatrava Addition. MAM built and still owns the Calatrava Addition.

Effective October 1, 2013, the County, WMC and MAM executed a set of five new agreements, including a Museum Lease and a Development Agreement, to replace all prior arrangements.

Under the 2013 Development Agreement, MAM is building the new East Atrium addition to the Kahler Building and will donate it to the County. Both the Museum and the County, meanwhile, are making related repairs and improvements to the Kahler and Saarinen buildings. The projects are underway, with MAM’s cost at over \$15 million and the County’s at over \$10 million.

Under the 2013 Museum Lease, the County leases the following to MAM:

- Land underlying most of the Calatrava Addition, access drive and fountain. The remainder of those facilities are on adjoining State land.
- The entire Kahler Addition.
- The East Atrium Addition, once complete.
- In the Saarinen Building, the museum offices, the docent area, and the African and European galleries on the lower rear floors of the building, tying into the Kahler Addition.
- The Sculpture Court Enclosure Space, which is interior art gallery space resulting from enclosure of the outdoor sculpture court as part of the current construction.
- Pedestrian Bridge Air Rights for the Calatrava Bridge over Lincoln Memorial Drive.
- The right to use the parking lots on the North Tract at current rates.

MAM receives the space and land rent-free from the County, plus an annual contribution from the County guaranteed at \$1.1 million through 2023 and subject to negotiation after that. The lease runs through 2022 with three 25-year extensions available at MAM's option. The County is responsible for capital and shoreline maintenance and MAM is responsible for utility costs and routine maintenance.

Under its own 2013 lease from the County, WMC occupies the remainder of the space in the Saarinen Building, including the lobbies, Veterans Courtyard, Memorial Hall, the third and fourth floors, and the roof. WMC also leases the "North Tract," which is the parking lots and open land north of the Saarinen Building and Kahler Addition. WMC collects parking fees from the lots. WMC receives its space rent-free from the County, plus an annual contribution from the County guaranteed at \$486,000 through 2023 and subject to negotiation thereafter. The lease runs through 2022 with three 25-year extensions available at WMC's option. The County is responsible for capital maintenance and WMC is responsible for utility costs and routine maintenance.

WMC and MAM have agreed to cooperate in furthering the purpose of the War Memorial to honor service veterans including through promoting the arts. WMC has the exclusive right to use and rent out the Veterans Courtyard enclosed by the Saarinen Building and the Fitch Plaza (the roof of the Kahler Addition and the roof of the new East Atrium Addition) for events. WMC's control of those areas "is a significant source of revenue to WMC," according to the Cooperation Agreement. Parking lot revenue from the North Tract is also significant for WMC. WMC and MAM cooperate on making their spaces available to each other for a certain number of events each year rent-free. They sometimes cooperate on promotions. MAM provides some free event, fundraising and exhibit advice to WMC.

MAM provides a fire safety system and an alarm system for the Kahler, East Atrium and Saarinen buildings, charging WMC a portion of the cost. WMC and MAM prorate insurance.

Both WMC and MAM uses are subject to the County's public trust obligations because the buildings are on filled lakebed.

## **II. HOW ARE RESPONSES TO AN RFP EVALUATED IF THE RESPONSES CONTAIN DIFFERENT TERMS?**

An RFP typically sets out detailed evaluation criteria, which are then scored by a panel. As an example, one of 11 criteria in the Park East Rolling RFP is "Project Description & Design," which includes but is not limited to "the quality of materials proposed and aesthetic design, and whether the design is consistent with the Park East Redevelopment Plan." If the various proposers responding to an RFP offer different sorts of terms in their responses, the panel of evaluators would rate all of the evaluation criteria against any of the terms in a proposal that apply to the criteria in order to come up with an overall score for the proposal. Evaluators may sometimes be able to ask for additional information, depending on how the RFP is crafted.

That said, the less detailed the evaluation criteria are, and the more they seek varied sorts of responses sought (jobs vs price, for example), the more difficult it will be to compare proposals that are substantially different and rank them against each other. It could be said that the RFP described in File 15-98 more closely resembles an "Request for Information," *see* MCO 32.96(4)(c), seeking available concepts rather than asking for firm proposals that could form the basis of an actual contract as an RFP is intended to do.

### **III. CAN THE COUNTY BOARD PROVIDE INPUT INTO THE TERMS OF AN RFP BEFORE IT IS CIRCULATED TO POTENTIAL PROPOSERS?**

The Board can pass a resolution that includes terms it expects to see in an RFP issued by the administration, as it did in File 15-98. By putting its preferred terms on record, the Board is alerting the administration that a proposed sale that did not satisfy those terms might not gain the Board's support.

### **IV. HOW ARE RESPONSES TO AN RFP PRESENTED TO THE BOARD?**

As supervisors are aware, when a proposal is presented by the administration “[w]ith regard to the sale or lease of property,” “[t]he county board may only approve or reject the contract as negotiated by the county executive.” Wis. Stat. § 59.17(2)(b)3. And it is the Executive who “shall administer, supervise and direct ... any person who negotiates on behalf of the county.” Wis. Stat. § 59.17(2)(b)1.

Thus only one response to an RFP will be recommended by the administration to the Board for approval. However, under open records laws, the full details of the recommended response as well as the full details of any other responses will also be made public once the notice of intent to award is issued by the administration to the winning proposer. This information may allow supervisors to suggest that the administration attempt to negotiate additional elements into the recommended proposal. However, the Board itself cannot attempt to insert such elements into the negotiated final proposal. The Board's action is limited to voting down the final proposal if it deems the final proposal omits desired elements.