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TO: Michael Mayo, Sr., Chair – Transportation, Public Works
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FROM: Margaret C. Daun, Acting Corporation Counsel *MD*
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CC: County Board Chairman Lipscomb
County Executive Abele
Scott A. Manske, Comptroller

RE: File No. 17-69: Follow-up request regarding contract authority for professional
services contracts and procurement services contracts under Chapter 32 of the
Milwaukee County Ordinances

DATE: March 3, 2017

On January 18, 2017, the Transportation, Public Works & Transit Committee received an informational report related to the operation of airport parking facilities and ground transportation. At that meeting, Supervisor Dimitrijevic requested of the Office of Corporation Counsel ("OCC") an opinion interpreting Milwaukee County Ordinance Chapter 32 regarding procurement services contracts, as well as professional services contracts, in light of 2015 Wis. Act 55 ("Act 55").

Recent determinations by the OCC and the Comptroller's Office regarding contracting authority have been guided by the many prior formal and informal legal opinions issued by the OCC since the passage of Act 55, as well as a chart summarizing that guidance prepared by the Comptroller's Office dated May 11, 2016 (attached hereto as Ex. 1). *See also* Exs. 2, 4-10 attached to Opinion, *infra*. However, to date, neither the OCC nor Comptroller's Office (nor the Procurement Division) has addressed Chapter 32 of the County's ordinances in light of Act 55.

As explained in the Opinion issued contemporaneously with this guidance entitled "Conflicts Created by Act 55 Related to the Scope of Board and County Executive Authority" ("Opinion"), the OCC identified numerous express and implicit conflicts within Chapter 59 of the state statutes following the adoption of Act 55 that ultimately require resolution from an external entity. In addition, the Opinion also observed that notwithstanding those contradictions, the plain language of nearly every subsection of Wis. Stat. section 59.52(6) addresses both real property and personal property (or refers generically to "property"). *See* Opinion at § I, p. 3; § II.C.-D. pp.5-9; n.6, p.7; n.8, p. 11. Therefore, it would improperly fly in the face of the statute's plain language and legislative intent to exclude from the county executive's authority the power to contract regarding non-park personal property, in addition to real property, buildings, and facilities, because

the statutory changes in Act 55 make that unqualified delegation to the executive. *Id.* See also P. Bargren Op., July 8, 2015, at p. 2 (“concerning county real estate and personal property”), attached as Ex. 4 to Opinion.

Given the foregoing, the recommendations in the Opinion, and the pending request from Supervisor Dimitrijevic, the OCC seeks to provide advice that adheres to the statute’s plain language, while maintaining the status quo as much as practicable. To that end, and to at least temporarily resolve the questions posed in the pending request, the OCC respectfully recommends the below-listed changes to Exhibit 1, the Comptroller’s chart dated May 11, 2016. The changes reflect the clear intent of the legislature, noted above and in the Opinion, to delegate to the executive not only the power to contract regarding non-park land, but also personal property,¹ subject to certain limits as denoted below (*see* * and ^). Attached to this guidance is Exhibit 2, which reflects these changes in an updated chart dated March 3, 2017.

Importantly, these changes do not materially alter the status quo, except to make clear that the executive may contract for procurement goods unilaterally, *unless* the contract is multi-year (to be determined by the OCC and Comptroller). These changes also clarify, but do not materially alter, the analysis that has been required since the issuance of the chart in May of 2016 as to all services contracts – whether a procurement or professional services contract – specifically, the executive may unilaterally contract for services *only if* the contract is (a) related to county personal property or land not zoned as park/buildings/facilities (to be determined by the OCC); and (b) not multi-year (to be determined by the OCC and Comptroller).²

These changes are being put forward after consultation and cooperation with the Comptroller’s Office.

- The heading of section I amended to state, “If the contract relates to land zoned as park (but not the Transit Center parcel at 909 E. Michigan Street) or if the contract is not related to county non-park personal property, buildings, facilities, or real estate”
- The heading of section II amended to state, “If the contract is related to county non-park personal property, buildings, facilities or real estate or the Transit Center Parcel at 909 E. Michigan Street”

¹ Black’s Law Dictionary, 7th ed. (1999) at 1233, defines personal property as, “[a]ny movable or intangible thing that is subject to ownership and not classified as real property.” In short, personal property is anything that can be owned or used that is not real estate, including both tangible and intangible things. See Wis. Stat. §§ 990.01(27); 70.03; 70.04; *In re Estate of Larson*, 196 Wis. 2d 231, 235, 538 N.W.2d 802, 803 (Ct. App. 1995) (“bank deposits, checks, annuities and trust agreements are all ... intangible personal property. . . . This conclusion is consistent with the law defining tangible and intangible personal property in other areas of the law, as in construing intangible personal property to include cash.”); *Acharya v. Carroll*, 152 Wis. 2d 330, 335-36, 448 N.W.2d 275, 278 (Ct. App. 1989).

² In the past, services contracts could be “put through” procurement to attempt to evade County Board review. This artifice is strongly discouraged and now, under this guidance, should have no impact on whether the board actually reviews the contract. If the services contract is “related to” county property (as determined by the OCC), then it is subject to review only if multi-year. Inversely, if the services contract is not “related to” county property (as determined by the OCC), then it is subject to review as outlined under I. of the attached chart.

- The sentences following the * edited to state, “A contract involving county personal property or land not zoned as park/buildings/facilities is not subject to CB review only if it uses funds from adopted fiscal years. Corporation counsel in conjunction with the Comptroller’s Office will determine whether contracts meet this criteria.”
- A ^ added to “Professional Services – Operating*^” and “Professional Services – Capital*^”
- A new paragraph added after the second table that states, “^ A contract for professional services is not subject to CB review only if it is related to county personal property or land not zoned as park/buildings/facilities. Corporation counsel will determine whether professional services contracts meet this criteria.” (*See also* n.6, p. 7 of the Opinion.)
- Point 5 of second table amended to more clearly state: “Procurement – Services and Other Non-Professional Services*^.” This change does not alter the current treatment of these contracts – i.e., subject only to section 59.60(12), meaning only a multi-year procurement contract for services will require board approval, without the necessity of an ad hoc analysis of each procurement services contract to determine that it is “related to county personal property, land not zoned as park, buildings, or facilities.”
- Added a new point 6 to the second table titled: “Procurement – Goods*,” which will make clear that like procurement services contracts, procurement contracts for goods are subject only to 59.60(12), meaning that only a multi-year procurement contract for goods will require board approval.
- Renumbered items 6, 7, 8 to items 7, 8, and 9 of the second table.
- The examples at the bottom of the May 11, 2016 chart are stricken.

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