



**Audit of Contracts
With Former City Employees**

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City Comptroller
City of Milwaukee, Wisconsin

July 2005

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Office of the Comptroller
July 15, 2005

To the Honorable
the Common Council
City of Milwaukee

Dear Council Members:

The attached report presents the results of our Audit of Contracts With Former City Employees to determine whether they comply with City and Internal Revenue Service requirements. The IRS has extensive criteria for determining whether such contracts should be considered employment contracts for payroll tax purposes. Improper classification could result in IRS claims against the City for back payroll taxes and penalties, and/or litigation over employment benefits.

The audit found no improper classification of workers. However, many of the contracting arrangements reviewed did not contain standard contract language to protect the City's interests. The audit recommends procedural changes to the services contracting process to ensure that all contracts are adequate to protect the City and that sufficient documentation is on file in the event of a challenge to the worker's status as a contractor.

Audit findings and recommendations are more fully discussed in the Audit Questions, Conclusions and Recommendations section of the report.

Appreciation is expressed for the cooperation extended to the auditors by the staff of the City departments involved in this audit, and for the assistance provided by the Office of the City Attorney and Department of Administration.

Sincerely,

W. MARTIN MORICS
Comptroller

I. Audit Scope and Objectives

The audit objective was to determine if contracts with former City employees meet Internal Revenue Service (IRS) guidelines for the applicability of payroll taxes. The review did not examine the process by which various City departments contracted for services with former employees.

Employees are subject to withholding of taxes from their pay, contractors are not. Former employees were reviewed rather than all contractors because workers continuing to perform the same or very similar duties as a contractor that they did as an employee present increased tax enforcement risks to the City. Should the IRS audit any of the contractors and determine that their classification is incorrect; the City could be liable for the employment taxes that it would have owed if the worker had been classified as an employee. This audit included only City of Milwaukee contracts; it did not include contracts issued by separate City entities such as RACM and HACM.

Individual vendors on the City's Accounts Payable vendor master file, with payments in 2003 and 2004 and social security numbers on file (entities other than individuals use employer identification numbers), were matched to the City's Human Resources Management System to find former employees. Seven former employees who had received contract payments of \$3,000 or more over the two years (payments ranged from \$3,100 to \$61,900) were selected for this audit. Contracting departments were contacted and appropriate staff interviewed to confirm the particulars of the contractor's services and to review available contract documents. The City departments involved are: Assessor, City Attorney, Employee Relations, Port, and Public Works.

The audit addresses the following questions:

- A. Are the former employees now working as contractors for the City properly classified for payroll tax purposes?
- B. Are the contractual arrangements adequate to protect the City's interests?

II. Background

Former City employees are prohibited by the City's Ethics Code from representing, for compensation, persons before City departments, commissions, or boards related to their former positions for a period of 12 months after employment ends. There is no prohibition against contracting for services with a former employee.

For tax purposes, workers are either employees or contractors. There are some very specific exceptions but they are not relevant to this audit. Employees are subject to withholding of taxes on their pay by the employer, who is responsible for forwarding the taxes to the state and federal taxing agencies. Contractors are not subject to withholding and must make their own tax payments to the taxing agencies.

The IRS has extensive guidelines for determining whether such contracts should be considered employment contracts for payroll tax purposes. Improper classification could result in IRS claims against the City for back payroll taxes and penalties, and/or litigation over employee benefits. Either the worker or the employer may request a review by the IRS if they feel the classification is not correct.

The IRS or the worker can challenge the classification (Appendix 1). As the United States Government Accountability Office (GAO), formerly the Government Accounting Office, reported in 1996 on Issues in Classifying Workers as Employees or Independent Contractors (GAO/T-GGD-96-130):

“The common law rules for classifying workers are unclear and subject to conflicting interpretations. Employers cannot be certain that their classification decisions will withstand challenges by IRS. If not upheld, they risk large retroactive tax assessments.”

Some of the conflicting interpretations arise from the competing objectives involved: contract workers generally mean reduced costs for employers due to their lack of employer-paid benefits; yet more contract workers also mean reduced tax collections since IRS studies have shown that independent contractors historically have a significantly lower rate of tax compliance than employees.

Should an employer's classification of workers as contractors be challenged and found to be incorrect, the employer is then subject to the back payroll taxes. In addition to the back taxes, penalties may be imposed, depending on the particular situation. There is

substantial case law pertaining to sanctions and penalties for organizations that treat workers as contractors for tax purposes but otherwise treat them as employees. The IRS published a list of 20 questions (Appendix 2) to assist in determining whether a worker was a contractor or an employee; however, there are no instructions on how to evaluate the answers.

In 1989 and 1990 the IRS audited Microsoft's use of contractors and determined that a substantial number of workers had been incorrectly classified as contractors. After the company changed its procedures to be in compliance with IRS guidelines, they were sued by many of the former contractors to obtain benefits commensurate with employee status. The cases were decided against the company. After this and several similar cases, the IRS expanded its guidelines to advise that all factors of the work situation are evaluated, with emphasis on the right to control the methods of work as being the dominant criterion. The actual determination of status is still a judgmental issue.

III. Audit Questions, Conclusions and Recommendations

A. Are the former City employees now working as contractors for the City properly classified for payroll tax purposes?

All the contractors in our sample were found to be properly classified. Determination of worker status is not a straightforward fitting of criteria to an individual, but rather an evaluation of the preponderance of the evidence relating to the work situation with no single criterion determining the outcome.

This is not to say that they would withstand a challenge from the IRS due to inadequate contractual arrangements, which is further discussed below.

B. Are the contractual arrangements adequate to protect the City's interests?

Improvement in user department contract administration is needed to adequately protect the City's interests. The audit found a lack of consistency in the contracting documents and a lack of consideration of potential conflicts with IRS guidelines for contract workers. Also, not all departments contacted had a copy of their agreement with the contractor in their files. The City is exposed to additional risks of litigation if contract scope and terms are not clearly described and reviewed by the City Attorney's Office.

Many of the standard clauses in the Department of Administration's (DOA) contract for services (Appendix 3) were not present, exposing the City to potential litigation. We are not aware of any pending legal disputes or prior adverse judgments against the City arising from any of these contractual situations.

When DOA handles the contracting arrangements at the request of another department, it uses a standard contract for services form which has been reviewed and approved by the City Attorney's Office. The audit found that departments that contracted directly without using DOA's services used a variety of contractual documents which varied greatly in their scope, terms, and conditions.

From the review of the contracting arrangements and related requests for payment, the audit concludes that more should be done to protect the City's interests, and that this increased protection could easily be achieved by requiring contracting departments to use the existing DOA Contract for Services (Appendix 3).

Recommendation 1: The Department of Administration should advise City departments to utilize the standard DOA Contract for Services whenever possible. In cases where the standard contract cannot be utilized, departments should be instructed to request the assistance of the City Attorney.

The standard DOA contract covers the following topics, which should be addressed in all service contracts:

- Description of services to be provided,
- Scope of services,
- Time period when the services are to be provided,
- Total amount of the contract,
- Parties to the contract,
- Conditions of performance and compensation,
- Conditions of payment,
- Method of payment,
- Defense of lawsuits,
- Indemnification required,
- Procedures for ending the contractual relationship (both for cause and for convenience of the City),
- Changes to the contract,

- Records to be kept,
- Conflict of interest,
- Prohibited discrimination,
- Audits and inspections,
- Compliance by the contractor with all federal, state, and local laws pertaining to the work performed.

Recommendation 2: The Department of Administration should advise City departments to use the IRS “20 questions list” to evaluate contracting arrangements. If departments have any questions or concerns regarding the contracting, they should consult the City Attorney.

Recommendation 3: The Department of Administration should advise City departments to retain a copy of the contract in their files, and submit a copy to the Comptroller’s Office to support invoices.

Additional risks to the City were noted during the review of contractor payments. Not all of the contractor invoices were complete in terms of identifying the specific services rendered, or did not record the department’s approval. Incomplete or inaccurate invoices could result in inaccurate, delayed, or erroneous payments. Clause IV of the DOA standard contract specifies that payment will be made “upon receipt of a properly submitted and approved invoice.”

Recommendation 4: The Department of Administration should advise City department that contractor invoices must completely identify the services performed, with an approving official’s signature certifying that the work was performed in accordance with the contract.

Appendix 1

**IRS form SS-8: Determination of Worker Status for Purposes of Federal
Employment Taxes and Income Tax Withholding**

Part I Behavioral Control

- 1 What specific training and/or instruction is the worker given by the firm?
- 2 How does the worker receive work assignments?
- 3 Who determines the methods by which the assignments are performed?
- 4 Who is the worker required to contact if problems or complaints arise and who is responsible for their resolution?
- 5 What types of reports are required from the worker? Attach examples.
- 6 Describe the worker's daily routine (i.e., schedule, hours, etc.).
- 7 At what location(s) does the worker perform services (e.g., firm's premises, own shop or office, home, customer's location, etc.)?
- 8 Describe any meetings the worker is required to attend and any penalties for not attending (e.g., sales meetings, monthly meetings, staff meetings, etc.).
- 9 Is the worker required to provide the services personally? Yes No
- 10 If substitutes or helpers are needed, who hires them?
- 11 If the worker hires the substitutes or helpers, is approval required? Yes No
If "Yes," by whom?
- 12 Who pays the substitutes or helpers?
- 13 Is the worker reimbursed if the worker pays the substitutes or helpers? Yes No
If "Yes," by whom?

Part II Financial Control

- 1 List the supplies, equipment, materials, and property provided by each party:
The firm
- The worker
- Other party
- 2 Does the worker lease equipment? Yes No
If "Yes," what are the terms of the lease? (Attach a copy or explanatory statement.)
- 3 What expenses are incurred by the worker in the performance of services for the firm?
- 4 Specify which, if any, expenses are reimbursed by:
The firm
- Other party
- 5 Type of pay the worker receives: Salary Commission Hourly Wage Piece Work
 Lump Sum Other (specify)
- If type of pay is commission, and the firm guarantees a minimum amount of pay, specify amount \$
- 6 Is the worker allowed a drawing account for advances? Yes No
If "Yes," how often?
- Specify any restrictions.
- 7 Whom does the customer pay? Firm Worker
If worker, does the worker pay the total amount to the firm? Yes No If "No," explain.
- 8 Does the firm carry worker's compensation insurance on the worker? Yes No
- 9 What economic loss or financial risk, if any, can the worker incur beyond the normal loss of salary (e.g., loss or damage of equipment, material, etc.)?

Part III Relationship of the Worker and Firm

- 1 List the benefits available to the worker (e.g., paid vacations, sick pay, pensions, bonuses)
- 2 Can the relationship be terminated by either party without incurring liability or penalty? Yes No
If "No," explain your answer.
- 3 Does the worker perform similar services for others? Yes No
If "Yes," is the worker required to get approval from the firm? Yes No
- 4 Describe any agreements prohibiting competition between the worker and the firm while the worker is performing services or during any later period. Attach any available documentation.
- 5 Is the worker a member of a union? Yes No
- 6 What type of advertising, if any, does the worker do (e.g., a business listing in a directory, business cards, etc.)? Provide copies, if applicable.
- 7 If the worker assembles or processes a product at home, who provides the materials and instructions or pattern?
- 8 What does the worker do with the finished product (e.g., return it to the firm, provide it to another party, or sell it)?
- 9 How does the firm represent the worker to its customers (e.g., employee, partner, representative, or contractor)?
- 10 If the worker no longer performs services for the firm, how did the relationship end?

Part IV For Service Providers or Salespersons—Complete this part if the worker provided a service directly to customers or is a salesperson.

- 1 What are the worker's responsibilities in soliciting new customers?
- 2 Who provides the worker with leads to prospective customers?
- 3 Describe any reporting requirements pertaining to the leads.
- 4 What terms and conditions of sale, if any, are required by the firm?
- 5 Are orders submitted to and subject to approval by the firm? Yes No
- 6 Who determines the worker's territory?
- 7 Did the worker pay for the privilege of serving customers on the route or in the territory? Yes No
If "Yes," whom did the worker pay?
- 8 If "Yes," how much did the worker pay? \$ _____
- 8 Where does the worker sell the product (e.g., in a home, retail establishment, etc.)?
- 9 List the product and/or services distributed by the worker (e.g., meat, vegetables, fruit, bakery products, beverages, or laundry or dry cleaning services). If more than one type of product and/or service is distributed, specify the principal one.
- 10 Does the worker sell life insurance full time? Yes No
- 11 Does the worker sell other types of insurance for the firm? Yes No
If "Yes," enter the percentage of the worker's total working time spent in selling other types of insurance. %
- 12 If the worker solicits orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments, enter the percentage of the worker's time spent in the solicitation. %
- 13 Is the merchandise purchased by the customers for resale or use in their business operations? Yes No
Describe the merchandise and state whether it is equipment installed on the customers' premises.

Part V Signature (see page 4)

Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.

Signature ► _____ Title ► _____ Date ► _____
(Type or print name below)

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose

Firms and workers file Form SS-8 to request a determination of the status of a worker for purposes of Federal employment taxes and income tax withholding.

A Form SS-8 determination may be requested only in order to resolve Federal tax matters. If Form SS-8 is submitted for a tax year for which the statute of limitations on the tax return has expired, a determination letter will not be issued. The statute of limitations expires 3 years from the due date of the tax return or the date filed, whichever is later.

The IRS does not issue a determination letter for proposed transactions or on hypothetical situations. We may, however, issue an information letter when it is considered appropriate.

Definition

Firm. For the purposes of this form, the term "firm" means any individual, business enterprise, organization, state, or other entity for which a worker has performed services. The firm may or may not have paid the worker directly for these services. **If the firm was not responsible for payment for services, be sure to enter the name, address, and employer identification number of the payer on the first page of Form SS-8 below the identifying information for the firm and the worker.**

The SS-8 Determination Process

The IRS will acknowledge the receipt of your Form SS-8. Because there are usually two (or more) parties who could be affected by a determination of employment status, the IRS attempts to get information from all parties involved by sending those parties blank Forms SS-8 for completion. The case will be assigned to a technician who will review the facts, apply the law, and render a decision. The technician may ask for additional information from the requestor, from other involved parties, or from third parties that could help clarify the work relationship before rendering a decision. The IRS will generally issue a formal determination to the firm or payer (if that is a different entity), and will send a copy to the worker. A determination letter applies only to a worker (or a class of workers) requesting it, and the decision is binding on the IRS. In certain cases, a formal determination will not be issued. Instead, an information letter may be issued. Although an information letter is advisory only and is not binding on the IRS, it may be used to assist the worker to fulfill his or her Federal tax obligations.

Neither the SS-8 determination process nor the review of any records in connection with the determination constitutes an examination (audit) of any Federal tax return. If the periods under consideration have previously been examined, the SS-8 determination process will not constitute a reexamination under IRS reopening procedures. Because this is not an examination of any Federal tax return, the appeal rights available in connection with an examination do not apply to an SS-8 determination. However, if you disagree with a determination and you have additional information concerning the work relationship that you believe was not previously considered, you may request that the determining office reconsider the determination.

Completing Form SS-8

Answer all questions as completely as possible. Attach additional sheets if you need more space. Provide information for all years the worker provided services for the firm. Determinations are based on the entire relationship between the firm and the worker.

Additional copies of this form may be obtained by calling 1-800-829-4933 or from the IRS website at www.irs.gov.

Fee

There is no fee for requesting an SS-8 determination letter.

Signature

Form SS-8 must be signed and dated by the taxpayer. A stamped signature will not be accepted.

The person who signs for a corporation must be an officer of the corporation who has personal knowledge of the facts. If the corporation is a member of an affiliated group filing a consolidated return, it must be signed by an officer of the common parent of the group.

The person signing for a trust, partnership, or limited liability company must be, respectively, a trustee, general partner, or member-manager who has personal knowledge of the facts.

Where To File

Send the completed Form SS-8 to the address listed below for the firm's location. However, for cases involving Federal agencies, send Form SS-8 to the Internal Revenue Service, Attn: CC:CORP:T:C, Ben Franklin Station, P.O. Box 7604, Washington, DC 20044.

Firm's location:

Send to:

Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming, American Samoa, Guam, Puerto Rico, U.S. Virgin Islands

Internal Revenue Service
SS-8 Determinations
P.O. Box 630
Stop 631
Holtsville, NY 11742-0630

Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, all other locations not listed

Internal Revenue Service
SS-8 Determinations
40 Lakemont Road
Newport, VT 05855-1555

Instructions for Workers

If you are requesting a determination for more than one firm, complete a separate Form SS-8 for each firm.



Form SS-8 is not a claim for refund of social security and Medicare taxes or Federal income tax withholding.

If the IRS determines that you are an employee, you are responsible for filing an amended return for any corrections related to this decision. A determination that a worker is an employee does not necessarily reduce any current or prior tax liability. For more information, call 1-800-829-1040.

Time for filing a claim for refund. Generally, you must file your claim for a credit or refund within 3 years from the date your original return was filed or within 2 years from the date the tax was paid, whichever is later.

Filing Form SS-8 does not prevent the expiration of the time in which a claim for a refund must be filed. If you are concerned about a refund, and the statute of limitations for filing a claim for refund for the year(s) at issue has not yet expired, you should file **Form 1040X**, Amended U.S. Individual Income Tax Return, to protect your statute of limitations. File a separate Form 1040X for each year.

On the Form 1040X you file, do not complete lines 1 through 24 on the form. Write "Protective Claim" at the top of the form, sign and date it. In addition, you should enter the following statement in Part II, Explanation of Changes to Income, Deductions, and Credits: "Filed Form SS-8 with the Internal Revenue Service Office in (Holtsville, NY; Newport, VT; or Washington, DC; as appropriate). By filing this protective claim, I reserve the right to file a claim for any refund that may be due after a determination of my employment tax status has been completed."

Filing Form SS-8 does not alter the requirement to timely file an income tax return. Do not delay filing your tax return in anticipation of an answer to your SS-8 request. In addition, if applicable, do not delay in responding to a request for payment while waiting for a determination of your worker status.

Instructions for Firms

If a **worker** has requested a determination of his or her status while working for you, you will receive a request from the IRS to complete a Form SS-8. In cases of this type, the IRS usually gives each party an opportunity to present a statement of the facts because any decision will affect the employment tax status of the parties. Failure to respond to this request will not prevent the IRS from issuing a determination letter based on the information he or she has made available so that the worker may fulfill his or her Federal tax obligations. However, the information that you provide is extremely valuable in determining the status of the worker.

If **you** are requesting a determination for a particular class of worker, complete the form for **one** individual who is representative of the class of workers whose status is in question. If you want a written determination for more than one class of workers, complete a separate Form SS-8 for one worker from each class whose status is typical of that class. A written determination for any worker will apply to other workers of the same class if the facts are not materially different for these workers. Please provide a list of names and addresses of all workers potentially affected by this determination.

If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker under section 530 of the 1978 Revenue Act. However, this relief provision cannot be

considered in conjunction with a Form SS-8 determination because the determination does not constitute an examination of any tax return. For more information regarding section 530 of the 1978 Revenue Act and to determine if you qualify for relief under this section, you may visit the IRS website at www.irs.gov.

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. This information will be used to determine the employment status of the worker(s) described on the form. Subtitle C, Employment Taxes, of the Internal Revenue Code imposes employment taxes on wages. Sections 3121(d), 3306(a), and 3401(c) and (d) and the related regulations define employee and employer for purposes of employment taxes imposed under Subtitle C. Section 6001 authorizes the IRS to request information needed to determine if a worker(s) or firm is subject to these taxes. Section 6109 requires you to provide your taxpayer identification number. Neither workers nor firms are required to request a status determination, but if you choose to do so, you must provide the information requested on this form. Failure to provide the requested information may prevent us from making a status determination. If any worker or the firm has requested a status determination and you are being asked to provide information for use in that determination, you are not required to provide the requested information. However, failure to provide such information will prevent the IRS from considering it in making the status determination. Providing false or fraudulent information may subject you to penalties. Routine uses of this information include providing it to the Department of Justice for use in civil and criminal litigation, to the Social Security Administration for the administration of social security programs, and to cities, states, and the District of Columbia for the administration of their tax laws. We may also disclose this information to Federal and state agencies to enforce Federal nontax criminal laws and to combat terrorism. We may provide this information to the affected worker(s) or the firm as part of the status determination process.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: **Recordkeeping**, 22 hrs.; **Learning about the law or the form**, 47 min.; and **Preparing and sending the form to the IRS**, 1 hr., 11 min. If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Tax Products Coordinating Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. **Do not** send the tax form to this address. Instead, see **Where To File** on page 4.



Appendix 2

IRS “20 questions” list

Summary of the 20 Common-Law Factors That Distinguish Employees From Independent Contractors

Workers are generally employees if they

- must comply with employer's instructions about the work;
- receive training from or at the direction of the employer;
- provide services that are integrated into the business;
- provide services that must be rendered personally;
- hire, supervise, and pay assistants for the employer;
- have a continuing working relationship with the employer;
- must follow set hours of work;
- work full-time for an employer;
- must do their work on the employer's premises;
- must do their work in a sequence set by the employer;
- must submit regular reports to the employer;
- receive payments of regular amounts at set intervals;
- receive payments for business and/or traveling expenses;
- rely on the employer to furnish tools and material;
- lack a major investment in resources for providing services;
- cannot make a profit or suffer a loss from the services;
- work for one employer at a time;
- do not offer their services to the general public;
- can be fired by the employer; or
- may quit work anytime without incurring liability.

Source: Exhibit 4640-1, Internal Revenue Manual 4600 (Employment Tax Procedures).

Appendix 3

DOA's sample Contract for Services

CBP-4(Rev. 08/25/03)

For (DOA) BUSINESS OPERATIONS DIVISION USE ONLY

**CONTRACT FOR SERVICES
PART I**

VENDOR CONTRACT NO.

DEPARTMENT:

City of Milwaukee
Department of Administration
Business Operations Division

DATE OF AWARD:

*The provisions of this contract have been reviewed
and approved by the Office of the City Attorney.*

REQUISITION NO.

Distribution
Original - Procurement
Services
Copy 1 - Contractor
Copy 2 - Comptroller
Copy 3 - Department

SAMPLE

SERVICE DESCRIPTION (General):

TIME OF PERFORMANCE:

TOTAL AMOUNT OF CONTRACT: Maximum Amount of Compensation Not to Exceed \$

THIS AGREEMENT, entered into by and between (hereinafter referred to as the "CONTRACTOR"),
and the City of Milwaukee, a municipal corporation of the State of Wisconsin (hereinafter referred to as the "CITY"),

Performance and schedules will be approved by , of the City of Milwaukee.

The following constitute the Contract documents. If there is a conflict or ambiguity, the Contract shall be governed by these listed documents in descending order of precedence.

- A. This Contract for Services
- B. Work may commence in accordance with the terms and conditions of this Contract after the CONTRACTOR has executed the Contract, and (a) been notified in writing to commence the Performance of Services, or (b) received from the CITY an original of the Contract that is complete and fully executed

WHEREAS, THE CONTRACTOR represents self as being capable, experienced and qualified to undertake and perform those certain services, as hereinafter set forth, as are required in accomplishing fulfillment of the obligations under the terms and conditions of this Contract as an independent entrepreneur and not as an employee of the CITY.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

- I. RETENTION OF SERVICES. The CITY hereby agrees to engage the CONTRACTOR and the CONTRACTOR hereby agrees to personally perform, as an independent contractor and not as an employee of the CITY, the services hereinafter set forth, all in accordance with the terms and conditions of this Contract. CONTRACTOR agrees time is of the essence and will meet all deadlines and any schedules as herein set forth.

II. REQUIREMENTS. The CONTRACTOR is required to

- A. do, perform, and carry out in a satisfactory, timely, and proper manner, the services delineated in this contract.
- B. Comply with requirements listed with respect to reporting on progress of the services, additional approvals required, and other matters relating to the performance of the services.

The provisions of this contract have been approved by the Office of the City Attorney

- C. Comply with time schedules and payment terms.

III. SCOPE OF SERVICES. (To include specific duties and responsibilities, time schedules and deadlines, compensation, terms, and approval requirements.)

CONTINUATION OF THIS CONTRACT BEYOND DECEMBER 31 OF ANY YEAR IS CONTINGENT UPON THE APPROPRIATION OF SUFFICIENT FUNDS BY THE PROPER CITY OFFICIALS.

IV. SPECIFIC CONDITIONS OF PAYMENT: Payment will be made to the following schedules if completion is satisfactory.

UPON RECEIPT OF A PROPERLY SUBMITTED AND APPROVED INVOICE, CONTRACTOR SHALL BE COMPENSATED AT A RATE NOT TO EXCEED

THE CITY STRIVES TO MAKE TIMELY PAYMENT ON ALL INVOICES. PAYMENT TO THE CONTRACTOR WILL BE DEEMED TIMELY IF THE PAYMENT IS MAILED, DELIVERED, OR TRANSFERRED WITHIN 60 CALENDAR DAYS AFTER RECEIPT OF A PROPERLY COMPLETED INVOICE OR RECEIPT AND ACCEPTANCE OF THE PROPERTY OR SERVICE UNDER THE ORDER OR CONTRACT, WHICHEVER IS LATER. IF THE CITY DOES NOT MAKE PAYMENT BY THE 60TH CALENDAR DAY, THE CITY SHALL PAY SIMPLE INTEREST BEGINNING WITH THE 31ST CALENDAR DAY AT THE RATE OF ONE PERCENT (1%) PER MONTH (UNLESS THE CITY DISPUTES THE AMOUNT OF THE INVOICE). REFERENCE COMMON COUNCIL FILE NO. 900859 ADOPTED OCTOBER 16, 1990, PROVISIONS OF STATE STATUTE 66.285 AND 66.286.

V. NOTICES: Any and all notices shall be in writing and deemed served upon depositing same with the United States Postal Services as "Certified Mail, Return Receipt Requested", addressed to the CONTRACTOR at:

and to the CITY at:

(DOA) BUSINESS OPERATIONS DIVISION
200 EAST WELLS SUITE 601
MILWAUKEE, WISCONSIN 53202

Attention: Ms. Cheryl L. Oliva, City Purchasing Director

All other correspondence shall be addressed as above, but may be sent "Regular Mail" and deemed delivered upon receipt by the addressee.

VI. REPORTS

- A. The CONTRACTOR agrees to submit reports as may be required by the CITY at such times as may be scheduled for submittal, unless otherwise agreed to in writing.

B. All reports, studies, analysis, memoranda and related data and material as may be developed during the performance of this Contract shall be submitted to and be the exclusive property of the CITY, which shall have the right to use same for any purpose without any further compensation to the CONTRACTOR other than hereinafter provided. All of the aforesaid documents and materials prepared or assembled by the CONTRACTOR under this Contract are confidential and the CONTRACTOR agrees that it will not, without prior written approval by the CITY, submit or make same available to any individual, agency, public body or organization other than the CITY, except as may be otherwise herein provided. Both parties recognize that this Agreement is subject to the provisions of the State of Wisconsin Public Records Law.

VII. **TIME OF PERFORMANCE.** The services to be performed under the terms and conditions of this Contract shall be in force and shall commence upon execution of this Agreement by the CONTRACTOR and upon written notice from the City to proceed, or when the CONTRACTOR has received an original of the Contract which is complete and fully executed, and shall be undertaken and completed in such sequence as to assure its expeditious completion in the light of the purposes of this Contract, but in any event all of the services required hereunder shall be completed as indicated on page 1 under "Time of Performance", which is the termination date of this Contract. In addition to all other remedies inuring to the CITY should the Contract not be completed by the date specified in accordance with all of its terms, requirements and conditions therein set forth, the CONTRACTOR shall continue to be obligated thereafter to fulfill CONTRACTOR's responsibility to complete the scope of services and to execute any necessary amendments to this CONTRACT.

VIII. **CONDITIONS OF PERFORMANCE AND COMPENSATION.**

- A. Performance. Notwithstanding any references to the contrary in the contract documents, the CONTRACTOR agrees that the performance of CONTRACTOR's work, services and the results therefrom, pursuant to the terms, conditions and agreements of this Contract, shall conform to such recognized high professional standards as are prevalent in this field of endeavor and like services.
- B. Place of Performance. The CONTRACTOR shall conduct CONTRACTOR's services as required under the terms and conditions of this Contract at such place or places as is necessary so as to enable the CONTRACTOR to fulfill CONTRACTOR's obligations under this Contract.
- C. Compensation. The CITY agrees to pay, subject to the contingencies herein, and the CONTRACTOR agrees to accept for the satisfactory performance of the services under this Contract the maximum as indicated on page 1 under "Total Amount of Contract," inclusive of all expenses, it being expressly understood and agreed that in no event will the total compensation to be paid hereunder exceed the maximum sum for all of the services required.
- D. Additional Fringe or Employee Benefits. The CONTRACTOR shall not receive nor be eligible for any fringe benefits or any other benefits to which CITY salaried employees are entitled to or are receiving.
- E. Taxes, Social Security, Insurance, and Government Reporting. Personal income tax payments, social security contributions, insurance, and all other governmental reporting and contributions required as a consequence of the CONTRACTOR receiving payment under this Contract shall be the sole responsibility of the CONTRACTOR.
The CONTRACTOR shall be solely responsible to meet CONTRACTOR's insurance needs as required by the CITY during the terms of this Contract or any extension thereof. A Certificate of Insurance shall be provided to the CITY as an additional insured providing for a thirty (30) day notice to the CITY prior to change, termination or cancellation.
- F. Subcontracting. The CONTRACTOR shall not subcontract for the performance of any of the services herein set forth without prior written approval obtained from the City Purchasing Div-

IX. **METHOD OF PAYMENT.** The City agrees that subsequent to the following

Contract and satisfactory performance of the services in accordance with the "work schedules" set forth herein it will pay the amount or amounts as hereinafter set forth. In the event of a dispute as to the services performed or the compensation to be paid, the decision of the City Purchasing Director or its designee shall prevail. The conditions of payment are as follows: Compensation for services required under this Contract shall be contingent upon each activity being reviewed for approval by the CITY approving officer designated on page 1 and approved by them for payment (as referenced and stipulated on page 2, IV Specific Conditions of Payment).

X. **DEFENSE OF SUITS.** In case any action in court or proceeding before an administrative agency is brought against the CITY or any of its officers, agents, or employees for the failure or neglect of the CONTRACTOR in whole or in part to perform any of the covenants, acts, matters or things by this Contract undertaken, or for injury or damage caused by the alleged negligence of the CONTRACTOR, its officers, agents or employees, the CONTRACTOR shall indemnify and save harmless the CITY and its officers, agents and employees from all losses, damages, costs, expenses, judgments, or decrees arising out of such action. The CITY shall tender the defense of any claim or action at law or in equity to the CONTRACTOR or CONTRACTOR's insurer, and upon such tender it shall be the duty of the CONTRACTOR and CONTRACTOR's insurer to defend such claim or action without cost or expense to the CITY or its officers, agents, or employees. The CONTRACTOR shall be solely responsible for the conduct and performance of the services required under the terms and conditions of this Contract and for the results therefrom.

XI. **INDEMNIFICATION.** Notwithstanding any references to the contrary in the contract documents, CONTRACTOR assumes full liability for all of its acts in the performance of this contract. CONTRACTOR will save and indemnify and keep harmless the City of Milwaukee against all liabilities, judgments, costs, and expenses which may be claimed against the City in consequence of the granting of this contract to said CONTRACTOR, or which may result from the carelessness or neglect of said CONTRACTOR, or the agents, employees or workmen of said CONTRACTOR in any respect whatever. If judgment is recovered, whether in suits of law or in equity, against the City by reason of the carelessness, negligence, or by acts of commission of the CONTRACTOR, such persons, firms or corporations carrying out the provisions of the contract for the CONTRACTOR, the CONTRACTOR assumes full liability for such judgment not only as to the amount of damages, but also the cost, attorneys fees or other expenses resulting therefrom.

XII. **REGULATIONS.** Contractor agrees to comply with all of the requirements of all federal, state and local laws related thereto.

XIII. **TERMINATION OF CONTRACT FOR CAUSE.** If, through any cause, the CONTRACTOR shall fail to fulfill in timely and proper manner its obligations under this Contract, or if the CONTRACTOR shall violate any of the covenants, agreements, or stipulations of this Contract, the City Purchasing Director shall thereupon have the right to terminate this Contract by giving written notice to the CONTRACTOR of such termination and specifying the effective date thereof, at least five (5) days before the effective date of the termination. In such event, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, reports, or other materials related to the services prepared by the CONTRACTOR under this Contract shall, at the option of the CITY, become the property of the CITY.

Notwithstanding the above, the CONTRACTOR shall not be relieved of liability to the CITY for damages sustained by the CITY by virtue of any breach of the CONTRACT by the CONTRACTOR, and the CITY may withhold any payments to the CONTRACTOR for the purpose of set off until such time as the exact amount of damages due to the CITY from the CONTRACTOR is determined.

XIV. **TERMINATION FOR CONVENIENCE OF THE CITY.** The CITY may terminate this Contract at any time for any reason by giving at least ten (10) days' notice in writing from the City Purchasing Director to the CONTRACTOR. If the CONTRACTOR is terminated by the CITY as provided herein, the CONTRACTOR will be paid an amount which bears the same ratio to the total compensation as the services actually and satisfactorily performed bear to the total services of the CONTRACTOR covered by this Contract, less payments for such services as were previously made. Provided, however, that if less than sixty percent (60%) of the services covered by this Contract have been performed upon the effective date of such termination the CONTRACTOR shall be reimbursed (in addition to the above payment) for that portion of the actual out-of-pocket expenses (not otherwise reimbursed under the Contract) incurred by the CONTRACTOR during the Contract period which are directly attributable to the uncompleted portion of the services covered by this Contract. If this Contract is terminated due to the fault of the CONTRACTOR, Paragraph XIII hereof, relative to termination, shall apply.

XV. **CHANGES.** The City Purchasing Director may, from time to time, request changes in the scope of services of the CONTRACTOR to be performed hereunder. Such changes, including any increase or decrease in the amount of CONTRACTOR's compensation which are mutually agreed upon by and between the CITY and the CONTRACTOR, shall be incorporated in written amendments to the Contract.

XVI. **PERSONNEL**

- A. The CONTRACTOR represents that it has or will secure at its own expense all personnel required in performing the services under this Contract. Such personnel shall not be employees of or have any contractual relationship with the CITY.
- B. All of the services required hereunder will be performed by the CONTRACTOR or under their supervision and all personnel engaged in the work shall be fully qualified and shall be authorized or permitted under state and local law to perform such services.
- C. None of the work or services covered by this Contract shall be subcontracted without the prior written approval of the City Purchasing Director. If any work or services is subcontracted, it shall be specified by written contract or agreement and shall be subject to each provision of this Contract. The CONTRACTOR shall be as fully responsible to the CITY for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by it, as its for the acts and omissions of persons directly employed by them.

XVII. **ASSIGNABILITY.** The CONTRACTOR shall not assign any interest in this Contract and shall not transfer any interest in same (whether by assignment, novation or any other manner), without the prior written consent of the City Purchasing Director. Provided, however that claims for money due or to become due the CONTRACTOR from the CITY under this Contract may be assigned to a bank, trust company or other financial institution without such approval. Notices of any such assignment or transfer shall be furnished promptly to the City Purchasing Director.

XVIII. **RECORDS.**

- A. **Establishment and Maintenance of Records.** Records shall be maintained in accordance with requirements prescribed by the CITY with respect to all matters covered by this Contract. Except as otherwise authorized, these records shall be maintained for a period of seven (7) years after receipt of the final payment under this Contract.
- B. **Documentation of Costs.** All costs shall be supported by property executed payrolls, time records, invoices, contracts or vouchers, or other official documentation evidencing in proper detail the nature and propriety of other accounting documents pertaining in whole or in part to this Contract and shall be clearly identified and readily accessible.

XIX. **REPORT AND INFORMATION.** At such times and in such forms as the CITY may require, there shall be furnished the City Purchasing Director such statements, records, reports, data, and information as the CITY may request pertaining to matters covered by this Contract.

XX. **AUDITS AND INSPECTIONS.** At any time during normal business hours and as often as the CITY, or if federal or state grants or aids are involved, as the appropriate federal or state agency may deem necessary, there shall be made available to the CITY or such agency for examination all of its records with respect to all matters covered by this Contract and CONTRACTOR shall permit the City or such agency and/or representatives of the Comptroller General to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment, and other data relating to all matters covered by this Contract.

XXI. **FINDINGS CONFIDENTIAL.** All of the reports, information, data, etc. prepared or assembled by the CONTRACTOR under this Contract are confidential and the CONTRACTOR agrees that they shall not be made available to any individual or organization, other than an appropriate agency of the United States Government, without the prior written approval of the City Purchasing Director.

XXII. CONFLICT OF INTEREST

- A. Interest in Contract. No officer, employee or agent of the CITY who exercises any functions or responsibilities in connection with the carrying out of any services or requirements to which this Contract pertains, shall have any personal interest, direct or indirect in this Contract.
- B. Interest of Other Local Public Officials. No member of the governing body of the locality and no other public official of such locality who exercises any functions or responsibilities in the review or approval of the carrying out of this Contract, shall have any personal interest, direct or indirect, in this Contract.
- C. Interest of Contractor and Employees. The CONTRACTOR covenants that no person described in Paragraph XXII, A and B above who presently exercises any functions or responsibilities in connection with the Contract has any personal financial interest, direct or indirect, in this Contract. The CONTRACTOR further covenants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services hereunder. The CONTRACTOR further covenants that in the performance of this Contract no person having any conflicting interest shall be employed. An interest on the part of the CONTRACTOR or its employees must be disclosed to the CITY. Provided, however, that this paragraph shall be interpreted in such a manner so as not to unreasonably impede the statutory requirement that maximum opportunity be provided for employment of and participation by residents of the area.

XXIII. DISCRIMINATION PROHIBITED

- A. In all hiring or employment made possible by or resulting from this Contract there (1) will not be any discrimination against any qualified employee or qualified applicant for employment because of sex, race, religion, color, national origin or ancestry, age, disability, lawful source of income, marital status or sexual orientation or familial status, and (2) affirmative action will be taken to ensure that applicants are employed and that employees are treated during employment without regard to their sex, race, religion, color, national origin or ancestry, age, disability, lawful source of income, marital status or sexual orientation or familial status, as defined in Section 109-9 of the Milwaukee Code of Ordinances.

This requirement shall apply to but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, lay-off or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. There shall be posted in conspicuous places available to employees and applicants for employment, notices required or to be provided by federal or state agencies involved setting forth the provisions of the clause. All solicitations or advertisements for employees shall state that all qualified applicants will receive consideration for employment without regard to sex, race, religion, color, national origin or ancestry, age, disability, lawful source of income, marital status or sexual orientation or familial status.

- B. No person in the United States shall, on the ground of sex, race, religion, color, national origin or ancestry, age, disability, lawful source of income, marital status or sexual orientation or familial status, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity made possible by or resulting from this Contract. The CITY and each employer will comply with all requirements imposed by or pursuant to the regulations of the appropriate federal agency effectuating Title VI of the Civil Rights Act of 1964.
- C. The CONTRACTOR will cause the foregoing provisions to be inserted in all subcontracts, if any, for any work covered by this Contract so that such provisions will be binding upon each subcontractor, provided that the foregoing provisions shall not apply to contracts or subcontracts for standard commercial supplies or raw materials.
- D. Contractor agrees that they will comply with all applicable requirements of the Americans with

Disability Act of 1990, 42 U.S.C. 12101, et seq.

XXIV. WORKER'S COMPENSATION INSURANCE. The CONTRACTOR, and all contractors, if any, shall provide to the CITY an affidavit or other satisfactory proof which the CITY may require evidencing that the CONTRACTOR and all subcontractors have obtained Worker's Compensation Insurance for all persons performing any work or services under the Contract or subcontract as is required by the Worker's Compensation Act of the State of Wisconsin. No payments or disbursements under the Contract shall be made if such proof has not been furnished.

XXV. WITHHOLDING OF SALARIES. If in the performance of this Contract there is any underpayment of salaries by the CONTRACTOR or by any subcontractor thereunder, the CITY shall withhold from the CONTRACTOR out of payments due to it an amount sufficient to pay to employees underpaid the difference between the salaries required hereby to be paid and the salaries actually paid such employees for the total number of hours worked. The amounts withheld shall be disbursed by the CITY for and on account of the CONTRACTOR or subcontractor, if any, to the respective employees to whom they are due.

XVI. CLAIMS AND DISPUTES PERTAINING TO SALARY RATES. Claims and disputes pertaining to salary rates or to classifications of architects, draftsmen, technical engineers, and technicians, if any, performing work under this Contract shall be promptly reported in writing by the CONTRACTOR to the CITY for the latter's decision, which shall be final with respect thereto.

VII. OTHER PROVISIONS.

- A. Any and all information, plans, reports and conclusions derived or developed as a consequence or result of this Contract may be utilized by the City in such manner and purpose as the CITY desires or determines without permission or approval of the CONTRACTOR or compensation to the CONTRACTOR therefor other than herein provided.
- B. The word "CONTRACTOR" means a person, or an entity, whether public or private, that enters into contract with the CITY, and whenever or wherever the word "CONTRACTOR" appears in Part II attached hereto, it means the same and is synonymous with "CONTRACTOR" as it appears in Part I of this Contract.
- C. Both parties understand that the City is bound by the Wisconsin Public Records Law, and as such all of the terms of this Agreement are subject to and conditioned on the provisions of sec. 19.21, Wis. Stats., et seq. Contractor acknowledges that it is obligated to cooperate with the City in producing records which are subject to Wisconsin Public Records Law.

XXVIII. This contract consists of this Part I; however, whenever federal state assistance, aids or grants are used in whole or in part for the procurement of the services herein before described or used for the purposes set forth in this contract, this Part I is subject to the provisions of Part II hereof applicable and in such event, Part II is specifically made a part of this contract as though set forth herein in full. Part II is applicable (and attached) _____ not applicable X.

IN WITNESS WHEREOF, the CONTRACTOR and the CITY have caused this Contract to be executed for and on their respective behalf as of the dates hereinafter set forth.

CITY OF MILWAUKEE, a municipal corporation:

CONTRACTOR:

By: _____

Firm: _____

City Purchasing Directory

Date: _____

Address: _____

Countersigned By: _____

City/State: _____ Zip _____

Comptroller

Federal Tax ID _____

Date: _____

Phone: _____

Fax: _____

By: _____

Title: _____

Date: _____

Witness: _____

PLEASE NOTE! CORPORATIONS MUST COMPLETE THE STATEMENT BELOW.

Title: _____

(Note: Someone other than the individual who executed this Contract must certify the following):

CERTIFICATE RE: CORPORATION

I, _____ certify that I am the _____ of the above CONTRACTOR
PRINT NAME *PRINT TITLE*

named herein; that _____, who executed this Contract on behalf of the CONTRACTOR was
PRINT SIGNATOR OF CONTRACTOR

then _____ of said corporation, and in said capacity, duly signed said Contract for and
OFFICIAL CAPACITY OF SIGNATOR

on behalf of said corporation, being duly authorized so to do under its bylaws or is authorized so to do by action of its
duly constituted board, all of which is within the scope of its corporate powers.

Dated at _____ this _____ day of _____, 20 _____
LOCATION

SIGNATURE