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April 13, 2009

Alderman Joe Dudzik
City Hall, Room 205

Re: Downtown Streetscape Artwork

Dear Alderman Dudzik:

On April 9, 2009, you asked several questions in connection with Common Council File Number 081630, a Substitute Resolution approving the final schematic design of public artwork to be incorporated into streetscape improvements constructed on East Wisconsin Avenue as part of the Milwaukee Central Business District Primary Pedestrian Corridors Development Project, and authorizing the commission of the artwork. We are happy to respond to your request.

You first asked "who has final approval over the design and installation of the Wisconsin Avenue Streetscape Artwork?" We believe it is the Common Council that possesses the authority to approve the final design of the artwork. The Three-Party Design Engineering Services Contract executed by the City, the Wisconsin Department of Transportation, ("WISDOT"), and Janet Zweig, LLC, ("Zweig"), (the "Contract"), provides in Section VI.B.2.c: "The MUNICIPALITY shall have final approval of the design." Because this phrase uses the term, "MUNICIPALITY," as opposed to, for instance, "the MUNICIPALITY'S authorized agent," or "the MUNICIPALITY, acting through its Department of Public Works," we are of the opinion that the "the MUNICIPALITY" means the City, acting through the Common Council. This is particularly so because the Contract does in fact use the term "the MUNICIPALITY'S authorized agent," elsewhere.

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You next ask whether the Council has “the authority to cancel its contract with Ms. Zweig,” and if so, could the City “reallocate the entire \$295,355 to some other street improvement project?” There are three ways this Contract could come to an end if the City so chooses: termination for convenience; termination for cause; or termination by its own terms upon rejection of two design proposals.

The Contract gives authority to the City to terminate for convenience, providing at Section III.C.1:

The MUNICIPALITY reserves the right to terminate all or part of this CONTRACT at any time upon not less than ten days’ written notice to the CONSULTANT.

As with the provision regarding approval of the design, we believe this right would be exercised by Common Council resolution. The matter of reallocation of the funds is murkier. First, it is highly unlikely that the entire \$295,355 would be available. The Contract provides, at Section III.C.2:

In the event the CONTRACT is terminated by the MUNICIPALITY without fault on the part of the CONSULTANT, the CONSULTANT shall be paid for the Services rendered, an amount bearing the same ratio to the total CONTRACT price as the amount of Services completed or partially completed and delivered to the MUNICIPALITY bears to the total amount of Services provided herein, as determined by mutual agreement between the MUNICIPALITY and the CONSULTANT as a CONTRACT amendment.

We note that even if any termination pursuant to the Contract were deemed to be “for cause,” rather than for convenience, Zweig would still be entitled to “the reasonable value of the Services rendered and delivered to the MUNICIPALITY up to the time of termination.” Section III.C.3. Thus, at this stage, at least some amount of the \$295,355 will be due to Zweig as compensation after any termination. This is a matter to which we will return *infra*.

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The status of the remainder of the \$295,355 is not addressed in the Contract. As we noted, WISDOT is a party to the Contract, and as you are aware, 80% of the Contract is funded by Federal Congestion Mitigation/Air Quality, ("CMAQ"), dollars. The question of what might happen to the remainder of the funds might be spelled out in the various grant documents relating to this project, however, we have not yet received copies of those documents and thus have not reviewed them in detail. We have consulted with an attorney at WISDOT, and we think it likely that, at a minimum, the City would be required to seek approval of state or federal authorities for any reallocation of the funds. (We have been advised that the Federal Highway Administration is no longer approving CMAQ funds for use in public art projects.)

We will answer your third and fourth questions together. These questions basically relate to what would happen if the Council rejected Zweig's proposed design. For instance, you asked, if the Council rejects this design, whether the Council has the option of requesting another proposal from Zweig, and would the City incur an additional cost in so doing. In fact, Zweig is required to present a second proposal pursuant to the Contract in that event. Section VI.B.2.e of the Contract provides:

If the schematic design concept is not accepted by the MUNICIPALITY pursuant to Section VI.B.2.c.the CONSULTANT will develop and present a second proposal.

In addition, Section III.C.(6) provides:

If the Schematic Design is not accepted following the development and presentation of a second proposal as defined in Section VI.B.2.e., the CONSULTANT'S fee will be paid as final reimbursement for all work under this CONTRACT as set forth in Section III.C.(2)and the CONTRACT shall be terminated.

As you can see, the contract contemplates Zweig providing a second proposal, (and no additional proposals thereafter), should the first proposal be rejected. Thus, rejection of her first proposal does not automatically terminate the Contract; if the Council wished to terminate the Contract prior to her presentation of a

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second proposal, that would need to be done pursuant to either Section III.C.(1) or III.C.(3), discussed above. The Contract provides that it terminates after rejection of a second proposal.

The remainder of your concerns relate to the compensation that is due Zweig, if any. Whether the City terminated the Contract for convenience prior to the presentation of a second proposal, or the Contract terminated by its terms after rejection of a second proposal, the compensation to which Zweig would be entitled is governed by Section III.C.(2). In other words, Zweig is to be paid "an amount bearing the same ratio to the total CONTRACT price as the amount of Services completed or partially completed and delivered to the MUNICIPALITY bears to the total amount of Services provided for herein...." The City and Zweig are to arrive at a "mutual agreement" as to this amount and are to memorialize that agreement in writing.

Of course, we cannot say whether the City and Zweig will be able to reach an agreement on this amount, or what any such agreement might be, however, we will make some observations. The Department of Public Works would be in a better position to answer definitively the amount of money Zweig might be entitled to. The Contract appears to contemplate that if the City chooses to commission the artwork, she will be paid "a lump sum of \$41,928" for "analysis and design services," regardless of whether she is asked to present one proposal or two proposals. We note, however, Zweig might claim entitlement to additional funds. This is because Zweig is allowed "direct costs" of \$253,427 pursuant to the Contract. The "Fee Computation Summary" annexed to the Contract outlines \$18,427 of "Direct Expenses" in the Design phase of the Contract. We are not in a position to say whether and to what extent Zweig has incurred Direct Expenses to this point, or whether she would incur additional Direct Expenses if she were required to present a second proposal.

We also note that we have been advised by the Department of Public Works that some funds have already been paid to Zweig, but we have not been advised as to the amount of those funds. You ask whether Zweig would have any obligation to reimburse the City for those funds. The Contract provides that payments to Zweig will be made based on invoices submitted by Zweig "for the authorized Services completed to date." Thus, it seems unlikely that Zweig has been paid funds to

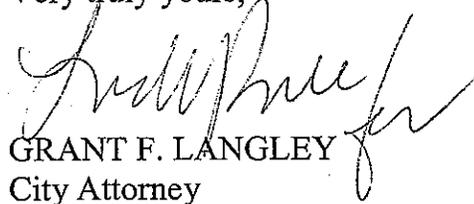
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which she would not be entitled pursuant to the termination provisions of the Contract.

Finally, on the matter of the status of the 80/20 split on any funds due to Zweig, we feel the best reading of the Contract is that if the City were to terminate the Contract, or were the Contract to terminate by its terms, the state will be responsible for 80% of any funds to become due Zweig. Although the Contract is silent on this question, WISDOT is a party to this Contract, and was therefore aware that its terms allow the City to terminate it for convenience and provide for termination upon rejection of a second design proposal. We note that an attorney for WISDOT has preliminarily agreed with this interpretation. We also note, however, that FHWA authorities may have a different interpretation and that grant documents may require a different result.

If you have any additional questions, please feel free to contact us.

Very truly yours,



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