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May 16, 2013

The Honorable Common Council
City of Milwaukee
Milwaukee City Hall

Re: Resolution to authorize the City Attorney to extend offers of settlement pursuant to Section 807.01(3), Wis. Stats. to certain defendants in the matter of *City of Milwaukee v. Simpson Gumpertz & Heger, Inc., et al*, Milwaukee County Circuit Court Case No. 12 CV 004989

Dear Council Members:

On May 12, 2012, the City Attorney filed a lawsuit against Simpson, Gumpertz & Heger, Inc. (SGH), Engberg Anderson, Inc. (EA), Bloom Companies, LLC, J. P. Cullen & Sons, Inc. (JPC), and numerous insurance carriers because terra cotta on the Milwaukee City Hall façade had cracked, spalled and fallen. The deteriorating terra cotta had been part of the renovations completed in December 2008. EA, SGH and Boom Companies were part of the design team for the renovation project. JPC was the general contractor.

The resolution referenced in this letter would authorize the City Attorney to extend formal offers of settlement of this law suit to SGH and its insurer, Lexington Insurance Company, to EA and its insurer, Lexington Insurance Company and to Bloom Companies and Endurance American Specialty Insurance Company which is Bloom's insurer.

Based upon the City's investigation and expert reports, the City believes it was a design error to fully grout terra cotta units, and to fail to provide air entrainment or other methods to reduce the risk of freeze thaw damage. Assuming for the sake of argument that fully grouting terra cotta units can be a viable design, the plans and specifications, and the construction oversight, failed to ensure tight controls on the amount of water that could be introduced to grouted terra cotta and thus reduce the risk of freeze thaw damage due to the presence of free water within the grout. These engineering issues were material contributing factors to the terra cotta failures.

SGH was the engineering firm that prepared and sealed the plans, drawings and specifications as they pertained to terra cotta replacement. EA, as architect of record, also sealed the design plans and specifications, and, in addition, EA was responsible to the City for the performance of SGH and Bloom Companies, as its sub-consultants, pursuant to the contract between EA and the City. The complaint alleges that SGH, EA and Bloom Companies failed to correct design errors and ensure contract compliance as part of their contractual and professional responsibility for construction oversight and guidance. The City believes that due to these errors and omissions, these defendants may be found liable for a substantial share of the City's damages.

SGH, EA and Bloom Companies have errors and omissions insurance that provides coverage for professional liability. The policy limits for each of these policies are reduced by the costs of defense in the litigation. The City Attorney believes that if litigation continues to trial, a verdict could be entered against each of these defendants in excess of their respective policy limits, and collection of a judgment in excess of the policy limits may be unpredictable. Further, the additional costs of litigation are likely to substantially reduce the remaining policy limits available for possible recovery. Therefore, it is the City Attorney's judgment that settlement demands should be made to these parties and their professional liability carriers for a figure likely to be within the current policy limits.

The resolution seeks authorization for the City Attorney to make a settlement demand for figures which are within these defendants current policy limits, as follows: a demand to SGH and Lexington Insurance Company for 9 million dollars, a demand to EA and Lexington Insurance Company for 1.85 million dollars and a demand to Bloom Companies and Endurance American Specialty Insurance for 1.5 million dollars, all pursuant to Section 807.01(3), Wis. Stats.

Under Section 807.01(3), Wis. Stats, a defendant has a period of ten days to accept the offer. If accepted, the defendant files notice of acceptance and that defendant would then be dismissed from the case upon payment of the settlement sum. If the defendant does not accept the offer of settlement, the case against that defendant continues. If a trial results in a judgment against that defendant which is greater than the amount of the settlement offer, that defendant is liable for double the taxable costs and for legal interest on the award from the date the settlement offer was rejected through the date the award is paid.

If a party accepts the offer, but other parties do not, the law suit then continues to trial against the remaining defendants. The settling party's responsibility for damages will still be assessed in a verdict by judge or jury; however, the amount assigned to that party will not result in payment to the City, whether that amount is more or less than the accepted settlement offer; rather, the total amount the City will obtain from the party who settled is the amount that party in fact paid pursuant to the settlement demand.

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The City Attorney requests that the resolution be referred to the appropriate committee for review and approval.

Very truly yours,

Grant F. Langley
City Attorney

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Assistant City Attorney

MRH/MRH
1081-2012-1217

c: Ghassan Korban, Commissioner of Public Works