



February 2, 2012

***Via Email & U.S. Mail***

Mr. Albert Stanek  
Parking and Transit Systems Manager  
City of Racine  
730 Washington Avenue – Room 304  
Racine, WI 53403

**Re: Opinion Letter: Review of City of Racine “pass through” contract for state operating assistance for Southeastern Wisconsin Commuter Bus and Request for Proposal (“RFP”)**

Our file number: 3354-1101881

Dear Mr. Stanek:

This opinion letter is presented at your request to address the concerns outlined in your November 3, 2011, email to Attorney Julie Wilson of our office wherein you listed your concerns:

The City of Racine is looking for either:

- confirmation that it is not assuming a financial obligation as the conduit of WisDOT operating assistance for the service. The City is a party to an operating assistance contract for the service with WisDOT and a separate contract with Coach USA-WI Coach Lines as the operator,
- or, legal advice on potential RFP and contract language that could protect the City of Racine from financial obligation.

After further discussions with you we understand the first point seeks an opinion on whether the City of Racine would have a financial obligation for amounts greater than the Wisconsin Department of Transportation (“WisDOT”) assistance.

It is our opinion that if the City of Racine uses the draft Request For Proposal and the draft 2012 Mass Transit Subsidy Agreement (hereinafter the “proposed contract”) that are forwarded with this opinion then the City of Racine would only be obligated pay the WisDOT “pass through” funds that are provided by the WisDOT. Our opinion is explained below and is based upon the information provided and documents identified in this opinion

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that we reviewed<sup>1</sup>. This opinion is based upon two significant assumptions: (1) that WisDOT will approve the proposed contract as this is a condition of the process; and (2) that the service provider will accept the terms of the proposed contract which specifically provides that the service provider will not be entitled to any funds beyond what the WisDOT provides.

## **I. Documents Reviewed.**

We reviewed the documents that you forwarded including the draft City of Racine “Request for Proposals”, 2011 Contract with WisDOT; 2011 Contract (Mass Transit Subsidy Agreement) with Wisconsin Coach Lines; and also we reviewed the Wisconsin Department of Transportation Mass Transportation Assistance Website, including the Transportation Operating Booklet and Schedules and the Wisconsin Administrative Code Sections Regarding Urban Mass Transportation Programs.

## **II. Will the City of Racine be Financially Obligated to the Service Provider for any Amounts Greater than the WisDOT Assistance?**

Based upon our review of the contract documents and the applicable state Administrative code provisions there is no requirement that the City pay any amounts other than what it contracts for. While the 2011 WisDOT contract identifies in Schedule I – Estimated Deficit a “Local Share of Deficit - \$266,107.00” there is no provision in that contract that requires that amount be paid to a service provider. Nor could we find any requirement in the applicable Administrative code that would require the City of Racine to pay the local share of deficit. It is our opinion that the proposed contract which clearly specifies that the service provider cannot expect, will not receive, agrees to release any claim for additional funds and further agrees to indemnify the City if they do, forecloses the service provider from seeking or recovering any funds greater than the WisDOT assistance funds.

Wisconsin courts, in decisions too numerous to cite, consistently hold that the object of contract construction is to determine the contracting parties' intent, and to do that the courts look to the language the parties used to express their agreement. When the contract's language is plain and unambiguous, the courts construe it as it stands. Therefore if a service provider enters into the proposed contract they would be faced with convincing a court that the contract does not mean what it says and if they cannot do that then they might argue that the contract was against public policy or was inconsistent with the City's agreement with WisDOT. It is our opinion that the WisDOT agreement would not provide the basis for a service provider to disclaim the provisions of the contract with the service provider and that

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<sup>1</sup> This opinion is made without review of any City ordinances or rules that may impact the City's obligations related to this matter. We assume that such ordinances or rules that would impact these questions would be reviewed by the City Attorney or would have been provided for our review.

they were entitled to additional funds. The proposed contract expressly provides that the City will not be paying any additional funds.

We believe that a reviewing court would enforce the intent of the parties as set forth in the proposed contract. The proposed contract is not inconsistent with the WisDOT contract because it does not require the City to pay additional funds and it certainly would not be against public policy for the City to not budget for or pay additional funds when it does so with full disclosure and by express contract. Of course we added indemnification language to protect the City in the event that the service provider would commence legal action to seek additional funds.

In addition, it is our opinion that WisDOT would not have standing to seek additional funding for a service provider. There is nothing in the WisDOT contract that would allow for that, but even more elemental than that would be that any claim that WisDOT would make would be derived from the service provider's right to the additional funding which as addressed above would mean that WisDOT could only prevail on such an argument if the service provider could.

### **III. Draft Request for Proposals and Proposed 2012 Mass Transit Subsidy Agreement.**

The attached draft Request for Proposals to Operate SE WI Commuter Bus Service is a redline draft of what was sent for our review. As you will note we have made only a couple of changes to ensure that there is full disclosure that the sole source of funds will be the Wisconsin Department of Transportation and we added language to that effect in the Official Notice. We also added that no funding will be available from the City of Racine to Par. 11. We did delete "professional" from Par. 7 as that appeared to have been mistakenly included. Other than those suggested changes the RFP appears to be a very thorough and appropriate RFP.

The attached proposed contract is a redline draft of the 2011 Mass Transit Subsidy Agreement with Wisconsin Coach Lines. Note that the changes that we recommend are principally to ensure that the parties clearly express their intention that the only funds available to pay for the performance of the services are the WisDOT funds and not funds from the City of Racine. We modified the indemnification clause (Par. 8) to provide additional protection to the City in the event that a claim is made for additional funding from the city. We added the language at Section II, Par. 4(A) to address the possibility that WisDOT might not pay some of the funds that they agreed to pay and in Section II, Par 4(G) to remove any possible argument that the City might also be a source of funds. We added Section III, Par 6 to again specifically state the City has not budgeted funds and that the parties agree that the sole source of funds will be the WisDOT funds.

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If you have any questions or wish to discuss any aspects of this opinion, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "William P. Dineen". The signature is fluid and cursive, with a long horizontal stroke at the end.

JULIE P. WILSON  
WILLIAM P. DINEEN, Of Counsel

WPD/lmr

Enclosures

cc by email to:      Mr. Rob Weber, Esq.  
                                 Mr. Scott Letteny, Esq.