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City of Racine, Wisconsin
COMMON COUNCIL

AGENDA BRIEFING MEMORANDUM

COMMITTEE: Finance and Personnel Committee **LEGISLATION ITEM #:** 1205-18

AGENDA DATE: November 26, 2018

DEPARTMENT: City Attorney's Office

Prepared By: City Attorney Scott R. Letteney

Reviewed By: N/A

SUBJECT: Communication from the City Attorney requesting to meet with the Finance and Personnel Committee in Closed Session pursuant to Wisconsin Statutes section 19.85(1)(g), to confer with legal counsel concerning an issue regarding Central States, Southeast, and Southwest Areas Pension Fund.

EXECUTIVE SUMMARY: The City Attorney and retained outside counsel, Attorneys Matt Flanary and Mark Olson, recommend the City enter into a Settlement Agreement with Central States, Southeast, and Southwest Areas Pension Fund, the operator of the pension plan for employees of the Belle Urban System, for the indefinite deferral of the payment by the City of withdrawal liability as required by the Multi-Employer Pension Plan Amendments Act of 1980 to the Employee Retirement Income Security Act of 1974.

BACKGROUND & ANALYSIS: Since the mid-1970s, the City of Racine has entered into a series of third-party contracts for the management and operation of its transportation system, also known as the Belle Urban System ("BUS"). Under those agreements, an independent third party operates the system and hires all of the necessary employees. *The City of Racine pays all operating costs, and it has historically agreed to a series of indemnification provisions that run in favor of the management company that operates BUS.* The employees of the management company that operates BUS are members of the Teamsters Union. In addition to wages and benefits of employment, the management company has always been required to provide BUS employees with pension benefits. As with all other costs of operations of the BUS, the City has always reimbursed the management company for the cost of those

31 wages, pension benefits, and other benefits. Again, the City has always agreed, by contract, to indemnify
32 the management company for the costs of the wages, and benefits, including pension costs. The BUS
33 employees' has always been operated by the Central States, Southeast, and Southwest Areas Pension
34 Fund ("Central States"), which is the pension plan associated with the Teamsters Union.

35 Central States is a "multi-employer pension plan." A multi-employer pension plan is a plan to
36 which more than one employer contributes, and which is maintained pursuant to collective bargaining
37 contracts between the employers and a union or unions. The Multi-Employer Pension Plan Amendments
38 Act of 1980 ("MPPAA") to the Employee Retirement Income Security Act of 1974 established more
39 stringent minimum funding requirements for such plans than had previously existed and added further
40 funding requirements for plans in financial difficulty. MPPAA also requires plan trustees to collect
41 "withdrawal liability" from employers whose covered operations, or obligation to contribute, has
42 terminated. The law removed collectively-bargained limitations on an employer's obligations.¹ Further,
43 as written, MPPAA imposes an absolute liability standard when an employer ceases to contribute to the
44 fund. In effect—beyond the accounting of the amount of the withdrawal liability and certain trade-
45 specific rules that don't apply here—there is no viable defense under MPPAA when an employer stops
46 contributing to the pension fund.

47 Because Central States is a multi-employer pension plan, having Central States as the BUS
48 employees' pension-benefits provider creates a potential problem in that individual employers are
49 required, by law, to pay withdrawal liability when they stop contributing to Central States. More
50 specifically, there is a risk that Central States will assess withdrawal liability any time the City of Racine
51 changes management companies.

52 Between February 1, 2004, and January 31, 2011, the City of Racine contracted with
53 Professional Transit Management, LTD ("PTM") for BUS services. Effective February 1, 2011, the City
54 entered into a new contract for identical services from First Transit, Inc. ("FTI"). Central States contends
55 that the transition from PTM to FTI amounted to a withdrawal of PTM's obligation to contribute to
56 Central States and threatened a withdrawal liability assessment in the amount of \$10,498,699.15 (the
57 "2011 Withdrawal Liability").

58 Central States made a similar demand for \$586,000 in 1997, after the City of Racine changed
59 management companies in 1996. The City attempted to avoid making any payments at that time, but
60 ultimately settled the claim for \$350,000 in 2000.

61 To press the position of the City of Racine, the City Attorney's Office engaged Attorneys Matt
62 Flanary and Mark Olson, of the Buelow Vetter Buikema Olson and Vliet law firm, to conduct the
63 negotiations. Although not previously involved with the BUS agreements or the earlier withdrawal
64 liability assessment and settlement, Attorney Flanary is an expert in multi-employer pension withdrawal
65 liability and Attorney Olson has been providing employment law services to the City for more than 30
66 years.

¹ Information in this paragraph comes from the White Paper published on line at <https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2015/05/updates-to-withdrawal-liability-to-multiemployer-p/files/2015-withdrawal-liability-to-multiemployer-pension/fileattachment/2015-withdrawal-liability-to-multiemployer-pension.pdf>.

67 On behalf of the City, Attorney Flanary took the quite reasonable position that BUS has
68 continued uninterrupted, the BUS employees continued working uninterrupted for each new
69 management company, and, as such, pension contributions to Central States continued uninterrupted.
70 Central States refused those arguments, but the discussions opened the door to a mechanism that
71 would recognize this structure going forward by not triggering a new withdrawal liability assessment any
72 time that the City of Racine contracts with a new management company. Following lengthy and
73 contentious negotiations that began in 2014, the attorneys for the City, Central States PTM, FTI, and
74 other subsidiaries of those organizations, have now reached such an agreement, subject to the
75 ratification of the various parties, including by the Common Council on behalf of the City of Racine.

76 Generally stated, the proposed Settlement Agreement recognizes that withdrawal liability exists
77 under federal law, that Central States will not actively attempt to collect the 2011 Withdrawal Liability,
78 and the City agrees that, *if* there were a future complete withdrawal, and *if* withdrawal liability were
79 imposed, it would be no less than \$10,498,699.15 More specifically stated, the proposed Settlement
80 Agreement provides for the following:

- 81 • Central States will suspend any effort to collect the 2011 Withdrawal Liability;
- 82 • Any future liability in connection with a complete withdrawal from Central States will not be less
83 than \$10,498,699.15;
- 84 • Even though the BUS employees are not employed by the City, the City will be directly liable for
85 2011 Withdrawal Liability and any subsequent partial or complete withdrawal liability;
- 86 • The City will also be directly responsible for any delinquent contributions in the event a future
87 entity is obligated to make contributions to Central States pursuant to a collective bargaining
88 agreement in connection with BUS services and such entity fails to make timely contributions;
- 89 • To the extent a future operator of BUS services has an obligation to contribute to Central States,
90 the City will require any such entity to adopt the Settlement Agreement and assume secondarily
91 liability;
- 92 • PTM, FTI, and other entities within their respective controlled groups, as well any future operator
93 that has an obligation to contribute to Central States in connection with the BUS services, will
94 have secondary liability for any future withdrawal liability in proportion to their respective
95 contributions during the 10 year window used to determine a withdrawal liability assessment;
96 and
- 97 • The City is not waiving its ability to challenge the 2011 Withdrawal Liability or any future partial
98 or complete withdrawal liability.

99 This negotiation has been ongoing for many months. During that time I have agreed to a series of
100 Tolling Agreements with the other parties to the proposed agreement – Central States, PTM, FTI, and
101 other companies who have been involved in BUS management over the past decade. Under the Tolling
102 Agreements, Central States agreed not to initiate litigation against the City while settlement negotiation
103 were ongoing. The current Tolling Agreement expires December 31, 2018. Central States has made it
104 clear that it will not extend the time for the City’s decision on the settlement past that date.

105 We believe this is the best possible outcome under the circumstances. This not only defers any
106 optional payment, it recognizes that any future payment is contingent on BUS effectively ceasing to
107 provide transit services via employees who participate in the Central States pension fund.

108

109 **BUDGETARY IMPACT:** No present payment, contingent future liability only.

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111 **OPTIONS/ALTERNATIVES:** Decline to approve the negotiated settlement and face litigation from Central
112 States, Southeast, and Southwest Areas Pension Fund.

113 _____

114 **RECOMMENDED ACTION:** Approve the negotiated settlement.

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116 **ATTACHMENT(S):** Negotiated settlement agreement.