

CITY OF MADISON, WISCONSIN

<hr/> REPORT OF: City Attorney TITLE: Water Utility Contract EMA, Inc. AUTHOR: Michael P. May, City Attorney DATED: July 11, 2007 <hr/>	<table border="0"> <tr> <td style="width: 50%;">PRESENTED</td> <td style="width: 50%;"><u>July 17, 2007</u></td> </tr> <tr> <td>REFERRED</td> <td>_____</td> </tr> <tr> <td>REREFERRED</td> <td>_____</td> </tr> <tr> <td>REPORTED BACK</td> <td>_____</td> </tr> <tr> <td>ADOPTED</td> <td>_____ POF _____</td> </tr> <tr> <td>RULES SUSPENDED</td> <td>_____</td> </tr> <tr> <td>ID NUMBER</td> <td>_____</td> </tr> </table>	PRESENTED	<u>July 17, 2007</u>	REFERRED	_____	REREFERRED	_____	REPORTED BACK	_____	ADOPTED	_____ POF _____	RULES SUSPENDED	_____	ID NUMBER	_____
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TO THE MAYOR AND COMMON COUNCIL:

RE: Authorizing the Mayor and City Clerk to execute Amendment No 1 to the Professional Services Agreement with EMA, Inc., to facilitate and conduct a utility-wide, participatory self-assessment of organizational issues, communication, work practices and technology, identify opportunities for improvement and implement recommendations.
Legistar File No. 06403

On July 3, 2007, I was asked to report on this proposed amendment to the contract with EMA, Inc. I was asked to review the proposed amendment to the contract with respect to two issues: (1) whether issuing an amendment to the contract on a sole source basis complied with Madison ordinances; and (2) whether the expenditure of funds with respect to the proposed amendment, prior to approval by the Common Council, complied with Madison ordinances.

Sole Source Amendment to the Contract:

In 2006, the Water Utility, through an RFP process, solicited proposals to conduct an organizational review of the Water Utility. Following receipt of the RFP's, a group of City staff recommended a contract with EMA, Inc. The Council approved this in August, 2006, by RES-06-00700, Legistar File No. 03838 (copy attached to this report).

Thus, it is clear that the original retention of EMA, Inc., was done pursuant to City Ordinance Sec. 4.26, which generally requires an RFP process for outside services agreements, subject to some exceptions.

In soliciting the RFP's, the Water Utility received proposals both for an assessment and implementation of an assessment, or a Phase I and Phase II portion of the project. Due to budgetary limitations, the initial contract was only for Phase I. It was only upon completion of the assessment that the Water Utility would determine whether it wished to proceed to Phase II. The contract for Phase I is limited to \$50,000, but it does mention the possibility of a Phase II. Indeed, the title of the resolution approving the contract indicates that one purpose of the contract is to "implement recommendations," a further indication that a Phase II, with the same contractor, was contemplated at the time. Unfortunately, the body of the resolution contains no such authorization, and the resolution and contract are limited to the initial phase and \$50,000.

The current proposal before the Council, Legistar File No. 06403, proposes to amend the initial contract to provide for a contract for Phase II with EMA, Inc. The Board of Water Commissioners has recommended approval of this Amendment No. 1 to the agreement with EMA, Inc., to allow them to proceed to move toward implementation of this strategic plan, Phase II of the original RFP.

Under these circumstances, the proposal to utilize EMA, Inc., for the second or implementation phase of the internal study appears to clearly fall within the provisions set forth in Sec. 4.26(4)(a)7, MGO. While there might be some legal debate as to the effect of the "implement recommendations" in the title of the resolution, the OCA's reading of resolutions normally relies upon the body of the resolution. And, because this amendment falls within an exception to sec. 4.26, MGO, I need not contemplate the discrepancy between title and text of the resolution.

The applicable provisions of sec 4.26 of the ordinances provide in part:

(4) Exceptions to RFP Process: The City may enter into negotiated contracts without a competitive bidding process for the purchase of services if the following are met:

(a) One or more of the following criteria are present as found by the Comptroller:

7. A particular consultant has provided services to the City on a similar or continuing project in the recent past, and it would be economical to the City on the basis of time and money to retain the same consultant.

(b) If the aggregate amount of the fee for services will exceed twenty-five thousand dollars (\$25,000) and the contract was not subject to a competitive bidding process, the contract shall meet one of the other requirements of sub. (4)(a) and be approved by the Common Council by resolution.

In this instance, the contract meets one of the requirements of sub. (4)(a), namely sub. 7. In addition, the contract is now before the Common Council for resolution as required by sub. (4)(b).

I conclude that this is the exact sort of situation that was contemplated by this provision in the ordinances, a provision which has existed for a number of years. A consultant has provided services with respect to one part of a project, and it is more economical to utilize the same consultant for the continuation of the project, rather than go to another RFP process. Indeed, going to an RFP process and hiring Consultant B for implementation of a strategic plan drafted by Consultant A could result in a situation where the new consultant would disagree with some portions of the strategic plan, and likely would result in a significant waste of taxpayer funds.

The proposed resolution to retain EMA, Inc., through an amendment to the contract for Phase II implementation of the strategic plan is in compliance with Sec. 4.26, MGO. In the future, agencies relying on exceptions to the competitive process in sec. 4.26 should make note of that in the resolution.

In closing, I note that contracts for services such as these that are not the construction of public works are not subject to the bidding requirements set forth in Sec. 62.15, Wis. Stats. *Aqua-Tech v. Como Lake Protection & Rehabilitation District*, 71 Wis. 2d 541, 547 (1976).

Approval of Contract After Some Services are Provided:

It is clear that some of the services which would be covered by this resolution and the amendment to the contract have already been provided. Invoices provided to the Water Utility indicate that some \$90,000 of services were provided in a period January to April, 2007, which is well before the consideration of this amendment by the Common Council (copies of the invoices are attached to this report).

It is also clear that this information was presented to the Board of Water Commissioners, and it was determined that some of these services should be provided on an ongoing basis, prior to seeking the Council's approval of the amendment. For example, the minutes of the Board of Water Commissioners meeting of January 16, 2007, states under Item 13, "Report on Communications Plan Subcommittee", the following:

Lauren said that the next subcommittee meeting is on January 24, and there will probably be two more meetings after that one. A plan is being completed for communication, and we are in the process of deciding what we want the plan to do, and what are events and ways to reach out to the community. . . . Jon asked if this is part of EMA's contract, or if they are being paid additionally for helping us with this plan. Dave said he's waiting to hear from the project manager, but he doesn't think he anticipated doing it as part of their contract, and we will have to pay for their time.

At the Board of Water Commissioners meeting of February 20, 2007, the Board established an agenda for a special Board meeting on policy, planning, and strategy, and was informed that the meeting would be facilitated by someone from EMA. In addition, at that Board meeting, EMA presented its strategic plan to the Board of Water Commissioners.

At its meeting on March 20, 2007, the Board approved the EMA's strategic plan. By this point in time, it is clear that the Board wants to proceed with a Phase II implementation, involving EMA. However, no resolution to approve a contract or contract amendment was introduced to the Common Council until May 15, 2007.

The minutes of that March meeting also indicate that staff was continuing to work on the communication plan, which involved work by EMA, Inc.

At its Board meeting of April 17, 2007, the Board of Water Commissioners had a report on the design team based management structure, which indicated that work was continuing with EMA. In addition, there was a report on the communications plan sub-committee which, as indicated above, included work by EMA.

Finally, at the May 15, 2007, meeting of the Board of Water Commissioners, an amendment to authorize EMA to continue to implement the contract was presented to the Board. There was much discussion regarding the proposed implementation, and the Board eventually voted to refer the matter to its next meeting. This discussion on May 15, 2007, was also the date on which the resolution was introduced to the Common Council.

At its meeting on June 19, 2007, the Board of Water Commissioners recommended approval of the Amendment No. 1, which was before the Common Council on July 3, 2007. On July 3, the Council referred the matter to its meeting of July 17, 2007.

The above series of events makes several things evident:

1. EMA, Inc., was asked to continue to provide services by the Water Utility staff, with the knowledge of the Board of Water Commissioners, prior to asking the Common Council for an amendment to the existing contract, or a new contract, authorizing the expenditure of funds. It is not clear if this initial work was considered part of Phase II, or simply services that the Water Utility and the Board deemed important to obtain immediately.
2. Until the Board of Water Commissioners approved the strategic plan in March, it was not clear what further services might be asked of EMA.

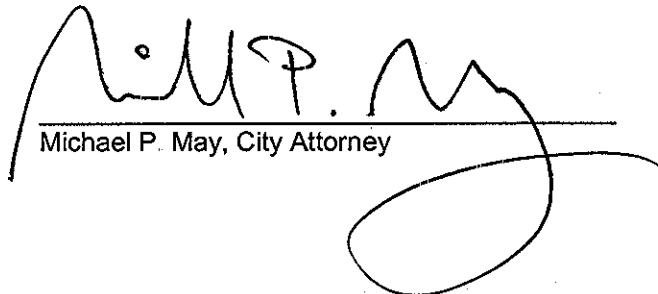
3. Once it was determined that EMA was to conduct Phase II, a resolution authorizing the services, indicating that the prior services in 2007 were part of Phase II, should have been brought promptly to the Common Council.
4. Funds for this work had been included in the Water Utility budget.

While Sec. 4.26(3), MGO, provides that City agencies and the Comptroller may enter into certain contracts when the funds have been budgeted, the ordinance makes clear that if the fees exceed \$25,000, and there is no competitive bidding process, the contract must be approved by the Common Council. This amendment to the contract with EMA, Inc., should have been presented earlier to the Common Council for approval. It is this fact which led me to characterize the current resolution as one "asking for forgiveness rather than permission."

Nonetheless, although not common, it is not unheard of within City government that certain services are commenced or continued by an agency while formal Council approval of the services is sought. In many instances, the services have always been contemplated and are not controversial. In other circumstances, where there is some urgent need for the services, it would be a mistake to require all departments to completely halt services while the formal approval of those services is sought. I cannot tell whether the situation at the Water Utility was of an urgent or exigent nature, but I suspect a strong argument could be made that the services from EMA were and are crucial to continuing improvement in Utility operations. What I found striking in this case, given the controversy regarding Water Utility operations, is both the amount of services which have been provided prior to seeking Council approval, and the amount of time it has taken to bring the resolution before the Common Council.

From the legal standpoint only, if the Common Council approves the amendment to the contract, it will have authorized payment for the services after the fact, and the contract will in all effects be legal and enforceable.

If the Council refuses to approve the amendment to the contract, there is a significant likelihood that the City will still be on the hook for payment to EMA, since the services were provided with the knowledge and acquiescence of at least the General Manager of the Water Utility, and the Board of Water Commissioners. In this regard, the confusion of jurisdiction caused by the existing ordinances (sought to be remedied by the ordinance amendment reflected in Legistar Item 06836, recently introduced and referred by the Common Council), is not insignificant. While one might lay blame at the feet of the Consultants, along with the City staff or even the Board of Water Commissioners for the delay in bringing this matter to the Common Council, the fact remains that it would be difficult for the City to deny payment for the services requested in this manner.


Michael P. May, City Attorney

MPM:pah

Attachments



City of Madison Master

City of Madison
Madison, WI 53703
www.cityofmadison.com

File Number: 03838

File Number: 03838

File Type: Resolution

Status: Passed

Version: 2

Reference:

Controlling Body: Water Utility

Requester: BOARD OF WATER
COMMISSIONERS

Cost:

Introduced: 06/06/2006

File Name: Authorizing the Mayor and the City Clerk to execute a Professional Services Agreement with EMA, Inc to facilitate and conduct a utility-wide, participatory self-assessment of organizational issues, communication, work practices, and technology; identify

Final Action: 08/01/2006

Title: SUBSTITUTE - Authorizing the Mayor and the City Clerk to execute a Professional Services Agreement with EMA, Inc , to facilitate and conduct a utility-wide, participatory self-assessment of organizational issues, communication, work practices, and technology; identify opportunities for improvement; and implement recommendations.

Notes:

Code Sections:

Agenda Date: 08/01/2006

Indexes:

Agenda Number: 72.

Sponsors: David J. Cieslewicz and Lauren Cnare

Enactment Date: 08/07/2006

Attachments:

Enactment Number: RES-06-00700

History of Legislative File

Version:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	Water Utility	05/31/2006	Fiscal Note Required / Approval	Comptroller's Office/Approval Group		05/31/2006	
1	Comptroller's Office/Approval Group	05/31/2006	Approved Fiscal Note By The Comptroller's Office	Water Utility		05/31/2006	
1	BOARD OF WATER COMMISSIONERS	06/06/2006	RECOMMEND TO COUNCIL TO ADOPT - REPORT OF OFFICER				Fail
1	BOARD OF WATER COMMISSIONERS	07/25/2006	RECOMMEND TO COUNCIL TO ADOPT - REPORT OF OFFICER				Pass
2	COMMON COUNCIL	08/01/2006	Adopt				Pass

Text of Legislative File 03838

..Fiscal Note

The proposed Professional Services Agreement with EMA, Inc will not exceed \$50,000 . Funds for this project are included in the 2006 Water Utility Operating Budget.

..Title

SUBSTITUTE - Authorizing the Mayor and the City Clerk to execute a Professional Services Agreement with EMA, Inc , to facilitate and conduct a utility-wide, participatory self-assessment of organizational issues, communication, work practices, and technology; identify opportunities for improvement; and implement recommendations

..Body

WHEREAS: The Mayor issued his Initiative to Protect and Improve Madison's Drinking Water on May 22, 2006, stating in part that performance standards and benchmarks for the Water Utility will be implemented, including a benchmark to require the involvement of Utility staff in a participatory process for reviewing and assessing Utility practices and procedures, and recommending strategies for improvement, and

WHEREAS: The Mayor has established a performance standard for the Water Utility to contract with an outside consultant specializing in public utilities by fall of 2006 to conduct a utility-wide self-assessment, gap analysis and strategic improvement plan with maximum involvement of management and staff; and

WHEREAS: It is to the benefit of the Utility, its staff, its customers and the City to initiate this process expeditiously; and the Utility has conducted a competitive process for soliciting and evaluating proposals for this project; and

WHEREAS: A selection committee with representatives of the Utility, the Board of Water Commissioners, the Mayor's Office and the Union has unanimously recommended EMA, Inc. for this contract; and

WHEREAS: The Board of Water Commissioners concurs with the recommendation to contract with EMA, Inc. for a Strategic Planning Initiative for the Water Utility; and

WHEREAS: EMA, Inc. is a firm with a national reputation of excellence and 30 years of experience working with water utilities and city governments on participatory assessments, strategic planning and implementation plans; and

WHEREAS: Madison Water Utility has funds for strategic planning budgeted in its 2006 operating budget;

NOW THEREFORE BE IT RESOLVED that the Mayor and the City Clerk are authorized to execute a Professional Services Agreement not to exceed \$50,000 with EMA, Inc of St. Paul, Minnesota to facilitate and conduct a participatory process of assessment, identification of opportunities for improvement and implementation of recommendation in the areas of organization, communication, work practices and technology



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 St. Paul, MN 55113-2624

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 www.ema-inc.com

1-0630-40

Madison Water Utility
 Attn: David Denig-Chakroff, GM
 119 East Olin Avenue
 Madison WI 53713-1431

INVOICE	
Date:	01/16/2007
Invoice:	5761-90011293
Terms:	Net due in 30 days
Period:	December 2006
Project:	5761010

Professional services provided by EMA, Inc related to the Assessment for Madison Water Utility.

INDIVIDUAL	HOURS	RATE	AMOUNT
Bradley J Jurkovic	80	195.00	\$ 15,600.00
Craig E Yokopenic	60	251.00	\$ 15,060.00
Richard B Sargent	1	135.00	\$ 135.00
Sharon E McLeod	6	96.00	\$ 576.00
Francois A Godin	24	195.00	\$ 4,680.00
Kristina Ward	15	66.00	\$ 990.00
Marion Freymann	5	96.00	\$ 480.00
Grant McGinnis	22	96.00	\$ 2,112.00
Total Labor			\$ 39,633.00
Total Expenses			\$ 5,694.85
Total Subcontr.			\$ 0.00
Total Invoice			\$ 45,327.85

ok [Signature]
 1/22/07

Contract Limit \$ 49,980.00
 Invoiced to date \$ 45,327.85
 Amount Remaining \$ 4,652.15

Please remit to: EMA, Inc., PO Box 1414, M&I-94, Minneapolis, MN 55480-1414



EMA, Inc.
 1970 Oakcrest Avenue
 St. Paul, MN 55113-2624
 phone: 651.639.5600
 fax: 651.639.5730
 www.ema-inc.com

Madison Water Utility
 Attn: David Denig-Chakroff, GM
 119 East Olin Avenue
 Madison WI 53713-1431

INVOICE	
Date:	05/23/2007
Invoice:	5761-90011805
Terms:	Net due in 30 days
Period:	January - April 2007
Project:	5761010

Professional services provided by EMA, Inc. related to the Assessment for Madison Water Utility.

INDIVIDUAL	HOURS	RATE	AMOUNT
Bradley J Jurkovic	44	195.00	\$ 8,580.00
Craig E Yokopenic	100	330.00	\$ 33,000.00
George B Vania	45	195.00	\$ 8,775.00
James D Gorski	12	195.00	\$ 2,340.00
Jack T Geisenhoff	56	172.00	\$ 9,632.00
Lisa A Steidl	2	83.00	\$ 166.00
Penny Brink	4	112.00	\$ 448.00
Kristina Ward	17	66.00	\$ 1,122.00
Marion Freymann	9	96.00	\$ 864.00
Grant McGinnis	73	112.00	\$ 8,176.00
Denise O'Berry	83	152.00	\$ 12,616.00
Total Labor			\$ 85,719.00
Total Expenses			\$ 9,720.03
Total Subcontr			\$ 0.00
Total Invoice			\$ 95,439.03

Please remit to: EMA, Inc., PO Box 1414, M&I-94, Minneapolis, MN 55480-1414