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Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

July 7, 2005

To: Robin Riley
Department of Recreation

From: Walter Wilson
Associate County Attorney

Re: Snack Bar Services at County Facilities

This memorandum is a follow-up to our discussions a few weeks back that were prompted by your request for advice as to whether the County's procurement process is the most appropriate way to handle the types of contracts created each summer between the County and the concessionaires that provide snack bar services at the County's aquatic facilities. Based on the information you provided, the pertinent facts as I understand them are as follows:

- Each year since 1994, the Department of Recreation has relied on an informal solicitation process to obtain the services of private concessionaires that are able to provide summertime snack bar services at the County's aquatics facilities.
- Instead of paying the vendors for providing concession services, the County allows them to use space in its aquatics facilities to sell food and beverages in exchange for a fixed dollar amount that each vendor agrees to pay to the County upfront. Proceeds from food and beverage sales at those facilities are the only compensation that the vendors receive under their contracts with the County.
- In addition to being responsible for purchasing all of the food and beverages to be sold, the vendors must provide all of their own equipment and supplies; including cash registers, food storage facilities, etc. The only items belonging to the County that are available for the vendors' use are the countertops and ice machines.
- Each year, the Recreation Department projects the net proceeds that the vendors can expect from food and beverage sales at each facility. The Office of

Procurement relies on those projections to determine the value of the contracts, and hence, whether a formal solicitation of the concessionaires' services is mandatory under County law. Because the expected net income for the vendors under these contracts has always exceeded the dollar amount that requires a formal solicitation, the only reason that the Recreation Department has only been able to obtain the vendors' services by informal solicitation up to now is because of waivers that the County's Chief Administrative Officer first approved in 1994.

Based on the foregoing facts, I have concluded that the contracts under which concessionaires provide snack bar services at the County's aquatics facilities are not subject to the County's procurement law. Chapter 11B (Contracts and Procurement) only applies when the County obtains goods, services, or construction by spending public funds, except where otherwise provided by law. The proceeds of direct sales between a food and beverage vendor and a private individual in a County facility where the County has essentially provided nothing more than the use of its premises for a fixed payment that the parties have agreed upon in advance is not an expenditure of public funds by the County. Rather, the concessionaire contracts are more akin to an agreement under which an area of County property is made available for use by either a business tenant or a paying licensee. This is different from a procurement contract.

For purposes of applying Chapter 11B, the concessionaire contracts are distinct from most other contracts with outside vendors that sell goods or services on behalf of the County, even in instances where the County uses the proceeds generated by the sales to pay the vendor. Those types of contracts are subject to the County's procurement laws. Instructor contracts are a prime example. Under those contracts, private instructors teach classes made available to the public through the Department of Recreation. The County collects the fees paid by the class participants and places them in a special Recreation Department account. The contractor must submit an invoice to request payment from the County. The County then draws funds from the special agency account to pay the instructor based on an adjusted percentage of the total fees collected from class participants or based on a pre-determined hourly rate. However, in either instance, the disbursement of payments to contractors out of proceeds retained by the County is an expenditure of public funds to acquire goods or services and is therefore subject to the requirements of Chapter 11B.

However, as far as how we should deal with the concessionaire contracts in the future, my recommendation would be that we draft them as license agreements in which the County grants the concessionaires a privilege to use a designated area of each aquatics facility exclusively for providing the services indicated in a service contract. The components of the service contract would be similar to those of the procurement contracts we have been using; however, the service contract would be attached and incorporated by reference into the license agreement.

Finally, even though the concessionaire contracts are not subject to the County's procurement laws, I strongly recommend that the Recreation Department continue to use an open competitive process when selecting the summertime concessionaires to whom the County will license space in its aquatics facilities.

Robin Riley

7/7/2005

Page 3

If you have any questions or concerns regarding this memorandum, please call me at (240) 777-6759.

cc: Marc Hansen, Office of the County Attorney
Richard Melnick, Office of the County Attorney
Ed Stockdale, Office of Procurement
Mary Ellen Davis-Martin, Office of Procurement